



403(b) Plan Developments

Restatement Period for Pre-Approved Plans and Impact of new IRS Position on the Use of Forfeitures

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Pre-Approved 403(b) Plan Program

Recent IRS developments indicate that the plan document restatement period for 403(b) plans is fast approaching. ASC has been working closely with the IRS on approval of its 403(b) plans under the new pre-approved plan program. Based on recent discussions, we expect that the IRS will issue approval letters on the plans within the next two months.

In preparation for the issuance of the approval letters, the IRS notified ASC that, as of March 3, 2017, it will temporarily suspend the acceptance of applications for pre-approved 403(b) plan approval letters. [Note: If you have not already sent your 403(b) pre-approved letter application to ASC, to prevent a delay in receiving your IRS Advisory Letters, be sure to submit your application to ASC **no later than February 28, 2017**. If you need the 403(b) pre-approved letter application form, please contact sales@asc-net.com.]

In a related development, the IRS announced, in Revenue Procedure 2017-18, that the remedial amendment period during which employers must restate their 403(b) plans will end on March 31, 2020.

ASC Insight: The opening of the restatement period, which the IRS has not yet announced, is tied to the issuance of approval letters under the new pre-approved 403(b) plan program. As we mentioned above, we expect the IRS to issue letters within the next two months. With the March 31, 2020 restatement deadline, this will give employers approximately a 3-year window to restate their 403(b) plans. ASC and other document providers encouraged the IRS to provide a 3-year period rather than 2-year period generally provided for pre-approved 401(a) plans. This will allow document providers sufficient

time to program their document generation systems and for practitioners to explain the restatement process to employers and secure executed plan documents. For a more complete discussion of the new pre-approved 403(b) plan program, see ASC Alert 2016-02.

Impact of New Proposed Regulations on the Use of Forfeitures for 403(b) Plans

As we discussed in ASC Alert 2017-01, the IRS recently issued proposed regulations that will allow qualified plans to use forfeitures to fund qualified nonelective contributions (QNECs), qualified matching contributions (QMACs) and safe harbor 401(k) plan contributions. ASC has received inquiries as to the impact of the proposed regulations on 403(b) plans. (For a detailed discussion on the proposed regulations, refer to ASC Alert 2017-01.)

Like 401(k) plans, 403(b) plans may take advantage of the new IRS position on the use of forfeitures. While 403(b) plans do not need to run the ADP test for elective deferrals (since they are subject to the universal availability test), they are subject to the ACP test for matching contributions and after-tax employee contributions. For this reason, some employers design their 403(b) plans as safe harbor plans. In addition, some 403(b) plans impose vesting schedules on employer contributions and matching contributions. Therefore, forfeitures may arise.

The change in the definition of QNECs under the proposed regulations applies to 403(b) plans. This means that, to the extent a 403(b) plan has forfeitures, the plan sponsor may, depending on plan terms, use the forfeitures to fund QNECs, and thus, safe harbor contributions. Under the effective date language in the preamble of the proposed regulations, plan

sponsors may rely on the proposed regulations for periods preceding the proposed effective date (i.e., immediately).

Plan sponsors should review their 403(b) plan documents' terms applicable to the use of forfeitures. Because of the special remedial amendment rules for employers planning on adopting a pre-approved 403(b) plan, depending on a plan's current forfeiture provisions, many employers generally will not need to adopt an interim amendment reflecting the new proposed regulations on the use of forfeitures. (See ASC Alert 2016-02 for a more detailed discussion on the 403(b) plan remedial amendment period and interim amendments.) However, plans that have a possible anti-cutback issue (e.g., under plan terms, forfeitures are used to increase allocations to plan participants or to pay plan expenses) will need to be amended before participants have satisfied the allocation conditions for receiving the allocation of forfeitures.

ASC Insight: After the issuance of the proposed regulations, ASC asked the IRS whether we could modify the language in our pre-approved 403(b) plans currently under review to reflect the new position on the use of forfeitures. Unfortunately, we were informed that this is not permissible. Therefore, ASC will provide a snap-on amendment to our pre-approved 403(b) plans that plan sponsors will adopt at the same time that they restate their plans. Please remember that 403(b) plans currently do not have the same interim amendment requirements as pre-approved 401(a) plans. See our discussion on interim amendments in ASC Alert 2015-02.

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