

Rev. Proc. 2022-40

Table of Contents

PART I – OVERVIEW

SECTION 1. PURPOSE.....	487
SECTION 2. BACKGROUND.....	488
SECTION 3. SUMMARY OF SIGNIFICANT MODIFICATIONS	489
SECTION 4. DEFINITIONS.....	490

PART II – INDIVIDUALLY DESIGNED QUALIFIED AND SECTION 403(b) PLANS

SECTION 5. REMEDIAL AMENDMENT PERIOD FOR INDIVIDUALLY DESIGNED QUALIFIED AND SECTION 403(b) PLANS	491
SECTION 6. PLAN AMENDMENT DEADLINE	492
SECTION 7. REQUIRED AMENDMENTS LIST	492
SECTION 8. OPERATIONAL COMPLIANCE LIST	493
SECTION 9. CIRCUMSTANCES UNDER WHICH A PLAN MAY BE SUBMITTED FOR A DETERMINATION LETTER	493
SECTION 10. SCOPE OF PLAN REVIEW	494
SECTION 11. RELIANCE ON DETERMINATION LETTERS	495
SECTION 12. TIMING OF SUBMISSION OF DETERMINATION LETTER APPLICATIONS FOR SECTION 403(b) PLANS	495
SECTION 13. SPECIAL NOTICE AND DISCLOSURE REQUIREMENTS FOR SECTION 403(b) PLANS.....	496

PART III – EFFECT ON OTHER DOCUMENTS, EFFECTIVE DATE, PUBLIC COMMENTS, DRAFTING INFORMATION

SECTION 14. EFFECT ON OTHER DOCUMENTS.....	496
SECTION 15. EFFECTIVE DATE.....	496
SECTION 16. PUBLIC COMMENTS.....	496

PART I – OVERVIEW

SECTION 1. PURPOSE

.01 This revenue procedure modifies Rev. Proc. 2016-37, 2016-29 IRB 136,¹ which, in part, provides the circumstances under which a Plan Sponsor may submit a determination letter application to the Internal Revenue Service (IRS) with respect to a qualified individually designed plan, to permit the submission of determination letter applications for section 403(b) individually designed plans. Under this revenue procedure, a Plan Sponsor that maintains a section 403(b) individually designed plan will be permitted to submit a determination letter application for an initial plan determination, for a determination upon plan termination, and in certain other circumstances identified by the IRS in guidance published in the Internal Revenue Bulletin (IRB). The earliest date a Plan Sponsor will be permitted to submit a determination letter application for a section 403(b) individually designed plan is June 1, 2023, in accordance with section 12 of this revenue procedure.

.02 This revenue procedure also (1) incorporates modifications of Rev. Proc. 2016-37 set forth in Rev. Proc. 2019-20, 2019-20 IRB 1182, relating to the submission of

determination letter applications for a determination with respect to Merged Plans, (2) clarifies and modifies the provisions of Rev. Proc. 2019-39, 2019-42 IRB 945,² that relate to the Remedial Amendment Period for section 403(b) individually designed plan Form Defects first occurring after June 30, 2020, (3) extends the expiration of the Remedial Amendment Period for new qualified individually

¹ For purposes of this revenue procedure, references to Rev. Proc. 2016-37 are to Rev. Proc. 2016-37, as modified by Rev. Proc. 2017-41, 2017-29 IRB 92, Rev. Proc. 2019-20, 2019-20 IRB 1182, Rev. Proc. 2020-40, 2020-38 IRB 575, and Rev. Proc. 2021-38, 2021-38 IRB 425.

² For purposes of this revenue procedure, references to Rev. Proc. 2019-39 are to Rev. Proc. 2019-39, as modified by Notice 2020-35, 2020-25 IRB 948, Rev. Proc. 2020-40, and Rev. Proc. 2021-37, 2021-38 IRB 385.

November 21, 2022
488 Bulletin No. 2022-47

designed plans, (4) modifies the circumstances under which a plan is considered to have been issued an initial plan determination, and (5) modifies the scope of review of qualified individually designed plans submitted under the determination letter program.

.03 This revenue procedure does not modify or restate the provisions of Rev. Proc. 2016-37 relating to qualified pre-approved plans. The Department of the Treasury (Treasury Department) and the IRS anticipate updating the provisions of Rev. Proc. 2016-37 relating to qualified pre-approved plans in future guidance.³

SECTION 2. BACKGROUND

.01 *Qualified individually designed plans.*

(1) Section 401(b) of the Internal Revenue Code (Code) provides a remedial amendment period⁴ during which a plan may be amended retroactively to comply with the Code's qualification requirements. Treas. Reg. § 1.401(b)-1 describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner of Internal Revenue (Commissioner) the discretion to designate certain plan provisions as disqualifying provisions and to extend the remedial amendment period.

(2) Section 7805(b)(8) provides that the Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

(3) Section 1.401(b)-1 provides that a plan that fails to satisfy the requirements of section 401(a) solely as a result of a disqualifying provision defined under § 1.401(b)-1(b) need not be amended to comply with those requirements until the last day of the remedial amendment period with respect to the disqualifying provision, provided the amendment is made retroactively effective to the beginning of the remedial amendment period. Under § 1.401(b)-1(b)(1), a disqualifying provision includes a provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan that causes the plan to fail to satisfy the requirements of the Code applicable to the qualification of the plan as of the date the plan or amendment is first made effective. Under § 1.401(b)-1(b)(3), a disqualifying provision includes a plan provision designated, at the Commissioner's discretion, as a disqualifying provision that either (a) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements, or (b) is integral to a qualification requirement of the Code that has been changed. For this purpose, § 1.401(b)-1(c)(1) provides that a disqualifying provision includes the absence from a plan of a provision required by or, if applicable, integral to the applicable change in the qualification requirements of the Code, if the plan was in effect on the date the change in those requirements became effective with respect to the plan. Under § 1.401(b)-1(c)(3), the Commissioner may impose limits and provide additional rules regarding the amendments that may be made during the remedial amendment period with respect to disqualifying provisions described in § 1.401(b)-1(b)(3).

(4) For a disqualifying provision of a new plan described in § 1.401(b)-1(b)(1), the remedial amendment period begins on the date the plan is put into effect and, in the case of a plan maintained by one employer, ends on the later of (a) the due date (including extensions) for filing the employer's tax return for the taxable year in which the plan is put into effect or (b) the last day of the plan year in which the plan is put into effect. In the case of a new plan maintained by more than one employer, the remedial amendment period ends on the last day of the tenth month following the last day of the plan year that includes the date the plan is put into effect.

(5) For a disqualifying provision that is an amendment to an existing plan described in § 1.401(b)-1(b)(1), the remedial amendment period begins on the earlier of the date the

plan amendment is adopted or put into effect and, in the case of a plan maintained by one employer, ends on the later of (a) the due date (including extensions) for filing the employer's tax return for the taxable year in which the amendment is adopted or effective (whichever is later) or (b) the last day of the plan year in which the amendment is adopted or effective (whichever is later). In the case of an amendment to an existing plan maintained by more than one employer, the remedial amendment period ends on the last day of the tenth month following the last day of the plan year in which the amendment is adopted or effective (whichever is later).

(6) For a disqualifying provision described in § 1.401(b)-1(b)(3), the remedial amendment period begins on the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, unless another time is specified by the Commissioner in revenue rulings, notices, and other guidance published in the IRB, the first day on which the plan is operated in accordance with the provision as amended. In the case of a plan maintained by one employer, the remedial amendment period for a disqualifying provision described in § 1.401(b)-1(b)(3) ends on the later of: (a) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins; or (b) the last day of the plan year that includes the date on which the remedial amendment period begins. In the case of a plan maintained by more than one employer the remedial amendment period ends on the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

³ This revenue procedure also does not address section 403(b) pre-approved plans. The Treasury Department and the IRS anticipate updating the provisions of Rev. Proc. 2019-39 relating to section 403(b) pre-approved plans in the future guidance that will update the provisions of Rev. Proc. 2016-37 relating to qualified pre-approved plans.

⁴ This revenue procedure includes certain defined, capitalized terms, such as Disqualifying Provision and Form Defect. On occasion, these same words were used in prior guidance without capitalization or with a somewhat different meaning. If this revenue procedure refers to words used in prior guidance under these conditions, those words are not capitalized.

(7) Section 1.401(b)-1(f) provides that the Commissioner has discretion to extend the remedial amendment period.

(8) Rev. Proc. 2016-37 provides that, effective January 1, 2017, a sponsor of a qualified individually designed plan is permitted to submit a determination letter application only for initial plan qualification, for qualification upon plan termination, and in certain other circumstances, as set forth in guidance published in the IRB. Rev. Proc. 2016-37 also provides an extended remedial amendment period under section 401(b) for qualified individually designed plans and a system of cyclical remedial amendment periods under section 401(b) for qualified pre-approved plans.

(9) Rev. Proc. 2019-20 provides for a permanent, limited expansion of the determination letter program with respect to qualified individually designed plans. As part of this limited expansion, the IRS accepts determination letter applications for certain qualified individually designed merged plans on an ongoing basis.

(10) Rev. Proc. 2022-4, 2022-1 IRB 161, sets forth the types of advice provided by the Commissioner, Tax Exempt and Government Entities Division, Employee Plans Rulings and Agreements Office, and the procedures for requesting such advice, including procedures for issuing determination letters (a) on the qualified status of pension, profit-sharing, stock bonus, annuity, and employee stock ownership plans under sections 401, 403(a), 409, and 4975(e)(7), and (b) except with respect to an adopting employer of a pre-approved plan requesting a determination letter under section 12 of Rev. Proc. 2022-4, on the status for exemption of any related trusts or custodial accounts under section 501(a).

02 *Section 403(b) individually designed plans.* Rev. Proc. 2019-39 sets forth a system of recurring remedial amendment periods for correcting form defects, first occurring after June 30, 2020, in section 403(b) plans. Rev. Proc. 2019-39 defines a form defect as (1) a provision that causes a plan to fail to satisfy the section 403(b) requirements, (2) the absence of a provision that causes a plan to fail to satisfy the section 403(b) requirements, (3) a provision that is integral to a section 403(b) requirement that has been changed (either by statute, or in regulations or other guidance published in the IRB), or (4) the absence from a plan of a provision required by a change to the section 403(b) requirements (either by statute, or in regulations or other guidance published in the IRB) or integral to the change. Rev. Proc. 2019-39 also sets forth the plan amendment deadlines for correcting form defects and for adopting discretionary amendments to section 403(b) individually designed plans. Section 7 of Rev. Proc. 2019-39 sets forth a limited extension of the initial remedial amendment period for section 403(b) individually designed plans.

SECTION 3. SUMMARY OF SIGNIFICANT MODIFICATIONS

.01 This revenue procedure modifies Rev. Proc. 2016-37 to permit Plan Sponsors to submit determination letter applications for section 403(b) individually designed plans. Beginning June 1, 2023, determination letter applications for section 403(b) individually designed plans generally may be submitted for an initial plan determination, for a determination upon plan termination, and in certain other circumstances identified by the IRS in guidance published in the IRB. However, the date on which an application may first be submitted for an initial plan determination is staggered over three dates (June 1, 2023, June 1, 2024, and June 1, 2025), depending on the last digit of the Plan Sponsor's employer identification number (EIN), in accordance with the schedule set forth in section 12.01.

.02 This revenue procedure modifies the definition of form defect, as set forth in Rev. Proc. 2019-39, with respect to a provision in, or an absence of a provision from, a section 403(b) plan that is integral to a change in Section 403(b) Requirements. In addition, this revenue procedure modifies the structure of the definition of form defect, as set forth in Rev. Proc. 2019-39. See section 4.01(2).

.03 This revenue procedure incorporates the provisions of Rev. Proc. 2019-39 relating to the Remedial Amendment Period for section 403(b) individually designed plan Form Defects first occurring after June 30, 2020. See section 5.02(2).

.04 This revenue procedure extends the expiration of the Remedial Amendment Period for a Disqualifying Provision with respect to a provision of a new plan or the absence of a provision from a new plan to the last day of the second calendar year following the calendar year in which the plan is put into effect.⁵ See section 5.03(1)(a).

.05 This revenue procedure extends the expiration of the Remedial Amendment Period for a Disqualifying Provision with respect to a provision of a new governmental plan within the meaning of section 414(d) or the absence of a provision from such a plan to the later of: (1) the last day of the second calendar year following the calendar year in which the plan is put into effect; or (2) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the plan's initial plan year.⁶ See section 5.03(2)(a).

.06 This revenue procedure modifies the eligibility rules for a Plan Sponsor to obtain an individual plan determination. Under the revised rules, for example, a Plan Sponsor that maintains a plan for which a determination letter has been issued as a result of filing a Form 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans) is no longer ineligible to submit that plan for a determination letter for an initial plan determination on a Form 5300 (*Application for Determination for Employee Benefit Plan*).⁷ See section 9.02.

⁵ Section 5.05(1) of Rev. Proc. 2016-37 provides that the remedial amendment period for a disqualifying provision with respect to a provision of a new plan or the absence of a provision from a new plan is extended to the later of: (1) the 15th day of the 10th calendar month after the end of the plan's initial plan year or (2) the "modified section 401(b) expiration date," which is defined in section 5.05(1)(a) and (b) of Rev. Proc. 2016-37.

⁶ Section 5.06(1) of Rev. Proc. 2016-37 provides that the remedial amendment period for a disqualifying provision with respect to a provision of a new governmental plan within the meaning of section 414(d) or the absence of a provision from such a plan is extended to the later of: (1) the date determined in section 5.05(1) of Rev. Proc. 2016-37 or (2) 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the plan's initial plan year.

⁷ Under section 4.03(1) of Rev. Proc. 2016-37, an employer that maintained a plan for which a determination letter had been issued as a result of filing a Form 5307 was not permitted to submit that plan for a determination letter for initial qualification. **November 21, 2022 490 Bulletin No. 2022-47**

.07 This revenue procedure modifies the scope of the IRS's review of individually designed plans submitted for a determination letter. Under the revised rules, the IRS generally will consider in its review Qualification Requirements and Section 403(b) Requirements that are in effect, or that have been included on a Required Amendments List, on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted. See section 10.01.

SECTION 4. DEFINITIONS

.01 General definitions.

(1) *Disqualifying Provision.*

(a) *In general.* For a qualified plan, the term "Disqualifying Provision" means:

(i) a provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan that causes the plan to fail to satisfy the requirements of the Code applicable to the qualification of the plan as of the date the plan or amendment is first made effective;

(ii) a plan provision that has been designated, pursuant to § 1.401(b)-1(b)(3), by the Commissioner, in guidance published in the IRB, as a disqualifying provision by reason of a change in those requirements; or

(iii) the absence from a plan of a provision required by (or, if applicable, integral to) a change in the qualification requirements of the Code.

(b) *Designation of Disqualifying Provisions.* Pursuant to § 1.401(b)-1(b)(3), the IRS designates a plan provision as a Disqualifying Provision if it:

(i) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements that is effective after December 31, 2001; or

(ii) is integral to a Disqualifying Provision described in section 4.01(1)(b)(i).

(2) *Form Defect.* For a section 403(b) plan, the term "Form Defect" means:

(a) a provision of a new plan, the absence of a provision from a new plan, or an

⁸ Under this definition, a change in Qualification Requirements includes a statutory, regulatory, or other guidance change that affects a requirement of section 401(a), 403(a), 409, or 4975(c)(7), without regard to whether the change results in a Disqualifying Provision or merely permits the adoption of a discretionary amendment.

⁹ Under this definition, a change in Section 403(b) Requirements includes a statutory, regulatory, or other guidance change that affects a requirement of section 403(b), without regard to whether the change results in a Form Defect or merely permits the adoption of a discretionary amendment.

amendment to an existing plan that causes the form of the section 403(b) plan to fail to satisfy the Section 403(b) Requirements applicable as of the date the plan or amendment is first made effective;

(b) a plan provision that:

(i) results in the failure of the form of the section 403(b) plan to satisfy the Section 403(b) Requirements by reason of a change in those requirements; or

(ii) is integral to a Form Defect described in section 4.01(2)(b)(i); or

(c) the absence from a plan of a provision required by (or, if applicable, integral to) a change in the Section 403(b) Requirements.

(3) *Plan Sponsor.* The term "Plan Sponsor" means an employer that sponsors a qualified individually designed plan for its employees or an eligible employer, as described in section 403(b)(1)(A), that sponsors a section 403(b) individually designed plan for its employees.

(4) *Qualification Requirements.* The term "Qualification Requirements" means the requirements of sections 401(a), 403(a), 409, and 4975(e)(7), including requirements provided in the Code, and in regulations or other guidance published in the IRB.⁸

(5) *Remedial Amendment Period.* The term "Remedial Amendment Period" means the period during which a Plan Sponsor maintaining a qualified plan or section 403(b) plan may correct Disqualifying Provisions or Form Defects in its plan retroactive to the beginning of the period. As part of the correction of a Disqualifying Provision or Form Defect within the remedial amendment period, a Plan Sponsor will be considered to have satisfied the Qualification Requirements or Section 403(b) Requirements, as applicable, if all provisions of the plan that are necessary to satisfy those requirements have been adopted and made effective in form and operation from the beginning of the remedial amendment period.

(6) *Section 403(b) Requirements.* The term "Section 403(b) Requirements" means the requirements of section 403(b), including requirements provided in the Code, and in regulations or other guidance published in the IRB.⁹

.02 Definitions related to Merged Plans.

(1) *Date of a Corporate Merger, Acquisition, or Other Similar Business Transaction.* The term "Date of a Corporate Merger, Acquisition, or Other Similar Business Transaction" means the effective date of the transaction as evidenced by a corporate board resolution or written documentation signed and dated by persons duly authorized to represent the entities involved.

(2) *Date of the Plan Merger.* The term "Date of the Plan Merger" means the effective date of the Plan Merger as evidenced by (a) a corporate board resolution or written documentation signed and dated by persons duly authorized to represent the entities involved, or (b) a plan amendment.

(3) *Merged Plan.* The term "Merged Plan" means a plan that results from the merger or consolidation of two or more qualified plans into a single qualified individually designed plan pursuant to a Plan Merger.

(4) *Plan Merger.* The term "Plan Merger" means a merger or consolidation, as described in § 1.414(l)-1(b)(2), that combines two or more qualified plans maintained by previously Unrelated Entities into a single individually designed plan, and that occurs in connection with a corporate merger, acquisition, or other similar business transaction among Unrelated Entities that each maintained its own plan or plans prior to the Plan Merger.

(5) *Unrelated Entities.* The term "Unrelated Entities" means entities that are not members of the same controlled group under section 414(b), the same set of trades or businesses under common control under section 414(c), or members of the same affiliated service group under section 414(m).

PART II – INDIVIDUALLY DESIGNED QUALIFIED AND SECTION 403(b) PLANS

SECTION 5. REMEDIAL AMENDMENT PERIOD FOR INDIVIDUALLY DESIGNED QUALIFIED AND SECTION 403(b) PLANS

.01 *In general.* The provisions of this section 5 set forth the Remedial Amendment Period for (1) Disqualifying Provisions in qualified individually designed plans, and (2) Form Defects first occurring after June 30, 2020, in section 403(b) individually designed plans.¹⁰ A plan for which a Plan Sponsor does not correct a Disqualifying Provision or Form Defect within the applicable Remedial Amendment Period will not be considered to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable.

.02 *Beginning dates of the Remedial Amendment Period.*

(1) *Disqualifying Provisions.* Section 1.401(b)-1(d)(1) sets forth the dates on which the Remedial Amendment Period begins for Disqualifying Provisions. Details regarding the beginning dates of the Remedial Amendment Period are set forth in sections 2.01(5), (6), and (7) of this revenue procedure.

(2) *Form Defects.* Unless another time is specified by the Commissioner in guidance published in the IRB, the Remedial Amendment Period for a Form Defect begins:

(a) in the case of a Form Defect with respect to a provision of, or absence of a provision from, a new plan, on the date the plan is put into effect;

(b) in the case of a Form Defect with respect to an amendment to an existing plan (other than a Form Defect that is related to a change in Section 403(b) Requirements, or that is integral to such a change, as described in paragraph (c) and (d), respectively, of this section 5.02(2)), on the date the plan amendment is adopted or put into effect, whichever is earlier;

(c) in the case of a Form Defect with respect to a provision that fails to satisfy the Section 403(b) Requirements by reason of a change in those requirements, on the date on which the change effected by an amendment to the Code or a change in requirements provided in regulations or other guidance published in the IRB became effective with respect to the plan; or

(d) in the case of a Form Defect with respect to a provision that is integral to a Section 403(b) Requirement that has been changed, on the first day on which the plan was operated in accordance with such provision, as amended.

.03 *Expiration of Remedial Amendment Period.*

(1) *Plans that are not governmental plans within the meaning of section 414(d).* Except as otherwise provided by statute or in regulations or other guidance published in the IRB, the Remedial Amendment Period for Disqualifying Provisions and Form Defects for plans that are not governmental plans within the meaning of section 414(d) expires as follows:

(a) *New plan.* The Remedial Amendment Period for a Disqualifying Provision or Form Defect with respect to a provision of a new plan or the absence of a provision from a new plan expires on the last day of the second calendar year following the calendar year in which the plan is put into effect.

(b) *Amendment to existing plan.* The Remedial Amendment Period for a Disqualifying Provision or Form Defect with respect to an amendment to an existing plan (other than an amendment described in paragraph (c) of this section 5.03(1)) expires on the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later.

(c) *Change in Qualification Requirements or Section 403(b) Requirements.* The Remedial Amendment Period for a Disqualifying Provision or Form Defect that arises as a result of a change in Qualification Requirements or Section 403(b) Requirements, as applicable, expires on the last day of the second calendar year that begins after the issuance of the Required Amendments List (described in section 7) on which the change in Qualification Requirements or Section 403(b) Requirements appears.

(2) *Plans that are governmental plans within the meaning of section 414(d).* Except as otherwise provided by statute or in regulations or other guidance published in the IRB, the Remedial Amendment Period for Disqualifying Provisions and Form Defects for plans that are governmental plans within the meaning of section 414(d) expires as follows:

(a) *New plan.* The Remedial Amendment Period for a Disqualifying Provision or Form Defect with respect to a provision of a new governmental plan or the absence of a provision from a new governmental plan expires on the later of:

(i) the last day of the second calendar year following the calendar year in which the plan is put into effect; or

(ii) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the plan's initial plan year.

(b) *Amendment to existing plan.* The Remedial Amendment Period for a Disqualifying Provision or Form Defect with respect to an amendment to an existing governmental plan (other than an amendment described in paragraph (c) of this section 5.03(2)) expires on the later of:

(i) the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later; or

(ii) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the calendar year in which the amendment is adopted or effective, whichever is later.

(c) *Change in Qualification Requirements or Section 403(b) Requirements.* The Remedial Amendment Period for a Disqualifying Provision or Form Defect with respect to a governmental plan that arises as a result of a change in Qualification Requirements or Section 403(b) Requirements, as applicable, expires on the later of:

(i) the last day of the second calendar year that begins after the issuance of the Required Amendments List on which the

¹⁰ For Remedial Amendment Period rules for form defects first occurring before July 1, 2020, see Rev. Proc. 2013-22, 2013-18 IRB 985, as clarified by Rev. Proc. 2017-18, 2017-5 IRB 743, and as modified by Rev. Proc. 2019-39. A Form Defect as defined in section 4.01(2) of this revenue procedure differs from the definition of a form defect first occurring before July 1, 2020. **November**

change in Qualification Requirements or Section 403(b) Requirements appears; or

(ii) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date of issuance of the Required Amendments List on which the change in Qualification Requirements or Section 403(b) Requirements appears.

(3) *Terminating plans.* Notwithstanding sections 5.03(1) and 5.03(2), the termination of a plan ends the plan's Remedial Amendment Period and thus, generally will shorten the Remedial Amendment Period for the plan. Accordingly, any retroactive remedial plan amendments or other required plan amendments for a terminating plan (that is, plan amendments required to be adopted to reflect Qualification Requirements or Section 403(b) Requirements that apply as of the date of termination) must be adopted in connection with the plan termination regardless of whether the requirements are included on a Required Amendments List.

(4) *Circumstances in which a Disqualifying Provision or Form Defect may not be corrected retroactively during a Remedial Amendment Period.* If it is not possible to amend a plan retroactively during a Remedial Amendment Period so that all provisions of the plan that are necessary to satisfy the Qualification Requirements or Section 403(b) Requirements related to a Disqualifying Provision or Form Defect, as applicable, are made effective in operation for the whole Remedial Amendment Period, then the Disqualifying Provision or Form Defect may not be corrected retroactively even if the Plan Sponsor adopts a retroactive plan amendment that, in form, appears to satisfy those requirements. A Plan Sponsor of an individually designed qualified plan or section 403(b) plan that cannot be corrected by an amendment during the applicable Remedial Amendment Period may be able to correct the Disqualifying Provision or Form Defect under the Employee Plans Compliance Resolution System. See Rev. Proc. 2021-30, 2021-31 IRB 172, or its successors.

SECTION 6. PLAN AMENDMENT DEADLINE

.01 *Required plan amendment.* Except as otherwise provided by statute or in regulations or other guidance published in the IRB, the plan amendment deadline for (1) a Disqualifying Provision in a qualified individually designed plan, or (2) a Form Defect first occurring after June 30, 2020, in a section 403(b) individually designed

plan, is the date on which the Remedial Amendment Period with respect to the Disqualifying Provision or Form Defect expires. See sections 5.03(1), (2) and (3) for the determination of the expiration of the applicable Remedial Amendment Period.

.02 *Discretionary plan amendment.* With respect to a discretionary amendment (that is, an amendment that is not made with respect to a Disqualifying Provision or Form Defect), except as otherwise provided by statute or in regulations or other guidance published in the IRB, the plan amendment deadline is the date described in paragraph (1) or (2) of this section 6.02, as applicable. (1) *Plans that are not governmental plans within the meaning of section 414(d).* In the case of a discretionary amendment to a plan that is not a governmental plan within the meaning of section 414(d), the plan amendment deadline is the end of the plan year in which the plan amendment is operationally put into effect. An amendment is operationally put into effect when the plan is administered in a manner consistent with the intended plan amendment (rather than existing plan terms). For example, the deadline for adopting a discretionary amendment with respect to a calendar year plan that increases participants' accrued benefits and is operationally put into effect during 2023 is December 31, 2023.

(2) *Plans that are governmental plans within the meaning of section 414(d).* In the case of a discretionary amendment to a governmental plan within the meaning of section 414(d), the plan amendment deadline is the later of:

(a) the end of the plan year in which the plan amendment is operationally put into effect; or

(b) 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect.

.03 *No relief from the requirements of section 411(d)(6).* This revenue procedure does not provide relief from the requirements of section 411(d)(6) for any plan amendments made to a qualified plan, including plan amendments adopted as a result of changes to the Qualification Requirements.¹¹ Except to the extent permitted under section 411(d)(6) and the regulations thereunder, under a statutory provision, or under other guidance published in the IRB, section 411(d)(6) prohibits a plan amendment that decreases a participant's accrued benefits or that has the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy, or eliminating an optional form of

benefit, with respect to benefits attributable to service before the amendment. However, an amendment that eliminates or decreases benefits that have not yet accrued does not violate section 411(d)(6), provided the amendment is adopted and effective before the benefits accrue.

SECTION 7. REQUIRED AMENDMENTS LIST

.01 *Required Amendments List to be published annually.* The Treasury Department and the IRS publish an annual Required Amendments List that applies to changes in Qualification Requirements and Section 403(b) Requirements. The Required Amendments List establishes the date that the Remedial Amendment Period expires for changes in Qualification Requirements and Section 403(b) Requirements set forth on the list, as described in sections 5.03(1) and 5.03(2).¹² See also section 10, which describes the scope of review by the IRS of a plan submitted for a determination letter.

¹¹ Section 411(d)(6) does not apply to section 403(b) plans. However, parallel rules in section 204(g) of ERISA apply to ERISA-covered section 403(b) plans.

¹² Notices setting forth the Required Amendments Lists can be found on the IRS website at <https://www.irs.gov/retirement-plans/required-amendments-list>. The most recent Required Amendments List is set forth in Notice 2021-64, 2021-50 IRB 869. **Bulletin No. 2022-47 493 November 21, 2022**

.02 *Items included on Required Amendments List.* In general, an item will be included on a Required Amendments List after guidance with respect to the item (including any model amendment, if applicable) has been provided in regulations or other guidance published in the IRB. However, in the discretion of the IRS, an item may be included on a Required Amendments List in other circumstances, such as when a statutory change is enacted, and it is anticipated that no guidance related to implementation of the statutory change will be issued.

SECTION 8. OPERATIONAL COMPLIANCE LIST

Although a plan may have a delayed amendment deadline to comply with a change in plan Qualification Requirements or a change in Section 403(b) Requirements, the plan must be operated in compliance with those requirements from the effective date of the change. To assist Plan Sponsors in achieving operational compliance, the IRS provides an Operational Compliance List¹³ that is updated periodically to identify changes in Qualification Requirements and Section 403(b) Requirements that are effective during a calendar year. However, a plan must comply operationally with each relevant Qualification Requirement or Section 403(b) Requirement, as applicable, even if the requirement is not included on an Operational Compliance List.

SECTION 9. CIRCUMSTANCES UNDER WHICH A PLAN MAY BE SUBMITTED FOR A DETERMINATION LETTER

.01 *In general.* A Plan Sponsor of an individually designed plan may submit a determination letter application for an initial plan determination, for a determination upon plan termination, and in other circumstances, as described in sections 9.02, 9.04, and 9.06, respectively. In addition, a Plan Sponsor of a qualified individually designed plan may submit a determination letter application for a determination with respect to a Merged Plan, as described in section 9.05.

.02 *Initial plan determination.* (1) *Statement of rule.* A Plan Sponsor of an individually designed plan may submit the plan for an initial plan determination on a Form 5300 unless the plan previously had been filed for a determination letter on a Form 5300 and had been issued a determination letter as an individually designed plan. For purposes of the preceding sentence, a plan that had been issued a determination letter as an individually designed plan includes a pre-approved plan that was treated as an individually designed plan under section 8.06 of Rev. Proc. 2017-41 or section 9.05 of Rev. Proc. 2021-37, as applicable, at the time the determination letter was issued with respect to the plan.¹⁴

(2) *Examples.* Examples 1 through 4 address whether an initial plan determination has been made with respect to a plan.

(a) *Example 1: Determination letter issued with respect to individually designed plan as a result of Form 5300 filing.* Plan Sponsor A adopted Plan W, an individually designed plan, in 2017. Plan Sponsor A submitted a determination letter application on Form 5300 with respect to Plan W in 2019. A determination letter previously had not been issued with respect to Plan W. A favorable determination letter was issued with respect to Plan W in 2020. Because a determination letter was issued as a result of Plan Sponsor A's filing of a determination letter application on Form 5300 with respect to individually designed Plan W, an initial plan determination letter is considered to have been issued with respect to the plan. Accordingly, Plan Sponsor A is not eligible to submit a future determination letter application for an initial plan determination with respect to Plan W on a Form 5300.

(b) *Example 2: Determination letter issued with respect to pre-approved plan as a result of Form 5307 filing.* Plan Sponsor B adopted Plan X, an individually designed plan, in 2015. In 2017, Plan Sponsor B amended Plan X by adopting a pre-approved plan. A determination letter had not been issued with respect to Plan X while the plan was individually designed; however, in 2017, after amending the plan to become a pre-approved plan, Plan Sponsor B submitted a determination letter application for the plan on a Form 5307 and received a favorable determination letter. Because the determination letter issued with respect to Plan X was issued as a result of Plan Sponsor B's filing of a determination letter application on Form 5307 with respect to a pre-approved plan, an initial plan determination is not considered to have been issued with respect to Plan X. Accordingly, Plan Sponsor B is eligible to submit a future determination letter application for an initial plan determination with respect to Plan X on a Form 5300.

(c) *Example 3: Determination letter issued with respect to pre-approved plan as a result of leased employee determination.* Plan Y is a nonstandardized qualified defined contribution pre-approved plan. Plan Sponsor C has continuously administered Plan Y as a pre-approved plan from the date of its establishment in 2005. A determination letter previously has not been issued with respect to Plan Y. Plan Sponsor C is otherwise eligible to submit a determination letter application. In 2022, Plan Sponsor C submitted a determination letter application and included a request for a ruling on the status of leased employees with respect to Plan Y. As required by sections 12.03(3)(a) and 17.03 of Rev. Proc. 2022-4 (updated annually), Plan Sponsor C submitted the application on a Form 5300. Because Plan Y is a pre-approved plan, even though a determination letter was issued as a result of Plan Sponsor C's filing of a determination letter application on Form 5300, an initial plan determination letter is not considered to have been issued with respect to Plan Y. Accordingly, Plan Sponsor C is eligible to submit a future determination letter application for an initial plan determination with respect to Plan Y on a Form 5300.

(d) *Example 4: Determination letter issued with respect to pre-approved plan treated as individually designed plan.* Plan Sponsor D adopted Plan Z, a nonstandardized qualified defined contribution pre-approved plan, in 2019. In 2021, Plan Sponsor D made several amendments to Plan Z and submitted a determination letter application on Form 5307 with respect to the plan, consistent with the requirements of Rev. Proc. 2017-41. In connection with its review of Plan Z, the IRS informed Plan Sponsor D that (1) due to the nature and extent of the amendments made to the plan, Plan Z would, pursuant to section 8.06 of Rev. Proc. 2017-41, be considered an individually designed plan, and (2) in order to request a determination letter with respect to the plan, Plan Sponsor D would need to file a Form 5300. Accordingly, Plan Sponsor D resubmitted Plan Z as an individually designed plan and requested a determination letter on a Form 5300. A favorable determination letter was issued with respect to the plan. Because Plan Z was considered an individually designed plan when a determination letter was issued with respect to the plan, the determination letter is considered an initial plan determination. Accordingly, Plan Sponsor D is not eligible to submit a future determination letter application for an initial plan determination with respect to Plan Z on a Form 5300.

.03 Timing of submission for section 403(b) plan initial plan determination. A Plan Sponsor that is eligible to submit a section 403(b) individually designed plan for an initial plan determination on a Form 5300 must submit the determination letter application in accordance with the schedule set forth in section 12.01.

¹³ The Operational Compliance List can be found on the IRS website at <https://www.irs.gov/retirement-plans/operational-compliance-list>.

¹⁴ Rev. Proc. 2017-41 sets forth the procedures for issuing opinion letters regarding the qualification in form of pre-approved plans under sections 401, 403(a), and 4975. Rev. Proc. 2021-37 sets forth the procedures for issuing opinion letters regarding the satisfaction in form of section 403(b) pre-approved plans with respect to the Section

403(b) Requirements. The Treasury Department and the IRS anticipate updating these revenue procedures in future guidance. **November 21, 2022 494**

Bulletin No. 2022-47

.04 *Determination upon plan termination.* A Plan Sponsor of an individually designed plan may submit a determination letter application for a determination upon plan termination on a Form 5310 (*Application for Determination for Terminating Plan*) if the application is filed in connection with plan termination. An application is deemed to be filed in connection with plan termination if it is filed no later than the later of:

- (1) one year from the effective date of the termination, or
- (2) one year from the date on which the action terminating the plan is taken.

However, in no event may the application be filed later than 12 months from the date of distribution of substantially all plan assets in connection with the plan termination.

.05 *Merged Plans.* A Plan Sponsor of a qualified individually designed plan may submit a determination letter application for a determination with respect to a Merged Plan on a Form 5300 if the following requirements are satisfied:¹⁵

(1) The Date of the Plan Merger occurs no later than the last day of the first plan year that begins after the plan year that includes the Date of a Corporate Merger, Acquisition, or Other Similar Business Transaction between Unrelated Entities, and

(2) A determination letter application for the Merged Plan is submitted within the Merged Plan submission period. The Merged Plan submission period is the period beginning on the Date of the Plan Merger and ending on the last day of the first plan year of the Merged Plan that begins after the Date of the Plan Merger.¹⁶

.06 *Other circumstances.* Consideration will be given annually to whether a Plan Sponsor may submit a determination letter application in specified circumstances other than for an initial plan determination, for a determination upon plan termination, and, in the case of qualified plans, for a determination with respect to Merged Plans. Circumstances that will be considered when evaluating whether to accept determination letter applications for certain amended plans or types of amendments in plans in certain future years, include, for example, significant law changes, new approaches to plan design, and the inability of certain types of plans to convert to pre-approved plan documents. In addition, the IRS's current case load and resources available to process determination letter applications will be significant factors in deciding if and when to consider certain amended plans or types of amendments in plans under the determination letter program. Taking into account comments already received and based on an analysis of the factors listed in this section 9.06, including the IRS's current resources and case load, the IRS, during calendar year 2023, will accept determination letter applications only for individually designed qualified and section 403(b) plans for an initial plan determination and for a determination upon plan termination, and, with respect to qualified plans, for a determination with respect to individually designed Merged Plans. In section 16, the Treasury Department and the IRS request comments on the additional situations in which the submission of a determination letter application may be appropriate. The Treasury Department and the IRS intend to request, on a periodic basis, additional comments relating to the expansion of the determination letter program. Additional situations in which Plan Sponsors will be permitted to request determination letters will be announced in guidance published in the IRB.

SECTION 10. SCOPE OF PLAN REVIEW

.01 *Ongoing plans.* (1) *Changes in Qualification Requirements or Section 403(b) Requirements that have been or will be included on a Required Amendments List.* Except as otherwise provided in section 10.01(3), with respect to ongoing plans, the IRS will consider, in reviewing changes in Qualification Requirements and Section 403(b) Requirements that have been or will be included on a Required Amendments List, only those changes that appear on a Required Amendments List issued on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted.¹⁷

(2) *Qualification Requirements or Section 403(b) Requirements that have not been and will not be included on a Required Amendments List.* Except as otherwise provided in section 10.01(3), with respect to ongoing plans, the IRS will consider, in reviewing Qualification Requirements and Section 403(b) Requirements that have not been and will not be included on a Required Amendments List, only those Qualification Requirements and Section 403(b) Requirements that are in effect on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted.¹⁸

(3) *Exceptions provided in annual revenue procedure.* Any exceptions to section 10.01(1) and (2) will be provided in the annual revenue procedure that sets forth the instructions for requesting determination letters from Employee Plans Rulings and Agreements (annual revenue procedure) that applies with respect to the year in which the determination letter application is submitted.¹⁹

(4) *Examples.* Examples 1 through 5 illustrate the IRS's scope of plan review.

(a) *Example 1: Change in Qualification Requirements that is included on a Required Amendments List.* Plan Sponsor A maintains Plan X, an ongoing qualified individually designed plan. During 2024, Law L is enacted and included on the 2024 Required Amendments List. Plan Sponsor

A is eligible to submit a determination letter for Plan X pursuant to section 9.02 and submits a determination letter application with respect to Plan X during the 2026 calendar year. The IRS will consider Law L in its review of Plan X because Law L was included on

¹⁵ See section 8 of Rev. Proc. 2019-20 for a special sanction structure applicable to Merged Plans.

¹⁶ See section 6 of Rev. Proc. 2019-20, which provides an extended remedial amendment period applicable to Merged Plans submitted during the Merged Plan submission period.

¹⁷ Generally, the Required Amendments List includes changes in Qualification Requirements and Section 403(b) Requirements that result in Disqualifying Provisions and Form Defects, respectively. See, for example, Part III of Notice 2021-64, for a description of the content of the Required Amendments List.

¹⁸ For a list of the most recent changes in Qualification Requirements and Section 403(b) Requirements, see the Operational Compliance List. With respect to qualified plans, see the Cumulative Lists for years beginning on or after 2005. Notices setting forth the Cumulative Lists can be found on the IRS website at Cumulative List of Changes in Retirement Plan Qualification Requirements | Internal Revenue Service (irs.gov). With respect to section 403(b) plans for years prior to 2016, see §§ 1.403(b)-1 through -11 and the requirements on the Cumulative Lists that are also applicable to section 403(b) plans.

¹⁹ Rev. Proc. 2022-4 is the annual revenue procedure for 2022. **Bulletin No. 2022-47 495 November 21, 2022**

the 2024 Required Amendments List (a Required Amendments List issued on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted).

(b) *Example 2: Change in Qualification Requirements that has not yet been included on a Required Amendments List.* The facts are the same as in *Example 1*, except that, during 2024, Law M also is enacted. Although Law M is a law that will be included on a Required Amendments List, Law M has not been included on a Required Amendments List as of December 31, 2024, because guidance has yet to be issued with respect to Law M. During 2024, Plan Sponsor A adopts an amendment that reflects Law M. Even though Plan Sponsor A adopted an amendment to reflect Law M, the IRS will not consider Law M in its review of Plan X because Law M was not included on a Required Amendments List that was issued on or before December 31, 2024 (the last day of the second calendar year preceding the year in which the determination letter application is submitted).

(c) *Example 3: Change in Qualification Requirements that is included on a Required Amendments List after IRS review cutoff date.* The facts are the same as in *Example 1*, except that, during 2025, Law N also is enacted. Law N is included on the 2025 Required Amendments List. During 2025, Plan Sponsor A adopts an amendment that reflects Law N. Even though Law N is included on a Required Amendments List and Plan Sponsor A adopted an amendment to reflect Law N, the IRS will not consider Law N in its review of Plan X because Law N was not included on a Required Amendments List that was issued on or before December 31, 2024 (the last day of the second calendar year preceding the year in which the determination letter application is submitted).

(d) *Example 4: Scope-of-review exception set forth in annual revenue procedure.* The facts are the same as in *Example 3*, except that, pursuant to section 10.01(3), the IRS sets forth an exception to the general rule by providing in Rev. Proc. 2026-4 that it will consider Law N in its review of plans submitted for a determination letter during 2026. As a result, even though Law N would require an amendment be made to the plan but generally would not be considered by the IRS in its review of a plan submitted during 2026 because Law N was not included on a Required Amendments List issued on or before December 31, 2024 (the last day of the second calendar year preceding the year in which the determination letter application is submitted), the IRS will consider Law N in its review of Plan X.

(e) *Example 5: Change in Qualification Requirements that is not included on a Required Amendments List and is effective after IRS review cutoff date.* The facts are the same as in *Example 1*, except that, during 2025, Law O also is enacted and is in effect as of January 1 of that year. Law O would not appear on a Required Amendments List because it is a new discretionary provision. During 2025, Plan Sponsor A adopts a discretionary amendment that reflects Law O. Even though Plan Sponsor A adopted a discretionary amendment to reflect Law O, the IRS will not consider Law O in its review of Plan X because Law O is effective after December 31, 2024 (the last day of the second calendar year preceding the year in which the determination letter application is submitted).

.02 *Terminating plans.* Terminating plans will be reviewed for amendments required to be adopted in connection with plan termination (see section 5.03(3)).

.03 *Plan restatement.* An individually designed plan generally must be restated, at the time the determination letter application is submitted, to incorporate all previously adopted amendments. However, a terminating plan need not be restated.

.04 *A determination letter does not consider issues under Title I of ERISA.* A determination letter issued under this revenue procedure will not address issues under Title I of ERISA. See section 11 for details regarding a Plan Sponsor's reliance on a determination letter.

.05 *Section 403(b) plans for which a determination letter will not be issued.* A determination letter will not be issued for the following section 403(b) individually designed plans:

- (1) a TEFRA church defined benefit plan (see § 1.403(b)-10(f)(2)); or
- (2) a plan grandfathered under Rev. Rul. 82-102, 1982-1 CB 62.

.06 *A determination letter does not consider issues related to a section 403(b) plan's coverage of multiple employers that are not in a single controlled group.* For a section 403(b) plan that is not a governmental plan within the meaning of section 414(d), a determination letter does not express an opinion, and may not be relied upon, with respect to whether the plan meets any requirements that apply due to a plan's coverage of multiple employers that are not in a single controlled group for purposes of section 414(b), (c), (m), or (o) and the regulations thereunder. For a section 403(b) plan that is a governmental plan within the meaning of section 414(d), a determination letter does not express an opinion, and may not be relied upon, with respect to whether the plan meets any requirements that apply due to a plan's coverage of multiple employers that are not aggregated in a single controlled group in a manner consistent with Notice 89-23, 1989-1 CB 654.

SECTION 11. RELIANCE ON DETERMINATION LETTERS

Section 23 of Rev. Proc. 2022-4 (updated annually) discusses reliance on a determination letter, including the effect of subsequent amendments made to the plan. For example, under section 23.04 (and under a future annual revenue procedure with respect to section 403(b) plans), in general, a Plan Sponsor that maintains an individually designed qualified plan or section 403(b) plan for which a favorable determination letter has been issued and that is otherwise entitled to rely on the determination letter may not continue to rely on the determination letter with respect to a plan provision that is subsequently amended (including any other plan provision that may be affected by the amended provision) or that is subsequently affected by a change in Qualification Requirements or Section 403(b) Requirements. However, a Plan Sponsor may continue to rely on a determination letter with respect to plan provisions that are not amended (or affected by an amendment) and plan provisions that are not affected by a change in Qualification Requirements or Section 403(b) Requirements. In addition, a Plan Sponsor that adopts a sample or model amendment issued by the IRS on a word-for-word basis (or adopts an amendment that is substantially similar to a sample or model amendment in all material respects) may continue to rely on a previously issued determination letter.

SECTION 12. TIMING OF SUBMISSION OF DETERMINATION LETTER APPLICATIONS FOR SECTION 403(b) PLANS

.01 *Initial plan determination.* A Plan Sponsor may submit a section 403(b) individually designed plan for an initial plan determination on or after the submission date applicable with respect to the Plan Sponsor's EIN as provided in the schedule set forth in this section 12.01. Thus, for example, a Plan Sponsor with an EIN ending in 3 may submit a determination letter application on June 1, 2023, or any later date.

If the EIN of the Plan Sponsor ends in:	A determination letter application may be submitted beginning on:
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025