

# New IRS Determination Letter Program for 403(b) and 401(a) Plans

by Kimberly S. Couch on November 10, 2022

On November 7, 2022, the IRS issued Revenue Procedure 2022-40, which allows certain tax-exempt employers (such as schools, charities, and churches) to apply for IRS determination letters on their individually designed section 403(b) retirement plans (“403(b) plans”) in substantially the same manner as plan sponsors of individually designed section 401(a) retirement plans (“401(a) plans”).<sup>1</sup> In addition, the Revenue Procedure makes significant changes to the procedures for submitting all individually designed plans (401(a) and 403(b) plans) for approval under IRS determination letter programs. The Revenue Procedure does not apply to pre-approved 401(a) and 403(b) plans.

## Section 403(b) Plans

The new IRS determination letter program for 403(b) plans applies to (i) initial 403(b) plan determinations, (ii) terminating 403(b) plans, and (iii) other circumstances identified by the IRS in future guidance.

Initial Plan Determination. A plan sponsor may submit an individually designed 403(b) plan to the IRS for an initial plan determination letter on whether the form of the plan complies with Section 403(b) (“Section 403(b) Requirements”).<sup>2</sup> of the Internal Revenue Code (“Code”). The dates on which applications may be submitted for an initial plan determination letter are staggered over three years based on the last digit of the plan sponsor’s EIN as follows:

If the EIN of the Plan Sponsor ends in:	A determination letter application may be submitted beginning on:
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025

<sup>1</sup> A plan sponsor may submit a 401(a) plan to the IRS for a determination that the plan provisions satisfy Code section 401(a) and the plan’s trust is exempt from tax under Code section 501(a). A favorable IRS determination letter provides assurances to the plan sponsor that the plan document is in compliance with applicable tax laws, the plan sponsor may deduct contributions made to the plan, and the plan contributions and earnings will not be taxed until benefits are distributed from the plan to plan participants.

<sup>2</sup> The term “Section 403(b) Requirements” means the requirements of Code Section 403(b) and regulations and other official guidance published by the IRS.

The IRS submission must be completed on Form 5300 (Application for Determination for Employee Benefit Plan). A plan sponsor must provide advance notice of the IRS application to all interested parties (such as participants, beneficiaries, and alternate payees) and the 403(b) application will be subject to public disclosure in the same manner as applications for 401(a) plans. These requirements will be described in future IRS revenue procedures.<sup>3</sup>

Determination upon 403(b) Plan Termination. Beginning on June 1, 2023, a plan sponsor may request a determination that an individually designed 403(b) plan complies with Section 403(b) Requirements upon plan termination. A plan sponsor may apply at any time on or after that date regardless of the last digit of the plan sponsor's EIN. The IRS submission must be completed on Form 5310 (Application for Determination for Terminating Plan). The notice and public disclosure requirements described above will apply to the IRS submission.

### **Changes to IRS Submission and Processing Procedures for 401(a) and 403(b) Plans**

Revenue Procedure 2022-40 also makes significant changes in the IRS submission and review processes for individually designed plans.

Initial Plan Determination. A plan sponsor of an individually designed plan (whether a 401(a) or 403(b) plan) may submit a determination letter application to the IRS for an initial plan determination no matter how long the plan has been in existence, provided that the plan has not (i) previously been submitted for IRS approval on Form 5300 and (ii) received an IRS determination letter as an individually designed plan. A plan sponsor that has received a determination letter using Form 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans) is no longer ineligible to submit the plan for a determination letter using Form 5300. Revenue Procedure 2022-40 provides examples addressing whether a plan is being submitted for an initial determination.

*Example 1:* Plan sponsor A adopts individually designed Plan W in 2017. In 2019, A submits Plan W to the IRS for an initial determination on Form 5300 and the IRS issues a determination letter with respect to Plan W in 2020. A is not eligible to submit Plan W to the IRS on Form 5300 in the future.

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<sup>3</sup> Code Section 7476, which contains the requirements for providing notice to interested parties, and Code Section 6104, which provides for public inspection of IRS applications, apply to section 401(a) plans and do not apply to section 403(b) plans. Accordingly, the IRS will issue procedures for 403(b) plans in future revenue procedures.

*Example 2:* Plan sponsor B adopts individually designed Plan X in 2015. In 2017, B restates Plan X as a preapproved plan, applies for an IRS determination letter on Form 5307, and receives a determination letter with respect to Plan X as a modified, preapproved plan. B is eligible to submit Plan X for a determination letter on Form 5300.

Because 403(b) plans have not been eligible to seek an IRS determination letter prior to Revenue Procedure 2022-40, almost all individually designed 403(b) plans will be eligible to apply for an IRS determination letter.<sup>4</sup>

Determinations upon Plan Termination. A plan sponsor of an individually designed plan may submit an application for a determination letter on Form 5310 in connection with a plan termination, provided the application is filed no later than the later of (i) one year from the plan termination effective date or (ii) one year from the date action is taken to terminate the plan. In no event may the application be filed more than 12 months from the date that substantially all assets have been distributed in connection with the plan termination.

Merged Plans. A plan sponsor of an individually designed plan may submit an application for a determination letter on Form 5300 with respect to a merged plan (a plan resulting from a merger of two or more 401(a) plans with formerly unrelated sponsors into a single individually designed 401(a) plan), provided that: (i) the date of the plan merger occurs no later than the last day of the first plan year that begins after the plan year that includes the date of a corporate merger, acquisition, or other similar business transaction between unrelated entities; and (ii) a determination letter application for the merged plan is submitted during the period beginning on the date of the plan merger and ending on the last day of the first plan year of the merged plan that begins after the date of the plan merger. Beginning in 2023, the IRS will accept applications for determination letters only with respect to 401(a) plan mergers.

Scope of Plan Review. In reviewing determination letter applications for ongoing plans, the IRS will consider Qualifications Requirements<sup>5</sup> for 401(a) plans and Section 403(b)

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<sup>4</sup> 403(b) plans that are TEFRA church defined benefit plans and grandfathered 403(b) plans under Revenue Ruling 82-102 that did not invest in annuity contracts purchased from insurance companies are not eligible for the new IRS determination letter program.

<sup>5</sup> For 401(a) plans, the term “Qualification Requirements” means the requirements of Code sections 401(a), 403(a), 409, and 4975(e)(7), and regulations and other official guidance published by the IRS.

Requirements for 403(b) plans that appear on a Required Amendments List<sup>6</sup> issued on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted. Not all changes in the laws are included on a Required Amendments List. In that event, the IRS will consider only the Qualification Requirements and Section 403(b) Requirements that are in effect on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted. The IRS reserves the right to make exceptions to the rule in revenue procedures providing instructions for determination letter applications. Also, the IRS will review all changes in effect as of a plan termination date even though they are not yet on a Required Amendments List.

Two examples of these rules in Revenue Procedure 2022-40 are set forth below.

*Example 1:* Plan sponsor A maintains Plan X, an ongoing individually designed plan. During 2024, Law L is enacted and included on the 2024 Required Amendments List. A amends Plan X for Law L and applies for a determination letter on Plan X in 2026. The IRS will consider Law L because it was included in the 2024 Required Amendments List.

*Example 2:* Assume the same facts as in Example 1, but that Law M is also enacted in 2024, and A amends Plan X for Law M. Although Law M will be included in a Required Amendments List, it does not appear on the 2024 List because the IRS needs to issue guidance. The IRS will not consider Law M in the 2026 determination letter application.

Plan Restatement. An individually designed plan must be restated at the time of the IRS determination letter application except in the case of a terminating plan.

Remedial Amendment Period for Correcting Disqualifying Provisions or Form Defects. Revenue Procedure 2022-40 clarifies and extends the remedial amendment period for (i) disqualifying provisions in individually designed 401(a) plans and (ii) form defects first occurring after June 30, 2020 in individually designed 403(b) plans. The remedial amendment period is the period in which a plan sponsor may correct disqualifying provisions or form defects, whichever applies, retroactive to the beginning of the period.

Revenue Procedure 2022-40 extends the remedial amendment period for a disqualifying provision in a new 401(a) plan or a form defect in a new 403(b) plan until the last day of the second calendar year following the calendar year in which the plan was put into effect. It extends the remedial amendment period for a disqualifying

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<sup>6</sup> Notices setting forth the Required Amendments Lists can be found on the IRS website at <https://www.irs.gov/retirement-plans/required-amendments-list>. The most recent Required Amendments List is set forth in Notice 2021-64, 2021-50 IRB 869.

provision or form defect with respect to a plan amendment to an existing plan to the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later. Notwithstanding the foregoing, the remedial amendment period for a disqualifying provision or form defect that arises as a result of a change in Qualification Requirements or Section 403(b) Requirements, whichever applies, expires on the last day of the second calendar year that begins after the issuance of the Required Amendments List in which the change in Qualification Requirements or Section 403(b) Requirements appears.

A “disqualifying provision” with respect to a 401(a) plan is a provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan that causes the plan to fail to satisfy Qualification Requirements as of the date the plan or amendment is first made effective; (ii) a plan provision that has been designated by IRS guidance as a disqualifying provision by reason of a change in Qualification Requirements; or (iii) the absence from a plan of a provision required by or integral to a change in the Qualification Requirements.

A “form defect,” as modified by Revenue Procedure 2022-40, is (i) a provision that causes a plan to fail to satisfy the Section 403(b) Requirements due to a change in those Requirements, (ii) a plan provision that is integral to a form defect described in subsection (i), or (iii) the absence from a plan of a provision required by or integral to a change to the Section 403(b) Requirements.

If the remedial amendment period has expired for a disqualifying provision or a form defect, a plan sponsor may wish to consider correcting plan provisions through the [IRS Employee Plans Compliance Resolution Program](#) before submitting the plan to the IRS for review under the IRS determination letter program.

## Action Items

In the past, plan sponsors of 403(b) plans could not receive the comfort of IRS approval of their plan documents or the impact of a plan termination on the plan’s compliance with Code section 403(b). Revenue Procedure 2022-40 presents a new opportunity for employers to seek IRS approval of their 403(b) plan documents for both ongoing and terminating plans. Employers with ongoing plans should check the last digit of their employer identification numbers to determine when they may submit their 403(b) plans to the IRS under the staggered three-year program. Employers who are terminating (or who have recently terminated) 403(b) plans should consider seeking an IRS determination letter that the plan termination will not adversely affect their plan’s compliance with Section 403(b) Requirements.

Employers who have adopted preapproved plans but have substantially changed the plan documents to accommodate unique plan features should consider applying for an IRS determination letter on their plan documents.



Please contact a member of our [Employee Benefits & Executive Compensation Group](#) if you have any questions regarding Revenue Procedure 2022-40, if you need assistance in reviewing and restating your plan documents for required amendments, and factors to consider in deciding whether and when to submit your 403(b) or 401(a) plan to the IRS for a determination letter.



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