

November 29, 2010

IRA Providers Give Thanks to IRS

On November 23, 2010, the IRS issued [Rev. Proc. 2010-48](#), providing helpful guidance regarding the amendment and approval of prototype IRAs for a host of statutory changes. With demographic changes driving the growth of IRAs over the next decade, the sensible and useful positions taken by the IRS are most welcome, and will help minimize the formalistic compliance costs and risks for IRAs to the ultimate benefit of IRA owners.

Procedural Guidance

The IRS provided guidance on the following procedural points:

- IRA documents are not required to be amended for a list of recent statutory changes (enumerated below) that became effective after June 2007. IRA providers can continue to rely on prior prototype approval of their IRA documents or the prior IRS model form without amendments.
 - Many IRA providers have read the Internal Revenue Code to mean that, unlike section 401(a) qualified retirement plans, IRAs need not be amended for statutory changes unless Congress specifically requires such an amendment.
 - It is good news to see the IRS confirm that position, at least for the enumerated statutory changes. As a technical matter, however, the guidance provided by Rev. Proc. 2010-48 will not apply to the next legislative enactment applicable to IRAs.
- Prototype IRA providers may operate IRAs in accordance with these recent statutory changes “without specific authorizing language in the prototype IRA.” That is, the IRS will accept prototype IRAs administered in accordance with applicable law as qualified under Internal Revenue Code § 408, without taking a scrivener’s eye to the documents.
- IRA providers thus have the choice of either (i) continuing to use existing IRA documentation and observing recent statutory changes in IRA administration, in which case any prior prototype approval (whether from use of the IRS model form or from an IRS opinion letter) continues to apply; (ii) incorporating the recent statutory changes into their IRA documents, in which case the prior prototype approval also continues to be valid; or (iii) amending their prototype IRA documentation and (if desired) submitting it for an IRS opinion letter. To receive a favorable letter from the IRS, a prototype IRA must include every applicable issue from the IRS List of Required Modifications, and use of the LRM language is strongly encouraged.
- Additional and significant procedural relief is provided for prototype IRA annuities described in Code § 408(b). For prototype approval applications submitted to the IRS after December 13, 2010, prototype sponsors must only submit one application for each IRA endorsement, regardless of the number of associated annuity contract forms. Among other things, the endorsement must provide explicitly that the terms of the endorsement supersede any conflicting terms of the associated contract. Opinion letters will be issued with respect to the endorsement rather than the contract form. The IRS expects to reduce the number of opinion letters issued and the amount of fees paid by issuers.
 - It is unclear from the Revenue Procedure whether prior approvals for IRA endorsements now extend beyond the specific contract form for which the endorsement was approved.
 - This new procedure is reflected in the revised [Form 5306](#), which may also be used for opinions on single-contract endorsements and by those providers that prefer to have separate opinion letters for each contract.

© 2010 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

1

Revised model IRAs are expected shortly. The IRS also plans to issue new model IRAs for traditional individual retirement annuities and SIMPLE individual retirement annuities.

Prototype IRA providers should revise their IRA disclosure statements to update both (i) any disclosures affected by the recent legislation, and (ii) if applicable, any statement about IRS approval of the prototype IRA that is affected by the new guidance.

Statutory Changes for IRAs

The statutory developments expressly covered by the Revenue Procedure (which also serves as a helpful checklist for IRA administration) include:

Development	Statutory Authority
Certain distributions from retirement plans made on account of Hurricane Katrina, Rita or Wilma may be repaid to an eligible retirement plan.	Gulf Opportunity Zone Act of 2005 (GOZA), Pub. L. 109-135, Section 201
Eliminating the \$100,000 modified adjusted gross income limit and the joint filing requirement for individuals to make qualified rollover contributions (other than from a designated Roth account or from a Roth IRA) to Roth IRAs, effective for distributions after 2009.	Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA), Pub. L. 109-222, Section 512
Compensation earned by members of the armed forces for service in a combat zone may be taken into account for purposes of making IRA contributions, effective for taxable years beginning after 2003.	Heroes Earned Retirement Opportunities Act (HERO Act), Pub. L. 109-227, Section 2
Roth IRAs may accept rollovers from any eligible retirement plan (as defined in Code § 402(c)(8)(B)), effective for distributions after 2007.	Pension Protection Act of 2006 (PPA), Pub. L. 109-280, Section 824, as amended by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA)
Qualified reservist distributions (as defined in Code § 72(t)(2)(G)) may be repaid to an IRA, effective for individuals called to active duty after September 11, 2001.	PPA, Section 827, as amended by WRERA and extended in the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act), Pub. L. 110-245, Section 107
Nonspouse beneficiary of a deceased participant's accrued benefit in an eligible retirement plan, other than an IRA, may roll over any portion of the benefit in a direct trustee-to-trustee transfer to an IRA established to receive such rollover, effective for distributions made after 2006.	PPA, Section 829, as amended by WRERA
Certain individuals who were participants in a § 401(k) plan maintained by certain indicted employers may make special catch-up contributions equal to three times the otherwise applicable IRA contribution limit, effective for taxable years beginning after 2006 and before 2010.	PPA, Section 831

Adjusting for inflation the modified adjusted gross income limits for regular contributions to Roth IRAs, effective for taxable years beginning after 2006.	PPA, Section 833
Including differential wage payments (as defined in Code § 3401(h)(2)) in the definition of compensation for purposes of making IRA contributions, effective for years beginning after 2008.	HEART Act, Section 105
Certain military death gratuities may be treated as qualified rollover contributions within the meaning of Code § 408A(e) and thus eligible for contribution to Roth IRAs, effective for deaths occurring after October 6, 2001.	HEART Act, Section 109
Distributions from retirement plans made on account of the Kansas May 4, 2007, severe storms and tornados may be repaid to an eligible retirement plan (as defined in Code § 402(c)(8)(B)).	Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, Section 15345
Certain amounts received in connection with the Exxon Valdez litigation may be contributed to an eligible retirement plan (as defined in Code § 402(c)(8)(B)).	Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. 110-343, Division C, Section 504
Certain distributions from retirement plans made on account of severe storms, tornados and flooding that occurred in certain parts of the Midwest during May and June of 2008 may be repaid to an eligible retirement plan (as defined in Code § 402(c)(8)(B)).	EESA, Division C, Section 702
Incorporating technical corrections to PPA §§ 824, 827 and 829, respectively.	WRERA, Sections 108(d), (e) and (f)
Certain bankruptcy payments made in settlement of claims against airline carriers may be treated as qualified rollover contributions within the meaning of Code § 408A(e) and thus eligible for contribution to Roth IRAs, effective for contributions made after December 23, 2008, with respect to payments made any time.	WRERA, Section 125
Required minimum distributions from IRAs are not required for 2009.	WRERA, Section 201



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com