February 6, 2009

W. Thomas Reeder
Benefits Tax Counsel
Treasury Department
1500 Pennsylvania Ave., NW
Room 3054
Washington, D.C. 20220

Andrew E. Zuckerman
Director, Rulings and Agreements, Employee Plans
Internal Revenue Service
1750 Pennsylvania Ave., NW
Room 483
Washington, D.C. 20220

Delivered via e-mail

Re: Request for Guidance on the 2009 Minimum Distribution Waiver in the Worker, Retiree and Employer Recovery Act of 2008

Dear Mr. Reeder:

I am writing on behalf of the American Benefits Council (the "Council") to request guidance on a number of administrative issues that have arisen under the 2009 minimum required distribution ("MRD") provisions of the Worker, Retiree and Employer Recovery Act of 2008 ("WRERA"). The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

As you know, WRERA eliminates the need for participants to receive MRD payments from plans and IRAs during 2009 (except for a payment by April 1 related to a minimum distribution required for 2008). The provision was enacted to help participants weather the current economic crisis by deferring minimum required distributions from accounts depleted by the steep declines in the equity markets. The intent appears to have been to provide a flexible approach in which employer-maintained plans may choose to offer participants the opportunity to defer otherwise required distributions or, if not, in which participants have the ability to effect the same outcome by rolling a distribution into an IRA or other eligible retirement plan.

The provision, however, was signed into law on December 23, 2008 and the extremely short time frame before the legislation's January 1, 2009 effective date has raised issues that could interfere with the legislative purpose underlying the relief. In this regard, many MRD payments were scheduled for early 2009 and there simply has not been enough lead time for plans to offer participants an opportunity to defer distributions. Moreover, there are a number of technical issues that arise which may have the unintended consequence of making it difficult for participants to exercise self-help remedies by rolling a plan distribution to an IRA or other eligible retirement plan. For these reasons, the Council is writing to request that the U.S. Treasury Department and the Internal Revenue Service (hereinafter collectively "Treasury/Service") facilitate the purpose behind the legislation by addressing these issues in published guidance.

Automatic Minimum Distributions

Because minimum distribution payments are generally required under Internal Revenue Code Section 401(a)(9), retirement plan administrators automatically pay out these distributions, either at the election of the participant or by default if no election is made. Due to the short time frame between enactment and the effective date, many plans continued making minimum distribution payments that had been set up as monthly payments. In some cases, the plans may want to continue making the payments because systems and procedural changes would be very costly to make for a one-year moratorium. Other plans stopped payments and faced complaints from participants expecting to receive them. Many questions have been raised including the following:

- May participants elect whether they wish to receive minimum required distributions (MRDs) in 2009?
- Can plan administrators suspend any MRDs absent a participant request to receive a distribution?
- Can plan administrators pay any MRDs absent a participant request to suspend them?
- If the language of WRERA is read as requiring an elimination of MRDs for the 2009 calendar year and the plan does not provide for any partial distributions to participants outside of the MRD, is the plan prohibited from making a partial distribution unless it amends its distribution provisions?
- Do the answers to these questions vary depending upon whether 401(a)(9) is incorporated by reference in the plan document?

Many participants depend on MRDs to meet their retirement income needs, and eliminating their ability to request an MRD could have significant negative impact. If a plan does not allow any form of partial distribution outside of the MRDs, absent a plan amendment, the participant's only choice may be a lump sum distribution. This would seem to run contrary to WRERA's intent and could force participants to liquidate their entire account in order to access the smaller portion they need for current expenses.

Although the participant could rollover the excess amount of the lump sum distribution, their only rollover option may be an IRA and they could lose access to institutional pricing and investment options that were only available in the qualified plan.

The Council recommends that Treasury/Service clarify that any automatic treatment outlined above will be deemed to meet the requirements of WRERA. This should apply regardless of whether the plan incorporates 401(a)(9) by reference and should also apply to other payment options designed to satisfy the MRD rules. The Council also recommends that plans that only permit MRDs and no other partial payments be allowed to continue the payments during 2009 without amending the plan (or delay any required amendment until the last day of the first plan year beginning on or after January 1, 2011). Plan amendment requirements are discussed further below. In addition, if plan participants are permitted to elect whether to receive the MRDs, plans can impose reasonable deadlines (based on administrative issues) for such elections.

Finally, the Council recommends that participants in any plan subject to the qualified joint and survivor annuity rules may elect to suspend the MRD payment without spousal consent (similar to the relief that was provided in IRS Notice 97-75 in connection with minimum distribution changes in the Small Business Job Protection Act).

Plan Document Amendments

To the extent that either (1) plan documents incorporate 401(a)(9) by reference and the plan ceases MRDs in 2009, or (2) MRD payments continue during 2009 under periodic payment or other plan distribution options that appear to permit the continuation, the Council urges Treasury/Service to clarify that no amendment of the plan will be necessary. If a plan administrator makes a reasonable determination that no amendment was necessary in either situation, Treasury/Service should permit the plan to be corrected with an amendment if a later determination is made that an amendment was necessary.[1]

To the extent that the plan permits participants to elect whether to suspend or receive MRDs, or any other action is taken which appears not to be addressed in the current plan documents, the Council urges Treasury/Service to clarify that such amendments would be considered to be in connection with the suspension of MRDs contained in the WRERA and thus subject to the WRERA remedial amendment period (due by the end of the 2011 plan year). The Council also encourages Treasury/Service to publish model or sample language to facilitate any necessary amendments. In addition, a sample notice for participants would be helpful.

[1] Such a determination could be made, for example, during the plan's next determination letter cycle. The Council believes that in such a case the plan amendment should be allowed without any submission under EPCRS or Audit Cap.

Rollover Issues

If a participant is taking periodic distributions from the plan to satisfy the MRD requirements, these distributions may be considered "substantially equal periodic payments (SEPPs)". Many plans have continued to make these payments either because of the insufficient time to change systems and processes or because the employer is concerned the participant may need the money for everyday living expenses. The problem is that under current law (Code Section 402(c)(4)), SEPPs are not eligible rollover distributions if they are scheduled to be made over 10 or more years or life expectancy (which is common) and so cannot be rolled over. Since some of these participants will not wish to keep the distributions, the Council recommends clarifying that SEPPs taken in 2009 that would formerly have been MRDs can now be treated as eligible rollover distributions. This is critical to the self-help remedy that was built into WRERA, which was meant to allow participants to roll over otherwise required distributions if the plan did not provide an opportunity to stop the payments. Moreover, this is consistent with the regulations that govern SEPPs and treat an "independent payment" as an eligible rollover distribution.[2] In addition, the guidance should clarify that if payments are stopped during 2009, any payment received before the cessation are not SEPPs.

The Council also encourages Treasury/Service to clarify that plans are permitted (but not required) to accept these MRDs back as rollover contributions even if the plan does not otherwise permit rollovers into the plan by non-employees (and whether permitting the rollovers would require plan amendment). Further clarifications that would be helpful in this area include the following:

- Normal documentation requirements for rollovers back into the plan would not be required (would the plan need to "obtain" proof of its own favorable determination letter?)
- The value of the MRD would be the amount returned to the plan (and not the number of units)
- Recontribution of MRDs attributable to after-tax contributions would be permitted (indirect rollover of after-tax contributions)
- Plans are permitted but not required to accept rollovers of the MRDs back into the plan (rollovers to IRAs would be available for participants unable to roll MRD amounts back into qualified plans)
- Nonspouse beneficiaries who took what would otherwise be an MRD distribution for 2009 are permitted to rollover the amount distributed to an inherited IRA

We also urge Treasury/Service to provide relief from the 60-day limit on indirect rollovers. Given the very short time frame between enactment and implementation, it is likely that at least some participants will not realize that they had a rollover

[2] Treas. Reg. § 1.402(c)-2, Q&A-6(a).

opportunity in time to satisfy the 60-day limit on indirect rollovers. The Treasury/Service has authority to extend the 60-day limit and we urge you to do so through December 31, 2009.[3]

We also suggest that Treasury/Service consider providing relief from the rule that limits rollovers between IRAs to one per year. In this regard, this rule is largely a historic anomaly given that unlimited direct transfers between IRAs are permitted. We appreciate that Treasury/Service may have concerns about their authority but we believe that it would be appropriate to provide relief in some manner.

The Joint Committee on Taxation report on WRERA states that in the case of a distribution for 2009 that would have been an MRD but for WRERA "the plan is permitted but not required to offer the employee a direct rollover of that amount and provide the employee with a written explanation of the requirement". This appears to allow a terminating participant otherwise subject to MRD in 2009 to elect a direct rollover of his or her entire account balance. The statutory language of WRERA (adding a sentence to Code Section 402(c)(4)) does not contain similar language so Treasury/Service confirmation of the Blue Book statement would be very helpful.

Withholding issues

WRERA indicates that if all or a portion of a distribution is an eligible rollover distribution because it is no longer an MRD, that portion will not be treated as an eligible rollover distribution for purposes of the direct rollover requirement, the notice of direct rollover, or the mandatory 20 percent income tax withholding for eligible rollover distributions. As previously mentioned, the Joint Committee report on WRERA clarifies that a plan is permitted, but not required, to offer a direct rollover of the portion that would have been an MRD. There is no similar language for the 20 percent income tax withholding provision.

For many service providers and plan administrators, systems are designed so that 20 percent income tax withholding applies automatically to any distribution that is an eligible rollover distribution. To separate withholding treatment from eligible rollover distribution status would require costly and labor-intensive systems changes that could not be accomplished during the very short time between WRERA's passage and its effective date and could take well into 2009 to complete.

The Council urges Treasury/Service to clarify that plans are permitted (but not required) to apply the 20 percent income tax withholding to the portion that would have been an MRD. If plans are prohibited from applying the 20 percent income tax

[3] Treasury is permitted to waive the 60 day rollover 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 the requirement." See Section 644 of EGTRRA. Treasury could waive the 60-day limit for amounts that would, absent WRERA, be an MRD in 2009 pursuant to this authority.

withholding to the portion that would have been an MRD, then plan administrators will continue to need to calculate the amount of the MRD, even though that requirement has been suspended for the 2009 calendar year, and apply different withholding rates to a single distribution. Absent programming, which is impracticable given the short lead time and short life span of the MRD waiver, this process will have to be manual and labor-intensive. It also may require the creation of a significant amount of new paperwork to collect withholding elections on the portion of a distribution that would have been an MRD. It appears the intent of the Joint Committee provision was to make it easier to administer the temporary waiver of the MRD, and allowing administrators to have the same flexibility with respect to the withholding requirements as they have with the direct rollover provisions will help accomplish this goal.

We greatly appreciate your consideration of our concerns. If you have any questions, please don't hesitate to call the undersigned at (202) 289-6700.

Respectfully submitted,

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

cc: Harlan Weller