



# IRS revamps 403(b) preapproved program, sets Cycle 2 review dates

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[Rev. Proc. 2021-37](#) overhauls the IRS opinion letter program for preapproved Internal Revenue Code (IRC) Section 403(b) retirement plans, simplifying the program's structure and aligning it with the program for Section 401(a) qualified plans. The new program takes effect retroactively to July 1, 2020 — the start of the second remedial amendment cycle for 403(b) plans (Cycle 2) — and applies to Cycle 2 opinion-letter applications and amendments to correct certain defects first occurring after that date. IRS will issue a cumulative list of changes in 403(b) requirements to be reviewed in Cycle 2 before May 2, 2022, the start date for the on-cycle submission period.

## Background on preapproval process for 403(b) plans

[Rev. Proc. 2013-22](#) established the preapproved program for 403(b) plans, giving employers a way to receive assurance that their plan documents complied with the 403(b) requirements. The procedure didn't provide any way for sponsors to guarantee their documents continued to stay compliant with changes in the 403(b) plan requirements. However, IRS said it planned to establish a system similar to the one for qualified plans, which allows preapproved plan sponsors to apply for new opinion letters on their plan documents every six years.

In [Rev. Proc. 2019-39](#), IRS established the promised six-year cycle for 403(b) plans. The agency also announced that Cycle 1 for preapproved 403(b) plans would end on March 31, 2020, with Cycle 2 starting the next day (although IRS later [announced](#) a three-month extension of Cycle 1 to June 30, 2020). Now [Rev. Proc. 2021-37](#) establishes procedures for IRS to issue opinion letters for preapproved 403(b) plan documents for Cycle 2 and subsequent cycles.

## Changes to preapproval program

The new revenue procedure revamps the 403(b) program to more closely align it with the streamlined program for qualified plans announced in 2017. Significant changes include eliminating the prototype and volume submitter terminology and establishing reliance provisions for adopting employers.

### Simplified preapproved plan categories

The revised program eliminates the old categories of prototype and volume submitter plans used for Cycle 1 plans. Like the program for qualified plans, the 403(b) program now uses the term "preapproved plans" for all documents, with two categories: standardized and nonstandardized. Both types can consist of either a single plan document or a main document and adoption agreement, and sponsors of both types of plans receive an IRS opinion letter that their documents comply with the 403(b) requirements.

**Standardized plans.** Standardized plans offering more than elective deferrals must include certain provisions for those other contributions. For example, allocations (other than matching contributions) must meet one of the design-based nondiscrimination safe harbors under the Section 401(a)(4) regulations. Standardized plans also must provide that all employees are eligible for the allocations under Section 410(a) (age 21 and one year of service). Standardized plans generally cannot condition allocations on participants remaining employed until year-end or completing a specified number of hours (except plans may deny allocations to participants who terminate before year-end with fewer than 500 hours of service). Standardized plans offering safe harbor withdrawals must also limit the withdrawals to circumstances that satisfy the safe harbor hardship standards in the 401(k) regulations.

**Nonstandardized plans.** A nonstandardized plan is any preapproved plan that is not a standardized plan. Nonstandardized plans can give adopting employers the option to choose a safe harbor definition of compensation and a design-based safe harbor for allocations that aren't elective deferrals or matching contributions. In addition, adopting employers can — but don't have to — make all nonexcludable employees eligible for allocations. Nonstandardized plans offering safe harbor withdrawals also don't have to limit the withdrawals to circumstances that satisfy the 401(k) safe harbor requirements, but the plan document must set objective criteria for determining eligibility for those withdrawals.

### Adopting employer's reliance on sponsor's opinion letter

An employer that adopts a preapproved plan with no changes beyond those specifically permitted in the revenue procedure may rely on the sponsor's opinion letter to show the plan document satisfies 403(b) requirements. This reliance applies for the full six-year cycle. Like the preapproved program for qualified plans, the scope of the reliance differs for standardized and nonstandardized plans.

**Standardized plans.** Employers adopting standardized plans generally can rely on the opinion letter to show the plan satisfies the nondiscrimination and minimum coverage requirements of IRC Sections 401(a)(4) and 410(b). However, if the plan provides for contributions other than elective deferrals, employers can't rely on the letter for nondiscrimination purposes unless all controlled-group members are entities that can offer a 403(b) plan. Employers can also rely on the letter to show compliance with

the IRC Section 415 limits, as long as any other plan in the controlled group covering the same employees is also a standardized plan.

**Nonstandardized plans.** An employer adopting a nonstandardized plan can't rely on the opinion letter to show compliance with the nondiscrimination requirements for contributions other than elective deferrals unless the employer chooses a design-based safe harbor and uses a safe harbor definition of compensation. The employer also can't rely on the sponsor's letter to show compliance with the minimum coverage rules for those contributions unless all nonexcludable employees benefit under the plan.

## Form 5307 determination letter requests now available

Employers making changes to a nonstandardized plan will lose reliance on the sponsor's opinion letter. But if the changes are not extensive, employers can submit [Form 5307](#) to request a determination letter during the employer adoption window, using procedures similar to those for preapproved qualified plans. The revenue procedure doesn't specifically define what kind of changes are extensive but gives a narrow list of changes that won't affect reliance. Examples on this list include changes to the plan's administrative provisions, amendments to reflect annual cost-of-living increases under IRC Sections 415, 402(g) and 401(a)(17), and amendments related to revised 403(b) requirements. If an employer makes extensive changes, the plan will become an individually designed plan (determination letters currently aren't available for individually designed plans).

An employer adopting either a standardized or nonstandardized plan can also use Form 5307 to request a determination letter on plan language added to comply with the requirement to aggregate the plan with other defined contribution plans under the employer's control to comply with the IRC Section 415 limits.

## Effective date of program changes

The preapproved program changes outlined in Rev. Proc. 2021-37 take effect retroactively to June 1, 2020, and will apply to all preapproved plans submitted in Cycle 2. Preapproved plans submitted in Cycle 1 remain subject to the procedures in Rev. Proc. 2013-22 (as later modified). Therefore, the program changes don't affect preapproved plans that employers adopted in Cycle 1 (the deadline for adopting those documents was June 30, 2020).

## Interim amendment deadlines

When a law changes a 403(b) requirement during a preapproved plan cycle, the plan sponsor or adopting employer must adopt an amendment reflecting the change (and comply operationally with the new requirement before the amendment is adopted). Rev. Proc. 2021-37 tweaks the interim amendment deadlines first established in Rev. Proc. 2019-39.

**Nongovernmental plans.** Interim amendments to nongovernmental plans must be adopted by the end of the second calendar year after the year in which the new or revised 403(b) requirement took effect. This grants an extra year from Rev. Proc. 2019-39's deadline — which required adopting interim

amendments by the end of the calendar year after the year in which a new or revised 403(b) requirement took effect. The change also aligns with the timing for interim amendments to preapproved qualified plans under Rev. Proc. 2021-38.

**Governmental plans.** Interim amendments for governmental plans must be adopted by the later of:

- The end of the second calendar year after the year the change became effective (instead of the year after the year the change took effect, as under Rev. Proc. 2019-39)
- 90 days after legislative body with authority to amend the plan ends its third regular legislative session that began on or after date the change took effect for the plan

## Remedial amendment periods

The remedial amendment period (RAP) for Cycle 1 began on Jan. 1, 2010 (or a plan's effective date, if later) and ended on June 30, 2020 (except for a limited extension discussed below). Rev. Proc. 2021-37 sets the end of the RAP for defects arising after the end of Cycle 1. If a good-faith interim amendment has been timely adopted, the RAP for the defect will end on the later of:

- The end of the cycle that includes the date on which the RAP would end if the plan were individually designed — for nongovernmental plans, this is the end of the cycle that includes the last day of the second calendar year after which the change appeared on the IRS's [Required Amendments List](#) (a later deadline applies to governmental plans)
- The end of the first cycle in which an application for an opinion letter that considers the form defect may be submitted

**Limited Cycle 1 RAP extension.** Rev. Proc. 2019-39 established a limited extended RAP for certain defects that arose near the end of Cycle 1:

- Defects that arise from a change in the 403(b) requirements or are integral to a requirement that has changed
- Plan amendments made on or after Jan. 1, 2018, that violate the 403(b) requirements

Rev. Proc. 2021-37 sets the end of this extended RAP as the last day of the cycle in which an application for an opinion letter that considers the form defect may be submitted. Only timely adopted amendments are eligible for the extended RAP. To be considered timely, the amendment must have been adopted by the later of June 30, 2020, or the end of the second calendar year after the year in which the change took effect.

## Cycle 2 details

The on-cycle submission period for Cycle 2 will begin May 2, 2022, and end on May 1, 2023. Before the cycle begins, IRS will issue a cumulative list of 403(b) plan requirements that weren't considered in Cycle 1 but will be reviewed in Cycle 2.

IRS is developing an application form for sponsors to use when submitting a request for an opinion letter. Sponsors should use the new form if it is available for the next submission period; however, if the form isn't available, sponsors should use [Appendix A](#) of the revenue procedure to submit the application.

## Church plans

Section 403(b)(9) provides that churches may operate defined contribution plans known as “retirement income accounts.” Under Rev. Proc. 2013-22, only churches or certain groups of churches could operate these plans. But in 2019, the Setting Every Community Up for Retirement Enhancement (SECURE) Act ([Division O of Pub. L. No. 116-94](#)) provided that employees of church-controlled tax-exempt organizations — including both qualified church-controlled organizations (QCCOs) and nonqualified church-controlled organizations (non-QCCOs) — could also participate in these plans. Accordingly, Rev. Proc. 2021-37 lets employees of QCCOs and non-QCCOs participate in a preapproved plan intended to be a retirement income account. Because the SECURE Act provision was effective retroactively, the revenue procedure also provides that Cycle 1 preapproved plans may be amended to let employees of church-controlled organizations participate effective retroactively to the beginning of Cycle 2 in July 2020. Plans must provide that the nondiscrimination requirements of Section 403(b)(12) will be applied to any employees other than employees of churches or QCCOs.

## Future enhancements

IRS expects to update the preapproved plan program from time to time, making changes in response to comments received on Rev. Proc. 2021-37. Comments may be submitted electronically or by regular mail, but IRS strongly encourages electronic submission since its ability to consider comments submitted on paper may be limited.

In addition, a footnote to the revenue procedure says that IRS now anticipates establishing a determination letter program for individually designed 403(b) plan documents similar to the program for qualified plans. That program generally limits determination letters to initial plan qualification, plan termination and plan mergers. The footnote doesn't indicate when the determination letter program will be available.

## Related resources

### Non-Mercer resources

- [Rev. Proc. 2021-37](#) (IRS, Sept. 1, 2021)

- [List of preapproved 403\(b\) plans](#) (IRS, March 17, 2020)
- [Rev. Proc. 2019-39](#) (IRS, Sept. 30, 2019)
- [Rev. Proc. 2017-41](#) (IRS, July 19, 2017)
- [Rev. Proc. 2013-22](#) (IRS, April 29, 2013)

## **Mercer Law & Policy resources**

- [IRS again tweaks preapproved plan amendment timing rules](#) (Sept. 20, 2021)
- [IRS snapshots show continued focus on 403\(b\) plan compliance](#) (Aug. 26, 2021)
- [IRS tweaks amendment timing rules for preapproved plans](#) (Sept. 24, 2020)
- [IRS extends preapproved DB, 403\(b\) plan adoption deadlines](#) (April 6, 2020)
- [IRS creates program for 403\(b\) plan document compliance](#) (Oct. 18, 2019)

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