PUBLICATION

Retirement Plan Decisions Required By November 30, 2009

November 12, 2009

For 2009 only, Congress has suspended the normal rules which are applicable to certain qualified retirement plan distributions. However, a decision must be made by November 30th as to how to utilize this suspension. See IRS Notice 2009-82.

By way of background, the federal tax laws require minimum distributions to participants, generally after the later of age 70 ½ or termination of employment, or following the death of the participant in the case of distributions to beneficiaries. Essentially the same rules apply to IRAs. Under the normal rules, a required minimum distribution may not be rolled to an IRA or other tax-sheltered arrangement to avoid current taxation.

This suspension for 2009 applies only to defined contribution plans such as 401(k) plans, profit sharing plans, and to IRAs, but not to defined benefit pension plans. The suspension also applies only to amounts which would otherwise be required to be distributed with respect to the year 2009. By way of example, the suspension would apply to the otherwise-required 2009 minimum distribution for a person over age 70 ½ whose employment terminated in 2006. By further example, the suspension would not apply to a minimum distribution amount with respect to 2008 for a person who became 70 ½ in 2008 and terminated employment in that year but waited until April 1, 2009 to take the 2008 required minimum distribution, but would apply to the amount required to be distributed with respect to 2009 by December 31, 2009.

The IRS, in Notice 2009-82 issued September 24, 2009, issued guidance on how to administer the rules for 2009. See IRS Notice 2009-82. Any minimum distribution payment otherwise required for a participant or beneficiary for 2009 is not required to be paid. Where the five-year payout rule would apply to a beneficiary, the payment is now required by the end of the sixth year following the death of the participant. If annuity payments are to be made and the first payment was due by the end of 2009, the first payment may be delayed until the end of 2010. Amounts which were already paid as minimum distributions for 2009 were not required, and may be rolled over within the usual 60 day period, or by November 30, 2009 if later.

These suspension rules for minimum distribution purposes do not exempt payments which are required under other Internal Revenue Code provisions. For example, if payments are being made in substantially equal annual payments to avoid the 10% early distribution tax under Code Section 72, and if the 2009 distribution which is required for Section 72 purposes is not made, then the 10% penalty tax will be recaptured on all distributions, including prior year payments.

The new IRS guidance requires plan sponsors to make decisions by November 30, 2009, and the plan must then be operated accordingly. First, all normally required distributions can be made as usual. Alternatively, the distributions can either be made automatically or not made automatically, unless in either case the participant elects otherwise. Finally, if distributions are made, the plan administrator must decide whether or not direct rollovers will be offered. If the choices made deviate from the normal rules, a plan amendment is required by the end of the 2011 Plan year (2012 for governmental plans).

Should you have questions or wish to discuss any of the foregoing, please contact one of the attorneys in the Firm's Tax Department.