

Employee Benefit Plan Review

IRS Announces Remedial Amendment Periods and Deadlines for Correction of 403(b) Plan Form Defects

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The Internal Revenue Service issued Revenue Procedure 2019-39,¹ which finalizes important changes to how sponsors and employers can ensure 403(b) plan compliance. The guidance is a welcome update from the Service, which initiated a regular system of remedial amendment periods for 403(b) plans in 2013, with the first period ending on March 31, 2020. Most significantly, Revenue Procedure 2019-39:

- Makes permanent the system of remedial amendment periods, during which an employer may retroactively amend its 403(b) plan or adopt a pre-approved 403(b) plan to correct a “form defect” (*i.e.*, a defect in the terms of the plan that causes the plan to fail a § 403(b) requirement);
- Clarifies that a retroactive amendment to correct a form defect is only permitted where the plan has been operated in compliance with the § 403(b) requirement;
- Establishes deadlines to adopt amendments that correct form defects as well as deadlines to adopt discretionary amendments (*i.e.*, amendments that do not remedy a form defect);
- Confirms that the Service will not review individually designed 403(b) plans through a determination letter process;
- Sets out a cyclical system in which pre-approved 403(b) plan sponsors may seek Service approval of plans; and
- Announces the Service’s intent to provide additional guidance related to 403(b) plans, including

its intent to include changes to the § 403(b) requirements on its annual Required Amendments List and the Operational Compliance List.

The Service intends to issue additional guidance in the next several years to address the procedures announced in Revenue Procedure 2019-39.

INDIVIDUALLY DESIGNED PLANS: RECURRENT REMEDIAL AMENDMENT PERIODS AND AMENDMENT ADOPTION DEADLINES

During a remedial amendment period, a sponsor has the opportunity to correct a form defect in its individually designed 403(b) plan by retroactively amending the plan to eliminate the defect or timely adopting a pre-approved 403(b) plan. A “form defect” is: (i) a provision or the absence of a provision that causes a plan to fail to satisfy the requirements of § 403(b); (ii) a provision that is integral to a § 403(b) requirement that has been changed (by statute, regulation or other IRS guidance); or (iii) the absence from a plan of a provision required by such a change.

The Service will consider an individually designed plan that does not meet the requirements of § 403(b) solely because of a form defect to have satisfied the requirements if the sponsor adopts a remedial amendment on or before the end of the applicable remedial amendment period (or a later date if a statute or the Service provides otherwise). A retroactive amendment is only permitted where the employer

	<i>Form Defect</i>	<i>Start of Remedial Amendment Period</i>	<i>End of Remedial Amendment Period</i>
1.	Inclusion or absence of a provision in a new plan, if the provision or lack of provision causes the plan to fail to comply with § 403(b)	Date plan is put into effect	Last day of the second calendar year following the year in which the plan is put into effect
2.	Amendment to an existing plan, if the amendment does not comply with § 403(b)	Earlier of the date the plan amendment is adopted or put into effect	Last of the day of the second calendar year following the year in which the plan amendment is adopted or put into effect, whichever is later
3.	Provision that fails to satisfy § 403(b) because of a change in § 403(b) requirements	Date the change to § 403(b) requirements went into effect	Last day of the second calendar year that begins after issuance of the Required Amendments List containing the new or changed requirement
4.	Provision that is integral to a § 403(b) requirement that has changed	First day on which plan was operated in accordance with the provision, as amended	Last day of the second calendar year that begins after issuance of the Required Amendments List containing the new requirement

has operated the plan in compliance with § 403(b) throughout the remedial amendment period. Put another way, the form defect alone—without an accompanying operational failure—must be the sole reason the plan did not satisfy the § 403(b) requirements. If a form defect cannot be corrected through the remedial amendment process, the sponsor may still be able to correct it through the Employee Plans Compliance Resolution System.

The Revenue Procedure also announces that, beginning in 2019, the Service will include changes to § 403(b) requirements on its annual Required Amendments List, and will include changes to § 403(b) requirements on its Operational Compliance List. The inclusion of § 403(b) requirements on these two lists will assist sponsors and eligible employers to develop and maintain robust procedures to ensure plan compliance, and is especially helpful because individually designed 403(b) plans cannot obtain determination letters from the Service.

Recurrent Remedial Amendment Periods & Deadlines for Adoption

The start and end of a remedial amendment period depends on the type of form defect at issue. A plan termination ends the remedial amendment period, even if the termination predates what would otherwise be the end date as determined by the Revenue Procedure. Events triggering the start and end of a remedial amendment period for nongovernmental plans are shown on the chart above.

The remedial amendment periods for governmental plans generally track the same start and end dates as nongovernmental plans, except that the end date may be extended to 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the event that gives rise to the form defect.

Deadlines for Adoption of Discretionary Amendments

The guidance sets out deadlines for sponsors to adopt discretionary

amendments, *i.e.*, amendments that do not remedy a form defect. For plan years beginning on or after January 1, 2020, a sponsor of a nongovernmental plan must adopt discretionary amendments by the end of the plan year in which the plan is first administered as provided in the amendment. Sponsors of governmental plans must adopt discretionary amendments by the same date, or, if later, 90 days after the close of the second regular legislative session of the legislative body with authority to amend the plan that begins on or after the date the plan amendment is put into effect.

PRE-APPROVED PLANS: LETTER CYCLES AND RECURRENT REMEDIAL AMENDMENT PERIODS

The Revenue Procedure also addresses two matters of concern for employers using pre-approved plans. First, the guidance sets out a system of cycles during which plan sponsors may submit plans for Service approval. The Service will review all

plans submitted in a particular cycle; upon approval, employers will have approximately two years to adopt the plans. The first cycle ends on March 31, 2020, and the Service does not expect to begin accepting pre-approved plan letters for the second cycle until 2023.

Second, the Revenue Procedure establishes recurrent remedial amendment periods to correct form defects first occurring after March 31, 2020, which function similarly to the remedial amendment periods for individually designed plans. The remedial amendment periods are also available to employers who, in good faith, do not adopt an interim amendment because they determine no amendment is required.

EXTENSION OF INITIAL REMEDIAL AMENDMENT PERIOD

In addition to establishing a system for future recurrent remedial amendment periods, the Revenue Procedure provides a limited extension of the initial remedial amendment period for certain form defects.

- **Individually Designed Plans:** The extension is to the later of March 31, 2020, or the date that would be the end of the remedial amendment period if calculated under the guidelines set out in the guidance for remedial amendment periods beginning after March 31, 2020. However, for form defects that arise in connection with a change in § 403(b) requirements, this extension is only available if the change in the § 403(b) requirement was effective in or after 2019.
- **Pre-approved Plans:** To be eligible for the extension, the form defect must have occurred in connection with a change in the §403(b) requirements (see #3 and #4 on accompanying chart), and may not have first occurred before January 1, 2018. The extension will end no later than the end of the second pre-approved plan cycle, which begins immediately after March 31, 2020.

The Revenue Procedure does not address plan errors arising under Title I of ERISA. (Title I of ERISA generally

applies to 403(b) plans sponsored by organizations that are not governmental or church entities.) The Department of Labor has separate voluntary compliance procedures that apply to potential ERISA violations.² 🌐

NOTES

1. <https://www.irs.gov/pub/irs-drop/rp-19-39.pdf>.
2. More information on the Department of Labor's compliance programs is available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs>.

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