



## 403(b) Plan Document Update

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For many retirement plan practitioners, 403(b) plans have become an important aspect of their business. These special types of retirement plans for public schools, certain tax-exempt organizations, churches and ministers present unique document issues for practitioners and adopting employers. This ASC Alert provides an update on the document requirements for 403(b) plans, including the status of pre-approved 403(b) plans and the restatement process, and the need for interim amendments for 403(b) plans. ASC will be conducting a webcast on May 26 that will provide the latest developments on the 403(b) pre-approved program. You can register for this, along with ASC's other upcoming and recorded webcasts at [www.asc-net.com](http://www.asc-net.com).

### Written Plan Document Requirement for 403(b) Plans

In 2007, the IRS issued comprehensive regulations applicable under Code §403(b), that were effective January 1, 2009. The regulations required 403(b) plan sponsors to adopt a written plan document conforming to the requirements of the regulations by December 31, 2009. Subsequent IRS guidance provided for a special remedial amendment period (RAP) for employers who adopted a written 403(b) plan by the end of 2009. This special RAP allows plan sponsors to correct any defects related to the form of the plan retroactive to January 1, 2010 (or the effective date of the plan, if later), provided the plan sponsor adopts a pre-approved 403(b) plan by the end of the yet-to-be-announced restatement period.

**ASC Insight:** Originally, the IRS indicated that an employer could utilize the special RAP if it adopted a pre-approved 403(b) plan **or timely applied for a determination letter**. In subsequent guidance, the IRS announced that it would NOT establish a determination letter program for individually designed 403(b) plans. Therefore, the only way that employers will be able to avail themselves of the retroactive protection provided under the special RAP is by adopting a **pre-approved 403(b) plan** during the restatement period.

Several practitioners have asked about the need to execute a Form 8905, Certification of Intent to Adopt a Pre-Approved Plan, for an employer that intends to adopt a pre-approved 403(b) plan. The Form 8905 is used by employers currently maintaining individually designed 401(a) plans who intend to adopt pre-approved 401(a) plans and do not wish to request an individually designed plan determination letter by the end of their plan's current 5-year remedial amendment cycle. **EMPLOYERS ARE NOT REQUIRED (OR ALLOWED) TO USE FORM 8905 TO INDICATE THEIR INTENT TO ADOPT A PRE-APPROVED 403(b) PLAN.**

Revenue Procedure 2013-22 establishes the procedures for issuing pre-approval letters for prototype and volume submitter 403(b) plans similar to the procedures for 401(a) plans. After some delays, document providers had until April 30, 2015 to submit pre-approved 403(b) plans to the IRS for review and approval. The IRS is currently reviewing the pre-approved 403(b) plans and is expected to issue favorable letters in 2017. Prior to issuing final approval letters, the IRS will announce the restatement period during which employers must adopt a pre-approved 403(b) plan and, thus, qualify for the special remedial amendment period.

**ASC Insight:** At this time, the IRS has not formally announced any time frames for the completion of their review of plan documents, the issuance of approval letters or the restatement period for employers adopting pre-approved 403(b) plans. Document providers will need sufficient time to program their document generation systems and practitioners will need time to explain the restatement process to employers and secure executed plan documents. These steps are complicated by the fact that the pre-approved 403(b) program is new to the IRS, practitioners and adopting employers. For these and other reasons, ASC and other document providers have asked the IRS to provide an initial restatement period of **three (3) years** for employers adopting pre-approved 403(b) plans to provide sufficient time for employers to comply with this new program.

### Status of ASC Pre-Approved 403(b) Plans and Restatement Period

On April 30, 2015, ASC submitted its 403(b) documents for approval under the new IRS pre-approved program. We are currently working through the review process with the IRS. We expect the IRS to complete its review of ASC's 403(b) plans within the next several months. However, the IRS will not issue approval letters for the plans until they are finished reviewing all of the pre-approved 403(b) plans that document providers submitted by April 30, 2015. We expect that the IRS will issue approval letters in early 2017. We then expect the IRS to announce a restatement period of at least two years during which employers must adopt a pre-approved 403(b) plan.

**ASC Insight:** Under the IRS procedures, the IRS will not issue determination letters for individually designed 403(b) plans. Moreover, adopting employers will not have the opportunity to submit pre-approved volume submitter plans for determination

letters using Form 5307. This means the only way that employers can receive reliance that the IRS approves the form of a 403(b) plan and have the advantage of the remedial amendment period is through the adoption of a pre-approved 403(b) plan. While an adopting employer may modify a pre-approved volume submitter 403(b) plan, the employer loses reliance on the plan's approval letter unless the plan remains "substantially similar" to the approved volume submitter plan. The IRS does not define "substantially similar."

## ASC Pre-Approved 403(b) Plan Options

ASC offers numerous pre-approved plan options to meet the design needs of their 403(b) plan clients. While most employers eligible to adopt 403(b) plans are employers exempt from tax under Code §501(c)(3), other types of employers (such as public schools and churches) will need to use plans that meet their specific needs and requirements. We suggest that all practitioners review their plans to ensure they have requested the appropriate documents. Practitioners, including those who have already applied for pre-approval letters, may still apply for pre-approval letters (or additional letters). Practitioners who apply for letters now will receive their letters at the same time as other practitioners. At some future date, the IRS will announce a deadline after which letters may be delayed.

## ASC pre-approved 403(b) plan types

**FULLY FLEXIBLE 501(c)(3) PLAN** - This fully flexible plan is designed for 501(c)(3) organizations and "electing" church plans (i.e., church plans that have elected to be covered by ERISA) that are subject to Title I of ERISA. The plan allows a wide range of adoption agreement elections, including funding through annuity contracts and/or custodial accounts, designation of eligible employees by category, numerous contribution options for salary deferrals, matching contributions and employer contributions, vesting schedules, several distribution options and other features. The plan is similar in design to the ASC PPA volume submitter 401(k)/profit sharing plan.

**SIMPLIFIED 501(c)(3) PLAN** - This plan is designed as a simplified version of the Fully Flexible 501(c)(3) Plan. The plan includes the more common design options and provides a more streamlined adoption agreement.

**SALARY REDUCTION ONLY PLAN** - This plan is designed to allow salary reduction contributions only. The plan is intended only for employers who intend for the plan NOT to be subject to Title I of ERISA, as provided under Department of Labor regulations.

**GOVERNMENTAL PLAN** - This plan is designed for State-sponsored educational organizations described in Code §170(b)(1)(A)(ii) (relating to educational organizations that normally maintain a regular faculty and curriculum and normally have a regularly enrolled body of pupils or students in attendance at the place where educational activities are regularly performed). For example, public colleges, universities, high schools and elementary schools may use this plan. The plan is designed to be exempt from Title I of ERISA.

**NON-ELECTING CHURCH PLAN** - This plan is designed for churches and church-related organizations that have not elected to be covered by ERISA. The plan also can cover ministers. The plan does not allow for the use of retirement income accounts under Code §403(b)(9) since IRS procedures require plans with a retirement income account option to adopt a separate plan. See our Retirement Income Account Church Plan below.

**RETIREMENT INCOME ACCOUNT CHURCH PLAN** - This plan is designed to allow for the use of the special provisions available to church-related organizations under Code §403(b)(9). IRS procedures require provisions allowing retirement income accounts to be contained in a separate plan. The provisions of Code §403(b)(9) allow retirement income account plans to avoid application of certain IRS and ERISA requirements for 403(b) plans.

**ASC Insight:** In the process of reviewing the ASC pre-approved 403(b) plans, several issues have arisen with respect to IRS positions on the designs of pre-approved 403(b) plans. One of the more controversial issues is the IRS decision to not allow Qualified Church Controlled Organizations (QCCOs) to adopt pre-approved retirement income accounts under Code §403(b)(9). ASC and other document providers are asking the IRS to reconsider its position, especially in light of the fact that the IRS regulations allow QCCOs to adopt retirement income accounts under Code §403(b)(9).

## Interim Amendments for 403(b) Plans

While practitioners are waiting to receive their approval letters for their pre-approved 403(b) plans, questions have arisen relating to required amendments (including interim amendments) for their 403(b) plan clients. As discussed earlier, if the employer adopts a pre-approved 403(b) plan during the yet-to-be announced IRS restatement period, with its provisions retroactively effective to the first day of the remedial amendment period (generally January 1, 2010), the adopting employer is protected against adverse tax consequences with respect to defects in the form of the plan. Under the special remedial amendment period rules for 403(b) plans, at this time, the IRS does not impose a mandatory interim amendment requirement on 403(b) plans.

**ASC Insight:** Employers maintaining 403(b) plans must operationally conform to applicable legal and regulatory rules that become effective. In addition, an employer may need to make discretionary amendments if it wishes to change certain design features of the plan. An employer terminating a 403(b) plan will need to amend the plan for all laws and regulations in effect as of the date of termination.

Please contact us at [ASCi@asc-net.com](mailto:ASCi@asc-net.com) if you would like to apply for an IRS approval letter for any of the above plans or if you have questions.

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