



Vol. XIV, No. 5 – May 4, 2009

Internal Revenue Service

IRS Releases Draft Guidance on 403(b) Prototype Plans and Sample Plan Language

A Special Edition of *Employee Plan News* summarizes Announcement 2009-34, which contains a draft revenue procedure on a proposed 403(b) prototype program, as well as draft sample plan language. <http://www.irs.gov/pub/irs-tege/se0409.pdf>. The IRS solicits comments on the draft plan language and draft revenue procedure by June 1, 2009. Upon finalization of the guidance, the prototype program is expected to open by the end of March, 2010.

The IRS previously published model plan language in Revenue Procedure 2007-71. This model plan language, which is the basis of written 403(b) plan documents that must be adopted to comply with the written plan requirement under the 403(b) final regulations no later than December 31, 2009, may continue to be used by public schools and other eligible 403(b) plan sponsors, pending further notice. The prototype plan provides another option for plan sponsors to consider when deciding how to satisfy the written plan document requirement going forward.

After the prototype program has been opened, a determination letter program for individually designed 403(b) plans will be established by the IRS.

Background on Prototype Plans

A financial organization, such as an insurance company or mutual fund organization, or an employee benefits practitioner may sponsor a prototype plan. A 403(b) prototype is a two-part plan document intended to satisfy the requirements of 403(b) and the 2007 regulations, which a prototype sponsor provides to eligible employers that wish to adopt a written 403(b) plan. The prototype sponsor submits the basic plan document, which contains nonelective provisions, and an adoption agreement, which permits specific plan design choices by the employer adopting the plan, to the IRS for approval in the form of a favorable opinion letter. The prototype plan sponsor must certify to the IRS that it expects at least 30 eligible employers to adopt its 403(b) plan. Once the IRS favorable opinion letter is issued, no changes may be made to the approved plan language.

The prototype sponsor has a continuing responsibility to timely amend the plan for changes in law and guidance issued by the IRS. If the prototype plan sponsor modifies the prototype plan, the prototype plan sponsor must provide to the adopting eligible employer who adopts the prototype plan copies of the plan, amendments, and opinion letters from the IRS. The adopting eligible employer must adopt the prototype plan on a timely basis to conform to legal requirements.

Specimen Plan Language

The IRS prepared specimen language to assist prototype sponsors who are drafting section 403(b) prototype plans, and to enable the IRS to process and approve section 403(b) prototype plans more quickly. These are known as Listing of Required Modifications (LRMs). The LRMs are intended to provide sample language for 403(b) sponsors that are public schools, non-governmental/non-church 501(c)(3) organizations, churches that have not elected into ERISA, and "dual status" employers relying on their governmental plan status.

No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor.

President Obama Appoints Assistant Secretary for Tax Policy

On April 27, 2009, J. Mark Iwry commenced a new Treasury Department position as Deputy Assistant Secretary for Tax Policy for Retirement and Health Policy. This position does not require Senate confirmation. From 1995 – 2001, Iwry served as benefits tax counsel at the Treasury Department, overseeing employee benefits and compensation issues.

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