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ASPPA Comments on the Suspension of Required Minimum Distributions in 2009

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The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). These comments relate to WRERA §201 which suspends the application of Internal Revenue Code (IRC) §401(a)(9) in 2009 for certain retirement plans.

ASPPA is a national organization of more than 6,500 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Summary of Recommendations

Discussion of Issues

A. Issues with Respect to a Retirement Plan

1. Optional or Mandatory Suspension

WRERA suspends Required Minimum Distributions (RMDs) under IRC §401(a)(9) for 2009, but it is not clear whether a plan must suspend distributions or may continue making distributions as though the law had not changed. If a plan incorporates the provisions of IRC §401(a)(9) by reference, then suspension might be required (at least to be consistent with the existing terms of the plan). If a plan does not incorporate the provisions of IRC §401(a)(9) by reference, then

one could interpret WRERA §201(c)(2) to provide that waiving RMDs by a plan is optional (*i.e.*, the terms of the plan can be followed).

The purpose of the law is to provide relief to individuals subject to RMDs and to minimize the burden to plans and plan providers. Many plans will want to continue making distributions as though the law had not changed. In fact, some plans make monthly distributions and may have already distributed amounts in 2009.

ASPPA recommends that all plans, regardless of how they are currently drafted, be permitted to either continue or suspend distributions for all, or part, of 2009. This would be consistent with the intention of the law and would minimize the burden, and expense, to plans.

2. Participant Consent Requirements

If a plan sponsor wants (or is required) to suspend payments, does the plan need to provide participants/beneficiaries with the option to continue or suspend payments? An automatic suspension of benefits might cause financial concerns to participants who may be depending on continued payments. Furthermore, an automatic suspension might be construed as a violation of the anti-cutback rules of IRC §411(d)(6) [at least with respect to plans that do not incorporate IRC §401(a)(9) by reference].

For plans subject to the qualified joint and survivor annuity rules of IRC §417 (*e.g.*, money purchase plans), guidance is needed regarding spousal consent requirements when a plan suspends or continues payments. For example, suppose in 2005 a participant, with spousal consent, elected to take installments of the RMD amount only. The plan decides not to distribute the 2009 RMD unless the participant requests it. Is spousal consent required if the participant requests the distribution? Again, one of the goals of the new law is to minimize the burden to plan sponsors. If plan sponsors must obtain spousal consent, then it will either increase plan costs or discourage employers from offering a suspension of RMDs.

ASPPA recommends that, if a plan sponsor wants to permit suspending some or all 2009 RMD payments (including installment payments elected to satisfy the RMD requirements), then plans must allow participants to elect whether to continue or suspend payments. Such election could be structured with a negative consent approach (*e.g.*, payments continue until notified to stop, or payments stop unless notified otherwise). ASPPA also recommends that for plans subject to IRC §417, spousal consent is not required, regardless of whether distributions are suspended or continued.

3. Form 1099-R Reporting

If a plan continues to make distributions in 2009, guidance is needed on how such distributions are reported on Form 1099-R. WRERA §201(b) permits a plan to treat distributions as though they are eligible rollover distributions, but not for purposes of the direct rollover, 402(f) notice, and mandatory withholding provisions of the IRC. If a participant elects a direct rollover of a distribution, then presumably the plan would report it as such on Form 1099-R. But, if an actual distribution is made, it is not clear how such distribution should be reported. It would be consistent with WRERA §201(b) to permit the plan to report the distribution as one that is not an eligible rollover distribution (*e.g.*, not subject to 20% withholding), even though the distribution might otherwise be eligible to be rolled over (whether it is an eligible rollover distribution is a separate issue discussed below).

ASPPA recommends that the IRS provide guidance permitting plans that continue to make distributions as though the law had not changed to report such distributions on Form 1099-R as non-eligible rollover distributions, to the extent not directly rolled over.

4. Plan Amendments

WRERA §201(c)(2) permits plans to operate in accordance with the law provided a conforming amendment is adopted no later than the last day of the plan year beginning on or after January 1, 2011 (or 2012 for governmental plans). This provision would apply to plans that want to suspend distributions but do not incorporate IRC §401(a)(9) by reference. However, guidance is needed for plans that incorporate §401(a)(9) by reference but want to continue making distributions as though the law had not changed. Presumably a plan amendment needs to be made, but clarification is needed regarding the timing of such amendment. Specifically, guidance is needed as to whether an amendment that provides for continued payments would violate the IRC §411(d)(6) cut-back rules and if not, whether sponsors can delay adoption of a conforming amendment until the last day of the 2011 plan year (2012 for governmental plans).

ASPPA recommends that no amendments be required for plans that incorporate IRC §401(a)(9) by reference where the plan will suspend RMDs for 2009 (at a participant's election, if elected by the plan sponsor). For plans that incorporate IRC §401(a)(9) by reference but want to continue making distributions in 2009 as though the law had not changed, then, ASPPA recommends that the IRS provide IRC §411(d)(6) relief and treat the amendment to be integral to a change in the qualification requirements so that the timing of amendments would be subject to WRERA §201(c)(2). In addition, ASPPA also recommends that the IRS provide model or good faith language that plans may use to implement the WRERA provisions.

B. Issues with Respect to Participants (Eligible Rollover Distributions)

As alluded to earlier, WREDA §201(b) modified IRC §402(c)(4) by providing that where a plan continues to make distributions in 2009, the plan may treat the distribution as being an eligible rollover distribution.

Specifically, WREDA §201(b) provides, in relevant part:

“If all or any portion of a distribution during 2009 is treated as an eligible rollover distribution but would not be so treated if the minimum distribution requirements under section 401(a)(9) had applied during 2009...”

However, if a plan continues to make a distribution in 2009, it is not clear whether all or a portion of the distribution is eligible for rollover treatment. If it is treated as part of a substantially equal periodic payment in accordance with IRC §402(c)(4)(A), then it is still not an eligible rollover distribution. Treas. Reg. §1.401(c)-2, Q&A 5 provides that the principles of IRC §72(t)(2)(A)(iv) apply in determining whether distributions are part of a series of substantially equal periodic payments. Rev. Rul. 2002-62 provides that if a series of distributions are made by following the RMD tables, then the series are substantially equal period payments for purposes of IRC §72.

It would seem to frustrate the purpose of the law if a plan were to continue making distributions in 2009, yet participants were not able to rollover all or a portion of such distributions.

ASPPA recommends that a participant/spousal beneficiary that receives 2009 RMDs be able to treat them as eligible rollover distributions that can be (1) directly rolled over to an IRA or another eligible retirement plan, if permitted by the plan sponsor, or (2) indirectly rolled over, in any event. This should be the case regardless of whether a participant had affirmatively elected to receive RMDs or whether the plan was making RMDs due to no election by a participant (*i.e.*, because the plan was required to make the distributions). In addition, where a participant had elected substantially equal period payments of amounts greater than the RMD, ASPPA recommends that participants be able to treat the amount that would have been an RMD for 2009 as an eligible rollover distribution.

ASPPA also recommends that, if continued payments in 2009 can be rolled over by participants, the IRS provide relief from the 60-day rollover period. Many plans may have already made distributions in 2009 and this relief would enable those participants to take advantage of the rollover option.



These comments were prepared on behalf of the ASPPA Government Affairs Committee and were primarily authored by Robert M. Richter, APM, Co-chair. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration.

Sincerely,

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