

December 17, 2008

TCRS 2008-11: Relief from Immediate Compliance With 403(b) Written Plan Requirement

In Notice 2009-3, the Internal Revenue Service (IRS) provides relief to section 403(b) plan sponsors with respect to the requirement to have a written plan in place by January 1, 2009, provided certain conditions are met. The new deadline is December 31, 2009.

Background

Under the final section 403(b) regulations issued on July 26, 2007, sponsors of section 403(b) plans are required, to have in place by January 1, 2009, a written plan that meets both in form and operation, the requirements of the final regulations. Since the publication of the final regulations, the IRS has received numerous comments about difficulties plan administrators are experiencing in meeting the January 1, 2009 deadline.

As a result of these comments, and because there is no current program available to section 403(b) plan sponsors under which they can obtain assurance that their written plan conforms to the final regulations, the IRS and Treasury have concluded that establishing plan programs similar to the IRS' pre-approved and individually designed programs for section 401(a) plans would facilitate compliance with the final regulations.

Relief for 2009 Under Notice 2009-3

While the IRS is finalizing the section 403(b) plan programs, transition relief is being provided to section 403(b) plan sponsors (new and existing) who have made appropriate efforts to comply with the written plan requirement in the final regulations. According to the Notice, these section 403(b) plans will be treated as meeting the requirements of the final regulations for 2009, provided the following conditions are met:

- by December 31, 2009, the plan sponsor has adopted a written plan that satisfies the requirements of the final regulations effective January 1, 2009;
- during calendar year 2009, the plan sponsor operates the plan in accordance with a reasonable interpretation of the final regulations; and
- before the end of 2009, the plan sponsor makes its best efforts to retroactively correct any operational failure during calendar year 2009 to comply with the written plan, based on the general principles of correction under the IRS' Employee Plans Compliance Resolution System (EPCRS).

Notice 2009-3 makes clear that the relief provided only applies to calendar year 2009.

Upcoming Section 403(b) Guidance

In the near future, as part of the establishment of a prototype program for section 403(b) plans, the IRS will request comments on a draft revenue procedure which may be used by plan sponsors in obtaining IRS approval of prototype section 403(b) plans, and on sample plan language for drafting prototype plans. This revenue procedure will include a remedial amendment period by which 403(b) plan sponsors will be able to make remedial amendments to retroactively fix plan issues.

Once the prototype program is in place, the IRS also intends to establish a determination letter program for individually designed section 403(b) plans and the EPCRS program will be revised to include section 403(b) issues.

This Summary is designed to provide an overview of Notice 2009-3, providing Relief from Immediate Compliance With 403(b) Written Plan Requirement, and is not intended to be comprehensive. The Transamerica Center for Retirement Studies® ("The Center") is a non-profit corporation and private operating foundation. The Center may be funded by contributions from Transamerica Life Insurance Company and its affiliates or other unaffiliated third-parties. For more information about The Center, please refer to www.transamericacenter.org. The Center and its representatives cannot give ERISA, tax or legal advice. This material is provided for informational purposes only and should not be construed as ERISA, tax or legal advice. Interested parties must consult and rely solely upon their own independent advisors regarding their particular situation and the concepts presented here. Although care has been taken in preparing this material and presenting it accurately, The Center disclaims any express or implied warranty as to the accuracy of any material contained herein and any liability with respect to it.