

NEWS ALERT

EMPLOYEE BENEFITS



The March 31, 2020 Deadline to Amend 403(b) Plan Documents Looms Large, and Other Remedial Plan Amendment Deadlines Will Follow

By Melanie N. Aska and Erik M. Sharp | March 9, 2020

The March 31, 2020 deadline to correct form defects in individually-designed 403(b) plan documents seemed a tiny speck on the distant horizon when the IRS announced it in early 2017. But now, March 31, 2020 looms large and employers who use individually-designed 403(b) plan documents have only a very short time to amend those documents, retroactively to the later of January 1, 2010 or the plan's initial effective date, to ensure that the documents fully reflect all applicable Internal Revenue Code Section 403(b) requirements, including the final hardship distribution regulations which the IRS issued in September of 2019 and, if the plan excludes certain part-time employees, the "once-in, always-in" rule (which says that once a part-time employee works 1,000 or more hours per year and is permitted to make elective deferrals, he or she may not be excluded from making elective deferrals in later years if he or she returns to part-time status).

Employers who had put 403(b) programs into place before January 1, 2010 may avail themselves of the March 31, 2020 remedial amendment deadline only if they had adopted, by December 31, 2009, a 403(b) plan document which complied with the plan document requirements that were then set forth in Internal Revenue Code Section 403(b) and the 2007 IRS 403(b) regulations. Such employers who have not yet updated their 2009 individually-designed 403(b) plan documents to comply with currently-applicable IRS rules must do so, no later than March 31, 2020, by adopting either an updated individually-designed 403(b) plan document or a pre-approved volume submitter or prototype 403(b) plan document that has a 2017 opinion or advisory letter from the IRS (that is, a "Cycle 1" pre-approved 403(b) plan document, as discussed below).

Limited Extension of the March 31, 2020 Initial Remedial Amendment Deadline for Individually-Designed 403(b) Plan Documents. As noted above, March 31, 2020 generally is the end date of the more than 10-year "initial remedial amendment period"—which began on January 1, 2010—that the IRS granted years ago to enable employers to cure form defects in their individually-designed 403(b) plan documents that arose at any time from January 1, 2010 to March 31, 2020. Recognizing, however, that some employers might be hard-pressed to amend their individually-designed 403(b) plan documents by March 31, 2020 to cure form defects first occurring rather late in that initial remedial amendment period, from January 1, 2019 to March 31, 2020, due to changes in the law that became effective during that period, the IRS recently issued guidance that gives such employers a limited extension of the March 31, 2020 deadline by which to cure those defects. The extended initial remedial plan amendment deadline is the later of (1) March 31, 2020, or (2) the last day of the second calendar year following the calendar year in which the form defect arose.

New Recurring Remedial Amendment System for Correcting 403(b) Plan Form Defects that First Occur after March 31, 2020. In October of 2019, the IRS issued guidance (Revenue Procedure 2019-39) that established a system of recurring remedial

amendment periods during which employers may correct form defects in their individually-designed and IRS pre-approved 403(b) plan documents that first occur after March 31, 2020 (the end date of the initial remedial amendment period). The IRS guidance defines a “form defect” in an individually-designed or pre-approved 403(b) plan document as any of the following:

- (1) A provision that causes a plan to fail to satisfy the 403(b) requirements;
- (2) The absence of a provision that causes a plan to fail to satisfy the 403(b) requirements;
- (3) A provision that is integral to a 403(b) requirement that has been changed (either by statute, or in regulations or other published IRS guidance); or
- (4) The absence from a plan of a provision required by or integral to a change to the 403(b) requirements (either by statute, or in regulations or other published IRS guidance).

■ **Individually-Designed 403(b) Plan Documents.**

- *Beginning and End Dates of the Recurring Remedial Amendment Periods.* Revenue Procedure 2019-39 established a system of recurring remedial amendment periods to allow an employer to retroactively correct the types of form defects listed above in their individually-designed 403(b) plan documents that first occur after March 31, 2020. The following chart shows the beginning and ends dates of the recurring remedial amendment periods (RAPs) that apply to such form defects first occurring in individually-designed *nongovernmental* 403(b) plan documents after March 31, 2020:

FORM DEFECT	RAP BEGINNING DATE	RAP END DATE
A form defect with respect to a provision of, or the absence of a provision from, a new plan	The date the new plan is put into effect	The last day of the second calendar year following the calendar year in which the new plan is put into effect
A form defect with respect to an amendment to an existing plan	The date the plan amendment is adopted or put into effect, whichever is earlier	The last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later
A form defect with respect to a provision that fails to satisfy 403(b) requirements because of a change in those requirements	The date the change in 403(b) requirements became effective with respect to the plan	The last day of the second calendar year that begins after the IRS issues a Required Amendments List (RAL) ¹ in which the change in 403(b) requirements appears
A form defect with respect to a provision that is integral to a 403(b) requirement that has been changed	The first day on which the plan was operated in accordance with such provision, as amended	The last day of the second calendar year that begins after the IRS issues a Required Amendments List (RAL) ¹ in which the change in 403(b) requirements appears
¹ The IRS publishes an annual Required Amendments List (RAL) that lists changes in the law applicable to individually-designed 403(b) plans and 401(a) qualified plans that are first effective during the plan year in which the RAL is published.		

Governmental employers have longer remedial amendment periods (RAPs) within which to cure the listed types of form defects in their individually-designed 403(b) plan documents if the remedial plan amendments must be adopted by a legislative body.

The *termination* of an individually-designed 403(b) plan ends (and so will generally shorten) the remedial amendment period (RAP) for each of the plan’s form defects. Accordingly, any retroactive remedial plan amendment or other required plan amendments for a terminating individually-designed 403(b) plan (that is, plan amendments which must be adopted to reflect 403(b) requirements that apply as of the date of plan termination) must be adopted in connection with the plan termination, regardless of whether those 403(b) requirements have appeared on an IRS-published Required Amendments List (RAL).

If an employer is unable to correct a form defect in its individually-designed 403(b) plan document within the applicable remedial amendment period (RAP), the employer may be able to correct the form defect under the IRS’s Employee Plans Compliance Resolution System (EPCRS, most recently published in Revenue Procedure 2019-19).

- *Plan Amendment Deadlines for Discretionary Amendments to Individually-Designed 403(b) Plan Documents.* Revenue Procedure 2019-39 provides that, except as otherwise provided by statute, or in regulations or other published IRS guidance, effective for plan years beginning on or after January 1, 2020, the plan amendment deadlines for discretionary amendments (for example, plan amendments to reflect desired plan design changes, which are not legally-required “interim” amendments) to nongovernmental and governmental individually-designed 403(b) plan documents, respectively, are as set forth below:

- For a *nongovernmental* individually-designed 403(b) plan, the discretionary plan amendment deadline is the end of the plan year in which the discretionary amendment is operationally put into effect. An amendment is “operationally put into effect” when the plan is administered in a manner consistent with the intended plan amendment.
- For a *governmental* individually-designed 403(b) plan, the discretionary plan amendment deadline is the later of (1) the end of the plan year in which the plan amendment is operationally put into effect (as described above), or (2) 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect.

- *Example Illustrating Plan Amendment Deadlines for Plan Amendments Curing Form Defects and Discretionary Plan Amendments.* Employer X maintains Plan Y, an existing nongovernmental 403(b) individually-designed plan that does not provide for plan loans. The plan year of Plan Y is the calendar year. During the 2021 plan year, Employer X makes plan loans available to all eligible participants in the plan in a manner consistent with the applicable requirements of the Internal Revenue Code. Employer X amends Plan Y by the end of 2021 to reflect the availability of plan loans. This discretionary plan amendment was timely adopted by the applicable plan amendment deadline described above for nongovernmental individually-designed 403(b) plans, i.e., by the end of the plan year (2021) in which the plan amendment is operationally put into effect. If, however, the language of the discretionary plan amendment does not comply with 403(b) requirements, then the plan has a form defect of the type described in the second row of the chart above (that is, a form defect with respect to an amendment to an existing plan), and Employer X will have until December 31, 2023, the end of the remedial amendment period (RAP) which applies to that type of form defect (that is, until the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later) to correct the form defect by means of a retroactive remedial plan amendment.

- *IRS-Preapproved Volume Submitter and Prototype 403(b) Plan Documents.* As it did for individually-designed 403(b) plans, Revenue Procedure 2019-39 also set up a system of recurring remedial plan amendment periods—called “pre-approved plan cycles”—beginning after March 31, 2020, for IRS-preapproved volume submitter and prototype 403(b) plan documents. Under this system, during each 403(b) pre-approved plan cycle, a 403(b) pre-approved plan sponsor (that is, a 403(b) prototype plan sponsor or a 403(b) volume submitter practitioner) will be able to apply to the IRS for an IRS pre-approved plan letter (that is, an IRS opinion letter in the case of a 403(b) prototype plan document, or an IRS advisory letter in the case of a 403(b) volume submitter plan document) for its plan during a one-year submission period, which generally will occur at the beginning of each 403(b) pre-approved plan cycle. The IRS will issue guidance on the procedures for applying for a 403(b) pre-approved plan letter and the timing of each 403(b) pre-approved plan cycle prior to the opening of each submission period. When the IRS has nearly completed its review of the 403(b) pre-approved plans that were submitted during a 403(b) pre-approved plan cycle, the IRS will announce the date by which an adopting eligible employer must adopt a newly-approved plan for that 403(b) pre-approved plan cycle. The IRS expects that the adoption deadline will be a uniform date that will apply to all adopting eligible employers. The IRS further expects that the adoption deadline will provide virtually all eligible employers approximately two years to adopt a newly-approved plan.

Cycle 1. The first 403(b) pre-approved plan cycle (Cycle 1) began on January 1, 2010 and will end on March 31, 2020.

Cycle 2. The second 403(b) pre-approved plan cycle (Cycle 2) will begin immediately after March 31, 2020, but the IRS does not expect the submission period for Cycle 2 to begin until 2023. Before then, the IRS will issue additional guidance on the submission procedures, including a cumulative list of changes in the 403(b) plan requirements that were not considered during Cycle 1 but will be considered in Cycle 2, and the requirements and procedures for an eligible employer to adopt a Cycle 2 pre-approved plan. After the IRS has issued Cycle 2 opinion and advisory letters, in order to obtain reliance on a Cycle 2 letter, an eligible employer must adopt the IRS-approved version of the Cycle 2 plan during an adoption window which the IRS will announce in future guidance. The IRS anticipates that the cycle system will continue after Cycle 2.

- *Beginning and End Dates of Recurring Remedial Amendment Periods.* Revenue Procedure 2019-39 also establishes a system of recurring remedial amendment periods to retroactively correct form defects (as defined above) in pre-approved 403(b) plan documents that first occur after March 31, 2020. The following chart shows the beginning and ends dates of the recurring remedial amendment periods (RAPs) that apply to certain types of form defects first occurring in pre-approved 403(b) plan documents after March 31, 2020:

FORM DEFECT	RAP BEGINNING DATE	RAP END DATE ¹
A form defect with respect to a provision of, or the absence of a provision from, a new plan	The date the new plan is put into effect	Unless otherwise provided by statute, or in regulations or other guidance issued by the IRS, a date which is no earlier than the end of Cycle 2 (the IRS intends to issue further guidance prior to the end of Cycle 2 that will specify this RAP end date)
A form defect with respect to an amendment to an existing plan	The date the plan amendment is adopted or put into effect, whichever is earlier	Same as above
A form defect with respect to a provision that fails to satisfy 403(b) requirements because of a change in those requirements	The date the change in 403(b) requirements became effective with respect to the plan	Same as above
A form defect with respect to a provision that is integral to a 403(b) requirement that has been changed	The first day on which the plan was operated in accordance with such provision, as amended	Same as above
¹ The RAP end date remains available so long as all interim plan amendments (that is, plan amendments which the IRS requires be made from time to time to bring the plan document into compliance with post-March 31, 2020 changes in 403(b) requirements) have been timely made by applicable IRS deadlines.		

As with the *termination* of an individually-designed 403(b) plan (discussed above), the *termination* of a pre-approved 403(b) plan ends (and will generally shorten) the remedial amendment period (RAP) for each of the plan's form defects. Accordingly, any retroactive remedial plan amendments or other required plan amendments for a terminating pre-approved 403(b) plan (that is, plan amendments required to be adopted to reflect 403(b) requirements that apply as of the date of termination) must be adopted in connection with the plan termination, regardless of whether those 403(b) requirements have appeared on an IRS-published Required Amendments List (RAL).

- *Limited Extension of the Initial Remedial Amendment Period for Cycle 1 Pre-Approved 403(b) Plans.* If a certain type of form defect first occurs in a Cycle 1 pre-approved 403(b) plan document during Cycle 1 (specifically, a form defect that results in the failure of the plan to satisfy the 403(b) requirements by reason of a change in those requirements, or that is integral to the 403(b) requirement that has been changed) and if the adopting eligible employer or the 403(b) pre-approved plan sponsor, as applicable, timely adopts an initial amendment (by the later of March 31, 2020 or the end of the calendar year after the calendar year in which the change in the 403(b) requirement is effective with respect to the plan) that is intended in good faith to correct the form defect, then the initial remedial amendment period will be extended from March 31, 2020 to a date (to be announced by the IRS in future guidance) no later than the end of Cycle 2.
- *Plan Amendment Deadlines for Interim Amendments to Pre-Approved 403(b) Plan Documents.* Revenue Procedure 2019-39 provides that, except as otherwise provided by statute, or in regulations or other published IRS guidance, the plan amendment deadlines for interim amendments to nongovernmental and governmental pre-approved 403(b) plan documents, respectively, are as set forth below (an "interim" amendment is a plan amendment to correct a form defect that results in the failure of the plan to satisfy 403(b) requirements by reason of a change in those requirements, or that is integral to the 403(b) requirement that has been changed):
 - For a *nongovernmental* pre-approved 403(b) plan, the interim plan amendment deadline is the end of the calendar year after the calendar year in which the change in 403(b) requirements is effective with respect to the plan.
 - For a *governmental* pre-approved 403(b) plan, the interim plan amendment deadline is the later of (1) the end of the calendar year after the calendar year in which the change in 403(b) requirements is effective with respect to the plan, and (2) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment becomes effective.

- *Plan Amendment Deadlines for Discretionary Amendments to Pre-Approved 403(b) Plan Documents.* Revenue Procedure 2019-39 also provides that, except as otherwise provided by statute, or in regulations or other published IRS guidance, effective for plan years beginning on or after January 1, 2020, the plan amendment deadlines for discretionary amendments (that is, non-interim amendments) to nongovernmental and governmental pre-approved 403(b) plan documents, respectively, are as set forth below:
 - For a *nongovernmental* pre-approved 403(b) plan, the discretionary plan amendment deadline is the end of the plan year in which the discretionary amendment is operationally put into effect (as defined above).
 - For a *governmental* pre-approved 403(b) plan, the discretionary plan amendment deadline is the later of (1) the end of the plan year in which the plan amendment is operationally put into effect (as described above), and (2) 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment becomes effective.

Important Note. The remedial amendment periods (RAPs) for individually-designed and pre-approved 403(b) plans only apply to the correction of form defects, that is, errors in the 403(b) plan document. To the extent that any 403(b) plan has operational failures—that is, failures to follow the terms of a legally-compliant plan document or any other failure to operate the plan in accordance with applicable 403(b) requirements—those failures may not be “corrected” by papering them over with a retroactive remedial plan amendment which reflects applicable 403(b) requirements. All operational failures would need to be corrected in accordance with the applicable provisions of IRS’s Employee Plans Compliance Resolution System (EPCRS, most recently published in Revenue Procedure 2019-19).

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