

For Tax-Exempt Employers: 403(b) Retirement Plan Compliance Opportunity

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Tax-exempt employers have a special opportunity to fix compliance concerns with their 403(b) retirement plans. They have through March 31, 2020 – the “Remedial Amendment Period” (RAP) – to retroactively self-correct compliance issues with their 403(b) plan documents, without going through the IRS’ more costly and time-consuming process that would normally be required. An overview of this opportunity is below.

Why focus on this now? While the March 31, 2020 deadline may seem far off, the correction process requires significant time. Since amendments to the plan document must be retroactive to January 1, 2010 (or the plan’s effective date, if later), a review must be done to evaluate both (1) all amendments made to the plan since that date, and (2) whether the plan has in fact been administered consistently with the plan document since that date. After that, amendments to the plan document would be prepared and then the internal approval process to formally amend the 403(b) plan document would be conducted.

1. What compliance issues can I fix?

Using the RAP, employers can fix compliance issues both in their 403(b) plan documents and in separate documents that are incorporated into their plan document by reference. The RAP does not apply to compliance failures that cannot be fixed by amending the 403(b) plan document, such as operational issues in administering the plan that cannot be fixed through a retroactive amendment.

2. Who is eligible?

Employers that adopted a written plan document by December 31, 2009 (or later, if the effective date of the plan is later) that was intended to comply with 403(b) requirements can take advantage of the RAP. Employers can use the RAP regardless of whether their plan is subject to ERISA, and regardless of whether their 403(b) plan document was pre-approved by the IRS.

3. What are the benefits?

Failure to correct violations of the 403(b) requirements can cause the loss of your 403(b) plan's tax-favored status. Employers that do not fix compliance issues with their 403(b) plan documents using the RAP would otherwise generally be able to correct the violations only under the IRS' Voluntary Correction Program (VCP), which is part of the IRS' Employee Plans Compliance Resolution System (EPCRS), and which is more costly and time consuming.

4. What do I do?

A 403(b) plan that did not satisfy the 403(b) requirements relating to the written plan document at any time between January 1, 2010 (or the plan's effective date, if later) and March 31, 2020 will be treated as if it actually was in compliance if its plan document is amended to come into compliance and the amendments are made effective retroactively. Employers may correct plan provisions that do not comply with 403(b) requirements by either:

1. adopting a 403(b) prototype plan document pre-approved by the IRS by March 31, 2020, retroactive to January 1, 2010 (or the plan's effective date, if later), or
2. amending their individually designed 403(b) plan document by March 31, 2020, retroactive to January 1, 2010 (or the plan's effective date, if later).

5. Background

Tax-exempt employers such as public schools, churches and other §501(c)(3) organizations are permitted to operate tax-advantaged retirement plans under Section 403(b) of the Internal Revenue Code. Final regulations governing 403(b) plans were issued in 2007, and organizations had until December 31, 2009 to come into compliance.

In 2013, the IRS announced that it would offer a program to grant pre-approval of 403(b) plan documents and also announced the opportunity to self-correct violations through the RAP (in Revenue Procedure 2013-22). But the IRS did not begin publicly releasing plans that it approved, and it did not announce the end date of the RAP (in Revenue Procedure 2017-18), until 2017. Plans that have been approved and publicly released by the IRS are often used by employers for assurance that they satisfy the 403(b) requirements.

6. Next Steps

Employers should gather the relevant documents and information and conduct a careful review to determine if there have been any compliance concerns with their 403(b) plan document since 2010 and if changes are needed based on (1) their 403(b) plan document and all amendments during that period, and (2) actual operational compliance with the terms of the plan document during that period.

- **Tip – Prototype Plans.** Currently, the IRS does not issue determination letters for individually designed 403(b) plans. Adopting a prototype pre-approved by the IRS is helpful for many employers to ensure compliance with 403(b) requirements, and can be advantageous in the event of an IRS audit. However, a prototype plan may not be an option (or the best option) for certain employers, such as if the IRS' prototype plans are not consistent with requirements of their collective bargaining agreements or local law, or if they desire more complex, individualized plan features.
- More information about the RAP opportunity is available on the IRS website [here](#).

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