

Part IV. – Items of General Interest

Remedial Amendment Period and Reliance for Section 403(b) Plans

Announcement 2009-89

Within the next few months, the Service expects to publish a revenue procedure for obtaining an opinion letter that the form of a prototype or other “pre-approved plan” meets the requirements of § 403(b) of the Internal Revenue Code and the regulations thereunder. The revenue procedure will reflect the Service’s consideration of comments it has received on the draft revenue procedure that was included in Announcement 2009-34, 2009-18 I.R.B. 916. Subsequently, the Service intends to publish a revenue procedure for obtaining an individual determination letter for a § 403(b) plan. This announcement provides for a remedial amendment period and reliance for employers that, pursuant to the upcoming revenue procedures, either adopt a pre-approved plan with a favorable opinion letter or apply for an individual determination letter when available.

Notice 2009-3, 2009-2 I.R.B. 250, provides relief during 2009 with respect to the requirement in the regulations to have a written § 403(b) plan in place by January 1, 2009. The Service will not treat a § 403(b) plan as failing to satisfy the requirements of § 403(b) and the regulations during the 2009 calendar year, provided that the employer satisfies the conditions of Notice 2009-3.

As one of the conditions for relief under Notice 2009-3, a written § 403(b) plan that is intended to satisfy the requirements of § 403(b) and the regulations must be adopted on or before December 31, 2009. If this condition is met and, pursuant to the upcoming revenue procedures, the employer sponsoring the plan either adopts a pre-approved plan that has received a favorable opinion letter from the Service or applies for an individual determination letter when available, the employer will have a remedial amendment period in which to amend the plan to correct any form defects retroactive to January 1, 2010. Further, such an employer will have reliance, beginning January 1, 2010, that the form of its written plan satisfies the requirements of § 403(b) and the regulations, provided that, during the remedial amendment period, the pre-approved plan is adopted retroactive to January 1, 2010 or the plan is amended to correct any defects in the form of the plan retroactive to January 1, 2010.

An employer that first establishes a § 403(b) plan after December 31, 2009, by adopting a written plan intended to satisfy the requirements of § 403(b) and the regulations will also have reliance beginning on the effective date of the plan, provided the employer either adopts a pre-approved plan with a favorable opinion letter or applies for an individual determination letter and corrects any defects in the form of the plan retroactive to the plan’s effective date.

The upcoming revenue procedures will include this remedial amendment provision and will address the time-frames for adopting a pre-approved plan or applying for a determination letter and other details regarding the remedial amendment period.

Rev. Proc. 2007-71, 2007-2 C.B. 1184, provided model plan language for use by public schools and other employers in complying with the requirements of § 403(b) and the regulations. Employers may continue to rely on the model plan language in Rev. Proc. 2007-71 as provided in that revenue procedure.

Employers may rely on this announcement prior to publication of the revenue procedure for pre-approved § 403(b) plans. Accordingly, employers should not request ruling or determination letters on the form of their § 403(b) plans at this time, pending publication of the revenue procedure for pre-approved § 403(b) plans and additional procedures on applying for individual determination letters for section 403(b) plans.

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to retirementplanquestions@irs.gov.