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## IRS Announces Program for Pre-Approved Prototype 403(b) Plans

The Internal Revenue Service has announced that it will establish a program to pre-approve prototype documents for 403(b) plans. The move is intended to help eligible employers that offer 403(b) programs (generally, tax-exempt organizations and public school systems) comply with IRS regulations that took effect in 2007. Under those regulations, employers offering 403(b) programs must adopt a written plan document that complies with the 2007 regulations by December 31, 2009. However, it is unlikely that IRS approved prototype documents will be available for employers in time to meet the December 31, 2009 deadline. Instead, the Announcement provides that employers will be entitled to retroactively amend their plans into approved prototype plans once these documents become available.

The IRS also announced that it intends to open a project to approve individually designed plans for plan sponsors who do not adopt a prototype document. However, the IRS will not begin to approve individually designed plans until after it has approved prototype documents.

### Background

Many tax-exempt employers, school districts and other eligible employers offer Section 403(b) plans to their employees, either as a primary retirement program or to supplement another retirement plan. A Section 403(b) plan (also known as a 'tax sheltered annuity' or 'tax deferred annuity') is a program funded primarily by employee salary deferral contributions to an insurance company annuity contract, a custodial account that invests solely in mutual funds, or (in the case of a church) in 'retirement income accounts.'

The IRS issued regulations in July 2007 requiring employers that offer 403(b) plans to their employees to adopt a written plan document that complies with those regulations. The original deadline to adopt a written plan was December 31, 2008. The IRS subsequently extended that deadline to December 31, 2009. In 2007, the IRS released model plan language that could be relied on by public schools as meeting the requirements of the new regulations. The IRS invited other eligible employers to use the model language, although only public schools are entitled to reliance. The Announcement provides that public schools may continue to rely on the 2007 model language and that other eligible employers may continue to use it.

A few employee benefits practitioners and financial organizations (such as mutual funds and insurance companies) currently offer prototype 403(b) plan documents. However, until now, there has been no way for these providers to secure IRS approval of their prototype documents. The new program will allow these providers to obtain that approval.

### New Prototype Plan Program

The IRS program is modeled after pre-approved 'master and prototype' plan program for qualified retirement plans described in Code Section 401(a).

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Thus, a 403(b) prototype plan will consist of two documents. The first document will be a 'basic plan' which will contain provisions that are uniform for all employers adopting the plan and that cannot be altered by an adopting employer. The second document will be an 'adoption agreement' through which the employer would adopt the basic plan and tailor the basic plan to its own program by checking applicable options and filling in blanks.

Under the 403(b) prototype program, a plan document provider (referred to in the IRS Announcement as the 'prototype sponsor') would submit the form of both documents to the IRS for approval. The IRS would reflect its approval of the form of the documents by issuing a favorable opinion letter to the prototype sponsor.

#### Adopting Employer's Right to Rely

An eligible employer that adopts a 'standardized' prototype 403(b) document will be entitled to rely on the prototype plan sponsor's favorable opinion letter without applying to the IRS for its own determination letter. For this purpose, a 'standardized' plan generally means a plan which either does not allow any form of contribution other than employee elective deferrals, or if the plan allows other forms of employer contributions, is drafted in a manner that ensures that the plan does not discriminate in favor of highly compensated employees. An employer that adopts a 'nonstandardized' plan will be entitled to rely on the plan provider's opinion letter for all purposes other than the nondiscrimination requirements relating to benefits, rights or features funded by employer contributions.

#### Timing Issues

It is unlikely that the IRS program will result in pre-approved 403(b) prototype plans in time for employers to meet the December 31, 2009 deadline to adopt a written plan. The Announcement asks that prototype sponsors advise the IRS of their intention to submit prototype plan documents for approval by June 1, 2009. The Announcement does not state when the IRS will begin to accept proposed prototypes for review. However, the Announcement states that the deadline for prototype sponsors to submit prototype plans to the IRS will 'not be earlier than March 15, 2010'. In the meantime, employers must adopt a plan document effective for the 2009 calendar year. Employers can meet this deadline by either adopting an individually drafted plan or by adopting a prototype document that has not been IRS approved. As discussed below, the Announcement provides employers limited relief to correct any defects in their documents by retroactively adopting a prototype plan at a later date.

#### Limited Retroactive Amendment Permitted

The Announcement provides that an employer may generally correct defects in its plan document by retroactively adopting an IRS approved prototype plan effective retroactively to the first day of the plan's 'remedial amendment period'. That period begins on January 1, 2010 (or if later, the effective date of the plan) and ends on a date to be announced by the IRS. The IRS intends to provide employers at least one year's notice of the end of the remedial amendment period. The remedial amendment period will not be available to any employer that fails to adopt a plan document before December 31, 2009. The IRS will not provide remedial amendment protection for 2009. For 2009, the IRS will measure compliance with the regulations based solely on the document adopted in 2009, even if the employer subsequently adopts a prototype effective retroactively to January 1, 2009. ■

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