

IRS Issues Guidance on In-Plan Roth Rollovers under 401(k) and 403(b) Plans

The IRS recently issued Notice 2010-84, which provides a series of questions and answers concerning how employers that sponsor 401(k) plans and 403(b) plans (Plans) may implement in-plan Roth rollovers as permitted under the Small Business Jobs Act of 2010 (Act). The guidance addresses topics such as the deadlines for amending Plans to include an in-plan Roth rollover feature, the categories of individuals who may elect in-plan Roth rollovers, the types of information that should be provided to participants in a Plan that permits in-plan Roth rollovers and how various rules under the Internal Revenue Code (Code) apply to in-plan Roth rollovers.

Drinker Biddle Note: For a complete discussion of in-plan Roth rollovers, please click [here](#) to view the client alert that Drinker Biddle issued in October 2010: "In-Plan Roth Conversions Allowed Under 401(k) and 403(b) Plans."

Deadlines to Amend Plans to Permit In-Plan Roth Rollovers

The IRS has provided remedial amendment periods, in which an employer may amend its Plans to add (1) Roth elective deferrals, (2) in-service distribution options as needed to enable participants to elect in-plan Roth rollovers (the guidance makes clear that the distribution option may be for the limited purpose of making in-plan Roth rollovers), and (3) an in-plan Roth rollover feature.

The guidance sets forth the remedial amendment periods as follows:

- > *401(k) Plans* – Must be amended by the later of the last day of the plan year in which the amendment is effective or December 31, 2011.
- > *Safe Harbor 401(k) Plans* – Must be amended by the later of the day before the first day of the plan year in which the safe harbor plan provisions are effective or December 31, 2011.
- > *403(b) Plans* – Must be amended by the later of the Plan's remedial amendment period (described in IRS Announcement 2009-89) or the last day of the plan year in which the amendment is effective.

Note that the guidance clarifies that the above amendment deadlines do not apply to an amendment to add a 401(k) cash or deferred arrangement to a Plan.

Individuals Who May Elect In-Plan Roth Rollovers

In addition to a Plan participant, a surviving spouse beneficiary or an alternate payee under a qualified domestic relations order who is a spouse or former spouse of a participant may elect an in-plan Roth rollover.

Notice to Participants

A Plan that permits in-plan Roth rollovers must include a description of this feature in the written explanation provided to recipients of eligible rollover distributions. The guidance identifies the following issues that should be described in the written explanation:

The availability of in-plan Roth rollovers under the Plan, including whether certain distributable events permit an individual only to make a direct rollover to an in-plan Roth account.

The consequences (*e.g.*, with respect to taxation and future distributions) of an in-plan rollover to a designated Roth account in the Plan.

The guidance also includes model language for revising the IRS safe harbor explanation for eligible rollover distributions to address some of the issues identified above.

Application of Certain Code Provisions to In-Plan Roth Rollovers

The guidance clarifies that in-plan Roth direct rollovers are not treated as distributions for all purposes under the Code. Specifically, an eligible rollover distribution that is directly rolled over into a designated Roth account in the same Plan is treated as follows:

- > *Plan Loans* – A Plan loan transferred in an in-plan Roth direct rollover without changing the repayment schedule is not treated as a new loan for purposes of the Code.
- > *Spousal Consent* – A married Plan participant is not required to obtain spousal consent in connection with an election to make an in-plan Roth direct rollover.
- > *Participant Consent for Distributions over \$5,000* – The amount rolled over to a designated Roth account in the same Plan continues to be taken into account in determining whether the participant's accrued benefit under the Plan exceeds \$5,000, thus triggering requirements for participant consent to immediate distributions.
- > *Elimination of Optional Forms of Benefit* – A distribution right that is included under the Plan (such as a right to an immediate distribution) cannot be eliminated through an in-plan Roth direct rollover.

The guidance also explains and provides examples of how various tax rules apply to in-plan Roth rollovers, including: (1) the inapplicability of mandatory 20 percent withholding, (2) the 10 percent additional tax on early distributions from the designated Roth account in the Plan, (3) the recapture of distributed amounts that were attributable

to an in-plan Roth rollover within a five-taxable-year period, and (4) income acceleration applicable to distributions in 2010 or 2011 of amounts attributable to an in-plan Roth rollover made in 2010 that would otherwise not have been includible in an individual's income until 2011 and 2012. Finally, the guidance states that an in-plan Roth rollover cannot be unwound (recharacterized) as can a rollover to a Roth IRA.

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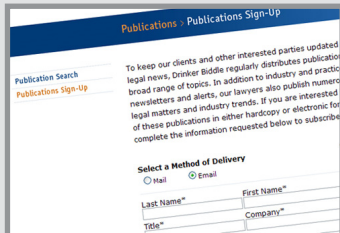
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