



IRS Issues Flexible 2009 Waiver of Required Minimum Distribution Guidance

On September 24, 2009, the IRS issued **Notice 2009-82** which provides guidance, relief and model amendments for the waiver of 2009 required minimum distributions (“RMDs”) from defined contribution plans (including 401(k), 403(b) and governmental 457(b) plans) and individual retirement accounts (“IRAs”).

Background

The Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”) waives 2009 RMDs. As a result of this waiver, a distribution for 2009 that would otherwise be an RMD is an eligible rollover distribution and may be rolled over to an IRA or another eligible employer plan. Moreover, the distribution is not required to be treated as a direct rollover by plans; is not subject to 20% mandatory withholding for federal income taxes; and plans do not need to provide Code Section 402(f) notices to the distribution’s recipient.

Model Plan Amendments

The notice includes two model amendments plans can use to permit a participant to elect to receive or not receive 2009 required minimum distributions. The default rule under the first model amendment is that the participant will receive a 2009 RMD unless he/she elects otherwise. The default rule under the second model amendment is that the participant will not receive a 2009 RMD unless he/she elects otherwise. In addition, the distribution must either be (1) equal to a single sum 2009 RMD; or (2) one or more payments of a series of substantially equal distributions over the life or life expectancy of the participant, the joint life or life expectancy of the participant and the participant’s designated beneficiary, or for at least ten (10) years.

The plan sponsor needs to tailor the amendment to its plan’s terms and administration. Both model amendments elect to treat 2009 RMD payments as eligible rollover distributions. Most elections to receive 2009 RMDs and the distributions need to be made in 2009. Plan amendments do not need to be made until the last day of the 2010 plan year (or 2011 plan year for governmental plans).

Relief for Plans

The IRS is aware that many plans have continued to pay 2009 RMDs and has provided relief in the notice. The relief is that the IRS will not consider a plan to have failed to operate in

accordance with its terms solely because the plan adopts one of the model amendments; even though during the period from January 1, 2009 to November 30, 2009, the plan may have operated in conflict with the model amendment adopted by the plan.

Relief for Plan Participants and IRA Owners

Plan participants and IRA owners who have already received 2009 RMDs and for whom the 60-day rollover period has expired, have been granted an extension of the rollover period for 2009 to November 30, 2009. In other words, participants who have received 2009 RMDs can rollover the distribution(s) they received to an IRA or an eligible employer plan and waive their 2009 RMD, provided they do so by not later than November 30, 2009. For IRAs only, this relief is limited to the one IRA rollover a year rule, which was not changed in WRERA.

Other Guidance

The notice also includes guidance with respect to the timing of elections by 2009 newly eligible RMD employees or beneficiaries to receive RMD(s) under either the 5-year rule or the life expectancy rule. This employee or beneficiary election may be made by the end of 2010, rather than by the end of 2009. The notice also includes guidance with respect to withholding for federal income taxes from 2009 RMDs. Ten percent (10%) voluntary withholding will apply to the 2009 RMD distribution and a 20% mandatory withholding will apply to any distribution that exceeds what would otherwise have been a required distribution for 2009.

The additional guidance in the notice includes a reminder that the 2009 RMD waiver does not apply to payments that are part of a series of substantially equal periodic payments under I.R.C. §72(t)(2)(A)(iv). Such substantially equal period payments are an exception to the ten percent (10%) early withdrawal excise tax and are not RMDs. Inadvertently stopping such payments in 2009 under the mistaken belief that they are RMDs will trigger a recapture tax under I.R.C. §72(t)(4).

Plan Sponsor and IRA Provider Actions

Plan sponsors and IRA providers need to decide whether the default rule for 2009 RMD elections will be to (1) not make a 2009 RMD payment unless a payment is elected, or (2) continue to make 2009 RMD payments unless a waiver is elected. In addition, plan sponsors and IRA providers who have already made 2009 RMD payments should communicate the right to rollover (and waive the 2009 RMD) by November 30, 2009.

IRS Notice 2009-82 can be accessed at <http://www.irs.gov/pub/irs-drop/n-09-82.pdf>.

The IRS and Treasury have provided flexible guidance that should have been provided earlier this year. A significant amount of work needs to be done by plan sponsors and IRA providers in a short period of time. Please let us know if we can be of assistance.

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