TAX-EXEMPT ENTITIES

The Birth of the First Ever IRS Pre-Approved 403(b) Plan Documents!

This column discusses the first official remedial amendment period for 403(b) plans.

BY SUSAN D. DIEHL

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Remember when you were a child and you just knew that you were getting a real puppy for Christmas? The anticipation that you felt was unnerving! You couldn't sleep, but if you didn't, Santa was not going to bring you anything so you had to try. The next morning finally arrived and the puppy that you had longed for turned out to be an electronic toy that barked, sat up, and could walk a few steps before it had to be charged again.

With the birth of the first pre-approved program for 403(b) plans right around the corner, the anticipation of many third-party administrators (TPAs), consultants, and attorneys has been unnerving as well, and for some of us is like waiting for the treasured Christmas present.

Keep in mind that employers have maintained 403(b) plans since 1959, well before 401(k) plans were even a glimmer in anyone's thoughts. Employers will, for the first time, need to restate their plans onto a "real" plan document by the end of the remedial amendment period (RAP).

And Then Santa Came Through!

On Friday the 13th (January 13, 2017), the IRS issued Revenue Procedure 2017-18, which provides employers with a three-year RAP that ends on March 31, 2020. So now we are on our way, but there are a number of items the IRS has yet to provide, namely more guidance and the actual approval letters.

The restatement period will be the three-year period ending on March 31, 2020. The IRS plans to issue approval letters (Opinion Letters for Prototype Plans and Advisory Letters for Volume Submitter Plans, collectively, the "Approval Letters") by March 31, 2017. Once the letters are issued, employers can start restating their plans.

Merry Christmas, Happy Hanukkah, and Happy New Year!

What Is a "Remedial Amendment Period"?

A remedial amendment period, or RAP, is the period of time the IRS gives employers to adopt an updated plan document that retroactively incorporates certain law changes that have occurred, going back to the end of the previous RAP. This concept has applied to qualified plans such as 401(k) plans for decades.

Although this is the first official RAP for 403(b) plans, employers are not necessarily required to go all the way back to the inception of their plans as part of this process. The reason is that the 403(b) regulations that were first effective in 2009 required all sponsors of 403(b) plans to adopt written plan documents no later than December 31, 2009. That means the plan restatements occurring during this RAP will focus on the period beginning on January 1, 2010, going forward.

That is not to suggest that this process will not be challenging. Quite the contrary. Collecting data on

the amendments that have been made for 7 to 10 years will potentially be difficult and time-consuming, and conducting an in-depth plan document review with clients may identify operational issues that never have been addressed. As a result, those that provide plan document services to 403(b) sponsors should initiate the process as soon as possible.

As an aside, employers that sponsor a 403(b) plan but did not adopt a written plan document by the end of 2009 must take additional corrective steps in addition to simply restating by the end of the RAP. In general, there are two methods to correct such a failure. The first option is to retroactively adopt a plan document back to 2009, ensuring that it reflects the plan's actual operations during that time frame, and to submit an application for correction under the IRS Voluntary Correction Program. A second option, presuming all of the relevant documentation is complete and available, is to use the "paperclip rule" as outlined in the preamble to the 2007 final 403(b) regulations.

Must All Employers Adopt an IRS Pre-Approved 403(b) Plan Document?

Similar to qualified plans, when an employer restates its plan using an IRS pre-approved document, that employer can rely on the approval letter to demonstrate that the form of the plan document complies with the applicable laws and regulations. In other words, the IRS cannot question the validity of the plan document on audit as long as it has been prepared properly and consistently with the pre-approved language. If, instead, the employer uses a document that the IRS has not approved, that document is fair game in an audit, and any noncompliant language can subject the employer to significant sanctions in addition to being required to correct the errant plan language.

In short, employers that do not restate onto an IRS pre-approved plan document must be made aware that they are taking a risk should they be audited. It is also important to note that plan documents that were created (by certain TPAs, consulting firms and Associations of School Business Officials) using the sample language in IRS Revenue Procedure 2007-71 are not being updated and will not offer employers the reliance that is available via a pre-approved document.

What Needs to Happen by March 31, 2020?

The answer depends on whether you are an employer, a TPA/consulting firm, or a financial institution.

Employers

As noted above, all employers must restate their plan documents by March 31, 2020. That means the updated plan document must be prepared and fully executed no later than that date. One of the most important (and probably time-consuming) aspects of the restatement is that it must reflect all amendments made from January 1, 2010 (or the plan's initial effective date, if later), through the restatement effective date.

For example, an employer adopted a plan by the end of 2009, as required, making sure that all provisions were stated in the plan to mirror the operations of the plan through the end of 2009. In 2010, the employer added loans to the plan; in 2012 the employer added a nonelective contribution with a one-year eligibility requirement; and in 2014 the employer added post-employment contributions.

On December 20, 2017, the employer executes the new IRS pre-approved plan document. In this case the employer would sign the restated plan with the effective date of January 1, 2010. The adoption agreement must include the effective dates of the amendments that have occurred since 2010. The location of this information within the adoption agreement will vary depending on the format of the specific pre-approved document. Assuming it is reflected on an appendix or addendum to the adoption agreement, it might be listed similar to the following:

Provision	Effective Date
Participant loans	June 30, 2010
Nonelective contributions	January 1, 2012
Post-employment contributions	January 1, 2014

Again, the level of detail and the specific layout will vary from pre-approved plan to pre-approved plan. Regardless of those formatting and location differences, the employer will not have reliance on the approval letter back to 2010 unless those amendments are indicated as such. The IRS has already indicated that they will be reviewing this portion of the adoption agreement when auditing plans.

Financial Institutions/Vendors/Advisors

All annuity contracts and custodial agreements (Contracts) must be updated to reflect all changes that have occurred since 2009 and, most importantly, to reflect the fact that certain provisions are required to be in the plan document. Additionally, there are also provisions that must be included in all Contracts by

March 31, 2020. For example, the IRS specified that the required minimum distribution (RMD) requirements must be specified in the Contracts, rather than the plan document. They cannot be incorporated by reference; the Contracts must contain specific definitions and language to comply with the RMD requirements.

- *Custodial Agreements*—These will be easier to update because these documents do not need to be submitted for approval by any state departments, and no signatures are required. Once updated, financial institutions can send a mass mailing to all participants.
- *Annuity Contracts*—Similar amendments must be made to these contracts, if they have not been made already. The major difference here is that these amendments must be submitted to the various states for approval. As with custodial agreements, financial institutions can notify participants of the new contract language via mass mailing.
- *Group Custodial Agreements/Group Annuity Contracts*—The deadline for the contracts/custodial agreements to be updated and sent to all participants and employers is March 31, 2020. The same requirements specified above will apply, respectively.

The new IRS pre-approved plan documents will include an Administrative Appendix that will outline certain employer responsibilities. One of the items on this appendix will be the duty to audit vendors each year. This requires a review of the vendors' forms, documents, procedures, and so on, and may cover areas including (but not limited to) distributions and withholding. Although this is not a new requirement, the IRS may be more likely to request documentation of an employer's vendor audit if the plan is selected for examination.

Third-Party Administrators

TPAs must familiarize themselves and their employers with all of the above items to help ensure they prepare plan restatements completely and accurately. Since many employers will be transitioning from an adoption agreement that is only a few pages long to one that is 20 or more pages in length, it will be critical to work closely with those employers to help them understand the importance of the process. Completing the Administrative Appendix can aid in educating employers on their responsibilities and for documenting the valuable services the TPA provides. It also creates an opportunity to discuss the need for annual vendor audits.

Once all is said and done, it is important to help clients get the restatement across the finish line to actually execute and retain copies of their new plan documents.

More to Come

By the time you are reading this column, mass submitters of 403(b) plan documents will likely have received notice of the approval of those documents and may even have the actual Approval Letters in hand. After checking the letters for accuracy, mass submitters will then send copies to all of the TPAs, consultants, and financial institutions that have contracted to use those documents so that they can begin the restatement process with their employer-clients, probably in April or May.

Restatements and Holidays

More than 1,700 words later, I guess I am not sure that this was such a great holiday present after all. Maybe I should think more Friday the 13th instead! ■