

# employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service  
Tax Exempt and Government  
Entities Division

A Publication of Employee Plans

## **Announcement 2009-34 - Request for Comments on Revenue Procedure for §403(b) Prototype Plans and Sample Plan Language**

The IRS is seeking public comments on drafts of:

- the **revenue procedure** for the proposed 403(b) plan prototype program for issuing **§403(b)** opinion letters, and
- **sample plan language** for drafting §403(b) prototype plans

released April 14, 2009.

IRS also requests entities that anticipate filing an **opinion letter** application as a §403(b) prototype plan sponsor to send an email to [ep.prototype.projections@irs.gov](mailto:ep.prototype.projections@irs.gov) stating their intent (mass submitters should send an estimate of the number of opinion letter applications it seeks for sponsors).

The 403(b) prototype plan program will allow eligible employers to adopt a pre-approved prototype plan and comply with §403(b) and the **§403(b) final regulations**, including the **written plan requirement**. The IRS will announce the date when it will begin accepting applications for opinion letters when the draft revenue procedure has been finalized after consideration of the comments received.

### **Highlights of the Draft Revenue Procedure:**

- An eligible employer is a public school or an employer described in **§501(c)(3)** which is exempt from tax under §501(a).
- An eligible §403(b) prototype plan sponsor is any company, firm or individual that expects at least 30 eligible employers to adopt its §403(b) prototype plan basic plan document(s).
- A mass submitter is any person that submits opinion letter applications on behalf of at least 30 prototype sponsors that have adopted, on a word-for-word identical basis, the same basic plan document.
- A governmental plan under **§414(d)** or a nonelecting church plan may rely upon a favorable opinion letter that the form of its §403(b) prototype plan satisfies the requirements of §403(b). However, a favorable opinion letter is not a determination as to whether the plan is a §414(d) governmental plan or a nonelecting church plan.

- A §403(b) prototype plan is standardized if:
  - elective deferrals are the only contributions under the plan, or
  - the plan provisions, other than for elective deferrals, benefit all eligible employers' non-excludable employees in the employer's controlled group under a design-based nondiscrimination safe harbor allocation formula.
- An eligible employer may rely upon a favorable opinion letter if the plan is a standardized plan and either:
  1. the only contributions allowed under the plan are **elective deferrals**, or
  2. all the employers in the adopting employer's **controlled group** are eligible employers.
- An adopting eligible employer **may not** rely on the opinion letter with respect to whether contributions under the plan (other than elective deferrals) satisfy the requirements of **§§401(a)(4)** and **410(b)** if either:
  - the plan is not standardized, or
  - the plan permits contributions other than elective deferrals and the adopting eligible employer's controlled group includes any employer that is not an eligible employer.

In this case, the adopting eligible employer can request a determination letter (as soon as a 403(b) determination letter program is available) to obtain reliance for §§401(a)(4) and 410(b). Governmental plans and nonelecting church plans are not subject to these requirements and may, therefore, rely on the opinion letter without regard to the form of the plan.

- The IRS will not review any annuity contracts or custodial accounts under the plan. The prototype plan's terms (basic plan document and adoption agreement) must satisfy the Internal Revenue Code (Code) and regulations' requirements and must override any contract or account terms that are inconsistent with the plan. However, employers may provide multiple investment arrangements (for example, **annuity contracts** and **custodial accounts**) in a plan or have different features in those arrangements.
- A retroactive remedial amendment is allowed so that an eligible employer can retroactively correct defects in its written §403(b) plan's form by timely adopting an approved §403(b) prototype plan or by otherwise timely amending its plan and submitting a request for a determination letter once a determination letter program is available for §403(b) plans. The eligible employer must amend its plan retroactive to the first day of the plan's remedial amendment period.
- The IRS will not issue letters for:
  1. **TEFRA church defined benefit plans**;
  2. plans that include provisions applicable only to churches, qualified church-controlled organizations, church-related organizations, or ministers; or
  3. plans that provide graduated vesting.
- An opinion letter provides reliance only for **Title II of ERISA**. However, the IRS may decline to issue an opinion letter where the plan fails to satisfy a Code provision that is parallel to a provision in **ERISA Part 2 of Subtitle B of Title I**.