

403B Update



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Ahead in this Music Lesson

- 1 *Notes and Chords*: Some plan basics, updates

- 2 *Jazzing it up*: Recent legislative changes

- 3 *Transposing*: With new preapproved 403(b) plan documents

- 4 *Harmonizing*: Plan combinations

- 5 *Improvisation*: Correcting errors

- 6 *Tenor of discussions*: Best interest, fiduciary, and more

Notes and Chords:
Some plan basics,
updates

Notes and Chords: Plan Basics and Updates

403(b) plans are defined contribution retirement savings plans

They can take various forms, including

- Voluntary only plans
- Employer contributory plans: matching and/or other employer contributions, including special purpose contributions
 - Ex: Special pay contributions, post-severance contributions,

Notes and Chords: Plan Basics and Updates (cont'd)

Some basics

- Governed by a written plan: at least since 2010
 - Some may still be operating under paper clip approach
 - Possible 2018 objective: formalize into a single document
- Elective deferral eligibility requirements: universal availability
 - Potential for automatic enrollment, subject to limitations in state payroll laws
- Contribution limitations: on elective deferrals (\$18,500, \$6,000 age 50 or older) and total of employee and employer contributions (\$55,000)
- Distribution and loan restrictions: limitations and specific qualifying events
 - Plan can be more restrictive, but cannot be less restrictive
- Distribution requirements: later of age 70 ½ or retirement
 - Unique plan rule for 403(b): participant's right to aggregate across 403(b) accounts, plans

Jazzing it up: Recent
legislative changes

Jazzing it up: Some recent legislative changes and additional guidance

- Natural disaster relief: relating to Hurricane and Tropical Storm Harvey, Hurricane Irma and Hurricane Maria, affecting Texas, Louisiana, Florida, Georgia, South Carolina, Puerto Rico and the U.S. Virgin Islands, and wildfires in California
- 401(k) financial hardship withdrawal safe harbor: Treasury directed to remove 6 month suspension (for plan years beginning after 12/31/2018)
 - Expected to apply to 403(b) also
 - New distinction from “facts and circumstances” hardship rules?
- Requirement to take a loan before qualifying for financial hardship withdrawal: gone for plan years beginning after 12/31/18
 - Safe harbor and facts and circumstances
- Plans allowed to permit hardship withdrawals from qualified matching contributions (QMACs) and qualified non-elective contributions (QNECs): only for 401(k) plans
 - No extension to 403(b)...yet
 - Also note: permissive, not required

Jazzing it up: Some recent legislative changes and additional guidance (cont'd)

- Plan loan rollovers: time for accomplishing extended to tax return filing date, but only in the event of plan termination or severance from employment
- Safe harbor hardships for home habitability repairs: after 2018, limited to repairs for uninsured or underinsured damage to principal residence due to a presidentially-declared disaster
- *Related*: Roth IRA conversion recharacterizations (i.e., reversals back to traditional IRA) no longer permitted

Transposing: With new
preapproved 403(b) plan
documents

Transposing: Pre-approved 403(b) documents

- 3 groupings
 - Public school 403(b) plan documents reflecting IRS model language from IRS Rev. Proc. 2007-71: only to the extent of such model language
 - Example: ASBO model documents
 - Subsequent changes: generally not covered in applicable reliance
 - Some questions about ongoing reliance
 - Currently available: original pre-approved documents released in 2017
 - Coming soon: additional approvals of minor modifiers of mass submitter documents

Transposing: Pre-approved 403(b) documents (cont'd)

- Basics
 - Employer not required to adopt pre-approved documents
 - *Without* one: both form and operation are considered in an IRS examination
 - *With* pre-approved document: form is satisfied, and the exam focuses on operations
 - Example: employers still relying on paper clip approach can have multiple challenges
 - Demonstrating and documenting the contents of the “written plan”
 - Validating that the written plan satisfies all applicable requirements, generally and in the event of an examination

Transposing: Pre-approved 403(b) documents (cont'd)

- **Some important considerations**
 - Remedial amendments back as far as 1/1/2010 available for correcting form defects, if adopted by 3/31/2020
 - Note: written plan not required prior to 2009 except for ERISA plans
 - Employers who committed to adopting a pre-approved plan to cure a form defect identified on exam: now need to adopt (by the deadline)
 - Expect a follow-up from IRS
 - Remedial amendment period carries both risks and opportunities
 - Opportunities: to correct form defects
 - Risks: to create operational defects, if not carefully applied

Harmonizing: Plan
combinations

Harmonizing: Plan combinations

- All limits apply across multiple 403(b) plans of the same employer
- Elective deferral limits and age 50 catch-up limits:
 - Single limit applies to all 403(b) and 401(k) plans in which the individual participates
 - Includes any “cap expansion” available in 403(b) plan for employees with at least 15 years of service with the employer and lower contributions in previous years; “cap expansion” applied before age 50 catch-up limit
 - Separate limits apply to any 457(b) plan of the same employer or of another employer
- Total of employee and employer contributions: these limits apply separately to 403(b) plans, 401(a)/(k) plans, and 457(b) plans
 - Additional 457(b) provision: cannot stack plan-specific catch-up and age 50 catch-up; must choose one or the other, in a given year

Improvisation:
Correcting errors

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- **Three primary methods*** for correcting errors
 - **DIY**: Self-correction, applies to many common errors, if you have sufficient (*not perfect*) compliance practices and procedures. Usually lowest cost and quickest resolution option. Important to retain documentation for future reference. (Self-Correction Program; **SCP**)
 - **IRS-Assisted**: Plan still does most of the work, but submits to IRS, along with any applicable fees, for review and approval. Usually higher cost than DIY, lower than IRS Initiated correction; also can be expected to take longer than DIY to complete. (Voluntary Correction Program; **VCP**)
 - **IRS-Initiated**: IRS identifies in examination, plan is required to correct. Usually highest cost option. (Audit Closing Agreement Program; **Audit CAP**)

* **Additional DOL fiduciary correction rules would apply to ERISA plans**

Improvisation: Correcting errors (cont'd)

- Which program(s) for which errors?

TYPE OF ERROR	DIY/SCP*	IRS ASSISTED/VCP	IRS INITIATED/AUDIT
Ineligible employer	No	Yes	Yes
Failure to timely adopt	No	Yes	Yes
Failure to follow plan terms	Yes	Yes	Yes
Failure to provide opportunity to defer	Yes	Yes	Yes
Auto enrollment errors	Yes	Yes	Yes
Failure to limit contributions under 415(c)	Yes	Yes	Yes
Deferrals in excess of 402(g) limit	Yes	Yes	Yes
Failure to comply with 15-year catchup rules for 402(g)	Yes	Yes	Yes
Elective deferrals in 5 year post-separation provision	Yes	Yes	Yes
Loans issued but not permitted by plan	Yes	Yes	Yes
Loan qualification failures	No	Yes	Yes
* Not all errors of a particular type will be eligible for DIY/SCP.			

Improvisation: Correcting errors (cont'd)

Important DIY/SCP Considerations

- **Critical eligibility requirement: existing compliance procedures**
 - Don't have to be perfect, but must be meaningful
 - Plan document by itself does not establish the existence of such procedures
 - Not available for egregious failures
 - Important theme: have substantive practices and procedures – plan sponsor, investment providers, TPA (if applicable)
 - Example: repeated 415(c) corrections not considered a failure to maintain sufficient procedures, *if corrections within 9 ½ months following affected year-end*
- **Two-year dividing line**
 - Corrected within two years: any size, any number (though large and repeated failures may indicate absence of procedures)
 - Corrected later: insignificant only
- **DIY/SCP may not cover all errors within a type/category**

Tenor of discussions:
best interest, fiduciary,
and more

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- Start with: DOL fiduciary rule
 - Applicable to ERISA plans, self-employed plans, and IRAs
 - Not applicable to public school plans, other plans of public employers
 - Issued in 2016, became applicable in 2017 with some elements of the guidance delayed, first to 2018 and then to 2019
 - Underlying premise: merging of
 - Fiduciary status, and
 - Requirement to act in client's best interest
 - Challenged in court by multiple plaintiffs
 - Vacated by Circuit Court of Appeals for the 5th Circuit: awaiting official order, expected May 7
 - Market is also awaiting DOL's response: accept, seek rehearing, appeal?
 - Starting point: not the end of the subject
 - DOL could revisit
 - Other regulators already looking at

Tenor of discussions: best interest, fiduciary, and more (cont'd)

- Securities and Exchange Commission (SEC), National Association of Insurance Commissioners (NAIC), and some individual states: also looking at this subject
 - Guidance would not be limited to ERISA plans
 - Guidance also not likely to be *plan compliance* issue: but definitely would affect services provided to plan participants

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