



IRS (Finally) Issues New Guidance on In-Plan Roth Rollovers No Amendment Needed for 2013!

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The Internal Revenue Service has finally issued new guidance (Notice 2013-74) relating to rollovers of “otherwise nondistributable amounts” to designated Roth accounts in the same plan. Unfortunately, the guidance has come late in the year and some plan document providers and employers have already acted to permit these types of rollovers. Still, the guidance is useful and provides an extended amendment deadline.

Under Code §402A, as added by the Small Business Job Protection Act of 2010, a plan could include a qualified in-plan Roth rollover program to allow employees to roll over amounts from their non-Roth accounts to designated Roth accounts in the plan. To be eligible, the rollover had to be an “otherwise distributable amount.” The IRS provided guidance on in-plan Roth rollovers of otherwise distributable amounts in Notice 2010-51. Many document providers added in-plan Roth rollover provisions in their plans sometime prior to the 2013 plan year.

Then, under the American Taxpayer Relief Act of 2012 (ATRA 2012), Code §402A was expanded to allow in-plan Roth rollovers of “otherwise nondistributable amounts,” effective in 2013. This allowed plans to offer in-plan Roth rollovers of amounts that were otherwise ineligible for distribution from the plan. Since then, we have anxiously awaited guidance on some of the difficult issues presented by this change in the law. Notice 2013-74 answers some of the questions relating to the rollover of otherwise nondistributable amounts, including the timing of a plan amendment to reflect these rules. This ASCi Alert describes the extended plan amendment date and other guidance provided in the Notice.

No amendment needed until December 31, 2014

Allowing in-plan Roth rollovers in a plan requires a discretionary amendment. Without the guidance provided in Notice 2013-74, employers who implemented in-plan Roth rollovers in their plans for 2013 needed to amend their plans by the end of the 2013 plan year. With the new guidance, the IRS extended the amendment date (even for those who implemented in-plan Roth rollovers for otherwise nondistributable amounts in 2013) to the later of the last day of the first plan year in which the amendment is effective or December 31, 2014. In the meantime, the plan must operate in accordance with the guidance issued by the IRS and an employer

must amend the plan consistent with such operation by December 31, 2014 (if the new in-plan Roth rollover provisions are first utilized in 2013 or 2014).¹

In addition to the in-plan Roth amendment, the extended plan amendment date also applies to certain related plan amendments, including plan amendments that (1) permit elective deferrals under the plan to be designated as Roth contributions, (2) provide for the acceptance of rollover contributions by designated Roth accounts, and (3) permit in-plan Roth rollovers of some or all otherwise distributable amounts.

ASci Insight - In early 2013, ASCi posted on its DGEM download page an amendment that pre-approved plan sponsors could use for adopting employers to allow in-plan Roth rollovers in their plans. Because of the 2013 effective date of the in-plan Roth rollover rules and the fact that without an extension a discretionary amendment was required by December 31, 2013, many sponsors have already adopted in-plan Roth rollover provisions for their plans. With the Notice 2013-74 extension, plan sponsors that have not yet adopted in-plan Roth rollover amendments can wait until December 31, 2014 to adopt these amendments. For plan sponsors who have already adopted the previously-issued ASCi in-plan Roth rollover provisions, the extension to December 31, 2014 provides time to assess the impact of the new IRS guidance on these plan amendments. ASCi is reviewing its previously-issued in-plan Roth rollover amendment to determine whether any modification is needed.

Other Guidance under Notice 2013-74

Notice 2013-74 provides the following guidance relating to qualified retirement plans under Code §401(a):

- Generally, the rules in Notice 2010-84 continue to apply to ALL Roth rollovers, including rollovers of otherwise nondistributable amounts under ATRA 2012. However, two rules announced under Notice 2010-84, only apply to in-plan Roth rollovers of otherwise distributable amounts. First, only in-plan Roth rollovers of otherwise distributable amounts may use the 60-day rollover rule. Second, employers only need to provide the Code §402(f) notice for in-plan Roth rollovers of otherwise distributable amounts. [This makes sense given that the 60-day

1. With this extension, sponsors of defined contribution pre-approved plans do not need to amend their plans for 2013. At this time, no amendments are needed to the ASCi pre-approved plans to reflect the Supreme Court’s ruling on same-sex marriage. Employers wishing to take advantage of the special Hurricane Sandy relief for loans and hardship distributions only needed to amend the plan if it did not otherwise permit loans or hardship distributions. (See IRS Announcement 2012-44.) Sponsors of defined benefit pre-approved plans should refer to ASCi Alert 13-06.

rollover rule and the 402(f) notice only apply when an actual distribution is made from the plan. Since an in-plan rollover of otherwise nondistributable amounts are not eligible for actual distribution, no 60-day rollover or Code §402(f) notice should be applicable.]

ASCI Insight – The application of Notice 2010-84 to in-plan Roth rollovers of otherwise nondistributable amounts effectively answers several important questions we have had with respect to the post-2012 in-plan Roth rollovers. For example, Notice 2013-74 now makes it clear that, in order to be rolled over, otherwise nondistributable amounts must be 100% vested. Also, it is now clear that employers do not need to provide a Code §402(f) notice for a participant making an in-plan Roth rollover of an otherwise nondistributable amount.

- Plan participants, if permitted under the plan, may elect to make an in-plan Roth rollover of the following contributions (and earnings): elective deferrals, matching contributions, and nonelective employer contributions (including QNECs, QMACs and safe harbor contributions).
- Otherwise nondistributable amounts that a participant rolls over continue to be subject to any distribution restriction (e.g., the attainment of age 59 ½) that applied prior to the rollover. In order to simplify recordkeeping, a plan may require that a participant can only roll over otherwise distributable amounts.

ASCI Insight – The ability of an employer to only allow participants to make in-plan Roth rollovers of otherwise distributable amounts certainly does simplify recordkeeping since separate rollover accounts would not be necessary. However, participants may want the expanded opportunity to make in-plan Roth rollovers of otherwise nondistributable amounts. Plan sponsors must recognize that this will greatly increase recordkeeping complexity and costs. Recordkeepers will need separate “buckets” to account for rollover amounts that are subject to distribution restrictions.

- The employer is not required to withhold taxes when a participant rolls over otherwise nondistributable amounts.
- An employer may eliminate in-plan Roth rollover options under a plan without violating the Code §411(d)(6) protected benefit requirements. However, elimination may cause nondiscrimination issues if it favors highly compensated employees.
- If an in-plan Roth rollover is the first contribution made to

an employee’s Roth account, the 5-taxable-year period of participation for a qualified distribution begins on the first day of the first taxable year in which the employee makes the in-plan Roth rollover.

- An in-plan Roth rollover is treated as a distribution for determining eligibility for the special tax rules on net unrealized appreciation (NUA).
- An in-plan Roth rollover is considered a “related rollover” and must be counted in determining a plan’s top-heavy status. Thus, amounts that are rolled over as part of an in-plan Roth rollover continue to count towards the plan’s top-heavy status.
- If after an in-plan Roth rollover, all or a portion of the rollover is determined to be an excess deferral, excess contribution or excess aggregate contribution, the plan must distribute the excess amount (plus earnings), even if the amount was an otherwise nondistributable amount at the time of the in-plan Roth rollover.
- Safe harbor 401(k) plans have a temporary period to provide for in-plan Roth rollovers without violating the prohibition on mid-year changes. The temporary period ends on December 31, 2014.

Application to 403(b) and governmental 457(b) plans

The guidance the IRS provides in Notice 2013-74 also applies to Code §403(b) plans and governmental Code §457(b) plans. With respect to plan amendments, 403(b) plans that met the written plan document requirements in 2009 (or the date the plan was established, if later) have until the end of the yet-to-be announced remedial amendment period applicable to 403(b) plans to adopt an amendment permitting in-plan Roth rollovers of otherwise nondistributable amounts.

ASCI Insight – ASCI does not expect the remedial amendment period for Code §403(b) plans to end for at least two years after the IRS has issued approval letters for prototype and volume submitter plans under its new pre-approved 403(b) plan program. ASCI will submit its mass submitter 403(b) plans to the IRS in April 2014.

With respect to governmental 457(b) plans, the employer must amend the plan if it wishes to permit in-plan Roth rollovers of otherwise nondistributable amounts by the later of the last day of the first plan year in which the amendment is effective or December 31, 2014. Tax exempt 457(b) plans are not allowed to offer Roth deferrals or in-plan Roth rollovers.

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