

Part III. Administrative, Procedural, and Miscellaneous

Guidance on 2009 Required Minimum Distributions

Notice 2009-82

I. PURPOSE

This notice provides guidance relating to the waiver of 2009 required minimum distributions, described in § 401(a)(9) of the Internal Revenue Code (“Code”), from certain plans under the Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”), P.L. 110-458. In particular, the notice:

- provides transition relief through November 30, 2009 for a plan that is not operated in accordance with its terms with respect to waived required minimum distributions and certain related payments;
- sets out rollover relief with respect to waived required minimum distributions and certain related payments, including an extension of the 60-day rollover period to November 30, 2009 for certain of the distributions; and
- answers questions that have been raised regarding the waiver of 2009 required minimum distributions under WRERA.

In the Appendix, the notice also provides two sample plan amendments that give recipients a choice as to whether to receive waived required minimum distributions and certain related payments and that specify the application of the direct rollover rules to the distributions. The sample amendments can be used by plan sponsors that are uncertain as to the treatment under plan terms of waived required minimum distributions and certain related payments or that otherwise desire to give recipients a choice as to whether to receive such distributions.

II. BACKGROUND

Section 401(a)(9) provides required minimum distribution (“RMD”) rules for stock bonus, pension, and profit-sharing plans described in § 401(a) and for annuity contracts described in § 403(a). Individual Retirement Accounts and Individual Retirement Annuities (“IRAs”) described in § 408(a) and § 408(b), § 403(b) plans, and eligible deferred compensation plans under § 457(b) also are

subject to the rules of § 401(a)(9) pursuant to §§ 408(a)(6) and (b)(3), 403(b)(10), and 457(d)(2), respectively, and the regulations under those sections.

Section 402(c) generally provides that the payment of any portion of an employee's interest in a qualified trust to the employee or the employee's surviving spouse in an eligible rollover distribution is not includible in gross income if the distribution is rolled over to an eligible retirement plan no later than the 60th day following the day of receipt. An eligible rollover distribution is defined in § 402(c)(4) as a distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust other than a distribution that is one of a series of substantially equal periodic payments made over a specified period, a distribution required under § 401(a)(9), and a distribution made on account of the employee's hardship. Section 402(c)(3)(B) provides that the Secretary may waive the 60-day rollover deadline under certain circumstances. Section 402(c)(11) provides for the direct rollover of a deceased employee's interest in a qualified trust to an inherited IRA established for the deceased employee's nonspouse designated beneficiary. Rules similar to those described in the preceding sentences in this paragraph apply to § 403(a) annuity plans, § 403(b) plans, and § 457 eligible governmental plans. (See §§ 403(a)(4)(B), 403(b)(8)(B), and 457(e)(16)(B).)

Section 408(d)(3) generally provides that an amount distributed from an IRA to the IRA owner, or to the surviving spouse of the IRA owner, is not included in gross income if the distribution is rolled over to an eligible retirement plan no later than the 60th day following the day of receipt. A distribution of an after-tax amount can only be rolled over to another IRA. Section 408(d)(3)(E) provides that an RMD cannot be rolled over. Section 408(d)(3)(I) provides that the Secretary may waive the 60-day rollover deadline under certain circumstances.

In general, § 72(t) imposes a 10-percent additional tax on early distributions from a plan described in § 401(a), § 403(a), or § 403(b), or from an IRA. However, pursuant to § 72(t)(2)(A)(iv), certain individuals receiving substantially equal periodic payments from a plan or an IRA are exempted from the 10-percent additional tax under § 72(t). Notice 89-25, Q&A-12, 1989-1 C.B. 662, as modified by Rev. Rul. 2002-62, 2002-42 I.R.B. 710, provides three calculation methods for determining whether distributions are substantially equal periodic payments under § 72(t)(2)(A)(iv). One method, the RMD method, uses rules similar to those under § 401(a)(9) to determine the amount of the payments required each year. If a series of substantially equal periodic payments stops or is otherwise modified (other than by reason of death or disability) prior to age 59½ or 5 years, all of the payments made are subject to a recapture tax under § 72(t)(4).

Section 201(a) of WREERA added § 401(a)(9)(H) to the Code. Section 401(a)(9)(H)(i) provides that § 401(a)(9) does not apply to defined contribution

plans and IRAs for 2009. Section 401(a)(9)(H)(ii)(I) provides that an individual's required beginning date is determined without regard to § 401(a)(9)(H) for purposes of applying § 401(a)(9) for calendar years after 2009. Section 401(a)(9)(H)(ii)(II) provides that if the 5-year rule for post-death distributions described in § 401(a)(9)(B)(ii) applies, the 5-year period is determined without regard to 2009.

Section 201(b) of WREERA amended § 402(c)(4) of the Code to provide that any amount distributed during 2009 that is an eligible rollover distribution, but would not have been an eligible rollover distribution had § 401(a)(9) applied during 2009, is not treated as an eligible rollover distribution for purposes of § 401(a)(31) (relating to direct and automatic rollovers of eligible rollover distributions), § 402(f) (relating to notices to recipients of eligible rollover distributions), and § 3405(c) (relating to mandatory 20-percent withholding on eligible rollover distributions).

Section 201(c) of WREERA provides that a plan or contract amendment relating to the changes made by § 201 can be delayed until the last day of the first plan year beginning in 2011 (2012 in the case of a governmental plan), provided the plan or contract operates as if the amendment were in effect from its effective date.

The Joint Committee on Taxation's Technical Explanation of H.R. 7327, which became WREERA, provides that if a distribution is made from a plan during 2009 that would have been an RMD but for § 401(a)(9)(H), "the plan is permitted but not required to offer the employee a direct rollover of that amount and provide the employee with a written explanation of the requirement." (JCX-85-08, December 11, 2008, at page 27.)

On February 2, 2009, the Service published Notice 2009-9, 2009-5 I.R.B. 419, which provides guidance to financial institutions on reporting for distributions that would be RMDs if not for § 401(a)(9)(H) (referred to in this notice as "2009 RMDs").

The Service has received many comments indicating that plan sponsors are uncertain of the effect of new § 401(a)(9)(H) on plan operation due, in part, to plan terms intended to satisfy § 401(a)(9). For example, some plans may contain distribution language that satisfies § 401(a)(9) without referencing this Code section and thus, arguably, would not be affected by § 401(a)(9)(H); nevertheless, sponsors of such plans may want to suspend 2009 RMDs. Also, some sponsors may want to give participants and beneficiaries the choice whether to continue or stop 2009 RMDs, but are uncertain if their current plan language permits such a choice. In addition, questions have been received concerning the permissibility of offering direct rollovers in the case of certain types of distributions that include 2009 RMDs (as indicated in the Joint Committee on Taxation's Technical Explanation described above), particularly

where a payment consists of a 2009 RMD amount and an additional amount that is an eligible rollover distribution without regard to § 401(a)(9)(H). The Service has also received questions on whether distributions that include 2009 RMDs can be rolled over even if such distributions would be substantially equal periodic payments without regard to § 401(a)(9)(H). This notice provides guidance on these and other issues relating to 2009 RMDs.

III. PLAN AMENDMENTS

To address the concerns of plan sponsors, two alternative sample plan amendments are provided in the Appendix that individual plan sponsors and sponsors of pre-approved plans can adopt or use in drafting individualized plan amendments. Both sample amendments provide participants and beneficiaries the choice between receiving and not receiving distributions related to 2009 RMDs, but only if the distributions would otherwise be equal to the 2009 RMDs or be one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary, or for a period of at least 10 years. All other distributions, including distributions that consist partly of 2009 RMDs, will be made. For example, a 75-year-old retiree's request to have his remaining plan account balance distributed in 2009 in a lump-sum, or in five approximately equal annual installments over a period that includes 2009, would not be affected by the sample amendments. The first sample amendment provides that the plan default that applies in the absence of a participant's or beneficiary's election will be to pay out distributions that include 2009 RMDs, and the second sample amendment provides that the plan default that applies in the absence of a participant's or beneficiary's election will be to not pay out distributions that include 2009 RMDs.

Both sample amendments also provide direct rollover choices (in addition to ones already provided for in the plan), with the default in each amendment being that the plan will offer a direct rollover option only for pre-WRERA eligible rollover distributions (i.e., a direct rollover option will not be offered for 2009 RMDs nor for amounts that can be rolled over solely due to the transition relief provided in Section IV of this notice). One option provides for the direct rollover of 2009 RMDs and of other amounts that may be rolled over pursuant to the transition relief for plans provided in Section IV of this notice (the latter amounts referred to as "Extended 2009 RMDs" in the sample amendments). Another option provides for the direct rollover of the entire amount of a distribution but only where the distribution consists of part or all of a 2009 RMD amount and an additional amount that is an eligible rollover distribution without regard to § 401(a)(9)(H).

Either plan amendment may be chosen by a plan sponsor, regardless of current plan language. Plan sponsors may have to modify the sample

amendment chosen to conform to their plan's terms and administrative procedures.

The amendment must be adopted no later than the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 for governmental plans), and, except as provided in Section IV of this notice, must reflect the operation of the plan to either cease or continue distributions that include 2009 RMDs in the absence of a participant's or beneficiary's choice. The timely adoption of the amendment must be evidenced by a written document that is signed and dated by the employer (including an adopting employer of a pre-approved plan).

In either case, the amendment (as modified, if necessary, to conform to the plan's terms and administrative procedures) will not result in the loss of reliance on a favorable opinion, advisory, or determination letter. Also, the Service will not treat the adoption of one of the sample plan amendments (as modified, if necessary, to conform to the plan's terms and administrative procedures) as affecting the pre-approved status of a master and prototype (M&P) or volume submitter plan. That is, such an amendment to an M&P plan that is adopted by an employer will not cause the plan to fail to be an M&P plan. Similarly, such an amendment to a volume submitter plan that is adopted by an employer will not cause the plan to fail to be a volume submitter plan.

The format of the sample plan amendments generally follows the design of pre-approved plans, including all M&P plans, that employ a "basic plan document" and an "adoption agreement." Thus, the sample plan amendment includes language designed for inclusion in a basic plan document and language designed for inclusion in an adoption agreement to allow the employer to select among options related to the application of the basic plan document provision. Sponsors of plans that do not use an adoption agreement should modify the format of the amendment to incorporate the appropriate adoption agreement options in the terms of the amendment. In such case, the notes in the adoption agreement portion of the sample amendment should not be included in the amendment that will be signed and dated by the employer.

IV. TRANSITION RELIEF

Plan operation relief. The Service understands that, due to the enactment of WRERA late in 2008, many plan administrators were unable to timely modify procedures relating to 2009 RMDs to accommodate the new rules. Also, prior to the issuance of the guidance in this notice, plan sponsors were unsure of the options available to them. A plan will not be treated as failing to satisfy the requirement that it be operated in accordance with its terms merely because, during the period beginning on January 1, 2009, and ending on November 30, 2009: (1) distributions that equal the 2009 RMDs or that are one or more

payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary, or for a period of at least 10 years were or were not paid, (2) participants and beneficiaries were not given the option of receiving or not receiving distributions that include 2009 RMDs, or (3) a direct rollover option was or was not offered for 2009 RMDs or for other amounts that can be rolled over pursuant to the rollover relief provided in the following paragraph.

Rollover relief for plans. Payments to a plan participant in 2009 will not be treated as ineligible for rollover on account of § 402(c)(4)(A) if the payments equal the 2009 RMDs or are one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary, or for a period of at least 10 years. Accordingly, such payments can be rolled over, provided the other rules of § 402(c) are satisfied. To assist plan participants who have already received distributions in 2009 but may have been unsure of which amounts could be rolled over, the Service, under the authority of § 402(c)(3)(B), is hereby extending the 60-day rollover period, for any 2009 RMD and for any additional payments that are part of a series described in the first sentence of this paragraph, so that it ends no earlier than November 30, 2009.

Rollover relief for IRAs. In the case of IRA owners who have already received distributions of 2009 RMDs in 2009, the Service, under the authority of § 408(d)(3)(I), is hereby extending the 60-day rollover period for any such distribution so that it ends no earlier than November 30, 2009. However, because of the one-rollover-per-year rule in § 408(d)(3), which was unchanged by WRERA, no more than one distribution from an IRA in 2009 will be eligible for this rollover relief.

V. OTHER ISSUES

Q-1. Do IRAs have to be amended for § 401(a)(9)(H)?

A-1. Pending the issuance of further guidance, IRAs do not have to be amended for § 401(a)(9)(H).

Q-2. In a plan that permits an employee or beneficiary to elect whether the 5-year rule in § 401(a)(9)(B)(ii) or the life expectancy rule in § 401(a)(9)(B)(iii) and (iv) applies, does § 401(a)(9)(H) extend the time for making the election?

A-2. Yes, when the deadline for making the election, in the absence of § 401(a)(9)(H), would be in 2009. Section 1.401(a)(9)-3, A-4(c), of the Income Tax Regulations requires the election to be made no later than the earlier of the

end of the calendar year in which distribution would be required to commence in order to satisfy the life expectancy rule in § 401(a)(9)(B)(iii) and (iv) or the end of the calendar year which contains the fifth anniversary of the date of death of the employee. Pursuant to § 401(a)(9)(H), no RMDs are required for 2009, effectively extending the deadline to the end of 2010 if the deadline, without regard to § 401(a)(9)(H), would be the end of 2009. Thus, for example, if a 50-year-old participant in a plan providing the election described in § 1.401(a)(9)-3, A-4(c), died in 2008 with his sister as his designated beneficiary, the sister has until the end of 2010 to choose between the 5-year rule and the life expectancy rule. Similarly, where a participant's spouse is the designated beneficiary, the spouse has until the end of 2010 to make the election if the deadline, in the absence of § 401(a)(9)(H), would be the end of 2009.

Q-3. In a plan that permits direct rollovers by nonspouse designated beneficiaries pursuant to § 402(c)(11), does § 401(a)(9)(H) extend the time for making the direct rollover?

A-3. Yes, if the participant died in 2008. The "special rule" at A-17(c)(2) in Notice 2007-7, 2007-5 I.R.B. 395, provides that if the 5-year rule applies to a benefit under a plan, the nonspouse designated beneficiary may determine the RMD using the life expectancy rule in the case of a distribution made prior to the end of the year following the year of death. The special rule in Notice 2007-7 is hereby modified so that if the employee's death occurred in 2008, the nonspouse designated beneficiary has until the end of 2010 to make the direct rollover and use the life expectancy rule.

Q-4. Besides the extensions provided in Q&A-2 and Q&A-3 of this notice and the rollover relief provided in Section IV of this notice, are any other deadlines extended or rollover requirements waived?

A-4. No, § 201 of WRERA only provides relief from certain deadlines and rollover requirements. Thus, for example, the deadline of September 30 following the year of death, in § 1.401(a)(9)-4, Q&A-4 (relating to the determination of designated beneficiaries); the October 31 deadline in § 1.401(a)(9)-4, A-6(b) (relating to the date by which the trustee of a trust that is a plan's designated beneficiary must provide the plan administrator certain information); and the last-day-of-the-year deadline in § 1.401(a)(9)-8, A-2(a)(2) (relating to the date by which separate accounts must be established) are not extended. Similarly, for example, with respect to rollovers, the one-rollover-per-year rule in § 408(d)(3) and the restrictions on rollovers by nonspouse beneficiaries and on rollovers of after-tax amounts were not changed by WRERA and still apply.

Q-5. For a plan subject to §§ 401(a)(11) and 417, is spousal consent required to suspend distributions that include 2009 RMDs and restart such distributions in 2010?

A-5. A plan subject to §§ 401(a)(11) and 417 can follow the procedures described in Q&A-8 of Notice 97-75, 1997-2 C.B. 337, choosing to have either a new annuity starting date or no new annuity starting date upon recommencement. If no new annuity starting date is chosen under those procedures, spousal consent is not required under most circumstances. If the plan provides that there is a new annuity starting date, spousal consent may be required under those procedures to suspend distributions that include 2009 RMDs and to restart such distributions in 2010, depending on the form of distribution.

Q-6. Can distributions that include 2009 RMDs made from a plan be rolled over back into the same plan?

A-6. Yes, provided the plan permits such rollovers and the rollover satisfies the requirements of § 402(c), taking into account the relief provided in Section IV of this notice.

Q-7. Can a 2009 RMD paid from a plan in 2009 be treated as an eligible rollover distribution for purposes of withholding under § 3405(c) at the 20-percent rate?

A-7. No, a 2009 RMD that is paid from a plan in 2009 is not treated as an eligible rollover distribution for purposes of § 3405(c). For example, if a plan makes a distribution in 2009 to a retiree of his entire account balance under the plan and part of the distribution is a 2009 RMD, the portion of the distribution that is not a 2009 RMD is subject to the 20-percent mandatory withholding rules under § 3405(c) and the portion of the distribution that is a 2009 RMD is subject to the 10-percent optional withholding rules under § 3405(b). On the other hand, if the retiree was receiving monthly distributions from the plan that exceeded his RMDs and that are expected to last for a period of at least 10 years, then the whole amount of each distribution is subject to the periodic-payment optional withholding rules under § 3405(a). The rule in this Q&A-7 only applies to 2009 RMDs paid from a plan in 2009. Withholding for a 2009 RMD that is paid in 2010 (for example, where the employee turns 70½ in 2009 and delays payment until April 1, 2010) is determined without regard to § 201(b) of WREIRA or this Q&A-7.

Q-8. How does a plan determine which distributions during 2009 are 2009 RMDs?

A-8. The first distributions in 2009 are any RMDs from prior years not yet distributed, followed by 2009 RMDs.

Q-9. Does § 401(a)(9)(H) apply to payments that are part of a series of substantially equal periodic payments under the "RMD method" (a series of payments described in Notice 89-25 and Rev. Rul. 2002-62 that are designed to

satisfy the § 72(t)(2)(A)(iv) exception to the 10-percent additional tax under § 72(t) so that stopping such payments for 2009 would not be considered a modification under § 72(t)(4)?

A-9. No, § 401(a)(9)(H) does not apply to such payments; accordingly, if they are stopped in 2009 (other than because of death or disability) prior to age 59½ (or prior to 5 years from the date of the first payment), all the payments made under the series are subject to a recapture tax under § 72(t)(4).

VI. EFFECT ON OTHER DOCUMENTS

Notice 2007-7 is modified by Q&A-3 of this notice.

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to retirementplanquestions@irs.gov.

Appendix
Section 401(a)(9)(H) Sample Amendments

Default to continue 2009 RMDs

For use by plan sponsors that want to give participants and beneficiaries an election between receiving and not receiving distributions that include 2009 RMDs and where the default that applies in the absence of a participant's or beneficiary's election will be to continue making distributions that include 2009 RMDs.

Notwithstanding section _____ of the plan, a participant or beneficiary who would have been required to receive required minimum distributions for 2009 but for the enactment of section 401(a)(9)(H) of the Code ("2009 RMDs"), and who would have satisfied that requirement by receiving distributions that are (1) equal to the 2009 RMDs or (2) one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary, or for a period of at least 10 years ("Extended 2009 RMDs"), will receive those distributions for 2009 unless the participant or beneficiary chooses not to receive such distributions. Participants and beneficiaries described in the preceding sentence will be given the opportunity to elect to stop receiving the distributions described in the preceding sentence. In addition, notwithstanding section _____ of the plan, and solely for purposes of applying the direct rollover provisions of the plan, certain additional distributions in 2009, as chosen by the employer in the adoption agreement, will be treated as eligible rollover distributions.

If no election is made by the employer in the adoption agreement, a direct rollover will be offered only for distributions that would be eligible rollover distributions without regard to section 401(a)(9)(H).

(Adoption agreement provision)

Direct Rollovers:

For purposes of the direct rollover provisions of the plan, the following will also be treated as eligible rollover distributions in 2009:

(Check one or none.)

_____ 2009 RMDs and Extended 2009 RMDs (both as defined in the plan).

_____ 2009 RMDs (as defined in the plan) but only if paid with an additional amount that is an eligible rollover distribution without regard to section 401(a)(9)(H).

Name of Employer

By: Signature Date

Name and title

Default to discontinue 2009 RMDs

For use by plan sponsors that want to give participants and beneficiaries an election between receiving and not receiving distributions that include 2009 RMDs and where the default that applies in the absence of a participant’s or beneficiary’s election will be to discontinue making distributions that include 2009 RMDs.

Notwithstanding section _____ of the plan, a participant or beneficiary who would have been required to receive required minimum distributions for 2009 but for the enactment of section 401(a)(9)(H) of the Code (“2009 RMDs”), and who would have satisfied that requirement by receiving distributions that are (1) equal to the 2009 RMDs or (2) one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant’s designated beneficiary, or for a period of at least 10 years (“Extended 2009 RMDs”), will not receive those distributions for 2009 unless the participant or beneficiary chooses to receive such distributions. Participants and beneficiaries described in the preceding sentence will be given the opportunity to elect to receive the distributions described in the preceding sentence. In addition, notwithstanding section _____ of the plan, and solely for purposes of applying the direct rollover provisions of the plan, certain additional distributions in 2009, as chosen by the employer in the adoption agreement, will be treated as eligible rollover distributions.

If no election is made by the employer in the adoption agreement, a direct rollover will be offered only for distributions that would be eligible rollover distributions without regard to section 401(a)(9)(H).

(Adoption agreement provision)

Direct Rollovers:

For purposes of the direct rollover provisions of the plan, the following will also be treated as eligible rollover distributions in 2009:

(Check one or none.)

_____ 2009 RMDs and Extended 2009 RMDs (both as defined in the plan).

_____ 2009 RMDs (as defined in the plan) but only if paid with an additional amount that is an eligible rollover distribution without regard to section 401(a)(9)(H).

Name of Employer

By: Signature

Date

Name and title

[Note to Sponsor: In either amendment, the first blank should contain the section of the plan dealing with RMDs (and the section of the plan dealing with other distributions, if applicable) and the second blank should contain the section of the plan dealing with direct rollovers.]