

Law &amp; Policy Group

**GRIST**

# IRS expands determination letter program for 403(b) plans and more

*By Margaret Berger and Brian J. Kearney  
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IRS is expanding its determination letter (DL) program for individually designed plans to include many Internal Revenue Code (IRC) Section 403(b) plans. [Rev. Proc. 2022-40](#) provides the first opportunity for 403(b) plan sponsors to get a DL, which gives assurance that their plan documents comply with all applicable IRC and regulatory requirements. IRS is also updating the program to incorporate changes for qualified plans made since the program's overhaul in 2016. Some sponsors of individually designed 403(b) plans will be able to apply for DLs as early as June 1, 2023.

## Evolution of the 403(b) compliance program

The expansion of IRS's DL program marks the latest step in the agency's development of a robust compliance program for 403(b) plans. Since 2009, all employers offering 403(b) plans — including plans not subject to ERISA — have had to maintain a written plan document as a condition of the plan's tax-favored status (a narrow exception applies to some churches). IRS established a preapproved document program in 2013 for 403(b) plans but gave little guidance for individually designed plans until 2019, when [Rev. Proc. 2019-39](#) established remedial amendment periods (RAPs) and amendment deadlines for these plans. This process provided a formal structure for sponsors to keep 403(b) plans compliant but didn't include any mechanism for getting IRS approval of individually designed documents.

Finally, in a footnote to [Rev. Proc. 2021-37](#) (which overhauled the opinion letter program for preapproved 403(b) plans), IRS noted its intent to establish a DL program for individually designed 403(b) plans similar to the program for qualified plans. [Rev. Proc. 2022-40](#) provides that program and makes other changes to align the overall documentary compliance process for qualified and 403(b) plans.

## 403(b) plan eligibility for DLs

Rev. Proc. 2022-40 limits the availability of DLs for individually designed 403(b) plans to initial plan determination, plan termination and other circumstances IRS identifies in published guidance. The same terms have applied to qualified plans since IRS curtailed the DL program in [Rev. Proc. 2016-37](#). IRS didn't extend eligibility for DLs to 403(b) plans arising from a merger or similar transaction, even though certain merged qualified plans have been eligible for DLs since 2019.

**Initial determination.** Although IRS will begin accepting applications for 403(b) plan initial determinations as early as June 1, 2023, some sponsors may have to wait up to two additional years to request a DL. The agency is implementing a staggered application schedule depending on the plan sponsor's employer identification number (EIN):

Last digit of EIN	Earliest date to submit application for initial DL
1, 2 or 3	June 1, 2023
4, 5, 6 or 7	June 1, 2024
8, 9 or 0	June 1, 2025

Because individually designed 403(b) plan sponsors previously could not apply for DLs, most plans will now be eligible for an initial DL, even if the plan has existed for many years. However, IRS won't issue DLs for certain legacy plans established in the early 1980s.

**Terminating plans.** Regardless of EINs, sponsors terminating their 403(b) plans may apply for a DL starting June 1, 2023.

**Submission process.** To apply for a DL, 403(b) plan sponsors must follow the instructions laid out in [Rev. Proc. 2022-4](#) (updated annually) that apply to qualified plan sponsors. Sponsors requesting an initial DL must use [Form 5300, Application for Determination for Employee Benefit Plan](#). Sponsors requesting a determination for a terminating plan should use [Form 5310, Application for Determination for Terminating Plan](#).

## Other changes

In addition to extending eligibility to individually designed 403(b) plans, IRS made several other changes that apply more broadly to the DL program.

**DLs available to formerly preapproved plans.** Rev. Proc. 2022-40 relaxes the rules so certain formerly preapproved plans — both qualified and 403(b) — will now be able to apply for an initial determination using Form 5300 as long as they haven't already received a DL (other than a DL issued under special circumstances, described below). IRS will accept initial DL applications for qualified and 403(b) plans with previous DLs issued pursuant to [Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans](#). This is a welcome change and means that

sponsors of certain modified preapproved plans can now switch to an individually designed document and apply for an initial DL.

**Special-circumstance DLs not disqualifying.** The new revenue procedure clarifies that only an initial determination prevents a sponsor from receiving another DL on the plan document. For example, a DL requested on Form 5300 on the status of leased employees won't disqualify the sponsor of a preapproved plan from converting to an individually designed document and requesting an initial DL.

**RAP for disqualifying provisions in new plans.** Rev. Proc. 2022-40 aligns the RAP for disqualifying provisions in new qualified plans with the RAP first established for new 403(b) plans under Rev. Proc. 2019-39. For new nongovernmental qualified and 403(b) plans, the initial RAP ends on the last day of the second calendar year after the year in which the plan is effective. For new governmental plans, the initial RAP ends on this same date or, if later, 90 days after the legislative body with authority to amend the plan closes the third regular legislative session that begins after the end of the plan's first plan year.

**DLs for merged qualified plans.** The revenue procedure incorporates the 2019 permanent expansion of the DL program with respect to merged qualified (but not 403(b)) individually designed plans arising from a corporate transaction between two unrelated entities.

**Scope of review.** Rev. Proc. 2022-40 also expands the scope of IRS's review of DL applications not submitted in connection with a plan termination. For initial and post-merger DL applications, the agency will review a plan for qualification and 403(b) requirements that are in effect or have been included on a Required Amendments List (RAL) on or before the end of the second calendar year preceding the year in which the application is filed. This now includes requirements that will never appear on a RAL (prior guidance didn't address these requirements).

## Comments requested on further expansion

Rev. Proc. 2022-40 requests comments on the specific types of plans or changes for which IRS should consider accepting DL applications in circumstances other than those currently permitted. For example, IRS might consider accepting DL applications due to significant law changes, new approaches to plan design or certain plans' inability to convert to preapproved documents. Comments are due by Feb. 28, 2023. Although IRS does not intend to open the DL program in 2023 for circumstances other than those already allowed, the agency intends to request comments periodically and annually reconsider its position.

## Upcoming guidance

Rev. Proc. 2022-40 doesn't restate or change any requirements for preapproved qualified and 403 plans, but IRS anticipates updating the guidance in Rev. Procs. 2016-37 and 2019-39 for those plans. IRS also anticipates updating the opinion letter guidance for preapproved plans.

## Related resources

### Non-Mercer resources

- [Rev. Proc. 2022-40](#) (IRS, Nov. 7, 2022)
- [Press release](#) (IRS, Nov. 7, 2022)
- [Rev. Proc. 2022-4](#) (IRS, Jan. 3, 2022)
- [Rev. Proc. 2021-37](#) (IRS, Sept. 1, 2021)
- [Rev. Proc. 2019-39](#) (IRS, Sept. 30, 2019)
- [Rev. Proc. 2016-37](#) (IRS, June 29, 2016)

### Mercer Law & Policy resources

- [IRS revamps 403\(b\) preapproved program, sets Cycle 2 review dates](#) (Dec. 1, 2021)
- [IRS creates program for 403\(b\) document compliance](#) (Oct. 18, 2019)

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