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# Eligible Rollover Distributions

Distributions from Qualified Plans and Section 457 Governmental Plans

Generally, if any portion of the balance to the credit of an employee in a qualified retirement plan is paid to the employee in an *eligible rollover distribution*, and the distributee transfers any portion of the property received to an *eligible retirement plan* (see Eligible Retirement, below), then the amount of the distribution so transferred will not be includable in income. IRC Sec. 402(c)(1). Many of the rules that follow for qualified plans are incorporated by reference into the requirements for eligible Section 457 governmental plans, effective for distributions after December 31, 2001.

An *eligible rollover distribution* is defined as any distribution made to an employee of all or any portion of the balance to the credit of the employee in a qualified trust, except that the term does not include: (1) any distribution that is part of a series of substantially equal payments (at least annually) made over the life expectancy of the employee or the joint life expectancies of the employee and his designated beneficiary; (2) any distribution made for a specified period of 10 years or more; (3) any distribution that is a required minimum distribution under IRC Section 401(a)(9); and (4) any hardship distribution. IRC Secs. 402(c)(4), 457(e)(16), as amended by EGTRRA 2001.

Regulations specify other items not considered to be eligible rollover distributions including any portion of a distribution excludable from gross income (other than net unrealized appreciation), the Table 2001 (or P.S. 58) cost of life insurance, corrective distributions of excess contributions, excess deferrals, excess aggregate contributions, and dividends paid on employer securities under Section 404(k). Treas. Regs. §§1.402(c)-2, A-3, 1.402(c)-2, A-4. (See Regulations §§1.402(c)-2, A-9 and 1.401(a)(31)-1 for guidance on the treatment of plan loans for purposes of the rollover and withholding rules.) Also ineligible for rollover treatment is any distribution that is a required minimum distribution under Section 401(a)(9). IRC Sec. 402(c)(4)(B).

If a qualified retirement plan distributes an annuity contract to a participant, amounts paid under that contract are considered to be payments of the balance of the participant’s credit and may be treated as eligible rollover distributions to the extent they would otherwise qualify. Therefore, the participant may surrender the annuity contract and treat the sum received as an eligible rollover distribution to the extent that it is includable in income and is not a required distribution under IRC Section 401(a)(9). Treas. Reg. §1.402(c)-2, A-10; Let. Rul. 9338041. The IRS determined that a separate lump-sum settlement payment to the widow of

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a plan participant who was already receiving monthly payments under the plan was eligible for rollover treatment under IRC Section 402(c)(4). Let. Rul. 9718037.

A distribution of property other than money is treated in the same manner as a distribution of cash; the amount transferred equals the property distributed. IRC Sec. 402(c)(1)(C). See Sale of Distributed Property, below.

The IRS determined that the mistaken transfer by a broker of an otherwise eligible rollover distribution from a qualified plan into a brokerage account and then into an IRA failed to qualify as an eligible rollover and was includable in the taxpayer’s gross income. Let. Rul. 9847031. Taxpayers who were defrauded by their investment advisor of IRA distributions intended to be rollovers were not permitted to replace the stolen assets from other funds and treat the replacement assets as rollover contributions. FSA 199933038.

Generally, the maximum amount that may be rolled over is the amount that would be includable in income if not rolled over. IRC Secs. 402(c)(2), 457(e)(16)(B), as amended by EGTRRA 2001. However, for distributions after December 31, 2001, *after-tax contributions* can be (1) rolled over from a qualified plan to a traditional IRA, or (2) transferred in a direct trustee-to-trustee transfer to a defined contribution plan, provided the plan separately accounts for after-tax contributions. After-tax contributions (including nondeductible contributions to a traditional IRA) may not be rolled over from a traditional IRA into a qualified plan, 403(b) tax sheltered annuity or eligible Section 457 governmental plan. IRC Secs. 402(c)(2), 457(e)(16)(B), as amended by EGTRRA 2001. Rollover amounts will be treated as first consisting of taxable amounts. See IRC Sec. 402(c)(2), as amended by JCWAA 2002.

A rollover must generally be completed within 60 days after receipt of the distribution. IRC Sec. 402(c)(3)(A), 457(e)(16)(B), as amended by EGTRRA 2001. See Sixty-Day Limitation, below. However, for distributions after December 31, 2001, the Secretary of the Treasury may waive the 60-day requirement where failure to waive it would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to the requirement. IRC Sec. 402(c)(3)(B), as added by EGTRRA 2001. Furthermore, unless a rollover is carried out by means of a “direct rollover,” the distribution amount will be subject to a mandatory income tax withholding rate of 20 percent. IRC Sec. 3405(c)(1).

A qualified plan may be amended to permit a default rollover of an involuntary cash-out of $5,000 or less without there being a violation of the direct rollover provision of IRC

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Section 401(a)(31), nor the prohibition on eliminating optional forms of benefits under IRC Section 411(d)(6). Rev. Rul. 2000-36, 2000-31 IRB 140. Rollover contributions may be divided among several traditional IRAs. See Rev. Rul. 79-265, 1979-2 CB 186; Let. Rul. 9331055. These may be either existing plans or plans newly created to receive the rollover. However, a traditional IRA inherited from someone who died after 1983 (other than a deceased spouse) is ineligible to receive a rollover. If an individual retirement annuity is used, it may not be an endowment contract. Although property may normally be rolled over, a rollover to a traditional individual retirement account may not include a retirement income, endowment or other life insurance contract, because IRC Section 408(a)(3) prohibits investment of individual retirement account funds in life insurance contracts. Rev. Rul. 81-275, 1981-2 CB 92. A rollover may be made from a qualified plan even though the participant is an active participant in another plan.

Distributions from Tax Sheltered Annuities

For distributions received from tax sheltered annuities, any portion of the balance to the credit of an employee that is paid to the employee in the form of an eligible rollover distribution and transferred to an eligible retirement plan (see Eligible Retirement Plans, below) is not includable in income by the employee. IRC Secs. 402(c)(1),  403(b)(8), as amended by EGTRRA 2001.

Generally, rollover distributions from tax sheltered annuities may be made to another tax sheltered annuity or a traditional IRA; however, for distributions after December 31, 2001, rollovers may also be made to a qualified plan, a Section 403(a) plan, or an eligible IRC Section 457 governmental plan (provided the 457 plan agrees to separately account for such funds). IRC Sec. 403(b)(8)(A)(ii), as amended by EGTRRA 2001.

For distributions after December 31, 2001, a trustee-to-trustee transfer from an IRC Section 403(b) plan to a defined benefit governmental plan that is used to purchase permissive service credits will be excluded from income. IRC Sec. 403(b)(13), as added by EGTRRA 2001. Under a 1991 ruling, rollover treatment was disallowed for such a transfer. See *Tolliver v. Comm.*, TC Memo 1991-460. A proper rollover was not achieved where a taxpayer invested a tax sheltered annuity distribution in a certificate of deposit. *Adamcewicz v. Comm.*, TC Memo 1994-361.

Distributions excepted from the term “eligible rollover distribution” include (1) any distribution that is part of a series of substantially equal payments made over the life expectancy of the employee or the joint life expectancies of the employee and his designated beneficiary, (2) any distribution made for a specified period of 10 years or more, (3) any distribution that is a required minimum distribution under IRC Section

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401(a)(9) and, (4) any hardship distribution. IRC Sec. 402(c)(4); IRC Sec. 408(b)(8)(B), as amended by EGTRRA 2001. Regulations specify other items not considered to be eligible rollover distributions, including any portion of a distribution excludable from gross income, the P.S. 58 or Table 2001 cost of life insurance, and corrective distributions of excess deferrals and excess employer matching contributions. Treas. Regs. §§1.402(c)-2, A-3, 1.402(c)-2, A-4, 1.403(b)-2, A-1. (See Treas. Regs. §§1.402(c)-2, A-9, 1.401(a)(31)-1 for guidance on the treatment of plan loans for purposes of the rollover and withholding rules.)

A distribution of property other than money is treated in the same manner as a cash distribution; the amount transferred equals the property distributed. IRC Sec. 402(c)(1)(C).

Generally, the maximum amount that may be rolled over is the amount that would be includable in income if not rolled over. IRC Sec. 402(c)(2). However, for distributions after December 31, 2001, *after-tax contributions* can be (1) rolled over to a traditional IRA, or (2) transferred in a direct trustee-to-trustee transfer to a defined contribution plan, provided the plan separately accounts for after-tax contributions.

After-tax contributions (including nondeductible contributions to a traditional IRA) may not be rolled over from a traditional IRA into a qualified plan, 403(b) tax sheltered annuity or eligible Section 457 governmental plan. IRC Secs. 402(c)(2), 403(b)(8)(B), as amended by EGTRRA 2001. Rollover amounts will be treated as first consisting of taxable amounts. See IRC Sec. 402(c)(2), as amended by JCWAA 2002.

Reaching a similar conclusion, a federal district court held that funds in a tax sheltered annuity attributable to a salary reduction agreement were not eligible for rollover treatment unless the requirements of IRC Section 403(b)(11) were satisfied. *Frank v. Aaronson*, 1996 U.S. Dist. LEXIS 15617. However, funds subject to such distribution requirements may be transferable to another tax sheltered annuity in a “direct transfer.” A deemed distribution under IRC Section 72(p) is not eligible to be rolled over to an eligible retirement plan. Prop. Treas. Reg. §1.72(p)-1, A-12.

A rollover generally must be completed within 60 days after the distribution is received (see Sixty-Day Limitation, below). IRC Sec. 402(c)(3). However, for distributions after December 31, 2001, the Secretary of the Treasury may waive the 60-day requirement where failure to waive it would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to the requirement. IRC Sec. 402(c)(3)(B), as added by EGTRRA 2001.

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Unless a rollover is effected by means of a direct rollover, the distribution amount will be subject to a mandatory income tax withholding rate of 20 percent. IRC Secs. 403(b)(10), 3405(c)(1).

Mandatory Income Tax Withholding on Distributions

Distributions from qualified retirement plans, tax sheltered annuities and (beginning after December 31, 2001) eligible IRC Section 457 governmental plans are subject to a mandatory income tax withholding rate of 20 percent unless the transfer is handled by means of a direct rollover. IRC Secs. 3405(c)(1), 457(e)(16)(B), as amended by EGTRRA 2001. The employee receiving the distribution may not elect out of the withholding requirement. (Distributions from traditional IRAs are not subject to mandatory 20 percent withholding.)

Some commentators have observed that a participant who wishes to retain all or a portion of a distribution from a qualified plan or tax sheltered annuity may avoid the mandatory 20 percent rate by a two-step process. First, the participant makes a direct rollover from a qualified plan or tax sheltered annuity to an IRA. Then, the participant takes a distribution from the IRA which is subject to the elective withholding rate of only 10 percent.

Note that if a participant’s total distribution is expected to be less than $200, the participant need not be offered the option of a direct rollover. Treas. Reg. §1.401(a)(31)-1, A-11.

If a participant receives an eligible rollover distribution that is subject to the 20 percent withholding rate, the 20 percent withheld will be includable in income (to the extent required by IRC Sections 402(a), 403(b)(1) or 457(a)(1)(A)) even if the participant rolls over the remaining 80 percent of the distribution within the 60-day period (see Sixty-Day Limitation, below). See Treas. Reg. §§1.402(c)-2, A-11, 1.403(b)-2, A-1.

Because the amount withheld is considered to be an amount distributed under such sections, the participant may add an amount equal to the 20 percent withheld to the 80 percent he has received, resulting in a rollover of the full distribution amount. The 10 percent premature distribution penalty may apply to the amount withheld where only the remaining 80 percent of the distribution is rolled over from a qualified plan or IRC Section 403(b) plan. Treas. Reg. §1.402(c)-2, A-11. (A distribution from an eligible IRC Section 457 governmental plan is treated as a premature distribution from a qualified plan to the extent that it represents funds rolled over from a qualified plan, 403(b) plan or traditional IRA. IRC Sec. 72(t)(9), as amended by EGTRRA 2001.)

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Where a distributee elects to transfer a portion of the distribution by a direct rollover and receive the remainder, the 20 percent withholding requirement applies only to the portion of the distribution that the distributee actually receives. It does not apply to the portion of the distribution that is transferred directly to another eligible retirement plan. Treas. Reg. §31.3405(c)-1, A-6.

# Maximum Rollover Amount

As a general rule, the maximum amount that may be rolled over is that portion of the distribution that is includable in income without regard to the rollover rules. IRC Sec. 402(c)(2).

# Sale of Distributed Property

A participant may roll over the proceeds (all or part, and including profit) from the sale of property received in a distribution, instead of the property itself, subject to the maximum amount allowable (see Maximum Rollover Amount, above). A participant may not retain the property received in the distribution and roll over a cash amount representing the fair market value of the property. He must either contribute the identical property received in the distribution or sell the property in a bona fide sale and contribute the proceeds. Rev. Rul. 87-77, 1987-2 CB 115.

Where a distribution includes property and exceeds the rollover contribution, the participant, following a sale, may designate (irrevocably) which portion of the money received, and which portion of the proceeds of the sale, are to be treated as included in the rollover and which portions are to be deemed attributable to the employee contributions (if any). (Presumably, “employee contributions” is intended to mean only nondeductible employee contributions in this case.) If he fails to make a designation, allocations will be made on a ratable basis. Under the basis recovery rules of Section 72(e), the nondeductible employee contributions are recovered first from the amounts not rolled over. Notice 87-13, 1987-2 CB 432, A-18; Let. Rul. 9043056. To the extent that the proceeds of the sale are rolled over, no gain *or loss*is recognized on the sale. IRC Sec. 402(c)(6). Where the entire proceeds of a sale are not rolled over, any gain or loss will be prorated between the proceeds rolled over and those retained (H. Rep. 95-1739).

# Sixty-Day Limitation

Once a distribution eligible for rollover treatment is received by a participant, he must make the rollover contribution *within 60 days*. IRC Sec. 402(c)(3).

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The 60-day limitation is applied separately to each distribution if more than one distribution is received by an employee during a taxable year. Treas. Reg. §1.402(c)-2, A-11.

Following years of rulings in which rollover treatment was denied to taxpayers who attempted, but failed through the fault or error of others, to meet the 60-day requirement, Congress enacted a provision allowing for waiver of the limit. For distributions after December 31, 2001, the Secretary of the Treasury is authorized to waive the 60-day requirement where failure to waive it would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to the requirement. IRC Sec. 402(c)(3)(B). Prior to this amendment, waivers of the 60-day time limitation were denied even where the failure to meet it was the result of mistake, erroneous advice, the inaction of third parties or reliance on prior rulings by the Service itself (see e.g., *Orgera v. Comm.*, TC Memo 1995-575; Let. Ruls. 9826036, 9211035, 9145036, 8608049, 8420083, 8207004, 8001067).

The IRS has issued guidelines for requesting a waiver of the 60-day requirement. See Rev. Proc. 2003-16, 2003-1 CB 359. Under the guidelines, a taxpayer may request a private letter ruling from the IRS waiving a failure to meet the 60-day requirement. The Service will consider “all relevant facts and circumstances,” such as whether financial institutions committed any errors; whether an incomplete rollover was due to death, disability, hospitalization, incarceration, or postal error; how an amount distributed was used by the taxpayer, including whether a check was cashed; and how much time has elapsed since the distribution. The guidelines grant automatic waivers in cases where the failure to timely complete a rollover is “solely due to an error on the part of the financial institution.” If the taxpayer followed the institution’s required procedures within the 60-day rollover period, and the error is ultimately corrected within one year of the distribution, no waiver request is necessary.

The IRS appears to be taking a taxpayer-friendly approach to granting waivers of the 60-day deadline. The IRS has granted waivers in cases involving blizzards, unexpected office closures, hospitalized spouses, recovery from surgery, treatment for alcohol and drug abuse, and a mistake as to the nature of a rollover check. Let. Ruls. 200405014, 200406050, 200406052, 200406055, 200406056.

Additionally, PLR 200327064 (April 9, 2003), the first occasion on which the IRS granted a waiver under Section 408(d)(3)(I), involved a simple case of misappropriation by the taxpayers' investment manager. A later series of letter rulings (PLR 200401020, October 8, 2003; PLR 200401023, October 9, 2003; PLR 200401024, November 4,

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2003; PLR 200401025, November 5, 2003) granted waivers, respectively, for a bank's erroneous withdrawal of funds from the taxpayer's IRA rather than the non-tax-favored account he specified; an attempted rollover that failed because the transferee bank erroneously opened a CD rather than an IRA; a taxpayer's failure to complete a rollover because he was institutionalized during the 60-day period; and a withdrawal made by a taxpayer with Alzheimer's whose daughter provided a medical declaration that her mother was incapable of understanding the consequences.

In PLR 200410027 (Dec. 9, 2003), the IRS went further than ever, granting a waiver to a hearing-impaired taxpayer who misunderstood an explanation of what he thought were rollover documents because he was not wearing his hearing aids.

These letter rulings, taken together, show that the Service seems committed to applying the relief afforded by Section 408(d)(3)(I) liberally. In fact, it is becoming easier to ask under what circumstances the IRS will deny a waiver of the 60-day period. The examples are few. In PLR 200428031 (April 16, 2004), the taxpayer received a notice of intent to levy from the IRS. The notice applied to amounts held in IRAs. The taxpayer made a withdrawal from his IRA in an attempt to avoid the levy. The IRS sent and then withdrew a notice of levy; thereafter, the taxpayer requested a waiver so that his redeposit of the amount he withdrew to avoid the levy could be treated as a rollover. The taxpayer, it would seem, was determined to illustrate the famous definition of the term "chutzpah": the quality exhibited by a man who murders his parents and then throws himself on the court's mercy because he's an orphan. Clearly the Service had to deny a waiver.

More problematically, in PLR 200428034 (April 13, 2004), the taxpayer took withdrawals from an IRA in order to cover necessary expenses during a period of unemployment and redeposited them after the 60-day period. Unlike a previous similar case, PLR 200417033, the taxpayer was able to argue that because his financial institution incorrectly told him he could only make one IRA withdrawal per year, he withdrew too much money; the Service allowed a waiver for the amounts he had not spent. The problem with these two letter rulings is not the denial of the waiver: Congress certainly never intended employees to use their retirement funds during periods of unemployment for what the IRS characterizes as interest-free loans. Rather, they highlight the problem that one can take such an "interest-free loan" from one's IRA as long as one redeposits it within 60 days.

In PLR 200502050 (October 19, 2004), the Service was confronted with a situation, alluded to above, in which a taxpayer tried to effectuate a rollover but died before succeeding. In this instance, she tried to effect a trustee-to-trustee transfer but was

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frustrated by bank error; the bank sent 80 percent of the funds to the new IRA custodian but withheld the remaining 20 percent, as is standard with a true rollover. The taxpayer tried to correct the error but could not do so before she died. The executor then deposited the equivalent of the withheld 20 percent in the second IRA. As explained above, this would have effected a rollover had it happened within the 60-day limit. The executor therefore asked for a waiver, which the IRS granted, holding that under these circumstances the executor could complete the rollover even though this would not usually be the case. In this case, death and financial institution error, two of the IRS's favorite justifications for granting waivers, combined to virtually compel the result.

Continuing in its sometimes inscrutable way, the IRS issued one of its rare rollover waiver denials in PLR 200508027 (Nov. 30, 2004), in which a widow effected a direct rollover of her husband's retirement account under the misapprehension that the 20 percent withheld represented her entire tax obligation. When she found otherwise and asked for a waiver, the IRS refused, saying that she had signed documents warning her of the consequences of a direct rollover and taken it anyway. This argument, holding the documents against the taxpayer, is probably unprecedented in the rollover waiver decisions, and if consistently applied would likely result in denial of virtually all waiver requests. (To be sure, the IRS could not appeal to its listed criteria; in particular, the taxpayer got accurate advice from the financial institution but did not understand it. But how much worse is this than getting accurate information but not hearing it because you turned off your hearing aid?)

This outcome seems particularly harsh when compared with the IRS's decision two weeks earlier in PLR 200506033 (Nov. 15, 2004). Here, the taxpayer withdrew his entire IRA balance less fees to hold it ready for a first house payment. When the deal fell through, three weeks later, he tried to effect a rollover but was talked out of it when the financial institution advised him, wrongly, that he would be subject to a 10 percent penalty. The IRS held that he would have affected the rollover if not for the bad financial institution advice. However, the bad advice did not prevent the rollover, it merely dissuaded the taxpayer from effecting it. He could have done it if he'd been willing to pay what he believed was the 10 penalty. One can easily see the IRS, in different mood, holding this against him as it held the taxpayer's misunderstanding against her in PLR 200508027.

Does the accumulated experience of rollover waiver letters give us any basis for predicting how likely a particular client’s request is to be approved? To some extent: but any particular case is a crapshoot. Nonetheless, some situations are more favorable than others, and allow us to suggest some guidelines.

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* Try to bring your case within one of the enumerated factors, especially financial institution error. Cases that would have clearly gone against the taxpayer can be turned around if any kind of "error" can be pinned on the financial institution—even failing to read the taxpayer’s mind to inform him of a mistaken belief, as in PLR 200543065 and PLR 200547023. And most recently in PLR 200828034, the IRS waived the 60-day rollover requirement for an amount misappropriated by a financial institution employee.
* Look sympathetic. Family caregiving obligations are not among the factors listed in the statute or regulations. It is not clear in general whether they are matters beyond the taxpayer’s reasonable control that would have prevented a rollover—the spirit of the law.  Nonetheless, the taxpayer in PLR 200547022 cited the distraction caused by such obligations as the basis for her waiver request, and the IRS granted it.  On the other hand, the taxpayer in PLR 200548030, who used part of his distribution to buy a motorcycle, got no sympathy from the IRS.
* Make sure you can replace a short-term distribution in timely fashion. Congress allowed you to use an IRA distribution as a short-term loan, but the IRS has shown implacable hostility toward taxpayers who do so.  So if you do this, just be very sure you can complete the rollover in timely fashion.

If a qualified pension or profit sharing plan distributes an ordinary annuity contract (deferred or otherwise) to a participant, the 60-day period begins when the annuity contract is distributed from the plan and not on its surrender or transfer to the receiving plan. See Let. Ruls. 8014034, 8035054.

Where a stock certificate representing the participant’s distribution was sent by registered mail but the participant was away from home, the 60-day period did not begin until the taxpayer signed the registered mail claim check at the post office and took physical receipt of the stock distribution. Let. Rul. 8804014. Likewise, the 60-day period began upon the taxpayer’s receipt of a distribution check even though the check had been issued 10 months earlier but delivery was delayed because of an incorrect address. Let. Rul. 8833043.

The 60-day period does not include any period during which the amount transferred to the individual is a “frozen” deposit (i.e., cannot be withdrawn because of the bankruptcy or insolvency of the financial institution or any state-imposed requirement based on the bankruptcy or insolvency (or threat thereof) of institutions in the state). IRC Sec. 402(c)(7)(B). Also, the 60-day period will not be considered to expire any earlier than

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ten days after the amount ceases to be frozen. IRC Secs. 402(c)(7)(A), 403(a)(4)(B), 403(b)(8)(B), 408(d)(3)(F). The inclusion of a distribution as income is not deferred into another calendar year merely because the 60-day rollover period extends into the succeeding year. *Robinson v. Comm.*, TC Memo 1996-517.

A timely rollover occurred where a corrective bookkeeping entry was made after the 60-day period but, based upon the facts of the case, the Tax Court concluded that the transfer itself had actually occurred within the required period. *Wood v. Comm.*, 93 TC 114 (1989).

Exception to 60-Day Rule for Frozen Accounts

The 60-day rule does not apply where the amount to be rolled over is a "frozen deposit." A frozen deposit is any deposit that may not be withdrawn due to (1) the bankruptcy or insolvency of any financial institution, or (2) any requirement imposed by the state in which the institution is located by reason of the bankruptcy or insolvency (or threat of bankruptcy or insolvency) of one or more financial institutions in the state. In such cases, the period of insolvency, etc., is not included in the 60-day period. And, in any case, an individual has ten days after the release of funds to complete the rollover. IRC Secs. 408(d)(3)(F); 402(c)(7).

# Eligible Retirement Plan

The definition of “eligible retirement plan” depends on the plan from which the rollover is made. The availability of rollovers between various types of plans was considerably expanded by EGTRRA 2001; the rules that follow apply for distributions after December 31, 2001, except as otherwise noted.

*Qualified plan*. An eligible retirement plan with respect to a qualified plan means a traditional IRA, another qualified plan, a 403(a) annuity, a Section 403(b) tax sheltered annuity, and an eligible IRC Section 457 governmental plan (provided it agrees to separately account for funds received from any eligible retirement plan, except another eligible Section 457 governmental plan). IRC Secs. 402(c)(8), 402(c)(10), as amended by EGTRRA 2001.

Prior to amendment by EGTRRA 2001, an eligible retirement plan, with respect to a qualified plan, was defined as either a traditional IRA or a qualified defined contribution plan that accepts rollovers. IRC Secs. 402(c)(8)(B), 401(a)(31)(D). For taxpayers wishing to preserve any capital gains or special averaging treatment, a distribution would still need to be made to a “conduit IRA” as under the old rules, and rolled back

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over to another qualified plan. For this purpose, money from a qualified plan still may not be commingled with other money. This privilege of a conduit rollover to a qualified plan is available for an IRA containing assets rolled over from a Keogh plan by a previously self-employed individual. See IRC Sec. 402(i). However, the conduit rollover privilege is not available for an IRA containing assets received from contributions other than the rollover from the first qualified plan. Thus, it is important to establish a separate IRA to receive a rollover from a qualified plan, and to avoid subsequent contributions to it, in order to assure its status as a conduit IRA if there is any possibility of a future retransfer into another qualified plan. A rollover of a conduit IRA which has received contributions other than the rollover from the first qualified plan will not be a tax-free rollover and could cause disqualification of the recipient plan. See Ltr. Rul. 9604028.

For years subsequent to 2001 maintenance of conduit status is considerably less important, since IRA distributions after 2001 may generally be rolled over into qualified plans. However, non-conduit rollovers to qualified plans may not include any non-taxable portion of the IRA withdrawal. Additionally, a distribution from a qualified plan that would have been eligible for capital gain or averaging treatment had it not been rolled over into an IRA will retain such eligibility after rollover from a conduit IRA back to a qualified plan, but such eligibility will be lost if the IRA is not maintained as a conduit.

*Traditional IRAs*. An eligible retirement plan with respect to a traditional IRA (individual retirement account or individual retirement annuity) means another traditional IRA, a qualified plan, a 403(a) annuity, an eligible IRC Section 457 governmental plan (provided it agrees to separately account for funds received from any eligible retirement plan, except another eligible Section 457 governmental plan), and a Section 403(b) tax sheltered annuity. IRC Secs. 408(d)(3)(A), 402(c)(10), as amended by EGTRRA 2001.

*Roth IRAs*. For purposes of rollovers ("conversions") from a traditional IRA or other retirement plan into a Roth IRA, eligible retirement plan means a traditional IRA, a qualified plan, a 403(a) annuity, an eligible IRC Section 457 governmental plan, and a Section 403(b) tax sheltered annuity. IRC Secs. 408A(e), 402(c)(8)(B).

*Section 403(b) annuity*. An eligible retirement plan with respect to an IRC Section 403(b) tax sheltered annuity includes a traditional IRA, a qualified plan, a 403(a) annuity, an eligible IRC Section 457 governmental plan (provided it agrees to separately account for funds received from any eligible retirement plan, except another eligible Section 457 governmental plan), and another 403(b) annuity. IRC Secs. 403(b)(8)(A)(ii), 402(c)(10), as amended by EGTRRA 2001.