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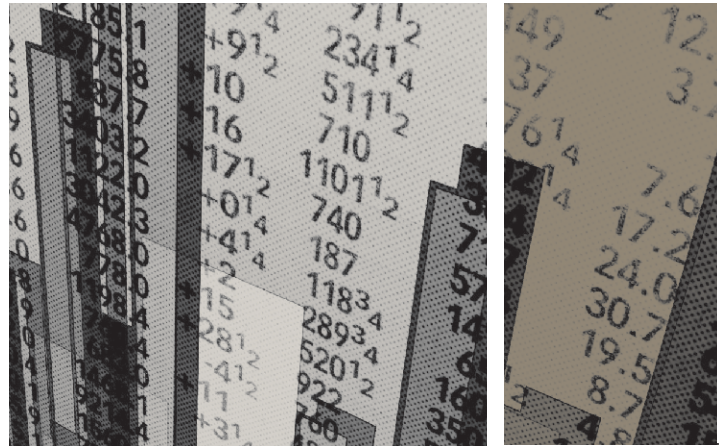
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# THE LINGERING EFFECTS OF THE 2009 RMD WAIVER

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Under section 401(a)(9)(H), enacted as part of “The Worker, Retiree, and Employer Recovery Act of 2008” (“WRERA”),<sup>1</sup> no minimum distribution is required for calendar year 2009 from individual retirement plans (“IRAs”) and employer-provided qualified retirement plans that are defined contribution plans (within the meaning of section 414(i)).<sup>2</sup> The impact of this statutory waiver of required minimum distributions under section 401(a)(9) (“RMDs”) is not limited to 2009. This discussion identifies certain situations in which the impact of the 2009 RMD waiver extends into 2010 and beyond. Issuers and providers of IRAs and employer-provided qualified retirement plans need to consider these situations and possibly modify their administrative systems and/or procedures for purposes of administering the IRAs and plans in accordance with the RMD rules.

## I. BACKGROUND

Section 401(a)(9) imposes minimum lifetime and after-death distribution requirements (discussed further below) that apply to IRAs and employer-provided qualified retirement plans, *i.e.*, qualified plans under section 401(a), qualified annuities under section 403(a), tax-sheltered annuity contracts under section 403(b), and governmental section 457(b) plans. An employer-provided qualified retirement plan can be a defined contribution plan or a defined benefit plan (*i.e.*, any plan which is not a defined contribution plan).<sup>3</sup> A defined contribution plan is defined in section 414(i) as a plan which provides: 1) an individual account for each participant; and 2) benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and forfeitures of accounts of other participants which may be allocated to such participant’s account.

Section 401(a)(9) and the regulations thereunder set forth different rules for purposes of determining the minimum distributions that are required to be made during the lifetime of the IRA owner or plan participant (collectively, the “participant”) and after the participant’s death. In general, if the participant is alive on his or her “required beginning date,” the entire interest must be distributed, commencing no later than that date, over the participant’s life (or the lives of the participant and his

or her “designated beneficiary” within the meaning of section 401(a)(9)) or over a period not extending beyond the participant’s life expectancy (or the life expectancy of the participant and his or her designated beneficiary). The required beginning date is April 1 following the calendar year in which: 1) the participant attains age 70½; or 2) in the case of a participant in an employer-provided qualified retirement plan who is not a 5 percent owner of the employer, the participant retires, if later.<sup>4</sup>

If the participant dies on or after the required beginning date, any remaining interest of the participant must be distributed at least as rapidly as under the method of distribution being used at the time of the participant’s death (the “at-least-as-rapidly rule”).<sup>5</sup> If the participant dies prior to the required beginning date, generally the participant’s entire interest must be distributed: 1) by December 31 of the calendar year containing the fifth anniversary of the participant’s death (the “5-year rule”);<sup>6</sup> or 2) over either the designated beneficiary’s life or a period not extending beyond his or her life expectancy, commencing no later than December 31 of the calendar year following the calendar year in which the participant dies (the “lifetime distribution rule”).<sup>7</sup> In the case of an IRA, a surviving spouse who is the deceased IRA owner’s sole designated beneficiary may elect to treat the IRA as his or her own, rather than take RMDs under these after-death distribution rules.<sup>8</sup>

Section 401(a)(9)(H) waives, for 2009, the minimum distribution requirement with respect to IRAs and employer-provided qualified retirement plans that are defined contribution plans. The Internal Revenue Service (IRS) published Notice 2009-9,<sup>9</sup> setting forth guidance to financial institutions on reporting for distributions that would be RMDs if not for the 2009 RMD waiver. These issues relating to this temporary waiver of the minimum distribution requirements were explored in an article titled “The Temporary (and Limited) Waiver of the RMD Rules for 2009” that appeared in the May 2009 issue of *TAXING TIMES*. Since that time, the IRS issued Notice 2009-82,<sup>10</sup> which provides additional guidance relating to the 2009 RMD waiver. This guidance answers a

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number of the questions regarding the waiver that remained after Notice 2009-9 was published.

For the most part, the issues relating to the 2009 RMD waiver are behind us. However, as discussed below, there are several circumstances in which the waiver will affect events in 2010 and beyond. These lingering effects of the waiver require that issuers and providers of IRAs and employer-provided retirement plans monitor these situations and possibly modify their administrative systems and/or procedures to account for these events.

## II. THE POST-2009 IMPACT OF THE RMD WAIVER

Discussed below are certain situations in which the impact of the 2009 RMD waiver extends into 2010 and beyond.

### A. April 1, 2010, Required Beginning Date

With respect to a living participant, a minimum distribution is first required under section 401(a)(9) for the year in which the participant attains age 70½ or, if applicable, retires.<sup>11</sup> However, the RMD for this first “distribution calendar year”

need not be made until April 1 of the following distribution calendar year, *i.e.*, the participant’s required beginning date. A separate RMD also is required for this second distribution calendar year. Hence, in the calendar year in which the required beginning date occurs, RMDs are required for two distribution calendar years—the prior calendar year in which the participant attains age 70½ or retires, as applicable, and the current calendar year.

If a participant attained age 70½ or retired, as applicable, in 2009, the required beginning date is April 1, 2010. However, no distribution is required to be made for 2009 and, thus, no RMD for 2009 is required to be made by April 1, 2010. Under the 2009 RMD waiver, the required beginning date is not delayed.<sup>12</sup> Hence, the participant will be viewed as having died prior to the required beginning date if he or she dies prior to April 1, 2010, and, likewise, will be viewed as dying on or after the required beginning date if

he or she dies on or after April 1, 2010.<sup>13</sup> The RMD for 2010 must be made generally by Dec. 31, 2010.

### B. The 5-Year Rule

As noted above, if the participant dies prior to the required beginning date, and the participant’s entire interest is not distributed under the lifetime distribution rule, the entire interest must be distributed in accordance with the 5-year rule. Under the 2009 RMD waiver, the 5-year rule applies without regard to calendar year 2009.<sup>14</sup> Disregarding 2009 for purposes of applying the 5-year rule affects IRAs and employer-provided qualified retirement plans under which participants died in 2004-2008, and can directly impact RMDs for calendar years as late as 2014.

For example, if a participant died in 2004 prior to the required beginning date, under the 2009 RMD waiver, the 5-year period during which the entire interest must be distributed ends on Dec. 31, 2010 (instead of Dec. 31, 2009). Similarly, if a participant died in 2008, the 5-year period is extended by the 2009 RMD waiver from Dec. 31, 2013, to Dec. 31, 2014.<sup>15</sup>

### C. The Lifetime Distribution Rule

Under the lifetime distribution rule, the entire remaining interest of a participant who dies prior to the required beginning date must be distributed over the designated beneficiary’s life—or over a period not extending beyond the designated beneficiary’s life expectancy—commencing no later than December 31 of the calendar year following the calendar year in which the participant died. The designated beneficiary generally must elect to take distributions under the lifetime distribution rule by the end of the calendar year following the calendar year of the participant’s death.<sup>16</sup> The IRS clarified in Q&A-2 of Notice 2009-82 that in the case of a participant who died in 2008, this one-year election period is extended under the 2009 RMD waiver from year-end 2009 to year-end 2010.

The IRS provided a similar clarification with respect to direct rollovers by nonspouse designated beneficiaries from an employer-provided qualified retirement plan to an “inherited” IRA (within the meaning of section 408(d)(3)(C)). In particular, section 402(c)(11) provides generally that any portion of a distribution from an employer-provided qualified retirement plan of a deceased participant can be transferred tax free by the participant’s nonspouse designated beneficiary directly to an inherited IRA that is subject to the after-death

The designated beneficiary generally must elect to take distributions under the lifetime distribution rule by the end of the calendar year following the calendar year of the participant’s death.

distribution requirements under section 401(a)(9). If the plan provides that the 5-year rule is to apply where the participant dies prior to the required beginning date, the nonspouse designated beneficiary nevertheless can apply the lifetime distribution rule if the rollover is made prior to the end of the calendar year following the year of the participant's death.<sup>17</sup> Q&A-3 of Notice 2009-82 clarifies that if the participant died in 2008, this election period is extended under the 2009 RMD waiver from year-end 2009 to year-end 2010.

#### D. 2010 Rollover of 2009 RMD

An "eligible rollover distribution" (within the meaning of section 402(c)(4)) from an employer-provided qualified retirement plan generally can be rolled over tax free to an IRA or other such plan no later than the 60th day following the day of receipt.<sup>18</sup> Similarly, an amount distributed from an IRA to the IRA owner, or to the owner's surviving spouse, can be rolled over tax free to an IRA or employer-provided qualified retirement plan no later than the 60th day following the day of receipt of the distribution.<sup>19</sup> The IRS can waive the 60-day rollover deadline in certain circumstances.<sup>20</sup>

Under the 2009 RMD waiver, a distribution from an IRA or employer-provided qualified retirement plan that includes 2009 RMDs generally can be rolled over into the same or a different IRA or employer-provided qualified retirement plan.<sup>21</sup> Notice 2009-82 sets forth guidance for determining whether a distribution that includes an RMD for 2009 can be viewed as an eligible rollover distribution that is entitled to this special rollover treatment. If so, the 60-day rollover period for a 2009 RMD can extend into 2010. For example, if a participant received a distribution on Dec. 31, 2009, of an amount that, absent the 2009 RMD waiver would have been the 2009 RMD, and that qualifies for tax-free rollover treatment, the distribution can be rolled over tax free as late as March 1, 2010.

It should be noted, however, that the 2009 RMD waiver does not provide relief from the limitation in section 408(d)(3)(B) that only one distribution from an IRA can be rolled over tax free during any one-year period.<sup>22</sup> This one-rollover-per-year rule applies with respect to distributions during any 12-month period, and does not apply on a strictly calendar year basis. Hence, the distribution from an IRA of a 2009 RMD cannot be rolled over tax free under the 2009 RMD waiver if a distribution from the same IRA was rolled over tax free within the preceding year. Likewise, if the IRA distribution of a 2009 RMD

is rolled over tax free, a distribution from the same IRA in the following one-year period may not be rolled over tax free.

#### E. Post-2009 Plan Amendments

Section 201(c) of WRERA provides that a plan or contract amendment relating to the 2009 RMD waiver can be delayed until the last day of the first plan year beginning in 2011 (2012 in the case of a governmental plan), provided that the plan or contract operates as if the amendment were in effect from its effective date. However, pending further guidance, IRAs do not have to be amended for section 401(a)(9)(H) in order to provide the 2009 RMD relief.<sup>23</sup>

### III. CONCLUSION

Most of the issues relating to the 2009 RMD waiver under section 401(a)(9)(H) are behind us. However, the impact of the waiver extends beyond 2009 in a number of situations. In order to make sure that IRAs and employer-provided qualified retirement plans satisfy the section 401(a)(9) minimum distribution requirements, issuers and providers of these arrangements need to consider these situations and possibly modify their administrative systems and/or procedures to account for these situations. ◀

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#### END NOTES

- <sup>1</sup> Pub. L. No. 110-458, 122 Stat. 5092 (2008).
- <sup>2</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.
- <sup>3</sup> Section 414(i) and (j).
- <sup>4</sup> Section 401(a)(9)(C).
- <sup>5</sup> Section 401(a)(9)(B)(i).
- <sup>6</sup> Section 401(a)(9)(B)(ii); Treas. Reg. section 1.401(a)(9)-3, Q&A-2.
- <sup>7</sup> In the case of a designated beneficiary under an employer-provided qualified retirement plan, distribution under the lifetime distribution rule can be delayed under section 401(a)(9)(B)(iv) until December 31 of the year following the calendar year in which the participant would have attained age 70½.
- <sup>8</sup> Treas. Reg. section 1.408-8, Q&A-5.
- <sup>9</sup> 2009-5 I.R.B. 419.
- <sup>10</sup> 2009-41 I.R.B. 491.
- <sup>11</sup> Treas. Reg. section 1.401(a)(9)-5, Q&A-1(b).
- <sup>12</sup> Section 401(a)(9)(H)(ii)(I).
- <sup>13</sup> Staff of J. Comm. on Tax'n, 110th Cong., Technical Explanation of H.R. 7327, the "Worker, Retiree, and Employer Recovery Act of 2008," as passed by the House on December 10, 2008, at 26-27 (J. Comm. Print 2008) ("WRERA Bluebook").
- <sup>14</sup> Section 401(a)(9)(H)(ii)(II).
- <sup>15</sup> WRERA Bluebook at 27.
- <sup>16</sup> Treas. Reg. section 1.401(a)(9)-3, Q&A-4(c).
- <sup>17</sup> See Q&A-17(c)(2) of Notice 2007-7, 2007-1 C.B. 395.
- <sup>18</sup> Section 402(c); section 403(a)(4)(B); section 403(b)(8)(B); section 457(e)(16)(B).
- <sup>19</sup> Section 408(d)(3).
- <sup>20</sup> Section 402(c)(3)(B); section 408(d)(3)(I).
- <sup>21</sup> See section IV and Q&A-6 of Notice 2009-82.
- <sup>22</sup> See Q&A-4 of Notice 2009-82.
- <sup>23</sup> See Q&A-1 of Notice 2009-82.