

## **IRS STARTS PROCESS FOR PRE-APPROVED 403(B) PLAN DOCUMENTS**

Any employer who sponsors a Code section 403(b) retirement plan (a plan permitting salary deferrals that is available to tax exempt organizations and certain educational organizations) has a plan document that is not approved by the IRS. This is because no pre-approved plan documents are available for 403(b) plans and the IRS does not yet review and approve individually designed 403(b) plans. This is slowly changing, however, and the recent Revenue Procedure 2013-22 sets out a procedure for vendors of prototype and volume submitter plans to submit their documents for IRS review and pre-approval. The IRS will begin accepting applications on June 28, 2013. If the timetable for 403(b) plans is similar to the one in place for regular tax qualified retirement plans, plans with favorable IRS opinion letters will be available sometime in 2017.

On a related note, the IRS released information informing the public that any employer with a 403(b) plan that was not described in a formal document adopted by the employer no later than December 31, 2009 was no longer a qualified plan. However, such employers have until December 31, 2013 to rectify this failure by adopting a document and filing it under the IRS correction program (Voluntary Correction Program) and paying only half the normal IRS fee. IRS fees are based on the number of eligible employees and range from \$750 to \$25,000.

In addition to the initiation of the pre-approved documents process designed to produce pre-approved 403(b) documents within a few years, the IRS also indicated the intention to develop a procedure whereby employers with individually designed 403(b) plans may submit them for IRS review and the issuance of a determination concerning their favorable tax status.

## **AMENDMENTS REQUIRED FOR DEFINED BENEFIT PLANS IN 2013**

NRS and all other qualified retirement plan document providers are required to amend defined benefit plans in order to reflect recent federal legislation and regulatory guidance. The legislation included the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 ("PRA 2010"), as well as the Moving Ahead for Progress in the 21st Century Act ("MAP-21"). This action was put on hold late last year after the Government announced that the latest date for adopting the amendments was postponed from December 31, 2012 until December 31, 2013. Since there is a possibility that language reflecting other laws or regulatory guidance may be required for adoption in 2013, NRS is postponing implementing the amendment until later in 2013. Based on current scheduling, the amendments will be sent to NRS clients this fall. More information concerning these required amendments will be provided to all NRS defined benefit plan clients in the coming months.

## **MAJOR APPEALS COURT UPHOLDS FIDUCIARY ACTIONS**

A recent ruling in the *Tibble v. Edison International* case involving fiduciary duties to an ERISA retirement plan was closely watched. The ruling discusses standards that the Court uses to determine whether employer fiduciaries are properly carrying out their duties in accordance with ERISA requirements or are in breach of those duties.

The U.S. Court of Appeals for the Ninth Circuit (largest of the federal appeals courts) affirmed a lower court's judgment, finding the Edison fiduciaries had properly discharged their fiduciary duties, with one exception (discussed below). The plaintiffs sued Edison International as sponsor of the 401(k) plan, including the Edison committees

responsible for operating the plan. They sought to recover investment losses suffered by the plan that they alleged resulted from breach of fiduciary duty. They argued that using revenue sharing payments that Edison received from parties dealing with the plan to offset plan costs violated ERISA. Likewise, they argued that Edison's use of a unitized stock fund, a short-term investment fund, and three retail mutual funds violated ERISA's "prudent man rule."

The court found that the use of revenue sharing did not constitute a "prohibited transaction," holding that because revenue sharing is permitted by the Edison Plan, the payments to Edison are properly viewed as reimbursement for plan expenses. The court also found that the decisions to include the unitized stock and the short-term investment funds were not imprudent. The Ninth Circuit affirmed the lower court's decision to the effect that using retail mutual funds was imprudent. Significantly, this conclusion was reached due to the evidence that Edison had not used a "prudent process" in examining and selecting the retail funds. *The court declined to hold that retail mutual funds are categorically imprudent.* However, there was no evidence that Edison had engaged in a process of examining or comparing retail and institutional share classes when they decided to offer retail share classes and it was this procedural failure that resulted in the conclusion that they had acted imprudently.

On balance, the Ninth Circuit decision was hailed as a victory for employers and other fiduciaries associated with retirement plans. The adverse "retail investment class" decision underscores the need for employers and their advisors to examine alternatives when selecting plan investments to be made available to participants.

## REMINDERS FOR MAY

May 15 - Calendar year defined contribution plans that permit participant investment selection must issue first quarter plan participant benefit statements.

May 15 - Form 5500/8955 SSA – Forms due for Plan Year Ending ("PYE") 07/31/2012 that are on extension.

May 15 - Defined contribution plan employer contributions are due for employer tax returns due May 15 covering the fiscal year ending 02/28/2013 and for the fiscal year ending 08/31/2012 tax returns that are on extension to May 15.

May 31 - Form 5500/8955-SSA – Forms due for 10/31/2012 PYE that have not been placed on extension.

**FOR MORE INFORMATION OR TO  
REQUEST A PROPOSAL, PLEASE VISIT OUR  
WEBSITE AT [WWW.NRSERVICES.COM](http://WWW.NRSERVICES.COM), OR  
FOR SALES SUPPORT, PLEASE CONTACT:**

### CENTRAL & EASTERN TIME

**Jim Houpt**

**Executive Vice President**

**T| (800) 627-1610 x 2207**

**E| [jim.houpt@NRServices.com](mailto:jim.houpt@NRServices.com)**

### PACIFIC & MOUNTAIN TIME

**Nate DeLong**

**Sales Representative**

**T| (800) 350-2172 x 260**

**E| [nate.delong@NRServices.com](mailto:nate.delong@NRServices.com)**