

# IRS Announces 403(b) Prototype Plan Procedures and Sample 403(b) Plan Language

On April 14, 2009, the Internal Revenue Service (IRS) released Announcement 2009-34 indicating its intent to establish a program for pre-approval of prototype 403(b) plan documents. The Announcement contains a draft revenue procedure detailing the process it proposes to use for issuing favorable opinion letters for 403(b) prototype plans. It also indicates that the IRS will follow with guidance for individually designed (non-prototype) plans at a later date.

At the same time, the IRS released draft sample plan language (List of Required Modifications or “LRM’s”) for use by those drafting 403(b) plan documents. The IRS has requested comments from the public on both the draft procedure and sample plan language by June 1, 2009, after which the IRS will consider the comments, make any modifications, and finalize the 403(b) prototype procedure and sample plan wording.

This Announcement applies to public school employers and non-profit organizations that are required to adopt a written plan by December 31, 2009.

## Background

For several decades, the IRS has issued favorable opinion letters to institutions and employers who sponsor retirement plans qualified under sections<sup>1</sup> 401(a) and 401(k) of the Internal Revenue Code. The approval letter gives assurance to the employer adopting the plan that the IRS has reviewed the document and determined that the terms of the plan meet the requirements of sections 401(a) and 401(k) of the Code and related regulations.

Additionally, the IRS has allowed financial institutions and benefit consultants to submit a “prototype” 401(a) or 401(k) plan document to the IRS to obtain a favorable approval letter. By adopting the institution’s prototype plan, clients can take advantage of the

prototype plan’s favorable IRS opinion letter. This process minimizes the cost and expense to the employer of retaining legal counsel to draft and submit a plan to the IRS and also reduces the number of plans to be reviewed by the IRS.

Even though 501(c)(3) organizations whose plans are subject to ERISA have been required to have plan documents for many years, these employers have been unable to adopt a prototype plan document because the IRS had no process in place to permit the filing of a 403(b) prototype plan or to issue a favorable opinion letter for any 403(b) plan. As a result, unless an employer requested a private letter ruling (rarely done), the employer had no reliance that their plan was written in conformance with 403(b) of the Internal Revenue Code and regulations.

<sup>1</sup> In the event of a plan audit, the IRS reviewer will typically ask for a signed copy of the employer’s plan (and any amendments), along with the plan’s IRS favorable opinion letter.

## Announcement 2009-34

Announcement 2009-34 provides a draft of the process that the IRS intends to use to open the door to the use of prototype 403(b) plans. Since one of the stated objectives of the IRS in issuing the recent final 403(b) regulations was to get 403(b) plans to operate more like 401(k) plans, it is not surprising that the procedures they propose are essentially the same as for 401(a)/401(k) master and prototype programs.

Announcement 2009-34 describes what a 403(b) prototype plan is, what features and provisions must be included in the plan, who is eligible to submit a prototype plan to the IRS, how to apply for an IRS favorable opinion letter, what fees the institution must pay when submitting the plan to the IRS and the responsibilities of the prototype plan's sponsor to maintain the approved status of the plan.

## Remedial Amendment Period

With a few exceptions, the IRS requires most employers, including public schools, to adopt a written plan document by December 31, 2009. However, Announcement 2009-34 makes it clear that the effective date of the plan cannot be later than January 1, 2009.

The Announcement also introduces a special "remedial amendment period" to generally run from January 1, 2010 through December 31, 2010. An employer would have until December 31, 2010 to adopt a prototype plan document that is in compliance with IRC Section 403(b) and the 403(b) regulations **provided the employer has adopted a written plan intended to qualify with 403(b) of the Code not later than December 31, 2009**. It also permits the prototype plan to be retroactively effective as of January 1, 2009.

This should not be confused as an extension of the December 31, 2009 deadline to adopt a written plan, nor does it mean that the employer is not expected to operate their plan in accordance with a "reasonable interpretation" of the 403(b) regulations after January 1, 2009.

The IRS indicates in the Announcement that it will not accept applications for a prototype plan filing any earlier than March 15, 2010, meaning that employers will not be able to adopt a pre-approved prototype plan by the December 31, 2009 deadline.

It is important to note that only employers who have adopted a **non-prototype written plan** before December 31, 2009 will have until December 31, 2010 to adopt a **prototype 403(b) plan document** that is in compliance with 403(b) of the Code.

Announcement 2009-34 also does not provide relief from a possible plan disqualification for any employer who fails to adopt a written 403(b) plan document by December 31, 2009. This is why AXA Equitable has encouraged employers to adopt a written plan as soon as possible.

## Sample Plan Language

At the same time the IRS released Announcement 2009-34, they also released sample 403(b) plan language for use by those who draft plan documents that they expect to submit for IRS approval. As with Announcement 2009-34, the IRS is looking for public comment by June 1, 2009. This wording supplements the model plan wording the IRS provided under Revenue Procedure 2007-71, designed to help public school employers adopt a written plan. The sample wording this time, however, covers many of the typical plan features adopted by public schools that were overlooked by the IRS.

## Will AXA Equitable be Submitting Their 403(b) Plans to the IRS?

Yes. AXA Equitable's documents, now in use, were designed by AXA Equitable and PenServ Plan Services in contemplation of being submitted to the IRS as prototype 403(b) plan documents. Once the IRS finalizes the prototype process and announces their ability to review the documents and issue approval letters, AXA Equitable will submit the plans to the IRS for a favorable opinion letter.

AXA Equitable has offered a 403(b) plan document for employers who are public schools and universities since April of 2008. Both ERISA and non-ERISA 403(b) plan documents are available for non-profit 501(c)(3) organizations.

These documents were drafted and are being administered by PenServ Plan Services, Inc. ("PenServ") and are available to AXA Equitable clients

regardless of whether they retain PenServ to provide any other services. PenServ qualifies as a "mass submitter" of documents with the IRS and, as a result, they will receive priority in the IRS review process.

AXA Equitable will advise clients when it receives IRS approval of the company's 403(b) prototype plans and make them available to clients who wish to adopt them. The public school and non-ERISA documents for 501(c)(3) employers are available at no charge from PenServ and the ERISA document is available at a nominal fee.

To obtain an AXA Equitable 403(b) plan document, employers should contact the AXA Plan Document Services unit at PenServ at 1-866-289-6049.

**AXA Equitable strongly encourages clients to adopt their 403(b) plan now to avoid a year-end crunch and the risk of not having enough time to get their signed document in place by December 31, 2009.**



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