



IRS Announces Amendment Period for 403(b) Plans, Proposes to Allow Forfeitures to Fund QNECS and QMACs

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The Internal Revenue Service recently issued a long-awaited Revenue Procedure regarding compliance for 403(b) plans and also offered flexibility to employers to fund employer contributions to their 401(k) plans with forfeitures.

Remedial Amendment Period for 403(b) Plans ends March 31, 2020

The IRS announced a remedial amendment period for 403(b) plans ending March 31, 2020. A remedial amendment period allows a plan sponsor to retroactively amend a plan to self-correct any defects in the form of the plan document.

Under Revenue Procedure 2017-18, a plan may be amended retroactively to January 1, 2010, or the effective date of the plan, if later, to comply with section 403(b) of the Internal Revenue Code (the "Code"). For the next three years, employers may amend their individually designed 403(b) plans to meet the applicable requirements or adopt an IRS pre-approved plan. The IRS has not yet issued opinion letters for pre-approved plans but is expected to do so soon. Generally, the form of a pre-approved plan will comply with Code section 403(b) requirements.

A 403(b) plan may only take advantage of the remedial amendment period if the plan sponsor had previously adopted a written plan document intended to comply with the Code section 403(b) plan requirements by January 1, 2010 or, if later, the effective date of the plan. Sponsors of 403(b) plans that had not previously adopted a written plan document may correct this error by filing a voluntary correction program filing under the Employee Plans Compliance Resolutions System.

Plan sponsors who maintain 403(b) plans should use the next three years to review their plan documents to assure compliance and determine whether any amendments or restatements to the plans should be made before March 31, 2020.

Forfeitures May be Used to Fund QNEC and QMAC Contributions

The IRS issued proposed regulations that allow the use of forfeitures to fund employer qualified nonelective contributions (“QNECs”) and qualified matching contributions (“QMACs”) under a 401(k) plan. If a 401(k) plan fails the annual nondiscrimination testing, the plan sponsor may choose to correct the failure by making a QNEC or QMAC to pass the actual deferral percentage (“ADP”) or actual contribution percentage (“ACP”) test, respectively.

The proposed regulations modify the definition of QNECs and QMACs to provide that the contributions must be nonforfeitable when they are allocated to a participant’s account, instead of when contributed to the plan (under the prior rule). This expansion permits forfeitures that arise from employer contributions, that were not otherwise subject to the nonforfeitable requirement at the time that the contributions were made, to be used to meet the failed ADP and ACP tests in lieu of the need for plan sponsors to contribute additional funds for a QNEC or a QMAC.

QNECs and QMACs are also the required employer contributions under safe harbor 401(k) plans, so plan sponsors may fund safe harbor contributions using forfeitures.

The IRS provided that the proposed regulations may be relied upon effective immediately. Therefore, plan sponsors may begin to use forfeitures this year to fund QNECs or QMACs.

Plan sponsors will need to review their plans to determine if a discretionary amendment is necessary to provide for the use of forfeitures to fund QNECs and QMACs. Many prototype plans were amended to specifically provide that forfeitures may not be used to fund QNECs and QMACs, so an amendment will likely be needed to a prototype plan.

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