

March 16, 2020

Ms. Cathy Jones
Director, Employee Plans (SE:TEGE: EP)
Internal Revenue Service
999 N. Capitol Street, NE
Washington, DC 20002
[Submitted via email](#)

Re: Comments regarding the section 403(b) plan remedial amendment period and Subsequent Correction Methods

Dear Ms. Jones,

The American Retirement Association is writing to comment on the section 403(b) plan remedial amendment period and the need for correction methods for plan sponsors that will find document failures in the future.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation which sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 28,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Summary/History

The Internal Revenue Service ("IRS") and the Department of the Treasury ("Treasury Department") adopted final regulations for section 403(b) plans in 2007, effective in 2009, which required all employers who offered or maintained section 403(b) plans to adopt plan documents that satisfied the new regulations. The only exception was for church plans that did not adopt a section 403(b)(9) plan.

These regulations required that all employers adopt a written plan document by the end of the 2009 year; make sure that the operation of such plan was based on the document adopted for the 2009 plan year and retroactively amend any operational failures that occurred prior to December 31, 2009.

The employers that were impacted most significantly under these regulations were governmental employers, including public schools and nonprofit organizations exempt under section 501(c)(3) of the Code, that were not required to have any actual plan documents prior to 2009.

IRS then issued Rev. Proc. 2017-18, which introduced for the first time a remedial amendment period for section 403(b) plans that ends on March 31, 2020.

For the past three years, third party administrators (TPAs) have been diligently notifying their clients about the restatement. It has been a daunting task for employers to collect data that goes back to 2010. The typical restatement conversation and work on the eventual plan document spanned at least five hours per employer.

This time could be much longer if they did not have the same TPA that entire time; self-administered their plan; or had adopted a plan that was written by a trade association or other organization which was assumed to be compliant but where issues emerged.

Reasons for Request

1. Due to recent events with the COVID-19 virus, public schools, universities and colleges are closing and TPAs cannot even set up meetings with the required parties to restate a plan. Those that we have been able to contact are dealing with an unprecedented public health emergency, which is rightly their first priority. Nationwide, there has been substantial closings of public schools, universities and colleges to date, with more expected in the near future.
2. Over the last few months, it has come to the attention of the section 403(b) TPA community that there are many employers that are just now readying themselves to take action on the document restatement requirement. Many of these employers did in fact self-administer their plans; others have a “plan” in place but not a pre-approved section 403(b) plan; others were with section 401(k) providers that were not aware of this new requirement, and some of the nonprofit employers that are small entities had no communication with any parties that would have indicated the restatement requirement.

Anecdotal evidence is now placing this group of employers as numbering in the thousands or even higher. The section 403(b) TPA community is currently receiving hundreds of calls for the restatement due by the end of March. Some of these “new” clients are also indicating that they had no document in 2009. Whether that means putting in place a “paperclip” plan document or submitting under EPCRS for the 2009 document, then going over with them the operations of their plan from 2010 through the present, it seems unlikely that all of these employers can get their restatement completed in a way that protects them and provides reliance.

We fear that there are hundreds or even thousands more out there that are unaware of this requirement. We also realize that this will present a challenge for the IRS in their goal to begin auditing more of the section 403(b) employers in 2020.

3. Finally, it has come to our attention that there are some large providers who “cut off” restatements to clients who did not return their signed plan document by an earlier deadline. For example, one provider indicated that if their clients had not returned a signed document by December 31, 2019, then they had to go elsewhere for a compliant document by the end of March 2020. We are now aware of at least four large providers who had an earlier cut-off for restated plan documents. While this should not be a surprise for the clients of the providers, it nevertheless underlines that many will not be ready to meet the restatement deadline.

Discussion/Recommendations

In an effort to assist the section 403(b) employers, the industry, and create more compliant documents for the IRS upon audit, **ARA recommends:**

1. An extension of the remedial amendment period for one year, which would alleviate missed retirement deadlines due to the public health emergency and the lack of understanding about the restatement requirement.

- It is clear that an educational campaign must be launched to address the lack of knowledge for the smaller section 403(b) employer, as well as those that are attempting to do it themselves, and the practitioner community that does not handle section 403(b) plans on a day-to-day basis.
2. Whether or not the IRS permits an extension of the remedial amendment period under item 1, we believe that there needs to be a fee structure for employers that file for a document failure (whether that is not having a plan document for 2009 or not restating by the deadline of March 31, 2020) to be in line with the special reduced Voluntary Compliance Program user fees that applied to qualified plans prior to 2018.

We are respectfully asking for a correction fee that will not be too high, especially for the small nonprofit employers and public schools. The result of charging a \$3,500 fee will unfortunately lead some of these employers to terminate their plan.

ARA looks forward to working with the IRS in designing a solution that will benefit all involved with the section 403(b) restatement process. We are happy to participate in a telephone call to discuss the issues raised herein. Thank you for your consideration of these comments. Please contact Martin L. Pippins, MSEA, Executive Director of ASEA and Director of Regulatory Policy (mpippins@usaretirement.org; 703.516.9300, ext. 146), if you have any comments or questions regarding the matters discussed above.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Martin L. Pippins, MSPA, EA
Executive Director
American Society of Enrolled Actuaries

Cc: Louis Leslie, Senior Technical Advisor, Internal Revenue Service (SE:TEGE:EP)