**Instructions and Explanation for SECURE §111 403(b)(9) Amendment**

SECURE §111 authorizes church-sponsored retirement income account plans under Code §403(b)(9) to retroactively amend the plan to permit employees of certain affiliated employers to participate in the plan. FIS has prepared an amendment that a 403(b)(9) sponsor using the FIS 403(b)(9) preapproved plan document can use to amend their plan to avail themselves of this provision.

Completing the amendment is simple. Fill out the identifying information in Section 2.1. In Section 2.2, indicate the affiliated employers or employees of affiliated employers who will participate in the plan, as of the effective date shown in 2.1(C). The plan sponsor should sign the amendment.

The following questions and answers explain the amendment and related legal provisions:

**What is a 403(b)(9) plan?**

A retirement income account plan is a plan described under Code §403(b)(9) and must be sponsored by a church. It allows a broader set of investment choices than does a conventional 403(b) plan.

**What is the effect of SECURE §111? Who can participate in a 403(b)(9) plan?**

In approving Cycle 1 403(b) preapproved plans, the IRS limited 403(b)(9) plans to employees of churches and certain self-employed ministers. Employees of qualified church-controlled organizations (QCCOs), other affiliated organizations (Non-QCCOs) and certain retired ministers were not allowed to participate.

SECURE §111 amended Code §403(b)(9) to permit employees described in Code §414(e)(3)(B) to participate in a 403(b)(9) plan. As a result, in addition to ministers, certain former employees, and current church employees, a 403(b)(9) plan can cover employees of tax-exempt organizations “controlled by or associated with a church.” The Code says an organization is “associated with” a church “if it shares common religious bonds and convictions with that church.”

These affiliated employees are generally divided into three groups: Churches, QCCOs, and non-QCCOs. See Section 1.09(C) of the FIS 403(b)(9) preapproved plan for the definitions of these terms. The distinction is important because employees of Non-QCCOs are subject to nondiscrimination testing, as described below.

The IRS provided guidance on SECURE §111 in Section 25 of Rev. Proc. 2021-37. This amendment is designed to comply with that guidance.

**How can the sponsor designate the employees who will be allowed to participate in the plan under the amendment?**

The amendment offers three alternative methods to specify the employees who will participate (in addition to employees of the plan sponsor).

1. In 2.2(a), the sponsor can list the affiliate employers whose employees will be able to participate. These are divided into three categories: churches, QCCOs, and Non-QCCOs.
2. In 2.2(b), the sponsor can specify that employees of organizations signing participation agreements. The participation agreement should reflect whether the sponsoring employer is a church, QCCO, or Non-QCCO.
3. In 2.2(c), a describe line provides maximum flexibility in describing participating employees. Again, the line should specify whether they are employees of a church, QCCO, or Non-QCCO.

**How does the amendment impact universal availability, coverage, and nondiscrimination testing of the plan?**

Employees of churches and QCCOs are not subject to the 403(b)(9) universal availability requirement for deferrals, or the coverage and nondiscrimination rules, such as the ACP test, with regard to employer contributions. However, according to Rev. Proc. 2021-37, employees of Non-QCCOs are subject to these requirements. The FIS 403(b)(9) document did not set forth these requirements because they did not apply to churches. Accordingly, the bulk of the amendment (Article 4) addresses these requirements, although they are limited to employees of Non-QCCOs. Church and QCCO employees remain exempt from these requirements.

**If an 403(b)(9) sponsor does not want to expand participation, does it need to adopt this amendment?**

No. It is a purely optional amendment.

**Can 403(b) plans other than retirement income account plans (403(b)(9) plans) use this amendment?**

No.

**Can this amendment be used with documents other than the FIS 403(b)(9) preapproved plan document?**

No. The amendment makes use of definitions and provisions that are in the FIS 403(b)(9) document.

**What should the effective date of the amendment be? How will the amendment impact reliance on the preapproved document?**

The amendment should be effective as of the date employees of affiliated employers began participating in the plan. SECURE §111(b) says the change in the law is effective “to years beginning before, on, or after the date of the enactment of” SECURE. We know of 403(b)(9) plans that covered employees of affiliated employers long before SECURE. The revision in the law was intended to retroactively apply to such plans.

Rev. Proc. 2021-37 states that a Cycle 1 403(b) preapproved plan can be retroactively amended to the beginning of Cycle 2, July 1, 2020, to implement that provision. However, IRS officials, in response to questions from the practitioner community, stated: “We agree that participation by QCCO’s and Non-QCCO’s before 7/1/20 are not disqualifying. Section 25.03 of RP 2021-37 indicates that an adopting employer may not rely on the cycle 1 opinion letter with respect to the amendment permitting participation of those employees, however for all other purposes reliance is retained.”

**Can a document Provider sign this amendment on behalf of the employer?**

No. This amendment is designed for the plan sponsor to sign.

**When should this amendment be adopted?**

In general, as with other SECURE amendments, the deadline to adopt this amendment is December 31, 2022 if it is to be effective prior to 2023.

**Can I modify this amendment?**

Yes. This is a good faith amendment, and the IRS has not reviewed or approved it. We anticipate that elections available in this amendment will appear in our documents for upcoming restatement cycles, but employer modifications to this amendment may not be supported in restatements.

**Will FIS update this amendment?**

We do not anticipate further IRS guidance on SECURE §111 but will revise the amendment if needed to conform to any guidance that is issued. Please check online to find the most current version of the amendment.