



Alert

Employee Benefits and Executive Compensation Client Service Group

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To: Our Clients and Friends

December 18, 2013

IRS Issues New Guidance on In-Plan Roth Rollovers

On December 11th, the IRS issued new guidance ([Notice 2013-74](#)) regarding rollover of a distribution from an individual's non-designed Roth account within a retirement plan to his or her designated Roth account in the same plan (often referred to as "In-Plan Roth Conversions" or "In-Plan Roth Rollovers").

This new guidance relates to the expansion of such rollovers which were introduced by the American Taxpayer Relief Act of 2012 ("ATRA"). Effective September 27, 2010, a plan that includes a qualified Roth contribution program can allow employees to roll over "not otherwise distributable" amounts in an In-Plan Roth Rollover. Following ATRA (and effective for rollovers made after December 31, 2012), the rollover of such amounts will not be treated as violating the statutory distribution restrictions applicable to elective deferrals.

The new guidance clarifies a number of points which plan sponsors should be aware of when adding and/or administering an In-Plan Roth Rollover feature:

1. Amount Eligible for and Tax Treatment of In-Plan Roth Rollovers

The new guidance explains that the "not otherwise distributable" amounts which are permitted to be rolled over include the following types of contributions (and any earnings thereon):

- Elective deferrals in 401(k) plans and 403(b) plans;
- Matching contributions and non-elective contributions; and
- Annual deferrals made to governmental 457(b) plans.

Although any such rolled over amount is not subject to withholding, a participant making an In-Plan Roth Rollover may need to increase his or her withholding or make estimated tax payments to avoid an underpayment penalty.

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2. Distribution Restrictions on In-Plan Roth Rollovers

The Notice also clarifies that any amount rolled over (including applicable earnings) to a designated Roth account remains subject to the distribution restrictions that were applicable to such amount before the in-plan Roth rollover. As an example, an In-Plan Roth Rollover made from a participant's 401(k) plan pre-tax elective deferral account prior to such participant reaching age 59½ cannot be distributed from the plan prior to his or her attainment of age 59½ (or the occurrence of another permitted distribution event under the 401(k) rules). Plan sponsors should keep such limitations in mind in drafting/revising In-Plan Roth Rollover provisions for their plans.

3. Extended Deadline for Plan Amendments

For 401(k) plans generally, the new guidance imposes a deadline for amendments providing for In-Plan Roth Rollovers of “not otherwise distributable” amounts to the *later of* (a) the last day of the first plan year in which the amendment is effective or (b) December 31, 2014 (provided that the amendment is effective as of the date the plan first operates in accordance with the amendment.)

Additionally, for plan sponsors of safe harbor 401(k) plans, the new guidance provides a temporary period (ending December 31, 2014) during which a mid-year change to provide for such rollovers is permitted. This is good news for 401(k) plan sponsors who have either not previously amended their plan documents for In-Plan Roth Distributions or desire to amend their plan documents in light of this new guidance.

For 403(b) plans, plan sponsors must still rely on the remedial period provided for in [Rev. Proc. 2013-22](#) which allows such plans to make remedial amendments to correct form defects retroactive to January 1, 2010 (or the date the plan is established). The new guidance notes that the IRS will announce the end date of this remedial amendment period around the time it issues opinion and advisory letters for pre-approved 403(b) plans.

The extended deadline for plan amendments applies to a plan amendment to (i) permit In-Plan Roth Rollovers; (ii) permit elective deferrals to be designated as Roth contributions; and (iii) provide for acceptance of rollover contributions by designated Roth accounts.

4. Additional Rules Applicable to All In-Plan Roth Rollovers

The Notice also provides an assortment of additional rules applicable to In-Plan Roth Rollovers, whether of “not otherwise distributable” amounts or not, which include the following:

- a. ***Restrictions on Type of Contribution*** - A plan sponsor may place restrictions on both the type of contributions eligible for In-Plan Roth Rollover and the frequency of such rollovers. However, such restrictions remain subject to the nondiscrimination requirements which are normally applicable to plan benefits, rights and features.
- b. ***Discontinuance of In-Plan Roth Rollovers*** - An amendment to eliminate a plan's In-Plan Roth Rollover provisions is subject to discriminatory timing rules (i.e., whether the timing of a plan amendment (or series thereof) has the effect of discriminating significantly in favor of highly-compensated employees). However, In-Plan Roth Rollover amendments are not protected

benefits under the qualified Roth contribution program rules and, as such, their removal / discontinuance would not violate such rules.

- c. ***First Contribution to Designated Roth Account*** - If a participant's In-Plan Roth Rollover is such participant's first contribution to his or her designated Roth account, then the 5-taxable-year period of participation required for qualified distributions begins on the first day of the first taxable year in which the employee makes such rollover.
- d. ***Net Unrealized Appreciation ("NUA") Rules*** - For the purpose of certain special tax rules on NUA on employer securities, an In-Plan Roth Rollover must be treated as a distribution in determining eligibility for such treatment.
- e. ***Top heavy Status*** - For the purposes of determining top-heavy status, In-Plan Roth Rollovers are deemed to be "related rollovers". As such, the plan must count the rollover in determining the present value of accrued benefits for testing purposes. As the new guidance notes, a plan which permits In-Plan Roth Rollovers is both the accepting and distributing plan for such testing purposes.
- f. ***Treatment of Excess Amounts*** - Where a participant rolls over all of his or her funds in an In-Plan Roth Rollover and it is later determined that all or a portion of such rollover is an "excess deferral" or an "excess aggregate contribution" the plan must distribute the excess amount (plus applicable earnings) from the designated Roth account, even if the amount was a "not otherwise distributable" amount when the rollover took place.

For updates and further analysis on these developments, please visit the blog of the Bryan Cave Employee Benefits and Executive Compensation team at www.benefitsbryancave.com.

If you have any questions regarding anything discussed in this Alert, the attorneys and other professionals of the [Employee Benefits and Executive Compensation](#) group of Bryan Cave LLP are available to answer your questions.

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