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## IRS Re-Opens the Door to Retiree Lump Sum Windows

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The IRS recently issued Notice 2019-18, reversing its prior position set forth in Notice 2015-49 that offering retirees in pay status the opportunity to elect a “cash out” of annuity benefits during a limited “window” violates the required minimum distribution (“RMD”) requirements of section 401(a)(9) of the Internal Revenue Code (the “Code”). Notice 2019-18 provides that the IRS no longer intends to amend the RMD regulations to prohibit the practice of offering retiree lump sum windows, and until further guidance is issued, will not assert that a plan amendment providing for a retiree lump sum window causes the plan to violate section 401(a)(9) of the Code. However, the IRS intends to continue to evaluate whether such windows might violate other Code provisions, including nondiscrimination, minimum vesting, benefit limitations, spousal protections and distribution restrictions.

### BACKGROUND

The RMD regulations generally prohibit any change in the period or form of an annuity after distribution of the annuity has started, and requires that annuity payments be “non-increasing,” subject to specific exceptions set forth in the regulations. One exception allows annuity payments to increase if the payment of increased benefits results from a plan amendment. In private letter rulings issued prior to Notice 2015-49, the IRS ruled that the addition of a lump sum payment window constituted an increase in benefits that fit within the exception, with the result that a change in the annuity payment period would be permitted under the RMD regulations.

However, in July 2015, the IRS announced in Notice 2015-49 that it was going to amend the RMD regulations to provide that a plan amendment adding a retiree lump sum window would not be treated as a payment of

### Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

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increased benefits described in the exception. The Notice explained that if a participant has the ability to accelerate annuity distributions at any time, then the actuarial cost associated with that right would result in smaller initial benefits, which would contravene the purpose of section 401(a)(9).

Notice 2019-18 reversed the IRS' position, retracting Notice 2015-49 and stating that the IRS no longer intends to amend the RMD regulations. While the IRS will not assert that an amendment adding a retiree lump-sum window violates IRC 401(a)(9) until further guidance is issued, the IRS intends to continue studying the issue, including whether such an amendment could cause a plan to violate other Code requirements. In addition, the IRS will not issue private letter rulings with respect to lump sum windows.

## CONCLUSION

Plan sponsors desiring to “de-risk” their pension plans (i.e., shifting the longevity and investment risk out of the pension plan) have historically either annuitized benefits or implemented a lump-sum window giving participants an election to forego annuity payments in exchange for an “actuarially equivalent” lump sum benefit. After Notice 2015-49, such lump sum windows were limited to terminated vested participants whose benefits are not in pay status. But with Notice 2019-18, the IRS has expanded the “de-risking” tools available to plan sponsors by again permitting lump sum windows for retirees in pay status.

Employers who may be interested in adding a retiree lump sum window should check with their actuary first because it may not always be the best approach. Depending on annuity and interest rates, paying lump sums pursuant to a window program may be more expensive than purchasing annuities. Further, retiree lump sum windows can lead to adverse selection (i.e., retirees in poor health choose the lump sum, while healthy retirees elect to remain in the plan) which could increase the cost of maintaining the plan. Employers should also consult with their attorneys to consider all of the plan qualification requirements that may be implicated by adoption of a retiree lump sum window—especially since the IRS will not issue a PLR on the issue. Finally, employers that move forward need to be aware of their fiduciary obligations and make sure that participant communications are clear and adequately disclose the consequences of accepting a lump sum cash-out.

King & Spalding is available to advise and assist if you are thinking about pension de-risking strategies, including adding a retiree lump sum window.

## May and June 2019 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

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The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for May through June. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
May 15  (within 45 days after the close of the first quarter of plan year)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the first quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans that allow participants to direct investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the first quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	
May 15  (the 15th day of the 5th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year. A 3-month extension may be obtained by filing a Form 8868, which must be filed by this date.	Qualified Retirement Plans  Voluntary Employee Beneficiary Associations

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Deadline	Item	Action	Affected Plans
June 30  (last day of 6th month following the plan year)	Excess Contributions	Deadline for plan administrator to distribute EACA excess contributions and earnings from the prior year to avoid 10% excise tax.	401(k) Plans with EACA