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LEGAL ALERT



## Legal Alert: New IRS Guidance Concerning 2009 RMD Waivers

9/28/2009

Last week, the Internal Revenue Service (IRS) announced guidance concerning qualified plan operations and rollovers that are (or could be) affected by the waiver of a 2009 required minimum distribution (RMD) under the Worker, Retiree, and Employer Recovery Act (WRERA) of 2008 (Pub. L. No. 110-458). Previously, the IRS had issued advice to financial institutions that are required to deal with the reporting aspects of a waiver of RMDs (Notice 2009-9, issued 1/9/09), but there was little if any guidance addressed to plan administrators or sponsors.

The new Notice (Notice 2009-82, to be issued 10/13/09) includes questions and answers addressing some difficulties that have arisen regarding the temporary RMD waiver that Congress provided in response to the 2008 financial crisis, as well as two model amendments that may be used by plan sponsors who wish to allow plan participants the option of choosing whether or not their RMDs would be made; one amendment provides that a participant may elect to receive the RMD, and the other provides that the participant may elect *not* to receive the RMD. The IRS also provides transition relief, through November 30, 2009, for plans that are operated other than in accordance with their terms with respect to optional RMDs. **Plan Operations** The Notice prescribes three circumstances that will not be treated as operating a plan contrary to its terms, even where the occurrence is contrary to the terms of the plan, provided that the events in question occurred between January 1, 2009, and November 30, 2009:

- A plan could have either made or not made distributions equal in value to what would have been 2009 RMDs, or the plan could have either made or not made one or more periodic payments that would have constituted, or been included in, a 2009 "RMD" amount.
- Plan participants were not afforded a choice as to whether or not they would receive distributions that were, or that included, 2009 RMDs.
- Amounts that would have been RMDs either were or were not subject to a direct rollover option. **Rollovers** Due to the uncertainty that existed during the year, the Notice provides certain additional relief for rollovers, for both qualified plans and IRAs, in situations affected by the waiver of a 2009 RMD. First, the Notice provides that certain distributions "will not be treated as ineligible for rollover *on account of §402(c)(4)(A)*" in certain circumstances. The cited section of the Code precludes rollover of certain periodic payments, i.e., substantially equal payments not less frequently than annually over the life (or life expectancy) of the participant, the joint lives (or joint life expectancies) of the participant and designated beneficiary, or a fixed period

of at least ten years. Therefore, in addition to single-sum distributions of 2009 "RMDs" being eligible for rollover, the Notice provides that the prescribed type of periodic payment, *which would not have been eligible for rollover in the normal course*, would, to the extent made in 2009, be eligible for rollover, provided that:

- the payments were, or included amounts that were, equal to the 2009 required minimum distributions; and
- the other requirements of §402(c) of the Code are satisfied. Because of this sort of uncertainty surrounding rollovers of distributions in 2009, the Notice also provides that the normal 60-day rollover deadline for distributions made in 2009 would be extended through Nov. 30, 2009. The notice also extends the 60-day rollover period, to November 30, 2009, for IRA owners who have already received distributions of 2009 RMDs. However, the Notice also points out that, in the case of an IRA distribution, the one-rollover-per-year rule (which WRERA did not change), means that only one 2009 distribution from an IRA is eligible for the extended deadline. **Answers to Select Questions**  
The Notice also answers several commonly asked questions, including whether distributions that include 2009 RMDs from a plan can be rolled back into the same plan (yes, provided that the plan permits rollovers and the rollover satisfies the applicable rollover requirements taking into account the relief provided in the Notice), and how a plan administrator knows which distributions in 2009 to treat as RMDs (the amounts first distributed, after allowing for any outstanding RMDs from prior years).

Another question modifies previous guidance from the IRS (Notice 2007-7, 1/16/07). Where a plan permits direct rollovers to be elected by designated beneficiaries other than spouses, and permits such beneficiaries to elect to determine RMDs using the life expectancy method only through the year following the participant's year of death, the Notice permits such beneficiaries of participants who died in 2008 to elect the life expectancy method through the end of 2010.

Finally, one question points out that a 2009 RMD, even though it may be eligible for rollover under the rules of the Notice, is *not* an "eligible rollover distribution" for purposes of the 20% withholding requirement applicable to "eligible rollover distributions." The text of the Notice can be found at <http://www.irs.gov/pub/irs-drop/n-09-82.pdf>. If you have any questions regarding the Notice, or any other issues relating to rollovers or the effect of WRERA on employee benefit plans, you can contact the author of this Alert, Jeffrey Ashendorf, at 212-453-5926, [jashendorf@fordharrison.com](mailto:jashendorf@fordharrison.com), or any other member of Ford & Harrison's Employee Benefits practice group.