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May 29, 2009

Michael Mundaca
Acting Assistant Secretary for Tax Policy
U.S. Department of the Treasury
Room 3104
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Clarissa Potter
Acting Chief Counsel
Internal Revenue Service
Room 3026
1111 Constitution Avenue, NW
Washington, DC 20224

RE: 2009-2010 Business Plan Suggestions on Retirement Security Issues

Dear Acting Assistant Secretary Mundaca and Acting Chief Counsel Potter:

The Investment Company Institute (the "Institute")¹ is pleased to submit recommendations regarding retirement security issues for projects to be included on the 2009-2010 Guidance Priority List. A separate ICI submission describes our recommendations regarding regulated investment companies.

I. Items from 2008-2009 Guidance Priority List

First, we request that the Service update the safe harbor language under section 402(f) to reflect changes made by the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). EGTRRA implemented a new automatic rollover provision and requires that 402(f) notices explain the effect of the automatic rollover rules. Although Notice 2005-5 provides guidance on automatic rollovers, the Service has not yet updated Notice 2002-3's model 402(f) safe harbor language. The revised 402(f) notice should include an explanation of rollover options available with respect to designated Roth contribution accounts. Because the automatic rollover rules and designated Roth contribution rules are already in effect, updated 402(f) language is needed now to allow for the proper administration of rollover distributions, especially for plans with mandatory distribution provisions and designated Roth accounts. While we emphasize the importance of publishing a revised model

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$9.71 trillion and serve over 93 million shareholders.

notice as soon as possible, we also believe that, given the length and complexity of the current notice, a revised and simplified notice format would greatly benefit plan participants.

Second, we request that the Service finalize the proposed regulations implementing section 1102 of the Pension Protection Act, which instructed the Secretary of the Treasury to modify the regulations under section 411(a)(11) to require disclosure of the consequences of failing to defer receipt of a distribution from a defined contribution plan.² We strongly recommend that the Service finalize the requirements as proposed. As we stated in our comment letter,³ the proposal strikes the right balance by alerting the participant that the plan may have investments, or fee structures, different from those obtainable in an IRA, and alerting the participant that more information is available. This approach will not overwhelm the participant with information that obscures the key information while also assuring the participant has access to information consequential to the decision whether to take or defer a distribution from the plan.

II. New 2009-2010 Guidance Priority List Items

The Institute requests that the Service add the following retirement security matters to the 2009-2010 Guidance Priority List. First, we request additional guidance on the 2009 waiver of the required minimum distribution (“RMD”) rules, enacted under the Worker, Retiree, and Employer Recovery Act of 2008. The attached list of issues needing guidance originally was communicated to Treasury in February 2009. Guidance on rollover issues (Item 7 in the attached document) is of particular importance. For example, certain retirees may not be able to use the 2009 waiver to the fullest extent unless Treasury waives the 60-day rollover rule or permits RMD-eligible holders of inherited IRAs to rollover would-be RMD funds. In addition, given the complexity of RMD rules and temporary nature of the waiver, we recommend that Treasury establish a “good faith” waiver compliance period for plan sponsors, RMD-eligible individuals and service providers.

Second, we request guidance, possibly in the form of a revenue ruling, regarding how to accomplish an effective 403(b) plan termination.⁴ In particular, there is significant confusion surrounding termination of 403(b) plans funded through individual custodial accounts. Effective plan termination depends on distribution of all accumulated benefits within a reasonable period of time. Individual custodial accounts, however, typically do not provide for distribution without the consent of the participant. Therefore, any participant who fails to request a cash distribution or rollover of his or her 403(b) account could jeopardize the effectiveness of the termination. To resolve this issue, we recommend that guidance provide for at least two possible alternatives as valid means of plan

² 73 Fed. Reg. 59575 (Oct. 9, 2008).

³ See ICI letter to Internal Revenue Service re proposed regulation (REG-107318-08), dated January 7, 2009.

⁴ See ICI letter to W. Thomas Reeder, dated March 17, 2009; and ICI letter to W. Thomas Reeder, dated Nov. 12, 2008.

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termination: (1) taxation of any remaining balances in individual accounts after a specified period (e.g., one year) and (2) automatic rollover to an IRA after a specified period, to the extent permitted by the custodial agreement and plan. Guidance in this regard will facilitate any necessary amendments to custodial agreements to permit automatic rollovers to IRAs in connection with plan termination and would allow custodians to rely on an employer's direction that a plan is being terminated. The Institute has strongly urged that this guidance be published as soon as possible, given that some employers have begun the process of terminating their 403(b) plans pursuant to the 2007 final regulations issued under section 403(b).⁵

Third, we request guidance from the Service permitting payors to mask social security numbers on Forms 1099 and 5498 sent to individual taxpayers. Identity theft is a serious problem, as evidenced by the 2007 report of the President's Task Force on Identity Theft, which recommended that Federal agencies decrease unnecessary use of social security numbers.⁶ In a letter to the Service dated September 18, 2008, ICI recommended that payors be permitted to mask the entire social security number on these forms. If the Service determines to permit truncation instead of full masking, we suggested that the Service should specify a uniform truncation standard for payors to use, such as masking the first five digits and leaving the last four digits visible.

Fourth, we request guidance on the proper tax treatment of escheated amounts from retirement plans and IRAs. In 2004, the Department of Labor ("DOL") issued guidance regarding missing participants in terminating defined contribution plans.⁷ The DOL guidance requires that a plan administrator use certain search methods to locate a missing participant. If all efforts to locate the missing participant fail, the DOL provides, then the fiduciary should consider distributing the amounts to a federally insured bank account or escheating them to a state unclaimed property fund. The requested business plan guidance should address certain federal tax implications of escheatment, including (1) whether Form 1099-R reporting is required, (2) whether payors should designate amounts as escheated and, if so, how payors should make such a designation, and (3) whether withholding is required. We have requested this guidance in prior years and we wish to reiterate its importance. We understand that several states recently have increased their efforts to collect unclaimed property in IRAs and other retirement plans.

Finally, we request guidance complementing the DOL's final regulations on the termination of abandoned plans.⁸ This guidance should implement language in the preamble to the DOL's regulations that the Service will not challenge the qualified status of any plan termination under the DOL's

⁵ 72 Fed. Reg. 41128 (July 26, 2007).

⁶ See Combating Identity Theft – The President's Identity Theft Task Force Report (April 2007).

⁷ U.S. Department of Labor, Employee Benefits Security Administration, Field Assistance Bulletin No. 2004-02, dated September 30, 2004.

⁸ 71 Fed. Reg. 20820 (April 21, 2006).

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regulations or take any adverse action against a “qualified termination administrator” (the party that assumes responsibility for plan distributions and termination), the plan, or any participant or beneficiary of the plan as a result of the termination, provided that several conditions are met.⁹ The guidance also should clarify how parties other than a participant can establish IRAs for abandoned plan accounts;¹⁰ under the DOL’s regulations, IRAs for abandoned plan participants could be established by default — without the participant’s involvement — in a manner similar to IRAs established under the automatic rollover rules of EGTRRA.

* * *

If we can provide you with any additional information regarding these issues, please do not hesitate to contact the undersigned at 202/326-5826.

Sincerely,

/s/ Mary Podesta

Mary Podesta
Senior Counsel – Pension Regulation

Attachment

cc: J. Mark Iwry

⁹ These conditions are as follows: (1) the qualified termination administrator reasonably determines whether, and to what extent, the survivor annuity requirements of sections 401(a)(11) and 417 apply to any benefit payable under the plan; (2) each participant and beneficiary must have a non-forfeitable right to the benefit as of the deemed termination date, subject to income, expenses, gains, and losses between that date and the distribution date; and (3) participants and beneficiaries must receive notification of their rights under section 402(f).

¹⁰ See Notice 2005-5; Institute Letter to the U.S. Department of Labor, dated March 10, 2003.

2009 RMD Waiver Issues

(for Section 201 of the The Worker, Retiree, and Employer Recovery Act of 2008)

1. **Waiver Applicability.** Treasury¹ should clarify the types of plans to which the 2009 RMD waiver applies. For example, Treasury should explain whether the 2009 RMD waiver applies to profit-sharing plans, money purchase pension plans and DC plan participants who annuitized their accounts.
2. **Direct Rollovers and Withholding Rules in 2009.** In 2009, would-be RMDs are treated as “eligible rollover distributions” under Code Section 402(c)(4), as amended by the Act, except for purposes of the section 402(f) notice, mandatory 20% withholding, and the right to a direct rollover. Treasury should confirm that plans are permitted, but not required, to apply one or more of these features to the would-be RMDs, consistent with an explanation in the JCT Report.²

Clarity on this issue is important to allow plans to implement procedures that work best for them. For example, some plans may prefer to apply a uniform withholding regime on all distributions, including would-be RMDs, to minimize confusion and processing mistakes. Some plans may wish to allow terminating participants to directly rollover their entire accounts, including would-be RMDs. Some plans may wish to provide a direct rollover right for would-be RMD amounts, but may not revise their 402(f) notice for this one-year waiver.

3. **IRAs — IRS Traditional Individual Retirement Custodial Account (Form 5305-A).** We recommend that Treasury provide guidance to IRA providers using Form 5305-A on whether any amendment is needed and, if so, provide sample amendment language.
4. **Qualified Plans — Whether Payment Suspension is Required; LRMs and Required Plan Amendments.** Treasury should clarify whether a plan is required to suspend would-be RMD distributions for 2009 and if it does not, what, if any, amendments would be required. While plans vary, Treasury should explain operational steps and publish plan amendments, if any, that would be required for a plan that uses the sample 401(a)(9) language published by the Internal Revenue Service in the List of Required Modifications.
5. **Qualified Plans that Do Not Permit Distributions Other Than RMDs.** In some plans, the only basis for a payment of less than the entire vested account after termination from employment is when a plan

¹ For purposes of this letter, the term “Treasury” means “Treasury and IRS,” unless expressly stated otherwise.

² See Technical Explanation of H.R. 7327, The “Worker, Retiree, and Employer Recovery Act of 2008,” as Passed by the House on December 10, 2008, JCX-85-08, *27 (dated Dec. 11, 2008).

incorporates Code section 401(a)(9) by reference. Treasury should clarify the process these plans should follow (including amendments) in continuing to make would-be RMD payments. To the extent possible, we recommend that Treasury provide relief that does not require plans to expend funds and resources on plan amendments to comply with the temporary waiver.

6. Qualified plans Subject to QJSA Requirements. Treasury should clarify that plans requiring spousal consent for all plan distributions except RMDs should not require spousal consent for would-be RMDs in 2009. Similarly, to minimize costs to plans, we recommend that Treasury provide relief that does not require plan amendments.
7. RMD Waiver and Rollovers. It appears that the only mechanism by which retirees³ may re-contribute funds withdrawn from RMD-eligible accounts in 2009 is through a traditional rollover. Treasury should clarify a number of issues related to rollovers of would-be RMD amounts.
 - a. The 60-day and One IRA Rollover Per a 12-month Period Restrictions. Because the Act was not enacted until late in the year, these rollover restrictions may prevent some retirees from using the waiver. Retirees who use systematic withdrawals may receive 2009 distribution payments before they learn of the 2009 RMD waiver. While providers are doing their best to inform retirees about the waiver and applicable rules, many retirees may not realize immediately that they have 60 days to rollover each distribution, and that they also need to comply with one IRA rollover per a 12-month-period restriction.

Treasury should waive the rollover restrictions that would preclude retirees from using the RMD waiver. At the least, Treasury should waive the 60-day restriction pursuant to section 408(d)(3)(I) of the Code, which permits Treasury to waive the 60-day requirement “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.”

- b. Inherited IRAs for Non-Spouse Beneficiaries. Code rules do not permit a non-spouse beneficiary of an IRA to rollover funds into or out of an inherited IRA. Because a rollover is the mechanism by which a taxpayer may re-contribute what would have been RMD funds back into a retirement account, the rollover limitation applicable to inherited IRAs appears to prevent beneficiaries of inherited IRAs from being able to use the 2009 RMD waiver if they receive any distributions in 2009. This result could especially be inequitable for beneficiaries set up for systematic payments who may receive their first round(s) of payments in 2009 before they learn of their right to suspend would-be RMD payments. We recommend that Treasury allow non-spouse beneficiaries to rollover would-be RMD funds in the same manner as any other IRA holder.

³ For purposes of this letter, the term “retiree” means an RMD-eligible taxpayer unless stated otherwise.

- c. Rollovers into the “Same” Plan. Treasury should clarify (i) whether a plan that made would-be RMD payments is required and/or permitted to accept those returned distributions, (ii) whether the same interpretation would apply to terminated participants, and (iii) any required procedural steps.
 - d. Rollover Amounts. Treasury should confirm that retirees may rollover any amount (up to the would-be 2009 RMD amount) that was distributed in 2009 that would have been considered an RMD but for the 2009 RMD waiver. Treasury should also explain how retirees should document their RMD rollovers (especially if they make one rollover that aggregates distributions from several RMD-eligible accounts).
 - e. Rollovers by Beneficiaries. Treasury should confirm that a beneficiary may include would-be RMD amounts in a rollover.
8. Systematic Withdrawal Payments and Series of Substantially Equal Payments. Some retirees satisfy their RMD requirements through receiving “a series of substantially equal periodic payments.” Treasury should confirm that (i) these retirees can suspend any payments that would have been for the purpose of satisfying the 2009 RMD requirements; and that (ii) they can benefit from the same rollover rules as any other retirees in 2009. Any other interpretation would be inequitable to this subset of retirees and contrary to Congress’ intent to waive the 2009 RMD obligations for all RMD-eligible individuals.
- Treasury should also confirm that simply because a retiree relies on systematic payments to satisfy his or her RMD obligations, those payments would not be treated as “a series of substantially equal periodic payments” in 2009.
9. Qualified charitable distributions under Code section 408(d)(8). Treasury should confirm that IRA distributions from RMD-eligible accounts made for charitable purposes in accordance with Code section 408(d)(8) will continue to be excludable from gross income.
10. Life expectancy tables. Treasury should confirm that the life expectancy tables in 2010 would apply in the same manner if there were no RMD waiver in 2009.