

IRS Guidance on 2009 RMD Relief

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The Service recently issued Notice 2009-82 (<http://www.irs.gov/pub/irs-drop/n-09-82.pdf>), which provides much-needed guidance on how defined contribution plans (including 403(b) and governmental 457(b) plans) and IRAs implement the waiver of 2009 required minimum distributions (RMDs) provided by Congress at the end of last year as part of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). Note: WRERA did not provide an RMD exception for defined benefit plans.

The guidance is structured in three key parts: (1) plan amendments, (2) transition relief, and (3) a Q&A section that addresses many of the concerns raised in ASPPA's comment letter. These are discussed below.

Plan Amendments

Importantly, the notice confirms that plan amendments are not required to be adopted until the end of the 2011 Plan Year (2012 plan year for governmental plans). The notice also provides two sample amendments to be used for this purpose, with both samples including a participant/beneficiary election to suspend or continue certain RMD payments and a direct rollover feature. The samples have different default options for RMD payments in the absence of a participant/beneficiary election: (1) pay, and (2) not pay.

These sample (not "model") amendments may be adopted by individual plan sponsors and sponsors of pre-approved plans. They may be modified, if necessary, to conform to the plan's terms and administrative procedures; the amendment will not result in loss of reliance on a favorable opinion, advisory, or determination letter.

There is no sample amendment for plans that do not provide a participant/beneficiary election, which should also be permissible (depending on current plan terms) and should not impact reliance on a favorable IRS letter. Unfortunately, there is no clear indication that the RMD relief is optional or on the impact of a plan amendment to not suspend these payments (e.g., anti-cutback concerns, amendment deadline).

The IRS also noted that IRAs do not have to be amended for this RMD relief (pending any further guidance).

Transition Relief

A. Operational Compliance. Although plan amendments are delayed, the IRS typically requires plan sponsors to be in operational compliance with the plan amendment from its effective date. In this regard, the notice provides helpful transition relief through November 30, 2009 for failure to comply with the plan's terms (as modified for this RMD relief). This means that plan sponsors have until December 1st to review and finalize their 2009 RMD relief approach for December 2009 that will be reflected in a plan amendment.

Under the notice, no corrective action appears to be required (presumably including no change to 1099-Rs for distributions prior to December 1st) for the following situations:

1. Payment or non-payment of a 2009 RMD amount (including periodic payments over life, life expectancy, or a period of at least 10 years that include the 2009 RMD amount, called "Extended RMDs"),

2. Participants and beneficiaries were not given the option to receive or not receive distributions that include 2009 RMDs, or
3. A direct rollover option was not offered.

This relief, however, does not extend to suspension of other payments (e.g., installment payments under 10 years or substantially equal payments under the "RMD method" for avoiding early distribution tax under notice 89-25 and Rev. Rul. 2002-62) where corrective action should be taken. If the corrective action involves amending the plan by year-end to provide for this distribution suspension feature, be careful of the section 72(t) 10% recapture tax and other IRS rules.

B. Indirect Rollover Relief. As ASPPA requested, the notice extends the 60-day indirect rollover period until no earlier than November 30, 2009. Therefore, participants who have already received 2009 RMD amounts (including Extended RMDs from plans) and have funds available to roll over may roll them into an IRA or qualified plan (including back to the same plan, if it accepts rollover contributions) and avoid current taxation. For IRAs, however, IRS did not waive the rule that limits this option to one indirect rollover a year for IRA owners.

Technical Questions and Answers

The IRS also addressed a number of technical points that are important for proper administration of this relief:

- Which distributions count as the 2009 RMD amounts?

The first distributions in 2009 must first be designated as RMDs for any prior years not yet distributed, followed by the 2009 RMD amounts.

- Do I need spousal consent to suspend or restart distributions?

Maybe. If the plan is otherwise subject to spousal consent rules (e.g., money purchase pension plan, but this should exclude governmental plans and non-annuity profit sharing plans), the plan sponsor must follow the procedures set forth in Notice 97-75, Q&A-8. In general, the plan sponsor can elect to apply "no" new annuity starting date and spousal consent should not apply.

- Is there an extension for RMD or direct rollover elections?

Yes. If the plan permits an employee or beneficiary to elect either the 5-year or life expectancy rule for calculating RMD amounts and such election was due in 2009 (e.g., participant died in 2008), then the election deadline is extended until 2010. Similarly, for a non-spouse rollover, if the participant died in 2008 and the plan provides a 5-year rule, the non-spouse beneficiary has until the end of 2010 to elect to rollover to an inherited IRA and apply the life expectancy rule for RMD payments. Notably, no other deadlines are extended (e.g., September 30 deadline for determining RMD beneficiaries, October 31 for trust beneficiary information, last day of the year deadline for separate accounts).

- Must the payor withhold 20% of the 2009 RMD amount paid from a plan?

No. The RMD amount is not an eligible rollover for withholding purposes so the mandatory 20% withholding does not apply. The 2009 RMD amount that is paid in 2009 is subject to voluntary withholding, unless directly rolled over. (This may cause system programming issues and no transition relief is provided for over-withholding.)