

New Guidance on Pre-Approved Defined Contribution Plans and 403(b) Plans

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In two recent pronouncements, the IRS issued plan document guidance for pre-approved defined contribution plans being restated for the Pension Protection Act of 2006 (PPA) ([Announcement 2014-16](#)), as well as 403(b) arrangements ([Revenue Procedure 2014-28](#)). The guidance is a mixed bag. For the defined contribution plans, the IRS announced the opening of the two-year window for employers to amend and restate their plans. For 403(b) arrangements, the document deadline has been delayed another year until April 30, 2015.

IRS Approval Letters Issued

After a mad scramble by the IRS in mid to late March to both approve plan documents and send confirmatory emails to the majority of mass submitters sponsoring prototype and volume submitter documents, on March 27th the IRS issued Announcement 2014-16 announcing they were far enough along in the approval process to begin issuing the necessary opinion and advisory letters. The IRS expected to issue most of the letters by March 31st or slightly thereafter. The approved plans were drafted based on the provisions of the 2010 Cumulative List.

Restatement Window Opens

With the letters being issued to the prototype sponsors and volume submitter practitioners, the IRS announced the opening of the 2-year period for employers using pre-approved documents to amend and restate their plans. The official restatement period is May 1, 2014 through April 30, 2016. Plan sponsors don't have to wait until the May 1 date to

begin restating client plans; restatements executed after the plan's opinion or advisory letter date are valid. The May 1st date applies to the submission of Form 5307.

In late 2011, the IRS made a major change with the issuance of Revenue Procedure 2011-49. Under that revenue procedure, prototype plans can no longer submit for an employer level determination letter. Rather, the employer must rely on the prototype's underlying opinion letter. Volume submitter plans can only be submitted on Form 5307 if changes are made to the plan document's approved language. The changes, however, cannot be so significant that it causes the plan to be deemed individually designed. The two year window is also to be used by employers sponsoring individually designed plans that are substantially based on the pre-approved document, and that do not contain impermissible provisions such as employee stock ownership (ESOP) or multi-employer provisions. Though these plans will be submitted on Form 5300, they are not submitted on the individually designed 5-year cycle, but rather stay on the pre-approved plan's 6-year cycle. Additionally, employers who executed a Form 8905 expressing an intent to switch from their individually designed plan to a pre-approved plan, but who decide to stay on the individually designed plan, will also submit during this 2-year window. They must then also submit on the next 5-year cycle that is applicable to them as well.

The major document vendors were advised separately that for those firms that sponsored

EGTRRA pre-approved plans and did not get their PPA restatement documents submitted by April 2, 2012, their opinion and advisory letters would not be issued until approximately October 1, 2014. This includes firms that use mass submitter-documents which did not get their Form 4461s submitted by that April 2, 2012 date. For those employers whose plans will be submitted for a favorable determination letter on either Form 5300 or 5307, additional instructions may be found in sections 8 and 9 of Revenue Procedure 2014-6.

Though not directly related to Announcement 2014-16, sponsors of newly adopted volume submitter plans that made modifications and submitted on Form 5307, have had the submissions rejected and have been advised that those plans can only be submitted during the upcoming May 1, 2014 – April 30, 2016 period. (For defined benefit plans, the 2-year submission period will likely open in 2016 or 2017.)

Pre-Approved Plans for 403(b) Arrangements

In Revenue Procedure 2014-28, issued on March 25, 2014 (similar to what was done with pre-approved defined benefit plans just before the January 30, 2014 submission deadline) the IRS postponed the 403(b) document submission deadline for a year from April 30, 2014, to April 30, 2015. ASPPA's Government Affairs Committee had sent comment letters to the IRS requesting such a delay and ASPPA GAC appreciates the IRS action. This Revenue Procedure is significant for a couple of reasons. In Revenue Procedure 2013-22, the IRS had formally announced the creation of the 403(b) pre-approved document program and set out a submission deadline of April 30, 2014. At that time, the IRS announced that there would be no individual determination letter program for 403(b) plans. The only way employers sponsoring 403(b) plans can assure reliance on their plan document is to adopt a pre-approved prototype or volume submitter plan. Though not addressed in Revenue Procedure 2014-28, the IRS has had discussions with the document practitioner community about the need to change the Form 5307 rules to allow for submission of volume submitter Section 403(b) plans similar to

what is allowed for defined contribution and defined benefit plans.

The IRS announced that Revenue Procedure 2014-28 was in response to comments from plan sponsors and practitioners. Based on those comments, the eligibility requirements for the program were modified to allow more plan sponsors and employers to participate in the 403(b) pre-approved program. While many prototype mass submitters were grandfathered (in only needing 10 word-for-word identical adopters for their PPA submissions in 2012), mass submitters of the volume submitter defined contribution plan were not grandfathered. With the creation of the volume submitter program, mass submitters were required to have 30 word-for-word identical adopters. A similar rule had been applied to the creation of the 403(b) pre-approved program. However, since it is not clear how large the 403(b) plan document market really is, many traditional mass submitters were not sure that they were going to be able to get the required 30 word-for-word identical sponsors. As part of the new revenue procedure the requirement has been lowered from 30 to 15. It remains to be seen whether some of the mass submitters will be able to reach the new target. Similarly, for those prototype sponsors or volume submitter practitioners who will not be working through a mass submitter but who will sponsor their own document, the required number of employers expected to adopt their pre-approved plan has also dropped from 30 to 15.

Pre-Approved Plan Coordination

The document drafting community is encouraged by one other significant change that was announced in the 403(b) plan program. Members of the Plan Document Sub-Committee of ASPPA's Government Affairs Committee have had discussions over the last several years about the pre-approved document program. One of the changes that was recommended is the coordination of the non-standardized prototype and the volume submitter documents. Specifically it was recommended that a new replacement program be set up combining the benefits of both of the existing programs. For example, the prototype program allows for the

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concept of the “minor modifier” which is an amendment from the word-for-word identical plan program at the plan sponsor level. This has not been allowed in the volume submitter program. Similarly, the volume submitter allows for modifications to be made at the individual employer level, however, making those same changes to a prototype causes the plan to be deemed individually designed. One of the changes the IRS made to the 403(b) program allows for the modification of the definition of “minor modifier” to now apply to both prototype

and the volume submitter documents. While this is not everything that was requested, the change is an encouraging first step.

Among the issues delaying 403(b) document submissions were problems that the practitioner community found with the IRS issued model language known as the “LRMs.” While not specifically addressed in the Revenue Procedure, there is a belief that the IRS will issue updated and corrected LRMs. Stay tuned!!

WE NEED YOUR QUESTIONS FOR IRS FOR THE ASPPA ANNUAL CONFERENCE!

With another testing season in the rearview mirror and PPA restatements looming on the horizon, there are sure to be plenty of questions on everyone’s mind...and ASPPA’s IRS Q&A subcommittee wants to hear them! We are currently gathering questions to go on the list that will be submitted to our friends at the IRS and discussed at the Question & Answer general session at this October’s Annual Conference.

The saying that there is no such thing as a dumb question applies here; however, we are especially interested in questions that include some nuance and might not have a clear-cut answer. Check with your co-workers, friends, family (ok, maybe not your friends and family unless they also happen to be co-workers) and send your questions to us at IRSquestion@asppa.org so that we can add them to the list.

Thanks,

--Adam C. Pozek, Chair

ASPPA GAC IRS Q&A Subcommittee