



## IRS Provides Guidance on 2009 Waivers of Required Minimum Distributions and DOL Says Summary Prospectus Satisfies ERISA Section 404(c)

*The IRS has issued Notice 2009-82 providing needed guidance for employers on the waiver of 2009 required minimum distributions (RMDs), including sample plan amendments. The guidance also provides plan operational relief for the period of January 1, 2009 through November 30, 2009, rollover relief until November 30, 2009, and Q&As that address miscellaneous issues related to the waiver of 2009 RMDs.*

*Separately, the DOL issued Field Assistance Bulletin (FAB) 2009-3 providing that the prospectus requirement for ERISA Section 404(c) compliance can be satisfied by furnishing participants with a "Summary Prospectus," a new short-form prospectus approved by the Securities and Exchange Commission (SEC) earlier this year as part of its enhanced disclosure framework for mutual funds.*

### Background

Section 401(a)(9) of the Internal Revenue Code provides RMD rules that apply to qualified retirement plans, including stock bonus, pension and profit-sharing plans, and individual retirement accounts (IRAs). Sections 403(b) and 457(b) plans are also subject to RMD rules. Under these rules, benefit payments from IRAs must begin the April 1 following the year in which the individual reaches age 70½ and payments from employer-sponsored plans, the April 1 following the later of age 70½ or actual retirement.

The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) added new Section 401(a)(9)(H) to provide a temporary waiver of 2009 RMDs from IRAs and defined contribution plans such as 401(k) or 403(b) plans. (See our December 15, 2008 [For Your Information](#).) However, 2009 RMD waivers are not available for defined benefit plans. Because the waivers are limited to 2009, a participant's required beginning date is determined without regard to a 2009 waived RMD for calendar years after 2009. If the 5-year rule for post-death distributions applies, the 5-year period is determined without regard to 2009.

Section 402(c) provides that distributions from qualified plans are not includible in taxable income rolled over to an "eligible retirement plan" no later than the 60<sup>th</sup> day following the day of receipt, but gives IRS authority under Section 402(c)(3)(B) to waive the 60-day rollover deadline in certain circumstances.

### IRS Notice 2009-82

In response to questions by plan sponsors on 2009 RMD waivers, the IRS has issued [Notice 2009-82](#).

**Sample Plan Amendments.** The notice includes two sample plan amendments that plan sponsors may adopt or use in drafting individualized plan amendments. Both sample amendments give recipients the choice of whether to receive distributions relating to 2009 RMDs, but only if the distribution would be equal to the 2009 RMDs or would be one of a series of substantially equal distributions that includes the 2009 RMD and is expected to last for the participant's life, the joint lives of the participant and beneficiary, or a period of at least 10 years (Extended RMD).

The first sample amendment provides that unless the participant elects otherwise, the plan will pay out distributions of 2009 RMDs, whereas the second sample amendment provides as a default that the plan will not pay out distributions that include 2009 RMDs. Both sample amendments also provide direct rollover choices (in addition to any 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., the plan will not offer direct rollovers for 2009 RMDs or amounts that can be rolled over solely due to the transition relief in the notice).

A plan sponsor may use either sample plan amendment, regardless of the current plan language, but may have to modify it to conform to the plan's format, terms and administrative procedures. Any 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), as evidenced by a written document that is signed and dated by the employer, including an adopting employer of a pre-approved prototype plan. The amendment, even if modified to conform to the plan, will not affect reliance on a favorable opinion or determination letter or the pre-approved status of a master and prototype or volume submitter plan.

**Plan Operation Relief until November 30, 2009.** The notice provides transition operational compliance relief for plan sponsors whether or not they paid 2009 RMDs (including Extended 2009 RMDs), or offered plan participants and beneficiaries waivers or direct rollovers of amounts eligible to be waived for the period beginning January 1, 2009 and ending November 30, 2009. No plan operational failures will be deemed to have occurred during this period.

**Rollover Relief until November 30, 2009.** The notice allows payments eligible for the RMD waiver that were already received this year to be rolled over to an eligible retirement plan (including the same plan), provided the other requirements of Section 402(c) eligible rollover distributions are met. Therefore, the IRS has extended the 60-day rollover period, allowing rollovers of RMDs during 2009 to be made until the later of 60 days after the distribution or November 30, 2009.

**Miscellaneous Questions & Answers.** The notice includes nine questions and answers concerning waivers of 2009 RMDs. The questions cover technical issues such as the timing of an election of the 5-year rule in Section 401(a)(9)(B)(ii) or the life expectancy rule in Section 401(a)(9)(b)(iii), the timing of rollovers by nonspouse beneficiaries, spousal consent requirements, rollovers of waived 2009 RMDs back into the same plan, and tax withholding under Section 3405(c) for payments that include 2009 RMDs.

## DOL Field Assistance Bulletin 2009-3

ERISA Section 404(c) regulations require plan fiduciaries to provide a participant or beneficiary in a participant-directed individual account retirement plan (such as a 401(k) plan) sufficient information to make informed investment decisions. In Advisory Opinion 2003-11A, the DOL said that the use of a mutual fund Profile under former Rule 498 of the Securities Act of 1933 (Securities Act) would satisfy the prospectus delivery obligation.

On January 26, 2009, the SEC published amendments to Form N-1A, the registration form for mutual funds, requiring a summary section at the front of a fund's long-form prospectus, and a new rule replacing Rule 498. The new Rule 498 permits a fund to meet its prospectus delivery obligations by providing a stand-alone "Summary Prospectus" (rather than the Profile) and posting the long-form prospectus online. The Summary Prospectus, if used by a fund, must include the same information as the summary section of the long-form prospectus.

The DOL has now issued [FAB 2009-3](#), which provides that a plan fiduciary of a participant-directed account plan can use a mutual fund's Summary Prospectus to satisfy its prospectus delivery obligations under ERISA Section 404(c) regulations. Under Section 404(c), the plan administrator can furnish, immediately before or after a participant's initial investment in a mutual fund, the most recent Summary Prospectus received by the plan. Although the term "prospectus" is not defined in the Section 404(c) regulations, in the DOL's view, the term prospectus includes a Summary Prospectus.

The DOL noted that the Summary Prospectus is a short-form document, written in plain English in a clear and concise format. In addition, the DOL said it provides a summary of key information about a mutual fund that is useful for evaluating and comparing plan investment options and making informed investment decisions. Further, the Summary Prospectus provides an Internet address that leads directly to the long-form prospectus as well as a toll free (or collect) telephone number and email address for obtaining the long-form prospectus and other information at no cost by email or US post.

## Conclusion

The new IRS guidance provides important transition relief and needed immediate guidance for plan sponsors to administer 2009 RMDs. The DOL's FAB also provides clarification for plan sponsors that rely on the protections of Section 404(c) in providing participants information to make informed investment decisions under self-directed account plans.

Buck's consultants would be pleased to assist you with any plan amendments or administrative issues relating to this guidance.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*