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Via Email

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Re: 2009 Suspension of RMD Rules

Dear Messrs. Reeder and Zuckerman:

We write to request additional clarifying guidance with respect to the 2009 suspension of the required minimum distribution ("RMD") rules for defined contribution plans described in Code section 401(a), 403(b) plans, governmental 457(b) plans, and IRAs provided under the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"). We appreciate the Service's initial IRA guidance in Notice 2009-9 but believe that there are a number of issues relating to the suspension of 2009 RMDs that should be addressed by additional guidance. In this regard, our firm represents many private sector employers, governmental employers, and retirement plan industry service providers, and we have already received a number of questions on this subject.

Many plans incorporate the Code section 401(a)(9) requirements by reference or use the model language issued by the Service in Revenue Procedure 2002-29. However, there are various ways the required minimum distribution rules are actually implemented. As such, in this letter we propose a number of potential guidance positions that are designed to:

- encourage and enhance compliance;
- maximize the flexibility accorded to participants, plan sponsors, and providers;
- take into account the various systems issues that can make implementing the RMD suspension rules difficult; and
- maximize the amount of assets that continue to be held in tax-advantaged retirement vehicles.

A. 2009 Plan Operations

Because each plan and provider is unique, to simplify the administration and enforcement of the 2009 RMD suspension, we suggest the following rules be applied to each of the following types of benefit payment.

1. Annuitized Benefits

Defined contribution plans may satisfy the RMD rules by purchasing an annuity contract from an insurance company. Treasury Regulation section 1.401(a)(9)-5, Q&A 1(e). Once an annuity is purchased, the terms of the annuity contract generally control the payout by the insurance company. However, some annuity contracts provide for RMD payments only until an annuity owner has elected a payment form. A question is whether the discretion to suspend these RMD payments, if it exists at all, lies with the insurance company, an annuity owner, or both. If an insurance company is required to suspend RMD payments, it may violate the terms of its annuity contract. This raises state insurance compliance issues because, in many cases, modifications to annuity contracts are subject to state regulatory approval. As such, we suggest that any guidance on this issue take into account the desire to maximize flexibility while also recognizing the unique state regulatory framework many annuity providers need operate within by providing annuity providers significant flexibility in implementing the 2009 suspension of the RMD rules.

2. RMD Payment Option

Although lump sum distributions are the default form of payment in many defined contribution plans, a number of defined contribution plans, including governmental retirement plans, permit participants to elect, either by an actual or negative election, a "RMD payment option" that pays out each year's RMD. Some plan sponsors may want to continue these payments because their systems or other procedures can not be modified without significant cost or other administrative burden (including the need to prepared detailed participant communications) to suspend payments in 2009. Other plan sponsors may want to suspend payments. Lastly, a third group of sponsors may want to allow participants to elect whether or not to suspend this RMD payment option. We suggest that the Service issue guidance providing that a plan sponsor that adopts any of these approaches for the 2009 suspension of the RMD rules will be treated as complying with the WRERA's 2009 suspension of RMDs. If there is an abuse concern of any kind, guidance might contain an anti-abuse provision to provide the Service flexibility should a sponsor attempt to structure its use of these rules to benefit a discriminatory class of participants.

3. Other Payment Options

Many defined contribution plans continue to offer installment and other forms of periodic distribution that, although not drafted in a manner that specifically references the RMD rules, by

their design, satisfy the RMD rules. As described above in the context of the RMD payment option offered by some plans, some plan sponsors may want to allow a suspension of these payments in 2009, others may not, and some may want to allow participant choice. For simplicity of administration, we suggest that the same broad-based relief suggested for the RMD payment option be applied to the various "other" payment options in plans that are designed to be Code section 401(a)(9)-compliant. Otherwise only those plan distribution options which specifically reference the RMD rules will be able to take advantage of a suspension. This consistent approach will eliminate the necessity of a plan sponsor having to determine whether the plan distribution options reference the RMD rules in order to suspend RMDs in 2009.

B. Rollovers

1. Periodic Payments

Code section 402(c)(4)(A) provides that an "eligible rollover distribution" does not include any distribution that is part of a series of periodic payments made over a participant's or participant and beneficiary's joint life expectancy or made for a specified period of ten years or more. It is possible that one or more distribution options under a defined contribution plan, including a RMD payment option, could fall within this carve out from the rollover rules, thus creating further confusion as to whether a 2009 payment of an amount that would, but for the RMD suspension, be treated as an RMD would now be eligible for rollover. We suggest that the Service deem that amounts paid in 2009 that would have been RMDs for the 2009 year be deemed to be an "independent payment" within the meaning of Treasury Regulation section 1.402(c)-2, Q&A 6(a), and thus eligible for rollover.

2. Notification of Rollover Rights

The suspension of the RMD rules, as explained by the Joint Committee on Taxation Report on H.R. 7327, is written in a permissive manner (*i.e.* to allow a plan to permit the rollover of amounts that would have been RMDs in 2009 by providing a written notice of a participant's rollover rights). As such, for simplicity, many plans may elect not to offer the direct rollover option. Code section 402(c)(3)(B) provides a hardship exception to the 60-day indirect rollover rule "where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement." We believe that the suspension of the RMD rules should automatically fall within this requirement. As such, we suggest that the Service issue guidance providing that as long as amounts that would have been an RMD are rolled over in an indirect rollover by April 15, 2010, these amounts will be deemed to have automatically received a waiver pursuant to Code section 402(c)(3)(B).

C. Plan Amendments

The WRERA effectively supersedes the interim and discretionary amendment rules contained in Revenue Procedure 2007-44 and provides that plan amendments to reflect the RMD suspension generally need not be adopted until the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 in the case of governmental plans). There is concern that any or all of the options described above will require a plan amendment and whether such amendments will fall in the scope of the WRERA's remedial amendment period instead of the periods described in Revenue Procedure 2007-44. To address this concern, we suggest that Service guidance provide as follows:

1. Limited Need to Amend Plan Documents

We recognize that the Service has a strong policy that the terms of plan documents reflect their actual operation. Reflecting this consideration, we suggest that the Service provide as follows:

- *Plans That Suspend RMD Payments.* Plans that suspend payments of amounts that would have been RMDs in 2009 and that have otherwise compliant Code section 401(a)(9) language, including permissible incorporation by reference language, should not have to adopt amendments to reflect the RMD suspension.
- *Plans That Continue to Pay RMD Payments Under Specified Forms of Benefit* To the extent a plan continues to make RMD payments, no amendment should be required if such payments are made under plan provisions, such as installment payment provisions and RMD payment only provisions that are independent of regular RMD incorporation by reference or good faith compliance language. In post-EGTRRA determination letter cycle reviews, a "reasonable, good faith" standard of compliance should be applied so as to liberally permit plans that believe that they did not need to amend may correct a deficient amendment without needing to file under EPCRS or correct under Audit CAP.
- *Elective Suspension.* To the extent a plan allows an election to suspend RMDs or permits rollovers directly from the plan, the Service could issue a short, snap-on, good-faith amendment that would be deemed to appropriately amend plans for the 2009 RMD suspension.
- *Governmental Plans.* Because governmental plans are subject to a reasonable and good faith standard of compliance with Code section 401(a)(9), we suggest that any Service guidance provide that governmental entities need not adopt an amendment of any kind so long as they follow their reasonable and good faith standard.

2. Timing of Amendments

The guidance should indicate that the scope of the WRERA amendment will be interpreted broadly by the Service such that plans that continue making payments of amounts that would have been RMDs in 2009, or that allow participant elections as to whether to receive amounts that would have been RMDs in 2009, will be deemed, with respect to these features, to fall within the WRERA remedial amendment period for purposes of plan amendments (if any amendments are required).

3. Code Section 411(d)(6) Relief

Many plan sponsors are hesitant to allow suspension of 2009 RMDs out of concern that RMDs are a Code section 411(d)(6) protected benefit (*i.e.*, an optional form of benefit). We suggest that the Service clarify that any of the above approaches to suspending or continuing payments of amounts that would have been RMD payments in 2009 will be deemed not to be impermissible cutbacks within the meaning of Code section 411(d)(6). In our view, any other position would create significant burdens or complexities for a plan and its participants as described in Code section 411(d)(6)(B). This Code section 411(d)(6) cutback relief is essential for forms of distribution described in Item A.3 above that do not, by their terms, specifically reference Code section 401(a)(9).

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We would be happy to meet with representatives of the Service or Treasury to discuss our comments further. Please let us know if you have any questions or if we can be of any other assistance. We can be reached at (202) 857-0620.

Very truly yours,

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