



## ADVISORY BULLETIN – NOVEMBER 10, 2009

### IRS ISSUES GUIDANCE ON 2009 REQUIRED MINIMUM DISTRIBUTION WAIVER

**Employers that sponsor retirement plans must act by November 30, 2009 to make operational decisions regarding the waiver of 2009 required minimum distributions (“RMDs”) contained in the Worker, Retiree, and Employer Recovery Act of 2008 (the “Act”).** The Act waived the requirement for participants and beneficiaries in defined contribution plans to take 2009 RMDs. [IRS Notice 2009-09](#) provided initial guidance on the waiver. [IRS Notice 2009-82](#), issued on September 24, 2009, provided additional guidance.

#### **Application of the 2009 RMD Waiver**

Under § 401(a)(9) of the Internal Revenue Code, a participant in a defined contribution plan (a 401(k) plan, profit sharing plan, ESOP, etc.) generally must take his or her first annual RMD by April 1 of the calendar year following the later of the calendar year in which he or she reaches age 70½ or retires. Subsequent RMD’s are made by December 31st. A five percent owner of an entity, however, must generally take the first RMD by April 1 of the calendar year following the calendar year in which he or she reaches age 70½ without regard to whether the owner has retired. RMDs are also required for beneficiaries of deceased participants. The 2009 RMD waiver temporarily changes these rules for 2009 as follows:

- *Individual turns 70½ in 2009:* The individual will not have to take the 2009 RMD which would otherwise have been due by April 1, 2010. The 2010 RMD would still be due by December 31, 2010.
- *Individual turned 70½ in 2008:* The Act does not waive the initial 2008 RMD which would be due by April 1, 2009. However, it does waive the 2009 RMD which would otherwise have been due by December 31, 2009. The 2010 RMD would still be due by December 31, 2010.
- *Individual turned 70½ before 2008 and is already taking RMDs:* The individual will not have to take the 2009 RMD that would otherwise have been due by December 31, 2009. The 2010 RMD would still be due by December 31, 2010.

- *5-year rule*: Under the Act, the determination of the 5-year period over which beneficiaries must receive RMDs is made without regard to 2009 (e.g. for a 2007 death, the 5-year period for paying RMDs would end on December 31 of 2013, not 2012). The Act also provides an extra year for choosing between the life expectancy and the 5-year option and provides an extra year to complete a rollover to avoid the 5-year rule.

## **IRS Notice 2009-82**

IRS Notice 2009-82 clarifies that while a plan does not have to be amended until 2011 (or later) to reflect the RMD waiver, certain operational decisions must be made by November 30, 2009.

### Treatment of 2009 RMDs

By November 30, 2009, plan sponsors must choose one of the following three options for treating distributions that would otherwise be 2009 RMDs:

1. Continue making 2009 RMDs. Under this approach, the plan would forgo the 2009 waiver and continue making distributions in accordance with plan terms and elections.
2. Allow participants to elect to receive a 2009 RMD. Under this approach, the plan would suspend all 2009 RMDs unless a participant requests a 2009 distribution.
3. Allow participants to elect not to receive a 2009 RMD. Under this approach, the plan would continue making 2009 RMDs unless a participant requested otherwise.

Regardless of which option a plan chooses, the plan must be in operational compliance with such option by December 1, 2009.

### Rollover of 2009 RMD Distributions

By November 30, 2009, plan sponsors must decide whether to allow direct rollovers of 2009 RMDs. Specifically, they must choose one of the following three options:

1. Prohibit direct 2009 RMD rollovers.
2. Allow direct 2009 RMD rollovers.
3. Allow direct 2009 RMD rollovers only if they are paid with an additional amount that would be an eligible rollover distribution.

Regardless of which option a plan chooses, the plan must be in operational compliance with such option by December 1, 2009. 2009 RMD distributions will not be subject to the mandatory 20% withholding rules, but will be subject to the voluntary 10% withholding rules.

Additionally, participants and spouse-beneficiaries have until the later of (1) November 30, 2009 and (2) 60 days after the distribution date to rollover a 2009 RMD indirectly.

### Plan Amendments

If a plan's chosen approach requires a plan amendment, then the amendment must be adopted by the last day of the plan year beginning in 2011. Such amendments will be retroactively effective to 2009. IRS Notice 2009-82 provides two sample plan amendments that allow participants and beneficiaries to decide whether to opt-in to or opt-out of 2009 RMDs. The samples should be modified as needed to conform to plan terms and procedures.

### Plan Notices

The Act does not impose notice requirements on plan sponsors. However, some plan sponsors are notifying participants about the Act and their approach to 2009 RMDs. Additionally, although direct rollover notices are not required, plan sponsors may want to notify those who have already received 2009 RMDs of the extended indirect rollover deadline.

### Transition Relief

IRS Notice 2009-82 also provides that the IRS will not treat plans as failing to operate in accordance with their terms for 2009 RMDs merely because from January 1, 2009 to November 30, 2009 they (1) paid or did not pay 2009 RMDs, (2) did not give participants the choice to receive or not receive 2009 RMDs, or (3) offered or did not offer a direct rollover option for 2009 RMDs or did not operate in accordance with the indirect rollover relief described above.

## **CONCLUSION**

Employers that sponsor retirement plans (1) have until November 30, 2009 to decide how to treat, and whether to allow direct rollover of, 2009 RMDs, (2) must place their plans in operational compliance with such decisions by December 1, 2009, and (3) have until the last day of the plan year starting on or after January 1, 2011 to amend their plans accordingly.

Please contact either Ken Johnson [(336) 271-5264] or David Bury [(336) 271-5266] if you have any questions concerning the Act or related IRS guidance.

© 2009 Tuggle Duggins & Meschan, P.A. All Rights Reserved. The purpose of this bulletin is to provide a general summary of significant legal developments. It is not intended to constitute legal advice or a recommended course of action in any given situation. It is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature. Moreover, information contained in this bulletin may have changed subsequent to its publication. This bulletin does not create an attorney-client relationship between Tuggle Duggins & Meschan, P.A. and the recipient. Therefore, please consult legal counsel before making any decisions or taking any action concerning the issues discussed herein.

### **INTERNAL REVENUE SERVICE - CIRCULAR 230 DISCLOSURE:**

As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this bulletin (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing, or recommending to another party any plan or arrangement addressed herein.