



WRMarketplace

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The *WRMarketplace* is created exclusively for AALU members by experts at Greenberg Traurig and the AALU staff, led **by Jonathan M. Forster, Steven B. Lapidus, Martin Kalb, Richard A. Sirius, and Rebecca Manicone**. *WRMarketplace #17-32* was written by Greenberg Traurig Associate **Michelle C. Kauppila**.

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TOPIC: *Hurry, Hurry, Exempt Organizations Step Right Up: IRS Announces Deadline for Retroactive Correction of 403(b) Plans.*

MARKET TREND: Retirement plans for tax exempt employees under Internal Revenue Code (“Code”) §403(b) (“403(b) Plans”) are popular retirement and retention tools. Since 403(b) Plans became subject to the requirement to have written plan documents in 2009, the IRS has provided programs to assist plan sponsors in meeting the “written plan” requirement.

SYNOPSIS: In Rev. Proc. 2013-22, the IRS provided two things: (1) a process by which 403(b) Plan document sponsors could have their prototype or volume submitter documents pre-approved by the IRS and (2) a “Remedial Amendment Period” for making corrections to plan documents retroactively to fix provisions that do not satisfy the requirements of Code §403(b) and any associated errors in plan operations. Recently, in Rev. Proc. 2017-18, the IRS further announced that the Remedial Amendment Period will end on March 31, 2020. The IRS website provides examples of situations in which relief is available during the Remedial Amendment Period. The relief will permit amendments to 403(b) Plans that are necessary to comply with Code §403(b) to be adopted retroactively effective January 1, 2010 (or the effective date of the 403(b) Plan, if later) and the correction of any errors in plan operations due to 403(b) Plan provisions that do not comply with the Code and regulations.

TAKE AWAYS: Advisors to organizations that sponsor 403(b) Plans should be aware of the deadline for retroactively correcting 403(b) plans and encourage these clients to

review such plans to identify and correct any plan document or administration errors that may have occurred.

PRIOR REPORTS: 14-26.

MAJOR REFERENCES: Rev. Proc. 2017-18; Rev. Proc. 2013-22.

In Rev. Proc. 2013-22, the IRS provided: (1) a process by which 403(b) Plan document sponsors could have their prototype or volume submitter documents pre-approved by the IRS and (2) a “Remedial Amendment Period” for making corrections to plan documents retroactively to fix provisions that do not satisfy the requirements of Code §403(b) and any associated errors in plan operations. Recently-released Rev Proc. 2017-18 designates March 31, 2020 as the last day of that 403(b) Plans can fall under the Remedial Amendment Period. The IRS website provides examples of situations in which relief is available during the Remedial Amendment Period. The relief will permit amendments to 403(b) Plans that are necessary to comply with Code §403(b) to be adopted retroactively effective January 1, 2010 (or the effective date of the 403(b) Plan, if later) and the correction of any errors in plan operations due to 403(b) Plan provisions that do not comply with the Code and regulations. The following discusses what can be corrected during the Remedial Amendment Period.

WHAT IS A 403(b) PLAN AND THE WRITTEN PLAN REQUIREMENT?

As described in *WRMarketplace No. 14-26*, 403(b) Plans are tax-deferred annuities that may be sponsored by tax-exempt organizations to provide deferred retirement income to their employees.¹ 403(b) Plans are similar to 401(k) Plans in many respects, including the requirement that they have written plan documents.

In 2007, the IRS issued final regulations on 403(b) Plans that impose a written plan requirement. A 403(b) Plan must comply in form and in operation with the requirements of the Code and the regulations. Generally, the regulations require 403(b) Plans to have plan documents for plan years beginning after December 31, 2008. The IRS issued further guidance in Notice 2009-3, providing transition relief to plan sponsors from the requirement to have a written plan document in place by January 1, 2009. The relief applied only to the 2009 calendar year and provided that a 403(b) Plan will not be treated as failing to satisfy the requirements of Code §403(b) during the 2009 calendar year if (i) the plan sponsor adopts a plan document on or before December 31, 2009 with an effective date of January 1, 2009, (ii) the plan sponsor operates the plan in accordance with a reasonable interpretation of Code §403(b), taking into consideration the final regulations, and (iii) before the end of 2009, the sponsor makes its best efforts to retroactively correct any operational failures that occurred in 2009 to conform the plan’s operations to the terms of the written 403(b) Plan.

Along the same lines, the IRS later issued Rev. Proc. 2013-22, which outlines procedures for the issuance of opinion and advisory letters for pre-approved and volume submitter 403(b) Plan documents. In this procedure, the IRS included a section allowing for retroactive remedial amendments to be adopted by an employer to correct

defects in its plan document to satisfy the plan document requirement in the 2007 regulations by timely adopting a pre-approved 403(b) Plan document or timely amending its individually-designed plan document. The Remedial Amendment Period is available if the employer adopted a plan document that was intended to satisfy the requirements of Code §403(b) on or before January 1, 2010 (or the effective date of the plan, if later).

WHAT CAN BE CORRECTED DURING THE REMEDIAL AMENDMENT PERIOD?

The following are examples of plan provisions and operations that may be corrected during the Remedial Amendment Period:

1. **Missing Required Plan Language with Compliant Plan Administration.** If the 403(b) Plan document does not include certain required language but the plan administration has been compliant, the 403(b) Plan should be corrected by the adoption of a corrective plan amendment by the end of the Remedial Amendment Period (i.e., March 31, 2020). For example, the plan document does not include the limitation on annual additions under Code §415, but the annual addition testing has been completed each plan year and no participants exceeded the Code §415 limitation. The corrective amendment must be effective retroactive to the beginning of the Remedial Amendment Period (i.e., January 1, 2010 or the effective date of the 403(b) Plan, if later).
2. **Error in Required Plan Language and Resulting Operational Error.** If the 403(b) Plan document contains language that does not comply with the Code requirements (e.g., the Plan provides for a maximum annual deferral amount (\$19,000) that exceeds the maximum provided for in the Code (\$18,000)), a corrective plan amendment should be adopted by the end of the Remedial Amendment Period, and any associated error in plan operations based on the erroneous plan terms should be corrected before the end of the Remedial Amendment Period. The corrective amendment should have an effective date as of the beginning of the Remedial Amendment Period and any excess deferrals of \$1,000 must be corrected for each plan year before the end of the Remedial Amendment Period.
3. **Error in Discretionary Plan Language and Resulting Operational Error.** If the written plan document contains discretionary language that does not comply with the Code requirements (e.g., the Plan has an optional plan feature allowing employees age 50 and over to make catch-up contributions of up to \$6,000, which exceeds the maximum catch-up contribution provided for in the Code (\$5,500)), the plan should be corrected by the adoption of a corrective plan amendment by the end of the Remedial Amendment Period, with a retroactive effective date as of the date on which the catch-up contributions were first allowed under the 403(b) Plan. The excess catch-up contribution of \$1,000 for each year in which the error occurred must be corrected during the Remedial Amendment Period.

WHEN IS RELIEF UNAVAILABLE DURING THE REMEDIAL AMENDMENT PERIOD?

Relief during the Remedial Amendment Period is unavailable when the 403(b) Plan documents comply with the 403(b) requirements, but the 403(b) Plan is not administered in accordance with its terms. For example, the Remedial Amendment Period relief is not available if the 403(b) Plan provides that the employer will make a contribution of 4% of compensation but the employer makes a contribution of only 3% of compensation. In cases in which the relief is not available during the Remedial Amendment Period, the corrections can still be made.²

TAKE AWAYS

Advisors to organizations that sponsor 403(b) Plans should be aware of the deadline for retroactively correcting 403(b) plans and encourage these clients to review such plans to identify and correct any plan document or administration errors that may have occurred.

DISCLAIMER

This information is intended solely for information and education and is not intended for use as legal or tax advice. Reference herein to any specific tax or other planning strategy, process, product or service does not constitute promotion, endorsement or recommendation by AALU. Persons should consult with their own legal or tax advisors for specific legal or tax advice.

NOTES

¹ 403(b) Plans may also be sponsored by public schools or by a minister or a minister's employer.

² E.g., based on the correction principles under the Employee Plans Compliance Resolution System (EPCRS).