

PLAN DISTRIBUTIONS

Recent PLRs Illustrate Circumstances Under Which IRS Will Waive the 60-Day Rollover Requirement

PLRs 200327064 and 200332026 are the first illustrations from the IRS of some of the facts and circumstances that will cause it to waive the 60-day rollover requirement under EGTRRA's substantive waiver standards and Revenue Procedure 2003-16's waiver application procedures.

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The Internal Revenue Code generally requires that any amount distributed from a qualified retirement plan, an individual retirement account or annuity (IRA), a qualified annuity plan, a tax-sheltered annuity, or an eligible governmental plan must be transferred to an eligible retirement plan no later than the 60th day following the day of receipt in order to avoid inclusion in the distributee's gross income. [See, Code Sections 402(c)(3) (pertaining to qualified retirement plans), 408(d)(3) (IRAs), 403(a)(4)(B) (qualified annuity plans), 403(b)(8)(B) (tax-sheltered annuities) and 457(e)(16)(B) (eligible governmental plans).] The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) authorized the Secretary of the Treasury 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 such requirement, effective for distributions made after December 31, 2001. [Code Section 402(c)(3), pertaining to qualified retirement plans, as amended by EGTRRA Section 644(a), and Code Section 408(d)(3)(I), as added by EGTRRA Section 644(b). The Secretary's authority also extends to IRAs, qualified annuity plans, tax-sheltered annuities, and eligible governmental plans. See, IRS Revenue Procedure 2003-16, 2003-4 I.R.B. 359, Section 3.04; EGTRRA Section 644(c).] The Conference Report to EGTRRA permitted the Secretary to issue guidance that includes objective standards for a waiver of the 60-day rollover requirement, such as waiving the rule due to military service in a combat zone or during a Presidentially declared disaster (both of which were allowed under pre-EGTRRA law), or for a period during which the participant has received payment in the form of

a check, but has not cashed the check, or for errors committed by a financial institution, or in cases of inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country, or postal error. [H.R. Rep. No. 84, 107th Cong., 1st Sess. 252 (2001)]

Pre-EGTRRA Rulings Upholding the 60-Day Rollover Requirement

Prior to EGTRRA, retirement plan distributions could be rolled over tax free if the rollover were made within 60 days after the date of receipt, but the Secretary of the Treasury had no authority to waive the 60-day rollover requirement, except during military service in a combat zone or by reason of a Presidentially declared disaster. [Under Code Sections 7508 and 7508A, the time for making a rollover may be postponed in the event of service in a combat zone or in the case of a Presidentially declared disaster or a terroristic or military action. See also, Treasury Regulations Section 301.7508-1 and 301.7508A-1 and Rev. Proc. 2002-71, 2002-46 I.R.B. 850.] Given the severe restrictions that were placed upon the Secretary's waiver authority prior to EGTRRA, a taxpayer who was not engaged in military service in a combat zone or affected by a Presidentially declared disaster and who had failed to roll over his distribution within the 60-day period had to include the taxable portion of the distribution in his federal gross income, even when his or her failure to meet the 60-day deadline was caused by factors outside the taxpayer's reasonable control. For example:

PLR 8420083 (February 17, 1984)

Taxpayer A in PLR 8420083 was declared legally incompetent on November 23, 1982 by Court N. B was appointed as guardian of A's estate and person. State O's statute provided, in part, that the guardian of an estate shall have the care, management and investment of the estate as far as necessary for the comfort and suitable support and education of the

ward. A maintained a certificate account with Savings and Loan P. B brought an action to consolidate A's assets in a central depository. An emergency withdrawal was made from the account on October 22, 1982, and on December 6, 1982, the balance was withdrawn and the account was closed. In 1983, it was discovered that the account was an IRA. The discovery was made beyond the 60-day period for making a tax-free rollover. A's representative requested a ruling from the IRS that A be permitted to roll over the IRA distributions even though the 60-day rollover period had expired, because A was incompetent, and Savings and Loan P did not properly inform B at the time of the withdrawals from the account that such withdrawals had tax implications. The IRS, citing its lack of authority to waive the 60-day rollover requirement, ruled that A could not roll over the IRA distributions because the 60-day period had expired.

PLR 8548073 (September 5, 1985)

Taxpayer T in PLR 8548073 received a distribution from the IRA he maintained at Company M. On November 2, 1981, T deposited the distribution at Company X. When T made the deposit, he instructed an account executive at Company X to deposit the funds into an IRA rollover account. In mid-December 1981, T received his first statement from Company X that indicated the funds had been deposited into T's personal account rather than an IRA. In January 1982, a representative of Company X called T and explained that the account executive had made an error and had deposited the funds into T's personal account despite T's explicit contrary instructions to deposit the distribution into an IRA rollover account. On March 23, 1982, Company X confirmed in writing that it had erred. T requested a ruling from the IRS that his IRA distribution would not be taxable because it would be deemed to have been properly rolled over into an IRA within the required 60-day period when he deposited it with Company X on November 2, 1981. The IRS, again citing its lack of authority to waive the 60-day rollover requirement, ruled that because T did not deposit the IRA distribution into his IRA rollover account within the required 60-day period, the distribution did not qualify as a tax-free rollover contribution. [PLR 8548073 revoked a previous contrary ruling, PLR 8235108, which the IRS had issued to T on June 8, 1982, and in which the IRS ruled that T's IRA distribution did qualify for tax-free rollover treatment, even though it had not been placed into an IRA rollover account within the 60-day rollover period, because T had done everything he could in order to accomplish a timely

rollover, he had not relied upon erroneous advice, and T's financial institution, not T, bore the full responsibility for the error. In PLR 8548073, however, the IRS explained that it was revoking PLR 8235108 because it believed that the earlier ruling was not in accord with the proper interpretation of the Code.]

PLR 9537017 (June 19, 1995)

Taxpayer A in PLR 9537017 received a distribution of the full amount standing to his credit in the IRA he maintained with Company C. A attempted to roll over the distribution back into the same IRA. However, Company C would not accept the rollover because it believed that the 60-day rollover period had expired. A requested a ruling that the 60-day rollover period be extended for a period ending 15 days after the date the IRS issued a private letter ruling to him. Once again citing its lack of authority to waive the 60-day rollover requirement, the IRS ruled that the 60-day period would not be extended for the requested period.

PLR 9842059 (October 16, 1998)

Taxpayer A in PLR 9842059 maintained IRA G with Bank D. Upon the advice of B, a financial planner, A received a check in Amount 1 from IRA G on Date 1 and intended to roll it over into another IRA. A sent that check to Company E, but it was not deposited into another IRA. A subsequently decided to roll over IRA G into IRA H, which she had set up with Company C. On Date 2, A received a check in Amount 2 from Company E which she gave to B to deposit into an IRA. On Date 3, more than 60 days after Date 1, the check which A received from Company E was deposited into IRA H. A's representative requested a ruling from the IRS that A's rollover of her distribution from IRA G into IRA H was tax-free. The IRS ruled, citing its lack of authority to waive the 60-day rollover requirement, that A's distribution was taxable because her rollover contribution was made after the 60-day period had expired.

PLR 200334044 (August 22, 2003)

Finally, Taxpayer A in PLR 200334044 was the beneficiary of a fractional share of Decedent's IRA X maintained with Company P and Trust F was the beneficiary of the other fractional share. Decedent had not yet started receiving minimum required distributions from IRA X before he died because he had not yet reached his required beginning date. In a letter dated March 19, 1996, A requested Company P to split IRA X, and transfer approximately \$33,000 to IRA Y, a new IRA established

at Company P in the Decedent's name with A as its sole beneficiary. A received monthly distributions from IRA Y until it was exhausted and closed in November 1996. The balance of IRA X, approximately \$600,000, remained in IRA X with Trust F as its sole beneficiary. A also was the trustee of Trust F. Trust F provided that, during A's lifetime, the net income of Trust F would be paid to her, at least quarterly, and that the trustee of Trust F would pay from the principal of the trust estate such sums as A may in writing request. In the same March 19, 1996 letter to Company P, A advised Company P that, as trustee of Trust F, she would take distributions from IRA X. Company P recognized Trust F as the beneficiary of IRA X, treated A as the designated beneficiary of Trust F and began making required minimum distributions, based on A's life expectancy, from IRA X to A in December 1997 and continuing through 2001. In November 2001, Company O advised A that 50 percent of the balance of IRA X had to be distributed prior to the close of 2001, which was the calendar year that contained the fifth anniversary of Decedent's death. To accomplish that distribution, A, on November 27, 2001, signed and returned to Company O a distribution form that resulted in a total distribution of approximately \$251,448 being made from IRA X on December 4, 2001. Although Trust F was the beneficiary of IRA X, the distribution form used to initiate the distribution was signed by A in her individual name, not as trustee of Trust F. The account at Company O to which the IRA X distribution was made was not Trust F, but rather, A's revocable grantor trust, Trust G. A subsequently challenged the validity of the distribution and, on May 10, 2002, asked Company O to rescind the distribution and redeposit the distribution back into IRA X. A was informed that the funds could not be redeposited into IRA X because the 60-day rollover period had expired. All of the securities and money that were transferred from IRA X to Trust G remained in Trust G. A's representative requested two rulings from the IRS: (1) that the distribution from IRA X of 50 percent of the balance in IRA X was not required under the minimum required distribution rules; and (2) that the distribution may be redeposited into IRA X despite the expiration of the 60-day rollover period. Further if the distribution could be so redeposited, A would not be required to include the distribution in her gross income for 2001. In response to A's first ruling request, the IRS ruled that, because distributions from IRA X had commenced within the period beginning not later than one year after the date of Decedent's death over A's life expectancy (which is a distribution method that falls within the exception to the five-year rule), a distribu-

tion from IRA X of 50 percent of the IRA X account balance was not required to be made by the close of 2001. In response to A's second ruling request, the IRS, applying pre-EGTRRA law because the distribution from IRA X had been made before January 1, 2002, ruled that because more than 60 days had elapsed since the distribution from IRA X had been made, A could not redeposit the distribution back into IRA X or any other IRA.

Post-EGTRRA Rulings Waiving the 60-Day Rollover Requirement

On January 8, 2003, pursuant to EGTRRA, the IRS issued Revenue Procedure 2003-16, 2003-4 I.R.B. 359, which provides guidance to taxpayers on applying to the IRS for a waiver of the 60-day rollover requirement. Revenue Procedure 2003-16 also provides for an automatic waiver under certain circumstances. [Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 1] The Revenue Procedure's rules for waiver of the 60-day rollover requirement apply to distributions from IRA accounts or annuities described in Code Section 408(a) or (b), qualified retirement plans described in Code Section 401(a), qualified annuity plans described in Code Section 403(a), tax-sheltered annuities described in Code Section 403(b), and eligible governmental plans described in Code Section 457(b). [Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 3.04]

Application to the IRS

Unless the automatic waiver applies, a taxpayer must apply for a hardship exception to the 60-day rollover requirement using the same procedure as that outlined in Revenue Procedure 2003-4, 2003-1 I.R.B. 123, accompanied by the user fee set forth in Revenue Procedure 2003-8, 2003-1 I.R.B. 236. [Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 3.01]

The IRS will issue a ruling waiving the 60-day rollover requirement in cases where the failure to waive the requirement would be against equity or good conscience, including casualty, disaster or other events beyond the reasonable control of the taxpayer. In determining whether to grant a waiver, the IRS will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution, other than the types of financial institution errors that will trigger an automatic waiver of the 60-day rollover requirement; (2) inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country, or postal error; (3) the use of the amount distributed (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred. [Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 3.02]

Automatic Approval

No application to the IRS is required if a financial institution receives funds on behalf of a taxpayer prior to the expiration of the 60-day rollover period, the taxpayer follows all procedures required by the financial institution for depositing the funds into an eligible retirement plan within the 60-day period (including giving instructions to the financial institution to deposit the funds into an eligible retirement plan) and, solely due to an error on the part of the financial institution, the funds are not deposited into an eligible retirement plan within the 60-day rollover period. [The term “eligible retirement plan” is defined in Code Section 402(c)(8)(B) to mean: (1) an individual retirement account or annuity described in Code Section 408(a) or (b); (2) a qualified retirement plan described in Code Section 401(a); (3) a qualified annuity plan described in Code Section 403(a); (4) an eligible governmental plan described in Code Section 457(b); and (5) a tax-sheltered annuity contract described in Code Section 403(b). Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 3.03.] Automatic approval is granted only: (1) if the funds are deposited into an eligible retirement plan within one year from the beginning of the 60-day rollover period, and (2) if the financial institution had deposited the funds as instructed, it would have been a valid rollover. [*Id.*]

General Rules

Revenue Procedure 2003-16 also imposes general rules that must be satisfied in order for a taxpayer to be eligible for a waiver of the 60-day rollover period, either automatically or through application to the IRS. [Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 3.04] First, the distribution must have occurred after December 31, 2001. [*Id.*] In addition, the rules regarding the amount of money or other property that can be rolled over into an eligible retirement plan within the 60-day rollover period (including Code Section 402(c)(6), relating to sales of distributed property) apply to deposits made pursuant to a waiver of the rollover period. So, for example, if a taxpayer received \$6,000 in cash from his IRA, the most that could be deposited into an eligible retirement plan pursuant to a waiver of the 60-day rollover period is \$6,000. [*Id.*]

Effective Date

Revenue Procedure 2003-16 became effective on January 27, 2003. [Rev. Proc. 2003-16, 2003-4 I.R.B. 359, Section 4]

At least two taxpayers have applied for and received waivers of the 60-day period from the IRS, following

the IRS application procedures set forth in Revenue Procedure 2003-16:

PLR 200327064 (July 3, 2003)

Taxpayer A in PLR 200327064, apparently the first letter ruling of its kind, maintained a number of IRAs. A was married to taxpayer B. A and B hired Individual C, who worked for Company M to manage their investments. In 2002, Individual C misappropriated funds from several of the taxpayers' IRAs. Individual C caused the custodian of taxpayers' IRA X, IRA Y, and IRA Z to distribute funds from the IRAs. Individual C received the funds for his personal use without the taxpayers' knowledge. The distributions at issue from IRA X occurred between January and August 2002, the distributions from IRA Y occurred in December 2002, and the distributions from IRA Z occurred in January 2002. As shown on forms 1099-R submitted with the taxpayers' ruling request, the amounts distributed from IRA X, IRA Y, and IRA Z, were Amount D, Amount E, and Amount F, respectively. The total amount distributed was Amount G. All of the distributions were made entirely in cash.

The taxpayers became aware of the misappropriation of funds late in 2002, when they did not receive account statements for IRA X, IRA Y, or IRA Z. After investigating the matter with the IRAs' custodians, the taxpayers learned that their account statements were being misdirected to another address, which the taxpayers later discovered was the address that Individual C provided to the custodians in order to conceal his misappropriation of funds.

The taxpayers were unaware of the distributions until after the 60-day rollover period had expired. The taxpayers proposed to contribute Amount G to one or more new IRAs.

The taxpayers requested the IRS to waive the 60-day rollover requirement with respect to the distributions of Amount D, Amount E, and Amount F, because the failure to waive the requirement would be against equity or good conscience.

After considering all relevant facts and circumstances (as required by Revenue Procedure 2003-16, Section 3.02), the IRS ruled that the information presented by the taxpayers demonstrated hardship, and indicated that the taxpayers could not reasonably satisfy the requirement that Amount D, Amount E, and Amount F be deposited in an IRA within 60 days of the distribution from IRA X, IRA Y, and IRA Z, respectively. The IRS further held that the failure to deposit Amount G into one or more IRAs within the 60-day period was beyond the taxpayers' reasonable control, and the failure to waive the 60-day

requirement would be against equity or good conscience. The IRS then waived the 60-day rollover requirement with respect to the distributions of Amount D, Amount E, and Amount F, and granted the taxpayers a period of 30 days from the issuance of the ruling letter to contribute Amount G, in cash, into one or more IRAs. The IRS also ruled that, provided all other rollover requirements of Code Section 408(d)(3) are met, except the 60-day requirement, the amounts would be considered rollover contributions under Code Section 408(d)(3).

PLR 200332026 (August 8, 2003)

In early 2002, taxpayer A in PLR 200332026, who was married to taxpayer B, maintained two IRAs, IRA X and IRA Y. In February 2002, A withdrew Amount 1 and Amount 2 from IRA X and IRA Y, respectively, and intended to place such amounts in IRA accounts with Company C. A and B were unaware that the amounts withdrawn from IRA X and IRA Y were, in fact, placed into taxable, non-IRA accounts with Company C. A and B realized their error in August 2002, when A withdrew amounts from the accounts with Company C. Upon withdrawal from the accounts with Company C, A utilized the services of Individual E of Company D in order to contribute Amount 3, which is less than the sum of Amount 1 and Amount 2, into IRA Z. Individual E represented that A took his minimum required distribution under Code Section 401(a)(9) for 2002. The distributions from IRA X and IRA Y of Amount 1 and Amount 2, respectively, were made entirely in cash and the contribution of Amount 3 to IRA Z was also made entirely in cash. A and B were unaware that the contributions to the accounts with Company C were made to taxable, non-IRA accounts until after the 60-day rollover period had expired.

A and B requested the IRS to waive the 60-day rollover requirement with respect to the distributions of Amount 1 and Amount 2, because the failure to waive that requirement would be against equity or good conscience.

After considering all relevant facts and circumstances (as required by Revenue Procedure 2003-16, Section 3.02), the IRS ruled that the information presented by A and B demonstrated hardship, and indicated that they could not reasonably satisfy the requirement that Amount 1 and Amount 2 be deposited in an IRA within 60 days of the distributions from IRA X and IRA Y, respectively. The IRS further ruled that the failure to deposit Amount 1 and Amount 2 into one or more IRAs within the 60-day

period was beyond the taxpayers' reasonable control, and the failure to waive the 60-day requirement would be against equity or good conscience. The IRS then waived the 60-day rollover requirement with respect to the distribution of Amount 1 and Amount 2. The IRS also ruled that, provided all other rollover requirements of Code Section 408(d)(3) are satisfied, except the 60-day rollover requirement, the contribution of Amount 3 to IRA Z would be considered a valid rollover contribution under Code Section 408(d)(3).

Conclusion

PLRs 200327064 and 200332026 are the first illustrations from the IRS of some of the facts and circumstances that will cause it to waive the 60-day rollover requirement under EGTRRA's substantive waiver standards and Revenue Procedure 2003-16's waiver application procedures. No doubt more PLRs will be forthcoming in this area, as other taxpayers also fail to meet the 60-day rollover requirement in various other hardship situations, including mental or physical disability, death, military service, disaster, casualty, acts of negligence or criminal wrongdoing committed by financial institutions or their employees, and other events beyond taxpayers' reasonable control.

If a taxpayer reasonably believes that all relevant facts and circumstances surrounding his or her distribution would support a waiver of the 60-day rollover requirement, but he or she is not absolutely certain that those facts and circumstances would qualify for an automatic waiver under Revenue Procedure 2003-16, he or she should apply to the IRS for a waiver using the application procedures outlined in that Revenue Procedure. No doubt many of the hapless taxpayers whose pre-January 1, 2002, distributions were denied tax-free rollover treatment by the IRS in the pre-EGTRRA PLRs described above could have qualified for either automatic or ruling letter waivers of the 60-day rollover requirement had their distributions occurred after December 31, 2001.

More Recent PLRs

Shortly before this article went to press, the IRS issued the following PLRs waiving the 60-day rollover requirement: PLRs 200406056 (wife's injury and hospitalization caused taxpayer to make untimely deposit into his IRA); 200406055 (heart valve replacement surgery and post-operative physical and mental difficulties permanently impaired taxpayer's ability to make rational judgments about his personal

and financial affairs); 200406054 (major snowstorm on February 18, 2003 that paralyzed the State of Maine and the rest of the northeastern United States); 200406052 (bank failed to follow taxpayer's instructions and taxpayer was unable to correct bank error due to wife's hospitalization for heart and kidney surgery); 200406050 (check issued by insurance company not clearly identified as an IRA distribution and taxpayer, recovering from heart surgery, mistakenly believed check was insurance policy proceeds); 200406049 (taxpayer mentally depressed, psychotic, and on Social Security disability); 200405017 (taxpayer relied on incorrect advice from investment advisor); 200405014 (taxpayer confused by the trauma of hospitalization, surgery, and chemotherapy); 200405013 (taxpayer received inadequate rollover information from 401(k) plan administrator); 200404056 (bank failed to timely execute taxpayer's instructions); 200404054 (unexpected and unrequested distribution from taxpayer's IRA); 200404053

(bank failed to deposit IRA rollover distributions into new IRA accounts); 200404051 (taxpayer disabled due to a stroke and moved to an assisted living facility); 200403099 (bank failed to deposit IRA rollover distribution into a new IRA account); 200403098 (bank failed to deposit IRA rollover distribution into a new IRA account); 200402029 (taxpayer confused and suffering from back surgery that required lengthy hospitalization); 200402028 (financial institution failed to deposit IRA rollover distribution into a new IRA account); 200401025 (taxpayer suffered from Alzheimer's disease); 200401024 (taxpayer was alcoholic, mentally ill, suicidal and was involuntarily admitted to mental health clinic); 200401023 (bank failed to deposit IRA rollover distribution into a new IRA account); 200401020 (bank mistakenly distributed funds from taxpayer's IRA and taxpayer did not redeposit them within 60 days); and 200334044 (financial institution failed to deposit IRA rollover distributions into new IRA accounts).