

# Client Alert

A report  
for clients  
and friends  
of the Firm      December 2008

## IRS Extends 403(b) Plan Document Requirement Deadline to December 31, 2009

On December 11, 2008, the Internal Revenue Service (the "Service") and the Treasury Department (the "Treasury") issued Notice 2009-3 (the "Notice") providing relief during 2009 for sponsors of plans governed by Section 403(b) ("403(b) Plans") of the Internal Revenue Code of 1986, as amended (the "Code") with respect to the requirement to have a written plan document in place by January 1, 2009. The Notice also indicates that there will be forthcoming guidance with respect to obtaining Service approval of 403(b) prototype plans and individualized plans (as further described below). The Service has previously indicated its intent to create such a program.

### Background

The Treasury issued final regulations under Code Section 403(b) on July 26, 2007 (the "Final Regulations") (*See [403\(b\) Final Regulations Client Alert](#)*). Pursuant to the Final Regulations, effective January 1, 2009, sponsors of 403(b) Plans, including non-ERISA plans (*i.e.*, plans that are not subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA")), are generally required to maintain a written plan that satisfies, in both form and operation, the requirements of the Final Regulations.

### Relief for 2009

Pursuant to the Notice, during the 2009 calendar year, a 403(b) Plan will not be treated as failing to satisfy the requirements of Code Section 403(b) and the Final Regulations, provided that:

(1) on or before December 31, 2009, the 403(b) Plan sponsor has adopted a written plan document that is intended to satisfy the requirements of Code Section

403(b) and the Final Regulations, effective as of January 1, 2009;

(2) during the 2009 calendar year, the 403(b) Plan sponsor operates the 403(b) Plan in accordance with a reasonable interpretation of Code Section 403(b) and the Final Regulations; and

(3) prior to December 31, 2009, the 403(b) Plan sponsor makes its best efforts to retroactively correct any operational failures that occur during the 2009 calendar year to conform to the terms of the written plan document, with such correction to be based on the general principles of correction set forth in the Service's Employee Plans Compliance Resolution System (EPCRS).

**The relief under the Notice 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.**

### Upcoming Guidance

The Service intends to issue further guidance on 403(b) Plans, including a revenue procedure on obtaining Service approval of prototype 403(b) Plans and on sample plan language for drafting prototype plans. The Service also intends to establish a determination letter program for individually designed 403(b) Plans once the 403(b) prototype program is established. The Service stated that the programs described in the forthcoming revenue procedure will also provide for retroactive remedial amendment of 403(b) Plans for years occurring after 2009.

### Comment

The Notice is very helpful, particularly for non-ERISA 403(b) Plans, which were previously not subject to a written document requirement. However, there is no indication in the Notice whether in the interim the Department of Labor will issue any further clarification on the interplay between the written plan document requirement and the exemption for certain 403(b) Plans to be treated as not subject to ERISA.

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