

New IRS Guidance FAQ

What Plan Administrators Need to Know

December 18, 2008

What action did the IRS take regarding 403(b) regulations?

On December 11, 2008, the IRS published Notice 2009-3, which extends the deadline for 403(b) plan sponsors to adopt a written plan document to December 31, 2009.

Does this latest IRS guidance delay the January 1, 2009 effective date for the newly adopted 403(b) regulations?

No, the January 1, 2009 general effective date for the final regulations remains unchanged; this latest guidance only provides additional time for plan sponsors to adopt written plans.

How does this change affect my obligations as a 403(b) plan sponsor?

The extended time period for sponsors to adopt a written plan only addresses the form of the plan document, not the operation of the plan. So this new guidance DOES NOT relieve plan sponsors from the need to administer their plans beginning on January 1, 2009 in accordance with a reasonable interpretation of the requirements of Section 403(b), including the final 403(b) regulations. Once a written plan is adopted, the plan sponsor must then retroactively fix any operational defects that may have occurred from January 1 through the effective date of the written plan.

How do these changes affect other timelines in the final 403(b) regulations?

This new guidance does not extend any other deadlines in the final 403(b) regulations, so an employer should assume that a service provider in the plan who receives contributions in 2009 must be part of the plan, even if the written plan is not adopted until after January 1, 2009. In effect, this means the last date for de-selecting inactive providers (those who will be subject only to the "reasonable good faith" standard for information sharing and compliance coordination) remains December 31, 2008. Even if the de-selection actually occurs prior to the adoption of a written plan in 2009, if the vendor received contributions after December 31, 2008, it is expected that they will be part of the plan.

If a plan sponsor chooses to terminate its 403(b) plan in 2009, and does so before adopting a written plan, is the plan sponsor still required to adopt a written plan in 2009?

Yes, a written plan will still be required. The IRS has previously clarified that a plan sponsor terminating a plan prior to January 1, 2009 is not generally required to adopt a written plan before the termination. The latest guidance provides no new relief for plans terminating in 2009 before adopting a written plan.

Some plan sponsors are opting to use a decentralized or manual compliance coordination process, with the expectation of introducing a centralized or automated process beginning later in the year. Other plan sponsors have elected to freeze loan and hardship eligibility until the centralized or other automated coordination process is implemented. Still others have elected to adopt a decentralized process going forward or to freeze the availability of loans and hardships entirely. Could the IRS' new guidance affect these decisions?

The new guidance doesn't specifically address individual compliance coordination strategies, but the employer's decisions from among these strategies could affect provisions of the plan that is ultimately adopted. If a written plan is adopted after the new regulations' operational effective date of January 1, 2009, a sponsor will have to retroactively follow up the plan adoption with corrective action for any 2009 transactions that are inconsistent with the newly adopted written plan. This requirement appears to apply even if the inconsistency does not involve a violation of Code Section 403(b), the underlying regulations, or other authoritative government guidance for 403(b) plans.

So, if the newly adopted written plan specifically addresses details of the compliance coordination process, and if these details are different from interim coordination procedures adopted by the employer for the portion of 2009 prior to plan adoption, it will be important for the plan to describe both the original 2009 procedures and the revised procedures. If the written plan addresses these topics more generally, it will still be important for the two timelines to be captured in plan procedures and announced to plan participants and vendors.

If a plan sponsor is on schedule to complete a written plan, its accompanying procedures, and the investment provider selection, should the sponsor delay the process in light of this new guidance?

Although we cannot provide legal or tax advice to a plan sponsor, it is our understanding that many plan advisors are recommending plan sponsors complete the transition process without delay. The new guidance has not altered the importance of selecting providers before 2009 and, at a minimum, employers will want to have strong commitments from those new providers that they will support the employer's new compliance coordination requirements. What's more, the longer an employer delays the adoption of a written plan, the more potential for operational failures that require correction.

If a plan sponsor already has a written plan, but it requires changes to fully comply with the final regulations, can those changes now be postponed?

Under the new IRS guidance, changes may wait until later in 2009. However, there may be other legal rules requiring the employer to amend the plan by January 1, 2009. For example, if the plan is subject to Title I of ERISA, and if an amendment is required to comply with the requirements of Title I, the IRS guidance does not provide an extension of any ERISA deadlines.

If a plan sponsor waits until after January 1, 2009 to adopt its written plan, and discovers resulting operational defects for the period in 2009 before adopting the plan, how can those operational failures be corrected?

Generally speaking, failure to operate a plan in accordance with the terms contemplated under the plan document will result in an operational failure. The new IRS guidance indicates that before the end of the 2009 plan year, the plan sponsor should make its best efforts to retroactively correct any operational failure and conform to the terms of the written plan, with any correction made in accordance with the general provisions of the Employee Plan Compliance Resolution System (EPCRS) set forth in IRS Revenue Procedure 2008-50.

Please note that the IRS is expected to update its EPCRS guidance with respect to the new requirements of the 403(b) regulations at some point in 2009.

What is AIG Retirement doing to support plan sponsors affected by these changing regulations?

We are drawing on five decades of experience in education markets and long-standing relationships with tens of thousands of K-12, higher education and private tax-exempt organizations to deliver services, products and counseling that meet their unique needs. We are also an excellent resource for general information on current 403(b) regulatory changes and their implications for plan sponsors. We offer a 403(b) regulations hotline at (877)-403(b)reg (2734) and a host of online resources at our 403bUniversity.com website.

Retirement Manager, our proven solution for 403(b) group retirement plans, has already helped hundreds of plan sponsors make the transition to full compliance, using a completely independent, vendor-neutral approach that positions each plan for current and continued administrative excellence.

Where can I go for more information about 403(b) regulation changes and this recent IRS action?

Contact your information source on 403(b) regulations by phone:

(877)-403(b)reg (2734) or online at: 403bUniversity.com

You may also visit the IRS website at <http://www.irs.gov/pub/irs-drop/n-09-03.pdf>

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