

Part III. Administrative, Procedural and Miscellaneous

Guidance on In-Plan Roth Rollovers

Notice 2010-84

I. PURPOSE

This notice provides guidance under § 402A(c)(4) of the Internal Revenue Code, relating to rollovers from § 401(k) plans to designated Roth accounts in the same plan (“in-plan Roth rollovers”), as added by § 2112 of the Small Business Jobs Act of 2010 (“SBJA”), P.L. 111-240. The guidance in this notice also generally applies to rollovers from § 403(b) plans to designated Roth accounts in the same plan.

II. BACKGROUND

Section 402A of the Code sets forth the rules for designated Roth contributions. A designated Roth contribution is an elective deferral that would otherwise be excludable from gross income but that has been designated by the plan participant who elects the deferral as not being so excludable. An employee’s designated Roth contributions and attributable earnings must be maintained by the plan in a separate account (a designated Roth account). A qualified distribution, as defined in § 402A(d)(2), from an employee’s designated Roth account is excludable from gross income. A distribution from an employee’s designated Roth account that is not a qualified distribution is includible in gross income pursuant to § 72 in proportion to the employee’s investment in the contract (basis) and earnings on the contract.

Section 408A of the Code sets forth the rules for Roth IRAs. A Roth IRA is a type of IRA under which contributions are not deductible from the owner’s gross income and qualified distributions, as defined in § 408A(d)(2), are excludable from gross income. Section 408A(d)(4) prescribes a special ordering rule for distributions from a Roth IRA.

Section 408A(d)(3)(A) of the Code provides that, generally, the taxable amount of a rollover or conversion to a Roth IRA is includible in gross income as if it were not rolled over or converted. For taxable years beginning in 2010 only, however, the taxable amount of a rollover or a conversion to a Roth IRA that would otherwise be includible in gross income for the taxable year beginning in

2010 is includible half in the taxable year beginning in 2011 and half in the taxable year beginning in 2012, unless the taxpayer elects to include the entire taxable amount in the taxable year beginning in 2010.

Section 408A(d)(3)(D) of the Code provides for such additional reporting “as the Secretary may require to ensure that amounts required to be included in gross income under [§ 408A(d)(3)(A)] are so included.”

Under section 408A(d)(3)(E) of the Code, in the case of a taxpayer who is deferring income inclusion of the taxable amount of a rollover to a Roth IRA made in the taxpayer’s taxable year beginning in 2010, the taxpayer’s gross income for the taxable year beginning in 2010 or 2011 is increased by the amount of any distribution in such year from the Roth IRA that is allocable to the taxable amount of the rollover.

Section 408A(d)(3)(F) of the Code provides that any distribution from a Roth IRA that is allocable to the taxable amount of a rollover to the Roth IRA (other than from another Roth IRA or a designated Roth account) made within the preceding 5 taxable years is treated as includible in gross income for purposes of applying the 10% additional tax under § 72(t). The 5-year recapture rule also applies if the rollover to the Roth IRA is from a designated Roth account and the distribution is allocable to the taxable amount of an in-plan Roth rollover made within the preceding 5 years. (See Q&A-12 of this notice.)

Section 2112 of SBJA adds § 402A(c)(4) to the Code, effective for distributions made after September 27, 2010, to permit plans that include a qualified Roth contribution program to allow individuals to roll over amounts from their accounts other than designated Roth accounts to their designated Roth accounts in the plan. Currently, only § 401(k) plans and § 403(b) plans are permitted to include qualified Roth contribution programs. For taxable years beginning after 2010, § 2111 of SBJA permits governmental § 457(b) plans to include designated Roth accounts.

Section 402A(c)(4)(A) of the Code provides that any distribution described in § 402A(c)(4) is included in gross income as if it were not rolled over to a designated Roth account. However, for such distributions made in taxable years beginning in 2010, unless the individual elects to include the taxable amount of the distribution in gross income for the taxable year beginning in 2010, the taxable amount of the distribution is includible half in the taxable year beginning in 2011 and half in the taxable year beginning in 2012.

Section 402A(c)(4)(B) of the Code provides that in-plan Roth rollovers of eligible rollover distributions may only be made within a plan containing a qualified Roth contribution program from accounts other than designated Roth accounts and only if the otherwise applicable rollover requirements of §§ 402(c), 403(b)(8) and 457(e)(16) are satisfied.

Section 402A(c)(4)(D) of the Code provides that the rules of § 408A(d)(3)(D), (E), and (F) apply for purposes of § 402A(c)(4).

The Joint Committee on Taxation's Technical Explanation of H.R. 5297, which became SBJA, states that an employer may add new, permissible distribution options to a plan that are conditioned on the employee directly rolling over the distribution to his or her designated Roth account under the plan. (JCX-47-10, September 16, 2010, at page 42.)

III. GUIDANCE

Q-1. What is an "in-plan Roth rollover"?

A-1. An "in-plan Roth rollover" is a distribution from an individual's plan account, other than a designated Roth account, that is rolled over to the individual's designated Roth account in the same plan, pursuant to new § 402A(c)(4) of the Code. The rollover may be accomplished by a direct rollover (an "in-plan Roth direct rollover") or by a distribution of funds to the individual who then rolls over the funds into his or her designated Roth account in the plan within 60 days (an "in-plan Roth 60-day rollover"). Section 402A(c)(4) applies to distributions made after September 27, 2010.

Q-2. What amounts are eligible for in-plan Roth rollovers?

A-2. Any vested amount held in a plan account for a plan participant (other than an amount held in a designated Roth account) is eligible for an in-plan Roth rollover to a designated Roth account in the same plan. However, an amount is not eligible for an in-plan Roth rollover unless it satisfies the rules for distribution under the Code and is an eligible rollover distribution as defined in § 402(c)(4). Thus, in the case of a § 401(k) plan participant who has not had a severance from employment, an in-plan Roth rollover from the participant's pre-tax elective deferral account is permitted to be made only if the participant has reached age 59½, has died or become disabled, or receives a qualified reservist distribution as defined in § 72(t)(2)(G)(iii). See Rev. Rul. 2004-12, 2004-1 C.B. 478, for a discussion of the various distribution timing restrictions applicable to amounts held in a plan. An amount is eligible for an in-plan Roth rollover only if the plan provides for such rollovers. But see Q&As-15 through -20 of this notice, permitting retroactive amendments for this purpose.

Q-3. Is an in-plan Roth direct rollover treated as a distribution for all purposes?

A-3. No. Because an in-plan Roth direct rollover merely changes the account in a plan under which an amount is held and the tax character of the

amount, a distribution that is rolled over in an in-plan Roth direct rollover is not treated as a distribution for the following purposes:

(a) *Section 72(p) (relating to 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 (so the rule in § 1.72(p)-1, Q&A-20, of the Income Tax Regulations does not apply).

(b) *Section 401(a)(11) (relating to spousal annuities)*. A married plan participant is not required to obtain spousal consent in connection with an election to make an in-plan Roth direct rollover.

(c) *Section 411(a)(11) (relating to participant consent before an immediate distribution of an accrued benefit in excess of \$5,000)*. The amount rolled over continues to be taken into account in determining whether the participant's accrued benefit exceeds \$5,000, and a notice of the participant's right to defer receipt of the distribution is not triggered by the in-plan Roth direct rollover.

(d) *Section 411(d)(6)(B)(ii) (relating to elimination of optional forms of benefit)*. A participant who had a distribution right (such as a right to an immediate distribution of the amount rolled over) prior to the rollover cannot have this right eliminated through an in-plan Roth direct rollover.

Q-4. Can a plan add an in-plan Roth direct rollover option for amounts that are not otherwise distributable under the terms of the plan but that would be permitted to be distributed under the Code if the plan so provided?

A-4. Yes. A plan may be amended to add an in-plan Roth direct rollover option for amounts that are permitted to be distributed under the Code but that have not been distributable under more restrictive terms contained in the plan. Moreover, such an amendment is not required to permit any other rollover or distribution option for these amounts. For example, a plan that does not currently allow for in-service distributions from a participant's pre-tax elective deferral account may be amended to permit in-plan Roth direct rollovers from this account by participants who have attained age 59½, while not otherwise permitting distribution of these amounts. (However, a plan amendment imposing such a restriction on a pre-existing distribution option would violate § 411(d)(6).)

Q-5. Must a plan that offers in-plan Roth rollovers include a description of this feature in the written explanation the plan provides pursuant to § 402(f) to an individual receiving an eligible rollover distribution?

A-5. Yes. For example, if the plan administrator generally bases its explanation under § 402(f) on the safe harbor explanation published in Notice 2009-68, 2009-39 I.R.B. 423, the safe harbor explanation for payments not from a designated Roth account could be revised by adding a new section in the

“SPECIAL RULES AND OPTIONS” portion of the explanation that describes the consequences if the distributee were to roll over a payment to a designated Roth account in the same plan, including the following information:

- If the distributee rolls over the payment to a designated Roth account in the plan, the amount of the payment rolled over (reduced by any after-tax amounts directly rolled over) will be taxed. However, the 10% additional tax on early distributions will not apply (unless the distributee takes the amount rolled over out of the designated Roth account within the 5-year period that begins on January 1 of the year of the rollover). For payments from the plan in 2010 that are rolled over to a designated Roth account in the plan (and that are not distributed from that account until after 2011), the taxable amount of the rollover will be taxed half in 2011 and half in 2012, unless the distributee elects to be taxed in 2010.
- If the distributee rolls over the payment to a designated Roth account in the plan, later payments from the designated Roth account that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a designated Roth account is a payment made both after the distributee attains age 59½ (or after the distributee’s death or disability) and after the distributee has had a designated Roth account in the plan for a period of at least 5 years. The 5-year period described in the preceding sentence begins on January 1 of the year the distributee’s first contribution was made to the designated Roth account. However, if the distributee made a direct rollover to a designated Roth account in the plan from a designated Roth account in a plan of another employer, the 5-year period begins on January 1 of the year the distributee’s first contribution was made to the designated Roth account in the plan or, if earlier, to the designated Roth account in the plan of the other employer. Payments from the designated Roth account that are not qualified distributions will be taxed to the extent allocable to earnings after the rollover, including the 10% additional tax on early distributions (unless an exception applies).

The section in the safe harbor explanation on payments to a Roth IRA would also need to be revised to reflect that rollovers to the plan’s designated Roth account are permitted. Further, for an in-plan Roth direct rollover for in which other distribution alternatives are not available, the safe harbor explanation would need to be revised to reflect the inapplicability of information in the explanation about other distribution alternatives.

Q-6. If a participant elects an in-plan Roth rollover, can he or she later unwind the in-plan Roth rollover, as can be done with rollovers to Roth IRAs?

A-6. No. The recharacterization rule in § 408A(d)(6) applies only to contributions to IRAs.

Q-7. What are the tax consequences of an in-plan Roth rollover?

A-7. The taxable amount of the in-plan Roth rollover must be included in the participant's gross income. The taxable amount of an in-plan Roth rollover is the amount that would be includible in a participant's gross income if the rollover were made to a Roth IRA. This amount is equal to the fair market value of the distribution reduced by any basis the participant has in the distribution. (See Notice 2009-75, 2009-35 I.R.B. 436.) Thus, if the distribution includes employer securities attributable to employee contributions, the fair market value includes any net unrealized appreciation within the meaning of § 402(e)(4). If an outstanding loan is rolled over in an in-plan Roth rollover, the amount includible in gross income is the balance of the loan.

Q-8. Are in-plan Roth direct rollovers subject to 20% mandatory withholding?

A-8. No, 20% mandatory withholding under § 3405(c) does not apply to an in-plan Roth direct rollover. However, a participant electing an in-plan Roth rollover may have to increase his or her withholding or make estimated tax payments to avoid an underpayment penalty. See Publication 505, *Tax Withholding and Estimated Tax*.

Q-9. When is the taxable amount of an in-plan Roth rollover includible in gross income?

A-9. Generally, the taxable amount of a distribution that an individual rolls over in an in-plan Roth rollover is includible in gross income in the taxable year in which the distribution occurs.

Q-10. Is there an exception to the general rule regarding the year of income inclusion for in-plan Roth rollovers made in 2010?

A-10. Yes. For distributions made in 2010 that are rolled over in an in-plan Roth rollover, the taxable amount is includible in gross income half in 2011 and half in 2012 unless the individual elects to include the taxable amount in gross income in 2010 (or unless the special rules described in Q&A-11 of this notice apply). An individual's election of 2010 income inclusion may not be changed after the due date (including extensions) for filing the individual's 2010 income tax return. The election applies to all of an individual's 2010 distributions that are rolled over in an in-plan Roth rollover. The election is independent of any election made with respect to qualified rollover contributions (as defined in § 408A(e)) to a Roth IRA from either a non-Roth IRA or a plan account other than a designated Roth account. The rules in this Q&A-10 and in Q&A-11 relating to the years 2010, 2011 and 2012 apply to calendar-year taxpayers; parallel rules

apply to taxable years beginning in 2010, 2011 and 2012 for individuals who are not calendar-year taxpayers.

Q-11. If a plan participant is deferring, to 2011 and 2012, inclusion in income of the taxable amount from a 2010 in-plan Roth rollover, are there any special income acceleration rules for distributions allocable to the 2010 in-plan Roth rollover?

A-11. Yes, pursuant to §§ 402A(c)(4)(D) and 408A(d)(3)(E), if the participant receives a distribution of an amount in 2010 or 2011 allocable to the taxable amount of a 2010 in-plan Roth rollover that would otherwise not be includible in gross income until 2011 and 2012, then the participant's gross income for the year of the distribution is increased by the amount of the distribution that would otherwise not be includible in gross income until a later year. In such a case, the amount that would otherwise be includible in the participant's gross income in 2012 is reduced by the income accelerated. Also, if the distribution is made in 2010, the amount that would otherwise be includible in the participant's gross income in 2011 is reduced by the amount the income accelerated to 2010 exceeds the amount that would otherwise be includible in income in 2012.

For example, if a participant makes an in-plan Roth rollover in 2010 with the taxable amount of the rollover, \$8,000, being deferred to 2011 and 2012 and then takes a distribution in 2010 or 2011 from the designated Roth account that consists of \$5,000 allocable to the taxable amount of the 2010 in-plan Roth rollover, then the participant's gross income for the year of the distribution must be increased by the taxable amount of the rollover that would otherwise be deferred to a later year. If this distribution occurred in 2010, the \$5,000 is included in the participant's 2010 gross income and the remaining taxable amount of the 2010 in-plan Roth rollover, \$3,000, is included in the participant's 2011 gross income.

The income acceleration rule in this Q&A-11 does not apply to a distribution that is rolled over to another designated Roth account of the participant or to a Roth IRA owned by the participant; however, the rule does apply to subsequent distributions made from such other designated Roth account or Roth IRA in 2010 or 2011. For purposes of this Q&A-11, the rules in §§ 1.408A-4, Q&A-11, and 1.408A-6, Q&A-6, on income acceleration (as modified by substituting the 2-year spread under § 2112 of SBJA for the 4-year spread in the regulations under § 408A of the Code) also apply. See Q&A-13 of this notice for rules on allocating distributions to in-plan Roth rollovers.

Q-12. Are there any special rules relating to the application of the 10% additional tax under § 72(t) for distributions allocable to the taxable amount of an in-plan Roth rollover made within the preceding 5 years?

A-12. Yes, pursuant to §§ 402A(c)(4)(D) and 408A(d)(3)(F), if an amount allocable to the taxable amount of an in-plan Roth rollover is distributed within the 5-taxable-year period beginning with the first day of the participant's taxable year in which the rollover was made, the amount distributed is treated as includible in gross income for the purpose of applying § 72(t) to the distribution. The 5-taxable-year period ends on the last day of the participant's fifth taxable year in the period. Thus, if a participant withdraws an amount that includes \$6,000 allocable to the taxable amount of an in-plan Roth rollover made within the preceding 5 years, the \$6,000 is treated as includible in the participant's gross income for purposes of applying § 72(t) to the distribution. In such a case, the participant would owe an additional tax of \$600 unless an exception under § 72(t)(2) applies. The 5-year recapture rule in this Q&A-12 does not apply to a distribution that is rolled over to another designated Roth account of the participant or to a Roth IRA owned by the participant; however, the rule does apply to subsequent distributions made from such other designated Roth account or Roth IRA within the 5-taxable-year period. For purposes of this Q&A-12, the rules in § 1.408A-6, Q&A-5, on the application of § 72(t) also apply. See Q&A-13 of this notice for rules on allocating distributions to the taxable amount of in-plan Roth rollovers.

Q-13. How is an amount distributed from a plan allocated to the taxable amount of an in-plan Roth rollover for purposes of Q&As-11 and -12 of this notice?

A-13. Solely for purposes of the income acceleration rule in Q&A-11 and the 5-year recapture rule in Q&A-12, an amount distributed that, under the terms of the plan, is paid from a separate account maintained solely for in-plan Roth rollovers (an in-plan Roth rollover account) is treated as attributable to an in-plan Roth rollover to the extent the amount distributed constitutes recovery of basis determined under the rules of § 72 and § 1.402A-1, Q&A-9.

Any amount distributed from a designated Roth account that, under the terms of the plan is not paid from an in-plan Roth rollover account, is treated as attributable to an in-plan Roth rollover to the extent the portion of the distribution that represents a recovery of basis under the rules of § 72 and § 1.402A-1, Q&A-9, exceeds the basis in the designated Roth account other than the basis resulting from in-plan Roth rollovers.

If an amount distributed is treated as attributable to an in-plan Roth rollover, then the rules of § 408A(d)(4)(B)(ii)(II) and the last sentence of § 408A(d)(4) apply. Thus, a distribution is attributed to an in-plan Roth rollover on a first-in-first-out basis and any amount attributed to such a rollover is allocated first to the taxable amount of the rollover.

Example.

In 2010, Participant P, age 45, makes a \$100,000 in-plan Roth direct rollover from his profit-sharing account and defers the inclusion of the \$90,000 taxable amount of the rollover to 2011 and 2012 (\$45,000 in 2011 and \$45,000 in 2012). At the time of the in-plan Roth direct rollover, P's designated Roth account contains \$78,000 of regular Roth contributions and \$25,000 of earnings. Since this is an in-plan Roth direct rollover, the rollover amount is separately accounted for within the designated Roth account. Later in 2010, P takes a \$106,000 in-service withdrawal from his designated Roth account. The source can only be the in-plan Roth rollover account, since P is under age 59½, which is the earliest the plan allows in-service distributions of elective deferrals from a designated Roth account. At the time of the distribution, P's designated Roth account consists of:

In-Plan Roth Rollover Account:

In-plan Roth rollover contributions (\$10,000 basis).....	\$100,000
Earnings.....	<u>\$6,000</u>
Total.....	\$106,000

Regular Roth Account:

Regular Roth contributions.....	\$80,000
Earnings.....	<u>\$24,000</u>
Total.....	\$104,000

Total in designated Roth account.....\$210,000

Under the pro-rata rules of § 72, of the \$106,000 distribution, \$106,000 x 30,000/210,000, or \$15,143, is includible in P's gross income. All of the \$90,857 of the distribution that is a return of basis is allocated to the in-plan Roth rollover account. P is subject to the additional 10% tax under § 72(t) on \$105,143 (the \$90,000 taxable amount of the in-plan Roth rollover under the 5-year recapture rule plus \$15,143 that is includible in P's gross income under the pro-rata rules of § 72). Also, the entire \$90,000 taxable amount of the in-plan Roth rollover is includible in P's gross income for 2010 (rather than being includible in gross income half in 2011 and half in 2012).

Since the amount of the in-plan Roth rollover was \$100,000, there is \$9,143 that may still be allocated to the rollover. This will be reported on a Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*, by the trustee if another distribution within 5 years is allocable to this rollover, but none of it will be subject to § 72(t) under the 5-year recapture rule because all the taxable amount of the in-plan Roth rollover has been used up.

If P were eligible for a distribution from his regular Roth account within his designated Roth account, he could have withdrawn \$93,333 and none of it would be allocable to the in-plan Roth rollover (because, of the \$93,333 distribution,

\$80,000 is a return of basis and that would be absorbed by the \$80,000 basis in P's regular Roth account). If P withdrew more than \$93,333, some would be allocated to the taxable amount of the in-plan Roth rollover even if P asked that the distribution be made from his regular Roth account.

Q-14. Is a beneficiary or alternate payee eligible to elect an in-plan Roth rollover?

A-14. An in-plan Roth rollover can be elected by a beneficiary only if he or she is a surviving spouse and by an alternate payee only if he or she is a spouse or former spouse. This is because in-plan Roth rollovers can only be elected with respect to distributions that are eligible rollover distributions as defined in § 402(c)(4) that can be rolled over to § 401(k) plans. Section 402(c)(4) defines an eligible rollover distribution as any of certain distributions "to an employee." Section 402(c)(9) and § 402(e)(1)(B) provide that a spousal beneficiary, and an alternate payee who is a spouse or former spouse, is treated as the employee for purposes of § 402(c)(4). (While § 402(c)(11) permits a non-spouse beneficiary to elect rollover treatment of certain amounts, that provision does not apply to rollovers to qualified plans.)

Q-15. Is a plan amendment providing for in-plan Roth rollovers in a § 401(k) plan required to be adopted by the end of the 2010 plan year?

A-15. No. Under section 5.02 of Rev. Proc. 2007-44, 2007-2 C.B. 54, which sets forth certain deadlines for adopting amendments to qualified plans, a plan amendment that provides for in-plan Roth rollovers is a discretionary amendment and ordinarily the amendment would have to be adopted by the last day of the plan year in which the amendment is effective. However, to give plan sponsors sufficient time to adopt plan amendments and thereby enable plan participants to make in-plan Roth rollovers before the end of the 2010 plan year, the Service is extending the deadline for adopting a plan amendment described in Q&A-17 (including amendments to provide for in-plan Roth rollovers in a § 401(k) plan) to the later of the last day of the plan year in which the amendment is effective or December 31, 2011, provided that the amendment is effective as of the date the plan first operates in accordance with the amendment.

Q-16. What is the deadline for adopting a plan amendment providing for in-plan Roth rollovers in a § 403(b) plan?

A-16. Announcement 2009-89, 2009-52 I.R.B. 1009, provides that if an employer adopts, on or before December 31, 2009 (or, if later, the date the plan is established) a written § 403(b) plan intended to satisfy the requirements of § 403(b) and the regulations, the employer will have a remedial amendment period in which to amend the plan to correct any form defects retroactive to January 1, 2010 (or the date the plan is established), provided that the employer subsequently adopts a pre-approved plan that has received a favorable opinion

letter from the Service or applies for an individual determination letter, under forthcoming procedures. In this case, the employer will have reliance that the form of its written plan satisfies the requirements of § 403(b) and the regulations, provided that, during the remedial amendment period, the plan is amended to correct any defects retroactive to January 1, 2010 (or the date the plan is established). In the case of a § 403(b) plan that has a remedial amendment period pursuant to Announcement 2009-89, a plan amendment described in Q&A-17 (including a plan amendment providing for in-plan Roth rollovers) is not required to be adopted before the later of the end of that remedial amendment period or the last day of the first plan year in which the amendment is effective, provided the amendment is effective as of the date the plan first operates in accordance with the amendment.

Q-17. What plan amendments does the extension of time under Q&A-15 or Q&A-16 apply to?

A-17. The extension of time to adopt a plan amendment under Q&A-15 or Q&A-16 applies to any plan amendment that is adopted pursuant to § 2112 of SBJA. Thus, for example, if a § 401(k) plan or a § 403(b) plan is amended to permit in-plan Roth rollovers, the applicable extension of time under Q&A-15 or Q&A-16 applies to a plan amendment that permits elective deferrals under the plan to be designated as Roth contributions, a plan amendment that provides for the acceptance of rollover contributions by the designated Roth account, and the plan amendment that permits in-plan Roth rollovers, including a plan amendment described in Q&A-4. However, the extension of time to adopt a plan amendment does not apply to a plan amendment that adds a § 401(k) cash or deferred arrangement to the plan. See § 1.401(k)-1(a)(3)(iii)(A).

Q-18. Does the extension of time described in Q&As-15 through -17 of this notice apply to § 401(k) safe harbor plans described in § 401(k)(12) or (13)?

A-18. Yes, however, instead of the extension being to the later of the last day of the plan year in which the amendment is effective or December 31, 2011, the extension for a § 401(k) safe harbor plan described in § 401(k)(12) or (13) is to the later of December 31, 2011, or the time specified in § 1.401(k)-3(e)(1) (requiring, generally, that safe harbor plan provisions be adopted before the first day of the plan year in which they are effective). Thus, for example, a § 401(k) safe harbor plan with a plan year beginning July 1 may operationally comply with § 2112 of SBJA during the plan year beginning July 1, 2010 (for distributions made after September 27, 2010) and the plan year beginning July 1, 2011, without having to be amended for such change in operation until December 31, 2011.

Q-19. Must a plan have a qualified Roth contribution program in place at the time a rollover contribution to a designated Roth account is made in an in-plan Roth rollover?

A-19. Yes. Thus, for participants to be eligible for the 2-year income deferral described in Q&A-10 of this notice, the distribution must be made no later than December 31, 2010, and, at the time of the rollover contribution to the designated Roth account, the plan must have a qualified Roth contribution program in place.

Q-20. For purposes of Q&A-19 of this notice, when is a qualified Roth contribution program in place?

A-20. Although, pursuant to Q&As-15 through -18 of this notice, a plan may be amended retroactively to add a qualified Roth contribution program, such a program is in place on a given date only if, with respect to compensation that could be deferred beginning with that date, eligible employees are given an opportunity to elect on that date to have designated Roth contributions made to the plan (or would have such an opportunity but for a statutory or plan limitation on the amount of an employee's elective deferrals).

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to RetirementPlanQuestions@irs.gov.

IRS Retirement Plan News – Fall 2010

In-Plan Roth Rollovers - New Guidance and 2010 Forms 1099-R and 8606 Reporting Instructions

On November 26, 2010, the IRS issued Notice 2010-84, containing guidance for 401(k) and 403(b) plans about in-plan Roth rollovers - a feature that permits plan participants to roll over eligible rollover distributions (ERDs) made after September 27, 2010, from a non-Roth account into a designated Roth account in the same plan. A non-Roth account means any plan account that does not hold designated Roth contributions.

Eligible Participants

- Besides plan participants, surviving spouse beneficiaries and alternate payees who are current or former spouses are also eligible to do an in-plan Roth rollover.

Types of In-plan Roth Rollovers

- In-plan Roth direct rollover - when the plan trustee transfers an eligible rollover distribution from a participant's non-Roth account to the participant's designated Roth account in the same plan.
- In-plan Roth 60-day rollover - when the participant deposits an eligible rollover distribution within 60 days of receiving it from a non-Roth account into a designated Roth account in the same plan.

Plan Amendments

- 401(k) and 403(b) plans have extended deadlines to amend to allow 2010 in-plan Roth rollovers if the amendment's effective date is the date the plan first operated in accordance with that amendment.
 - 401(k) plans have until the later of the last day of the year in which the amendment is effective or December 31, 2011.
 - Safe harbor 401(k) plans have until 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 have until the later of the plan's remedial amendment period (described in Announcement 2009-89) or the last day of the first plan year in which the amendment is effective.
- A §457(b) government plan may adopt an amendment to include a designated Roth account after December 31, 2010, and then allow in-plan Roth rollovers.

Eligible Rollover Distributions

- Participants may only roll over eligible rollover distributions from a non-Roth account to a

designated Roth account in the same plan.

- A plan can be amended to allow new in-service distributions from the plan's non-Roth accounts conditioned on the participant rolling over the distribution in an in-plan Roth direct rollover. However, the plan cannot impose this condition on any existing distribution options available under the plan.

In-Plan Roth Rollover Account

- A plan may have to hold in-plan Roth rollovers for a participant in a separate account maintained solely for these rolled over amounts.

In-Plan Roth Rollovers Not Treated as a Distribution

- A distribution rolled over as an in-plan Roth direct rollover is not treated as a distribution for the following purposes:
 - Transferring a plan loan to the designated Roth account without changing its repayment schedule;
 - Requiring spousal consent;
 - Requiring a participant's consent before an immediate distribution of an accrued benefit of more than \$5,000; and
 - Eliminating a participant's right to optional forms of benefit.

Written Explanation (402(f) Notice)

If a plan offers in-plan Roth rollovers, it must include a description of this feature in the written explanation (402(f) Notice) the plan provides to participants who receive an eligible rollover distribution. Notice 2010-84 describes how a plan that uses the safe harbor explanations can revise them if it offers an in-plan Roth rollover option to participants.

Taxability and Withholding

- In-plan Roth rollovers are not subject to the 10% additional tax on early distributions under Code §72(t) and an in-plan Roth direct rollover is not subject to the mandatory 20% withholding under Code §3405(c). An individual who makes an in-plan Roth direct rollover may have to increase his or her federal income tax withholding or make estimated tax payments to avoid an underpayment of tax penalty.
- A special recapture rule applies when a plan distributes any part of the in-plan Roth rollover within a 5-taxable-year period, making the distribution subject to the 10% additional tax on early distributions under Code §72(t) unless an exception to this tax applies or the distribution is allocable to any nontaxable portion of the in-plan Roth rollover. The 5-taxable-year period begins January 1 of the year of the in-plan Roth rollover and ends on the last day of the fifth year of that period. This special recapture rule does not apply when the participant rolls over the distribution to another designated Roth account or to his or her Roth IRA but does apply to a subsequent distribution from

the rolled over account or IRA within the 5-taxable-year period.

- Notice 2010-84 prescribes an ordering rule and an example involving a distribution from a participant's designated Roth account to which the participant had made an in-plan Roth rollover.

Special Rules for 2010 In-Plan Roth Rollovers

- The participant generally reports the taxable amount (fair market value of the distribution minus the employee's basis in the distribution) of an in-plan Roth rollover in the taxable year in which he or she receives the distribution. However, for in-plan Roth rollovers done in 2010, the participant:
 - reports half of the taxable amount in 2011 and the other half in 2012 (2-year income spread), or
 - elects to report the entire taxable amount in 2010.

If a participant elects to include the taxable amount in 2010, this election applies to all of his or her in-plan Roth rollovers in 2010 and he or she may not revoke the election after the due date (including extensions) of his or her 2010 tax return.

- In order for a participant to be eligible for the 2-year income spread, the distribution to be rolled over in an in-plan Roth rollover has to be made no later than December 31, 2010, and the plan must have a designated Roth account in place at the time the distribution is rolled over.
- Special income acceleration rules apply if the participant later receives a distribution of any amount of the taxable portion of the in-plan Roth rollover in 2010 or 2011 that wouldn't have been included in gross income until 2011 and 2012. Under these rules, the participant must increase gross income in the year of distribution by the amount of the distribution that the participant could have deferred to 2012. Notice 2010-84 has an example where a participant receives a distribution allocable to the taxable portion of an in-plan Roth rollover where such taxable portion has not yet been included in the participant's gross income.

No Recharacterization Rights

- Unlike a conversion or rollover to a Roth IRA, a participant may not recharacterize any amount of an in-plan Roth rollover.

Loans

- If an outstanding loan is part of in an in-plan Roth rollover, the taxable amount of the rollover is the balance of the loan.

Reporting 2010 In-plan Roth Rollovers

Form 1099-R Reporting

- Report 401(k) and 403(b) in-plan Roth direct rollovers on Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*:
- Include the amount rolled over in box 1 (Gross distribution)
- Include the taxable amount rolled over in box 2a (Taxable amount)
- Don't check box 2b (Taxable amount not determined)
- Report the basis in the amount rolled over in box 5 (Employee contributions)
- Use distribution code "G" in box 7

Plans are not required to withhold 20% for an in-plan Roth direct rollover. The 10% additional tax on early distributions under Code section 72(t) does not apply to any amount of an in-plan Roth rollover.

Plans must report any distributions made in 2010 from designated Roth accounts allocable to an in-plan Roth rollover on a separate Form 1099-R. Report the distribution as you would any other distribution from a designated Roth account (see Form 1099-R instructions). However, in the blank box to the left of box 10, enter the amount of the distribution allocable to the in-plan Roth rollover.

For additional information, please see the [Changes to Current Tax Forms, Instructions, and Publications](#) Web page.

Plan Participants - Form 8606 Reporting

Plan participants who make an in-plan Roth rollover in 2010 must:

- File Form 8606, *Nondeductible IRAs*, with their 2010 tax return
- Complete Form 8606, Part III, to report their in-plan Roth rollover
- Complete certain lines of Form 8606, Part IV, if they receive a distribution in 2010 of any amount of their in-plan Roth rollover
- Complete Form 8606, Part II, to report any amount converted from a non-Roth IRA to a Roth IRA in 2010
- File and complete a separate Form 8606, Part III, if they also rolled over amounts from a qualified retirement plan to a Roth IRA in 2010

View the proposed revisions to the 2010 Form 8606 on our [Draft Tax Forms](#) Web page.