

Request for Comments on Revenue Procedure for § 403(b) Prototype Plans

Announcement 2009-34

The Internal Revenue Service intends to establish a program for the pre-approval of prototype plans under § 403(b) of the Internal Revenue Code (Code). This announcement includes a draft revenue procedure that contains the Service's proposed procedures for issuing opinion letters as to the acceptability under § 403(b) of the form of prototype plans. The Service is simultaneously posting draft sample plan language on the irs.gov website for use in drafting § 403(b) prototype plans. The Service seeks public input before finalizing these procedures and sample plan language, and invites interested persons to submit comments.

Background

Final regulations under § 403(b) (the 2007 regulations) were published on July 26, 2007 (72 Fed. Reg. 41128). These regulations are a comprehensive update of the § 403(b) regulations and are generally effective January 1, 2009. Under the 2007 regulations, sponsors of § 403(b) plans are required to maintain a written plan. Notice 2009-3, 2009-2 I.R.B. 250, provides, in part, that the Service will not treat a § 403(b) plan as failing to satisfy the requirements of § 403(b) and the 2007 regulations during the 2009 calendar year if certain conditions are met. One condition is that by no later than December 31, 2009, the sponsor of the plan has adopted a written plan that is intended to satisfy the requirements of § 403(b) (including the 2007 regulations) effective as of January 1, 2009.

In Rev. Proc. 2007-71, 2007-2 C.B. 1184, the Service provided guidance regarding compliance with the 2007 regulations and published model plan language that may be used by public schools either to adopt a written plan to reflect the requirements of § 403(b) and the 2007 regulations or to amend a § 403(b) plan to reflect the requirements of § 403(b) and the 2007 regulations. Rev. Proc. 2007-71 also provides that other eligible employers may use the model language as sample language to comply with one or more of the requirements imposed by the 2007 regulations. Rev. Proc. 2007-71, including its provisions regarding the extent to which the model plan language may be relied upon, is not modified by the draft revenue procedure in this announcement. Accordingly, absent further notice, public schools and other eligible employers may continue to use the model language in Rev. Proc. 2007-71.

§ 403(b) Prototype Plan Program

In order to promote compliance with § 403(b) and the 2007 regulations, the Service is establishing an opinion letter program for § 403(b) prototype plans. This is described in detail in the draft revenue procedure in the appendix of this announcement. While this will be the first time the Service has had a § 403(b) prototype plan program, the procedures and rules of this program, as set forth in the draft revenue procedure, will

generally be similar to those that apply under Rev. Proc. 2005-16, 2005-1 C.B. 674, the Service's opinion letter program for master and prototype plans qualified under § 401(a), except for differences related to the requirements of § 403(b).

This program for § 403(b) prototype plans will allow employee benefits practitioners and financial organizations, such as mutual funds and insurance companies, to obtain advance approval of the form of a § 403(b) prototype plan. Generally, under the draft revenue procedure, a § 403(b) prototype plan is a plan document prepared by a vendor (or other person) who expects the plan to be adopted by at least 30 employers, along with an adoption agreement to be completed by each adopting employer. Employers who adopt these § 403(b) prototype plans will generally have assurance that the form of the plan meets the requirements under § 403(b) and the 2007 regulations. As described in Notice 2009-3, the draft revenue procedure would provide for a retroactive remedial amendment of § 403(b) plans for years after 2009.

The Service will announce the date that it will start accepting applications for opinion letters for § 403(b) prototype plans when the draft revenue procedure has been finalized after consideration of the comments received. Vendors will be able to sponsor an approved prototype plan that the Service expects will enable most eligible employers to satisfy the written plan requirement of the 2007 regulations. However, the Service also intends to establish a determination letter program for § 403(b) plans at a later date that would allow eligible employers to obtain determination letters for individually designed plans.

Request for Comments and Information

Interested persons are invited to comment on the draft revenue procedure, the sample plan language draft (http://www.irs.gov/pub/irs-tege/draft_lrm_403b_prototypes.pdf), or any other aspect of the § 403(b) prototype plan program, generally.

Written comments should be submitted by June 1, 2009, to CC:PA:LPD:PR (Announcement 2009-34), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Announcement 2009-34), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, D.C. Alternatively, comments may be submitted via the Internet at Notice.Comments@irs.counsel.treas.gov. All materials submitted will be available for public inspection and copying.

In order to anticipate its future workload, the Service also requests each entity that expects to file an opinion letter application for a § 403(b) prototype plan, either as a prototype plan sponsor or as a mass submitter (each within the meaning of section 7 of the draft revenue procedure), to so advise the Service in writing by June 1, 2009, at the following address: ep.prototype.projections@irs.gov. Each entity that expects to file as a mass submitter is also asked to provide an estimate of how many opinion letter applications it will submit on behalf of prototype sponsors that use the mass submitter's

plan. This information should be submitted separately from any comments on the draft revenue procedure and sample plan language.

Drafting Information

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Draft Revenue Procedure

Rev. Proc.

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SECTION 1. PURPOSE

.01 This revenue procedure establishes an opinion letter program for § 403(b) prototype plans. Under this program, the Service will accept applications for opinion letters regarding the acceptability under § 403(b) of the Internal Revenue Code of the form of prototype plans starting **[DATE TO BE DETERMINED]**. The procedures and rules of this program are generally similar to those that apply under Rev. Proc. 2005-16, 2005-1 C.B. 674, to the Service's opinion letter program for master and prototype (M&P) plans qualified under § 401(a), except for differences related to the requirements of § 403(b).

.02 The Service expects that most eligible employers will be able to adopt a prototype plan approved under this revenue procedure to satisfy the requirement in § 1.403(b)-3(b)(3) of the Income Tax Regulations that a § 403(b) contract be issued pursuant to a written plan. However, the Service also intends to establish a determination letter program for § 403(b) plans ("the determination letter program") that will allow eligible employers that maintain § 403(b) plans with features which preclude the use of a prototype document under this revenue procedure or that choose not to use a prototype document to receive assurance that the form of a plan satisfies the requirements of § 403(b).

.03 An eligible employer that adopts an approved § 403(b) prototype plan will generally be able to rely directly on the prototype plan's opinion letter and will not need to request an individual determination letter under the determination letter program. In the case of a plan that provides for contributions that, under § 403(b)(12)(A)(i), are subject to the nondiscrimination requirements of §§ 401(a)(4) and 410(b), this reliance will be limited to contributions that satisfy certain uniform coverage and contribution standards. If such a plan does not satisfy these standards, the eligible employer will still generally be able to rely directly on the prototype § 403(b) plan's opinion letter, except with respect to whether those contributions satisfy the requirements of §§ 401(a)(4) and 410(b). In this case, if the eligible employer wishes to obtain reliance with respect to the requirements of §§ 401(a)(4) and 410(b), the employer will have the opportunity to request a determination letter after the determination letter program is established.

.04 This revenue procedure allows an eligible employer to retroactively correct defects in the form of its written § 403(b) plan by timely adopting an approved § 403(b) prototype plan that was submitted to the Service for an opinion letter by a date that will be announced in the future (and will not be earlier than March 15, 2010), or by otherwise timely amending its plan and submitting a request for a determination letter. Future guidance will specify the date(s) for timely adoption and for timely amendment and submission.

SECTION 2. BACKGROUND

.01 Contributions for an annuity contract purchased for an employee by an eligible employer are generally excluded from the employee's gross income if the requirements described in § 403(b) are met. Amounts paid by an eligible employer to a

custodial account which satisfies the requirements of § 401(f)(2) are treated as contributed to an annuity contract for an employee if the requirements of § 403(b)(7)(A)(i) and (ii) are met. For purposes of this revenue procedure, and except where otherwise indicated, an eligible employer is a public school or an employer described in § 501(c)(3) which is exempt from tax under § 501(a).

.02 Final regulations under § 403(b) (“the 2007 regulations”) were published on July 26, 2007 (72 FR 41128). The 2007 regulations are generally effective as of January 1, 2009.

.03 Section 1.403(b)-3(b)(3) of the 2007 regulations provides that a contract (or custodial account) does not satisfy the requirements of § 403(b) unless it is maintained pursuant to a plan. A plan means a written defined contribution plan which, in both form and operation, satisfies the requirements of the 2007 regulations.

.04 The Service has not heretofore maintained a program for the issuance of determination or opinion letters as to the acceptability of a plan under § 403(b). However, the Service did on occasion issue private letter rulings regarding the excludability of contributions to a contract under § 403(b).

.05 The Service has received comments from the public recommending ways to assist eligible employers in complying with the written plan requirement of the 2007 regulations. Among the recommendations have been the publication of model plan language for § 403(b) plans of public schools, the establishment of a determination letter process for individually designed § 403(b) plans, and the expansion of the scope of the Service’s master and prototype plan opinion letter program for the pre-approval of plans qualified under § 401(a) to include § 403(b) plans.

.06 In Rev. Proc. 2007-71, 2007-2 C.B. 1184, the Service provided guidance regarding compliance with the 2007 regulations and published model plan language that may be used by public schools either to adopt a written plan to reflect the requirements of § 403(b) and the 2007 regulations or to amend a § 403(b) plan to reflect the requirements of § 403(b) and the 2007 regulations. Rev. Proc. 2007-71 also provides that other eligible employers may use the model language as sample language to comply with one or more of the requirements imposed by the 2007 regulations. Rev. Proc. 2007-71, including its provisions regarding the extent to which the model plan language may be relied upon, is not modified by this revenue procedure. Accordingly, absent further notice, public schools and other eligible employers may continue to utilize the language in Rev. Proc. 2007-71 as model or sample language.

.07 Notice 2009-3, 2009-1 I.R.B. 250, states that the Service and Treasury have concluded that compliance with the 2007 regulations would be facilitated by the establishment of both pre-approved and individually designed plan programs and that transition relief should be provided to all § 403(b) plan sponsors who have made appropriate efforts to comply with the written plan requirement in the 2007 regulations. The transition relief under the notice provides that the Service will not treat a § 403(b)

plan as failing to satisfy the requirements of § 403(b) and the 2007 regulations during the 2009 calendar year, provided that:

(1) on or before December 31, 2009, the sponsor of the plan has adopted a written § 403(b) plan that is intended to satisfy the requirements of § 403(b) (including the 2007 regulations) effective as of January 1, 2009;

(2) during 2009, the sponsor operates the plan in accordance with a reasonable interpretation of § 403(b), taking into account the 2007 regulations; and

(3) before the end of 2009, the sponsor makes its best efforts to retroactively correct any operational failure during the 2009 calendar year to conform to the terms of the written § 403(b) plan, with such correction to be based on the general principles of correction set forth in the Service's Employee Plans Compliance Resolution System (EPCRS) at section 6 of Rev. Proc. 2008-50, 2008-35 I.R.B. 464.

The relief in Notice 2009-3 applies solely with respect to the 2009 calendar year, and may not be relied on with respect to the operation of a § 403(b) plan or correction of operational defects in any prior or subsequent year.

.08 The Service expects that most eligible employers will be able to adopt a § 403(b) prototype plan approved under the opinion letter program described in this revenue procedure. As indicated in Notice 2009-3 and in section 1.02 above, the Service also intends to establish a determination letter program that will enable other eligible employers to receive assurance that the form of a plan satisfies the requirements of § 403(b). Eligible employers that utilize either the opinion letter program or the determination letter program will be able to retroactively correct defects in the form of a written § 403(b) plan for years after 2009 by timely adopting remedial amendments.

SECTION 3. OVERVIEW OF THE REVENUE PROCEDURE

.01 The Service is establishing a § 403(b) prototype plan program through this revenue procedure with the intent of assisting eligible employers in complying with the written plan requirement of the 2007 regulations. For many years the Service has maintained a similar program for plans qualified under § 401(a). Based on the Service's experience with the prototype plan program for qualified plans, it believes that the prototype program for § 403(b) plans offers most eligible employers a lower-cost way to satisfy the written plan requirement and obtain assurance from the Service that a plan meets the requirements of § 403(b) than an individual determination letter.

.02 As more fully described in section 4, a § 403(b) prototype plan is a two-part plan document intended to satisfy the requirements of § 403(b) and the 2007 regulations which a vendor or other entity (referred to as "the prototype sponsor") provides to eligible employers that wish to adopt a written § 403(b) plan. The prototype sponsor submits the document to the Service for approval, in the form of an opinion

letter issued to the sponsor by the Service, that the form of the document meets the requirements of § 403(b) and the 2007 regulations.

.03 The first part of a § 403(b) prototype plan document, called the basic plan document, contains provisions that apply to the plan of any eligible employer that uses the document to adopt a written § 403(b) plan. Under the prototype program, an eligible employer may not modify the provisions of a basic plan document. The second part of the document, called the adoption agreement, is the part of the plan document which the eligible employer completes and signs in order to establish a written plan. The adoption agreement gives the eligible employer elections and options to choose among in order to customize the particular features of its plan. Thus, many eligible employers can use the same § 403(b) prototype plan document to adopt a written § 403(b) plan, with the plans differentiated by the different choices each eligible employer makes in its plan's adoption agreement and the different investment arrangements (i.e., annuity contracts and custodial accounts) offered under each plan. This revenue procedure does not impose any special restrictions on the types, number, or features of investment arrangements that may be offered under an eligible employer's § 403(b) prototype plan. However, the terms of the § 403(b) prototype plan must override any inconsistent provisions of investment arrangements under the plan.

.04 Because the terms of a § 403(b) prototype plan apply to each eligible employer that adopts the plan (with variations according to the different adoption agreement elections made by each employer) and because the revenue procedure does not impose special restrictions on investment arrangements under a § 403(b) prototype plan, the terms of the prototype plan must satisfy the requirements of § 403(b) and the 2007 regulations, regardless of the employer's choices in the adoption agreement or the terms of investment arrangements under the plan, and the Service therefore will not review the terms of any investment arrangements or documents other than the basic plan document and adoption agreement. Section 5 describes the provisions that must therefore be included in every § 403(b) prototype plan. Also see section 9 regarding the scope of an opinion letter.

.05 Some of the provisions described in section 5 that must be included in every § 403(b) prototype plan reflect requirements of the prototype program rather than requirements of law. One of those requirements is that each § 403(b) prototype plan allow the prototype sponsor to amend the § 403(b) prototype plan on behalf of each eligible employer that has adopted the plan. Under this revenue procedure, each prototype sponsor obligates itself to carry out certain duties under the procedure, among them to keep the document up to date for changes in law and to provide copies of amendments to the document to eligible employers. See section 7 for eligibility to sponsor a § 403(b) prototype plan, section 12 for opinion letter application procedures, and sections 8 and 11 through 15 regarding the duties of sponsorship.

.06 One of the Service's goals in establishing the § 403(b) prototype plan program is to ensure that § 403(b) prototype plans will be broadly suitable for the majority of eligible employers. The Service does not intend that prototype plans be

suitable for every eligible employer or every circumstance. Thus, the revenue procedure does not permit § 403(b) prototype plans to include certain provisions that the Service believes do not apply to most eligible employers, such as vesting schedules and provisions applicable only to churches and organizations described in § 3121(w)(3). See section 5.06 and section 9.

.07 While the Service intends to establish a determination letter program for § 403(b) plans in the future, the § 403(b) prototype plan program is designed to enable eligible employers that adopt a § 403(b) prototype plan to obtain assurance (referred to in section 10 as “reliance”), without the need to apply for an individual determination letter, that the Service has determined that the terms of the eligible employer’s § 403(b) prototype plan satisfy § 403(b) and the 2007 regulations. However, if the adopting eligible employer is neither a governmental entity nor a church, the extent to which the employer may rely directly on the § 403(b) prototype plan’s opinion letter without applying for an individual determination letter depends on the form of the eligible employer’s § 403(b) prototype plan, as explained in section 3.08 (next paragraph).

.08 There are two forms of § 403(b) prototype plan under this revenue procedure: a “standardized plan” and a “nonstandardized plan.” A plan is a standardized plan if the only contributions the employer may choose to provide under the plan are elective deferrals or if the plan automatically satisfies uniform coverage and contribution standards with respect to any other contributions under the plan. A nonstandardized plan is a plan that is not a standardized plan. An eligible employer that adopts a standardized plan generally may rely directly on the opinion letter for the plan. An eligible employer that adopts a nonstandardized plan generally may rely directly on the opinion letter for the plan except with respect to whether the plan satisfies the nondiscrimination requirements of §§ 401(a)(4) and 410(b) relating to contributions under the plan other than elective deferrals. The eligible employer will be able to request a determination letter on the nondiscrimination requirements, if desired, after the determination letter program is open. Finally, if the § 403(b) prototype plan is a governmental plan as described in § 414(d) or a “nonelecting church plan” (see section 5.05(4)), the eligible employer may generally rely on the opinion letter regardless of whether the plan is a standardized plan or a nonstandardized plan. Of course, an opinion letter may not be relied upon with respect to Title I of ERISA, although the Service may decline to issue an opinion letter on a plan that fails to satisfy a Code provision that is parallel to a provision of Part 2 of Subtitle B of Title I of ERISA. Standardized and nonstandardized plans are discussed in section 6, and reliance is discussed in section 10. Also see section 9 regarding the scope of reliance on an opinion letter.

.09 As indicated in Notice 2009-3, this revenue procedure provides a remedial amendment provision that allows eligible employers to retroactively correct defects in the form of their § 403(b) plans for certain years through the timely adoption of remedial amendments. This provision applies to eligible employers that timely adopt a § 403(b) prototype plan or that otherwise timely amend and request a determination letter for a § 403(b) plan. Plan sponsors should not draw any inferences from this provision

regarding the application of § 401(b) regarding retroactive changes in plans qualified under § 401(a). See section 16.

SECTION 4. WHAT IS A § 403(b) PROTOTYPE PLAN?

.01 A § 403(b) prototype plan is a defined contribution plan that is intended to satisfy the requirements of § 403(b) and is made available by a prototype sponsor for adoption by eligible employers. A § 403(b) prototype plan consists of a basic plan document and an adoption agreement. The basic plan document contains all the nonelective provisions of the prototype plan that apply to the plans of all adopting eligible employers. The basic plan document may not include any options or blanks to be completed. The adoption agreement contains all the options that may be selected by an adopting eligible employer.

.02 An adoption agreement can be used with only one basic plan document. A basic plan document can be used with more than one adoption agreement, but each basic plan document/adoption agreement pair constitutes a separate § 403(b) prototype plan. A § 403(b) prototype plan adopted by an eligible employer is a single plan regardless of whether there are multiple investment arrangements or multiple vendors (i.e., insurance companies or regulated investment company custodians) under the plan. Adoption of two prototype § 403(b) plans (that is, execution of two separate adoption agreements) constitutes the adoption of two separate § 403(b) plans.

.03 A prototype sponsor may maintain more than one basic plan document. For example, a prototype sponsor may maintain one basic plan document to be used only with plans that limit contributions to elective deferrals and another basic plan document to be used with plans that provide for elective deferrals and employer nonelective contributions, whether or not such plans also provide for matching contributions and/or after-tax employee contributions.

.04 As described above, a basic plan document may have more than one adoption agreement. For example, a basic plan document may have one adoption agreement to be used to adopt a standardized plan and another adoption agreement to be used to adopt a nonstandardized plan. See section 6 for an explanation of the difference between a standardized plan and a nonstandardized plan.

SECTION 5. PROVISIONS REQUIRED IN EVERY § 403(b) PROTOTYPE PLAN

.01 Subsections .05 through .11 of this section 5 describe provisions that must be included in every § 403(b) prototype plan. Some of these requirements reflect requirements in the 2007 regulations; others derive from the nature and purposes of the prototype plan program and are generally similar to requirements that apply under Rev. Proc. 2005-16 to the Service's opinion letter program for M&P plans qualified under § 401(a).

.02 As provided in section 9.02, the Service's review of a § 403(b) prototype plan will consider only the terms of the basic plan document and adoption agreement. Accordingly, the provisions described in subsections .05 through .11 of this section 5 must be included in the basic plan document or adoption agreement of every § 403(b) prototype plan, regardless of the terms of any investment arrangements under the plan or any documents that may be incorporated by reference. This does not preclude the adoption of a § 403(b) prototype plan (including a standardized plan, as described in section 6) in cases where different investment arrangements (annuity contracts or custodial accounts) under a plan have different features or prevent the inclusion of additional provisions in the terms of the investment arrangements under the plan or documents incorporated by reference. However, the terms of the basic plan document and adoption agreement must satisfy the requirements of law and subsections .05 through .11 of this section 5 without regard to the terms of investment arrangements under the plan or any documents incorporated by reference.

.03 For example, an eligible employer's § 403(b) prototype plan may offer both investment arrangements that permit loans and investment arrangements that do not. In this case, the basic plan document and adoption agreement, as completed by the employer, must (1) provide that participant loans are available, depending on the choice of investment arrangements, (2) include provisions reflecting the requirements of the 2007 regulations, including § 1.403(b)-6, and § 1.72(p)-1, and (3) identify the party responsible (e.g., the employer) for coordination among the vendors to ensure compliance with the requirements and limitations on participant loans. For sample plan language that satisfies these requirements, see the Listing of Required Modifications (for § 403(b) plans) which may be downloaded from the Internet at the following address: (http://www.irs.gov/pub/irs-tege/draft_lrm_403b_prototypes.pdf). As another example, a § 403(b) prototype plan may provide that the forms of annuity benefit available under the plan are those described in the contracts under the plan. However, the terms of the basic plan document and adoption agreement must ensure that the required minimum distributions of § 401(a)(9) will be satisfied regardless of the form of benefit paid, and the distributable events under the plan must be described in the basic plan document and adoption agreement.

.04 As provided in subsection .07 of this section 5, the terms of the basic plan document and adoption agreement must override any inconsistent provisions of investment arrangements under the plan or documents incorporated by reference. An eligible employer that adopts a § 403(b) prototype plan should take this and the other requirements of this section 5 into account in considering investment arrangements to be offered under the plan as well as other documents that may be incorporated by reference.

.05 Every § 403(b) prototype plan must satisfy the requirements of §§ 1.403(b)-1 through 1.403(b)-11, including the following requirements:

(1) The plan must contain all the material terms and conditions for eligibility, benefits, applicable limitations, the investment arrangements available under the plan, and the time and form under which benefit distributions will be made.

(2) The plan must satisfy the universal availability requirement with respect to elective deferrals described in § 1.403(b)-5(b), whether or not this requirement is applicable to the plan under § 1.403(b)-5.

(3) The plan must limit the amount of compensation that can be taken into account with respect to any contribution under the plan to the limitation in effect under § 401(a)(17), whether or not this limitation is applicable to the plan under § 1.403(b)-5.

(4) Unless the plan is designed by the prototype sponsor to be available for adoption only as a governmental plan as defined in § 414(d) or a church plan as defined in § 414(e) for which the election under § 410(d) has not been made (a “nonelecting church plan”), the plan must include terms that satisfy the applicable requirements of § 401(m) if the plan provides for matching or after-tax employee contributions.

(5) The plan must set forth the terms governing any hardship distributions, loans, plan-to-plan transfers, contract-to-contract exchanges, and rollovers into the plan that are available under the plan.

.06 Every § 403(b) prototype plan must provide for full and immediate vesting of all contributions under the plan.

.07 Every § 403(b) prototype plan must provide that in the event of any conflict between the terms of the plan and the terms of any annuity contract or custodial account under the plan, or of any other document that is incorporated by reference in the plan, the terms of the plan shall control.

.08 Every § 403(b) prototype plan must provide a procedure for amendment of the plan by the prototype sponsor, so that changes in the Code, regulations, revenue rulings, or other guidance published by the Service, or corrections of prior approved plans, may be applied to all eligible employers that have adopted the plan.

.09 Under § 1.415(f)-1(a)(3), all § 403(b) annuity contracts purchased by an employer for a participant are treated as one § 403(b) annuity contract for purposes of § 415. Every § 403(b) prototype plan must include plan language reflecting this rule. In particular, the plan language must coordinate the application of the § 415 limits to all the § 403(b) prototype plans of the adopting eligible employer and its related employers so that, if the only § 403(b) plans maintained by the adopting employer and its related employers are prototype plans, the plans will satisfy § 415(c) and § 1.415(f)-1(a)(3) without requiring the addition of overriding plan language. The plan language must also allow the adopting eligible employer to add overriding language to the adoption agreement if necessary to coordinate the application of the § 415 limits where the adopting eligible employer or its related employers also maintain § 403(b) plans that are

not prototype plans. For this purpose, the term “related employers” means all employers that are aggregated with the adopting eligible employer under § 414(b) and (c) (each as modified by § 415(h)), (m), and (o), including § 1.414(c)-5. Sample language provided in the Listing of Required Modifications (for § 403(b) plans) may be downloaded from the Internet at the following address: http://www.irs.gov/pub/irs-tege/draft_lrm_403b_prototypes.pdf.

.10 Every § 403(b) prototype plan must provide that the eligible employer is considered to have adopted an individually designed plan, and the eligible employer is not entitled to reliance on an opinion letter issued with respect to the plan, if:

(1) the eligible employer amends any provision of the plan, including its adoption agreement (other than to (a) change the choice of options or procedures in the adoption agreement, (b) add overriding language in the adoption agreement if necessary to satisfy § 415 because of the required aggregation of multiple plans, or (c) adopt sample or model amendments published by the Service that specifically provide that their adoption by an adopter of an approved § 403(b) prototype plan will not cause such plan to be treated as individually designed); or

(2) the eligible employer chooses to discontinue participation in the plan as amended by the prototype sponsor and does not substitute another approved § 403(b) prototype plan.

.11 The adoption agreement of every § 403(b) prototype plan must satisfy the following requirements:

(1) The adoption agreement must require the adopting employer to indicate whether:

(a) the plan is a governmental plan as defined in § 414(d),

(b) the plan is a nonelecting church plan, or

(c) the adopting eligible employer is an organization described in § 501(c)(3) and the plan is neither a governmental plan as defined in § 414(d) nor a nonelecting church plan.

(2) The adoption agreement must allow the adopting eligible employer to add overriding plan language if necessary to satisfy § 415 because of the required aggregation of multiple plans.

(3) The adoption agreement must identify who: (a) is responsible for the various administrative functions under the plan to comply with the requirements of § 403(b) and other tax requirements, including such requirements that apply on the basis of the aggregated contracts issued to a participant under the plan; and (b) is responsible to

maintain a list of all the vendors of annuity contracts and custodial accounts under the plan.

(4) The adoption agreement must contain a dated employer signature line. The eligible employer must sign the adoption agreement when it first adopts the plan and must complete and sign a new adoption agreement if the plan has been restated. In addition, the eligible employer must complete a new signature page if it modifies any prior elections or makes new elections in its adoption agreement. The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment or modification thereof, by the eligible employer.

(5) The adoption agreement must state that it is to be used only with one specific basic plan document, and must identify that document.

(6) The adoption agreement must contain a cautionary statement to the effect that the failure to properly fill out the adoption agreement may result in failure of the plan to satisfy the requirements of § 403(b). The Service expects that § 403(b) prototype plan documents will be written in a manner designed to assist adopting eligible employers in the correct completion of the adoption agreement.

(7) The adoption agreement must also state that the prototype sponsor will inform the adopting eligible employer of any amendments made to the plan or of the discontinuance or abandonment of the plan.

(8) The adoption agreement must include the prototype sponsor's name, address, and telephone number (or a space for the address and telephone number of the prototype sponsor's authorized representative) for inquiries by adopting eligible employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the opinion letter.

SECTION 6. STANDARDIZED PLANS AND NONSTANDARDIZED PLANS

.01 Each § 403(b) prototype plan is either a standardized plan or a nonstandardized plan. A § 403(b) prototype plan is a standardized plan if:

(1) the only contributions which an adopting eligible employer may elect to provide under the plan are elective deferrals; or

(2) the form of the plan satisfies the requirements in section 6.02 with respect to any contributions under the plan other than elective deferrals, regardless of the adopting eligible employer's elections in the adoption agreement or the terms of any investment arrangements under the plan or any documents incorporated by reference in the plan.

.02 The form of a § 403(b) prototype plan satisfies the requirements in this section 6.02 with respect to any contributions under the plan other than elective deferrals if:

(1) The plan by its terms benefits all employees except those that may be excluded under § 1.410(b)-6. For this purpose, employee means an employee, within the meaning of § 1.403(b)-2(b)(9), of the adopting eligible employer and any eligible employer within the meaning of § 1.403(b)-2(b)(8) in the adopting eligible employer's controlled group. The controlled group consists of the adopting eligible employer and each other employer that is aggregated with the adopting eligible employer under § 414(b), (c), (m) or (o), including § 1.414(c)-5. Thus, if there is more than one eligible employer in the controlled group, the plan must benefit all the employees of all the eligible employers in the controlled group except those employees that may be excluded under § 1.410(b)-6. (A plan does not fail to satisfy this requirement with respect to contributions other than elective deferrals merely because the plan provides, either as the result of an elective provision or by default in the absence of an election to the contrary, that individuals who become employees as the result of a transaction described in § 410(b)(6)(C), relating to certain employer acquisitions and dispositions, are excluded from eligibility to participate in the plan during the period beginning on the date of the transaction and ending on a date that is not later than the earlier of the last day of the first plan year beginning after the date of the transaction or the date of a significant change in the plan or in the coverage of the plan.)

(2) All benefits, rights, and features under the plan (other than those, if any, that have been prospectively eliminated) are currently available to all employees benefiting under the plan. (For information regarding benefits, rights, and features, see § 1.401(a)(4)-4.) Thus, for example, all employees benefiting under the plan must be able to choose among all the investment arrangements available under the plan.

(3) If the plan provides for employer nonelective contributions (other than matching contributions), the plan must satisfy one of the design-based safe harbors described in § 1.401(a)(4)-2(b)(2) with respect to such contributions.

(4) The plan must define compensation for purposes of determining the amount of contributions other than elective deferrals as total compensation. For this purpose, total compensation means a definition of compensation that includes all compensation within the meaning of § 415(c)(3) (disregarding § 415(c)(3)(E)) and excludes all other compensation, or that otherwise satisfies § 414(s) under § 1.414(s)-1(c).

.03 A nonstandardized plan is a § 403(b) prototype plan that is not a standardized plan.

SECTION 7. WHO CAN SPONSOR A § 403(b) PROTOTYPE PLAN? / WHO CAN BE A MASS SUBMITTER?

.01 A person is eligible to sponsor a § 403(b) prototype plan if the person (1) has an established place of business in the United States where it is accessible during every business day and (2) expects at least 30 eligible employers to adopt its § 403(b) prototype plan basic plan documents(s). A person eligible to sponsor a § 403(b) prototype plan may request opinion letters for any number of basic plan documents and adoption agreements.

.02 Any person that has an established place of business in the United States where it is accessible during every business day may sponsor a plan as a word-for-word identical adopter of a § 403(b) prototype plan of a mass submitter, regardless of the number of eligible employers expected to adopt the plan. A mass submitter is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) submits opinion letter applications on behalf of at least 30 prototype sponsors each of which is sponsoring, on a word-for-word identical basis, the same basic plan document. A § 403(b) prototype plan of a mass submitter must include language designating the mass submitter as agent for the prototype sponsor for purposes of making plan amendments. A mass submitter may request opinion letters for any number of basic plan documents and adoption agreements.

.03 The filing of an application for an opinion letter for a § 403(b) prototype plan constitutes a representation that the requirements in .01 or .02 of this section 7 are satisfied.

SECTION 8. DUTIES OF A PROTOTYPE SPONSOR

.01 A prototype sponsor must maintain a written record of the eligible employers that have adopted the plan. Upon written request, the prototype sponsor must provide the Service a list of the names, addresses, and employer identification numbers of all eligible employers that have adopted the plan, excluding employers that ceased to maintain the plan as a prototype plan more than three years prior to the request.

.02 Unless the prototype sponsor has withdrawn its opinion letter application pursuant to section 13, notified the Service and adopting eligible employers that it is abandoning the plan pursuant to section 14, or been notified by the Service under section 15 that its opinion letter has been revoked, the prototype sponsor must continue to maintain the approved status of the plan as provided in section 11. Thus, the prototype sponsor must timely amend the plan for changes in the Code, regulations, revenue rulings, or other guidance published by the Service, and must apply for new opinion letters when required. The prototype sponsor must provide to the eligible employer copies of the plan and any restatements thereof, all amendments and all opinion letters, and must comply with the notice requirements under this procedure and any other written guidance.

.03 The prototype sponsor must have a procedure to verify that an adopting eligible employer has timely completed and signed a new adoption agreement when

required (i.e., upon initial adoption and restatement of the prototype plan). If the prototype sponsor is unable to verify an adopting eligible employer's timely completion of a new adoption agreement, the prototype sponsor must notify the eligible employer that failure to timely complete a new adoption agreement could result in adverse tax consequences to participants.

.04 The prototype sponsor must have a procedure for adopting eligible employers to acknowledge receipt of plan amendments when an adopting eligible employer is not required to complete a new adoption agreement. The prototype sponsor must notify any adopting eligible employers that fail to acknowledge receipt of a plan amendment that failure to take the amendment into account in the operation of the plan could result in adverse tax consequences to participants.

.05 The filing of an application for an opinion letter for a § 403(b) prototype plan constitutes a representation that the prototype sponsor agrees to comply with the requirements of this revenue procedure. Failure to do so may result in the loss of eligibility to sponsor § 403(b) prototype plans and the revocation of opinion letters that have been issued to the prototype sponsor.

SECTION 9. SCOPE OF AN OPINION LETTER

.01 An opinion letter for a § 403(b) prototype plan constitutes a determination that the plan as adopted by a particular adopting eligible employer satisfies the requirements of § 403(b) only under the circumstances, and to the extent, described in section 10.

.02 The Service's review of a prototype sponsor's application for an opinion letter for a § 403(b) prototype plan, or of an adopting eligible employer's application for a determination letter for the eligible employer's § 403(b) prototype plan, will consider only the terms of the basic plan document and adoption agreement. The Service's review will not consider, and an opinion or determination letter will not express an opinion with respect to, the terms of any annuity contracts or custodial accounts under the plan of any adopting eligible employer or any other documents that may be incorporated into an adopting eligible employer's plan by reference.

.03 An opinion letter for a § 403(b) plan does not express an opinion, and may not be relied upon, with respect to whether any plan is subject to the requirements of Title I of ERISA or whether a plan satisfies any of those requirements.

.04 Opinion letters will not be issued for any of the following:

(1) TEFRA church defined benefit plans. (See § 1.403(b)-10(f)(2).)

(2) Plans that:

(a) include provisions applicable only to churches or qualified church-controlled organizations as described in § 3121(w)(3), church-related organizations described in

§ 1.403(b)-2(b)(6), or ministers described in § 414(e)(5)(A), such as the provisions of § 1.403(b)-9, relating to retirement income accounts and special limitations under § 415(c)(7); or

(b) fail to satisfy requirements that apply to organizations other than churches and qualified church-controlled organizations as described in § 3121(w)(3), such as universal availability for elective deferrals or the limitation of § 401(a)(17).

(3) Plans grandfathered under Rev. Rul. 82-102, 1982-1 C.B. 62.

(4) Plans that include blanks or fill-in provisions for the eligible employer to complete unless the provisions have parameters that preclude the eligible employer from completing the provisions in a manner that could cause the plan to fail to satisfy § 403(b).

(5) Plans that incorporate by reference the limitations of § 415 or the ACP test of § 401(m)(2).

Paragraph (2) of this section 9.04 does not preclude the adoption of a § 403(b) prototype plan by an exempt organization under § 501(c)(3) that is one of the entities described in paragraph (2). The Service may, in its discretion, decline to issue opinion letters for other types of plans not described in this section 9.04. For example, in the case of a plan that provides for nonelective contributions and is neither a governmental plan as defined in § 414(d) nor a nonelecting church plan, the Service may, in its discretion, decline to issue an opinion letter where the plan fails to satisfy a Code provision that is parallel to a provision in Part 2 of Subtitle B of Title I of ERISA (such as §§ 410 and 411 of the Internal Revenue Code).

SECTION 10. EMPLOYER RELIANCE

.01 An eligible employer that adopts a standardized § 403(b) prototype plan may rely upon a favorable opinion letter issued for the plan that the form of the adopting eligible employer's plan satisfies the requirements of § 403(b) if (1) the only contributions under the plan are elective deferrals or (2) all of the employers in the adopting eligible employer's controlled group are eligible employers within the meaning of § 1.403(b)-2(b)(8). If the plan provides for contributions other than elective deferrals and the adopting eligible employer's controlled group includes any employer that is not an eligible employer within the meaning of § 1.403(b)-2(b)(8), the adopting eligible employer may rely on the opinion letter, except with respect to whether contributions under the plan other than elective deferrals satisfy the requirements of §§ 401(a)(4) and 410(b). In this case, the adopting eligible employer may request an individual determination letter in order to obtain reliance with respect to the requirements of §§ 401(a)(4) and 410(b). The Service intends to publish procedures for requesting such a letter in the future.

.02 An eligible employer that adopts a standardized or a nonstandardized § 403(b) prototype plan may rely upon a favorable opinion letter issued for the plan that the form of the adopting eligible employer's plan satisfies the requirements of § 403(b) if the plan is a governmental plan as defined in § 414(d) or a nonelecting church plan. However, the issuance of a favorable opinion letter does not constitute a determination that the plan is a governmental plan as defined in § 414(d) or a nonelecting church plan, but instead is conditioned on the adopting eligible employer's representation to that effect.

.03 An eligible employer that adopts a nonstandardized § 403(b) prototype plan may rely upon a favorable opinion letter issued for the plan that the form of the adopting eligible employer's plan satisfies the requirements of § 403(b), except with respect to whether contributions under the plan other than elective deferrals satisfy the requirements of §§ 401(a)(4) and 410(b), if applicable. The adopting eligible employer may request an individual determination letter in order to obtain reliance with respect to the requirements of §§ 401(a)(4) and 410(b), under procedures to be published in the future.

.04 Notwithstanding the other provisions of this section, an opinion letter issued for a § 403(b) prototype plan may not be relied upon with respect to the requirements of § 415 if the adopting eligible employer or any of its related employers maintains another § 403(b) plan covering any of the same participants as the § 403(b) prototype plan, unless the other plan is also a § 403(b) prototype plan. For this purpose, the term "related employers" means all employers that are aggregated with the adopting eligible employer under § 414(b) and (c) (each as modified by § 415(h)), (m), and (o), including § 1.414(c)-5. The adopting eligible employer may request an individual determination letter in order to obtain reliance with respect to the requirements of § 415 under procedures to be published in the future.

.05 An opinion letter for a § 403(b) prototype plan also may not be relied upon with respect to issues of an inherently factual nature, such as whether the effective availability of any benefits, rights, and features is nondiscriminatory, or with respect to whether a plan satisfies the requirements of §§ 401(a)(4) and 410(b) with respect to former employees.

.06 An eligible employer's reliance on an opinion letter will not be adversely affected by the prototype sponsor's correction, after the § 403(b) prototype plan has been approved, of obvious and unambiguous typographical errors in the approved plan and/or cross-references in the plan that merely correct a reference but that do not in any way change the original intended meaning of the provisions. The Service in its discretion may determine whether any changes made by the prototype sponsor to the approved § 403(b) prototype plan conform to these standards.

SECTION 11. MAINTENANCE OF APPROVED STATUS

.01 An approved § 403(b) prototype plan must be amended by the prototype sponsor and, if necessary, the eligible employer, to retain its approved status if any provisions therein fail to meet the requirements of § 403(b) as a result of a changes in the Code, regulations, revenue rulings, or other guidance published by the Service. The Service expects future guidance to require the restatement of every § 403(b) prototype plan by the prototype sponsor every six years. Upon issuance of a new opinion letter for the restated plan, adopting eligible employers would be required to complete new adoption agreements. Future guidance will also address operational compliance and whether interim amendments may be required between plan restatements.

.02 If a prototype sponsor determines that a § 403(b) prototype plan as adopted by an eligible employer may no longer satisfy the requirements of § 403(b) and the prototype sponsor does not or cannot submit a request to correct under the Voluntary Correction Program (VCP) component of the Employee Plans Compliance Resolution System (EPCRS), the prototype sponsor must notify the eligible employer that the plan may no longer satisfy § 403(b), advise the eligible employer that adverse tax consequences to participants may ensue, and inform the eligible employer about the availability of EPCRS. See Rev. Proc. 2008-50, or any successor thereto.

SECTION 12. HOW TO APPLY FOR AN OPINION LETTER

.01 The Service will accept applications for opinion letters for § 403(b) prototype plans beginning **[DATE TO BE DETERMINED]**.

.02 A separate application is required for each adoption agreement that is offered for adoption by the prototype sponsor. For example, if a prototype sponsor maintains two basic plan documents and there are two adoption agreements that may be used with each basic plan document, the prototype sponsor must submit four separate applications.

.03 An application for an opinion letter for a § 403(b) prototype plan may be filed by a prototype sponsor as defined in section 7.01, by a mass submitter as defined in section 7.02 with respect to its mass submitter plan, or by a mass submitter on behalf of a word-for-word identical adopter of the mass submitter's plan. An application filed by a prototype sponsor or by a mass submitter with respect to a mass submitter plan must be submitted on Form 8929, *Application for Approval of § 403(b) Prototype Plan*. An application filed by a mass submitter on behalf of a word-for-word identical adopter of the mass submitter's plan must be filed on Form 8929-A, *Application for Approval of § 403(b) Prototype Plan Mass Submitter Adopting Sponsor*. The forms (and instructions) specify what to include with the application. These forms may be downloaded from the Internet at the following address: **[TO BE ADDED WHEN FINALIZED]**. All information on the first page of the application must be typed. The applicable user fee, determined under section 6.03 of Rev. Proc. 2009-8, 2009-1 I.R.B. 229, as if the application were for a master and prototype plan, should be included with the application. The request is to be sent to:

Internal Revenue Service
P.O. Box 2508
Cincinnati, OH 45201
Attn: § 403(b) Prototype Coordinator
Room 5106

A request shipped by Express Mail or a delivery service should be sent to:

Internal Revenue Service
550 Main Street
P.O. Box 2508
Cincinnati, OH 45202
Attn: § 403(b) Prototype Coordinator
Room 5106

.04 In the case of an initial submission of a mass submitter's basic plan document under this revenue procedure, the mass submitter's application(s) must also be accompanied by applications for opinion letters filed on behalf of at least 30 word-for-word identical adopters, unless the mass submitter has already satisfied this requirement in connection with a previous application under this revenue procedure involving another basic plan document. After satisfying the 30 word-for-word identical adopter requirement, the mass submitter may submit additional applications on behalf of other prototype sponsors that wish to adopt a word-for-word identical plan. In addition, the mass submitter may then submit requests for opinion letters for its other § 403(b) prototype plans regardless of the number of identical adopters of such other plans.

.05 Sample plan language to be used in drafting § 403(b) prototype plans is available from Employee Plans Rulings and Agreements. Such language is not automatically required in § 403(b) prototype plans, but should be used as a guide in drafting such plans. To expedite the review of their plans, prototype sponsors are encouraged to use the Service's sample plan language and to identify where such language is being used in their plan documents. The sample plan language may be downloaded from the Internet at the following address: http://www.irs.gov/pub/irs-tege/draft_lrm_403b_prototypes.pdf.

.06 The Service may determine the extent of review of a § 403(b) prototype plan based on the application. A failure to disclose a material fact or misrepresentation of a material fact in the application may adversely affect the reliance that would otherwise be obtained through issuance by the Service of a favorable opinion letter. Similarly, failure to accurately provide any of the information called for on any form required by this revenue procedure may result in no reliance.

.07 The Service may, at its discretion, require any additional information that it deems necessary in connection with its review of a § 403(b) prototype plan. If a letter requesting changes to plan documents is sent to the prototype sponsor or an authorized

representative, the changes must be received no later than 30 days from the date of the letter, and the response must include either a copy of the plan with the changes highlighted or, if the changes are not extensive, replacement pages. If the changes are not received within 30 days, the application may be considered withdrawn. An extension of the 30-day time limit will only be granted for good cause.

.08 The Service will return, without further action, plans that are not in substantial compliance with the approval requirements or plans that are so deficient that they cannot be reviewed in a reasonable amount of time. A plan may be considered not to be in substantial compliance if, for example, it omits an applicable Code section or merely incorporates by reference an applicable Code section. The Service will not consider these plans until after they are revised, and they will be treated as new requests as of the date they are resubmitted. No additional user fee will be charged if an inadequate submission is amended to be in substantial compliance and is resubmitted to the Service within 30 days following the date the prototype sponsor is notified of such inadequacy.

.09 If the plan document submitted as part of an opinion letter request contains a provision that gives rise to an issue for which contrary published authorities exist, failure to disclose and address significant contrary authorities may result in requests for additional information, which will delay action on the request.

.10 An opinion letter issued to a prototype sponsor is not transferable to any other entity. For this purpose, a change of employer identification number is deemed to be a change of entity.

.11 A change in a prototype sponsor's name only is not deemed to be a change of entity. However, the prototype sponsor must notify the Service in writing of the change in name and certify that it still meets the conditions for sponsorship described in section 7. No opinion letter will be issued and no user fee will be required for a mere change in name.

SECTION 13. WITHDRAWAL OF REQUESTS

.01 A prototype sponsor may withdraw its request for an opinion letter at any time prior to the issuance of such letter by notifying EP Rulings and Agreements in writing of such withdrawal. The prototype sponsor must also notify each eligible employer that has adopted the plan that the request has been withdrawn. Such an eligible employer will be deemed to have an individually designed plan.

.02 Even though a request is withdrawn, EP Rulings and Agreements will retain all correspondence and documents associated with that request and will not return them to the prototype sponsor. EP Rulings and Agreements may furnish its views concerning the approval status of the plan to EP Examinations, which has audit jurisdiction over the returns of the eligible employers that have adopted the plan.

SECTION 14. ABANDONMENT OF SPONSORSHIP OF § 403(b) PLANS

.01 A prototype sponsor must notify EP Rulings and Agreements in writing of an approved § 403(b) prototype plan that is no longer used by any eligible employer and which the prototype sponsor no longer intends to offer for adoption. Such written notification should be sent to the address in section 12.03 and should refer to the file folder number appearing on the latest opinion letter issued.

.02 A prototype sponsor that intends to abandon an approved § 403(b) prototype plan that is in use by any adopting eligible employer must inform each adopting eligible employer that the form of the plan has been terminated, that the eligible employer's plan will become an individually designed plan (unless the eligible employer adopts another approved § 403(b) prototype plan), and that any employer reliance will not continue if there is a change in § 403(b), the regulations, revenue rulings, or other guidance published by the Service. After so informing all adopting eligible employers, the prototype sponsor must notify EP Rulings and Agreements in accordance with subsection .01 of this section 14.

SECTION 15. REVOCATION

An opinion letter found to be in error or not in accord with the current views of the Service may be revoked. However, except in rare or unusual circumstances, such revocation will not be applied retroactively if the conditions set forth in sections 13 and 14 of Rev. Proc. 2009-4, 2009-1 I.R.B. 118 (disregarding references therein to §§ 7428 and 7476) are met. For this purpose, opinion letters will be given the same effect as rulings. Revocation may be effected by a notice to the prototype sponsor to which the letter was originally issued, or by a regulation, revenue ruling, or other statement published in the Internal Revenue Bulletin. The prototype sponsor should then notify each adopting eligible employer of the revocation as soon as possible. The content of the notification to each adopting eligible employer must explain how the revocation affects any reliance an adopting eligible employer has on the applicable opinion letter.

SECTION 16. RETROACTIVE REMEDIAL AMENDMENT

.01 Effective January 1, 2009, a contract does not satisfy the requirements of § 403(b) unless the contract is maintained pursuant to a written plan which, in both form and operation, satisfies the requirements of the 2007 regulations. The transition relief in Notice 2009-3 sets forth conditions under which a § 403(b) plan will not be treated as failing to satisfy the requirements of § 403(b) and the 2007 regulations during the 2009 calendar year. The relief in Notice 2009-3 applies solely with respect to the 2009 calendar year.

.02 This section 16 allows an eligible employer to retroactively correct defects in the form of its written § 403(b) plan by timely adopting an approved § 403(b) prototype plan or by otherwise timely amending its plan and submitting a request for a determination letter. Under this remedial amendment provision, an eligible employer must amend its plan to the extent necessary to correct any form defects retroactive to

the first day of the plan's remedial amendment period. For this purpose, "the first day of the plan's remedial amendment period" means the later of January 1, 2010, or the effective date of the plan.

.03 The form of a plan will be treated as satisfying the requirements of the 2007 regulations as of the first day of the plan's remedial amendment period if, on or before such day, the eligible employer adopts a written plan that is intended to satisfy the requirements of § 403(b) and the 2007 regulations and the conditions in paragraphs (1) or (2) of this section 16.02 are satisfied:

(1) The eligible employer amends the plan to the extent necessary to correct any form defects retroactive to the first day of the plan's remedial amendment period by timely adopting an approved § 403(b) prototype plan. (An eligible employer that timely adopts an approved § 403(b) prototype plan is not required, but may nevertheless choose, to amend its plan retroactive to January 1, 2009. However, for purposes of Notice 2009-3 and whether the Service will treat the eligible employer's § 403(b) plan as satisfying the requirements of § 403(b) and the 2007 regulations during the 2009 calendar year, only the plan that was adopted and in effect on December 31, 2009, will be taken into account.) For this purpose, an approved § 403(b) prototype plan means a plan for which a favorable opinion letter is issued pursuant to a timely filed application under this revenue procedure. An application for an opinion letter under this revenue procedure is timely filed if (a) the application is filed with the Service by a date to be announced in the future (which will not be earlier than March 15, 2010), or (b) if the plan is a word-for-word identical adopter of a mass submitter plan, the opinion letter application for the mass submitter plan is filed with the Service by a date to be announced in the future (which will not be earlier than March 15, 2010), irrespective of when the opinion letter application for the identical adopter plan is filed. The Service will announce, in subsequent guidance, the date by which an approved § 403(b) prototype plan must be adopted to be considered timely adopted for purposes of this section. The Service expects that eligible employers will have a period in excess of one year from the date of the announcement in which to timely adopt an approved § 403(b) prototype plan.

(2) The eligible employer timely amends the plan to the extent necessary to correct any form defects retroactive to the first day of the plan's remedial amendment period and timely submits the plan to the Service for a determination letter. (An eligible employer that timely submits its plan for a determination letter is not required, but may nevertheless choose, to amend the plan retroactive to January 1, 2009. However, for purposes of Notice 2009-3 and whether the Service will treat the eligible employer's § 403(b) plan as satisfying the requirements of § 403(b) and the 2007 regulations during the 2009 calendar year, only the plan that was in adopted and in effect on December 31, 2009, will be taken into account.) Future guidance regarding the determination letter program for § 403(b) plans will specify the date by which a § 403(b) plan must be amended and submitted to the Service to be considered timely amended and submitted for purposes of this section, but this date will not be earlier than March 15, 2010. Any amendments required by the Service as a result of its review of a timely

submitted determination letter application for a § 403(b) plan will be considered timely adopted if they are adopted by the 91st day following issuance of a determination letter.

.04 For purposes of this section 16, a “written plan intended to satisfy the requirements of § 403(b) and the 2007 regulations” includes both a new plan that is intended to satisfy those requirements and an existing plan that has been amended with the intent of satisfying those requirements, including a plan that is based on the model plan language in Rev. Proc. 2007-71 and a plan that is an adoption of a § 403(b) prototype plan that has been timely submitted for an opinion letter under this revenue procedure.

SECTION 17. EFFECT ON OTHER DOCUMENTS

Section 6.03 of Rev. Proc. 2009-8 is modified to provide that the user fee for an application for an opinion letter for a § 403(b) prototype plan is the same user fee that would apply if the application were for a master or prototype plan.

SECTION 18. EFFECTIVE DATE

This revenue procedure is effective **[TO BE ADDED WHEN FINALIZED]**.

SECTION 19. PAPERWORK REDUCTION ACT

[TO BE ADDED WHEN FINALIZED].

DRAFTING INFORMATION

The principal authors of this revenue procedure are Angelique Carrington and James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll-free number) or e-mail Ms. Carrington or Mr. Flannery at *RetirementPlanQuestions@irs.gov*.