Transcript for In-Plan Roth Rollovers

<u>Note</u> - Any federal tax advice contained in this transcript is intended to apply to the specific situation described and should not be considered official guidance independent of the presentation. The tax advice and statements contained herein should not be relied upon for retirement planning purposes without first consulting a tax or retirement planning professional. This transcript has been edited for technical accuracy and may differ slightly from the audio recording of the In-Plan Roth Rollovers phone forum. This information is current as of December 20, 2010. Since changes may have occurred, no guarantees are made concerning the technical accuracy after that date.

Moderator: Welcome to the In-Plan Roth Rollover Phone Forum. At this time, all participants are in a listen-only mode. As a reminder, today's conference is being recorded. I would now like to turn the conference over to your host, Mr. Mark O'Donnell.

M. O'Donnell: Hello, everyone. I'm Mark O'Donnell, Director of Customer Education and Outreach for IRS Employee Plans. Welcome to our Phone Forum on In-Plan Roth Rollovers.

Today we'll be hearing from Roger Kuehnle, a Tax Law Specialist with Employee Plans, Technical Guidance and Quality Assurance. Roger is the principal drafter of our technical guidance on in-plan Roth rollovers. We'll also be hearing from Anita Bower, a Tax Law Specialist in Employee Plans, Customer Education and Outreach. Anita has been working closely with Roger and others on our Communication and Outreach initiative for in-plan Roth rollovers.

I'd like to point out a couple of things before we start. Everyone registered for this Forum will receive a certificate of completion by e-mail approximately one week after the Forum. You must attend the entire live Forum to receive the certificate. Enrolled agents and enrolled retirement plan agent are entitled to continuing professional education credit for this session.

Other types of tax professionals should consult their licensing organization to see if this session qualifies for continuing professional or educational credit. For more information on retirement plans, visit the retirement plans community Web site at www.irs.gov/ep. You can also get there by going to the main IRS Web page and clicking on the Retirement Plan Community tab along the top.

We have three new resources on our Web site regarding designated Roth accounts and in-plan Roth rollovers. First, we have In-Plan Roth Rollover Frequently Asked Questions, including questions about how to handle 2010 in-plan Roth rollovers. Second, we have a chart showing the top ten differences between a Roth IRA and a designated Roth account. Third, we have six new pages devoted to designated Roth accounts, including in-plan Roth rollovers.

You can get to these pages by clicking on the in-plan Roth rollover link at the top of our landing page and scrolling to the bottom. While visiting our website you might also want to subscribe to our free electronic newsletters. The link for newsletters is in the left-hand navigation bar.

We have two newsletters: *Retirement News for Employers* for employers sponsoring a retirement plan, and *The Employee Plans News* for retirement plan professionals.

Without further ado, here are Anita and Roger.

A. Bower: Hello, everyone. This is Anita and thanks for joining us this afternoon. I'm sure all of you have received the handout for today's presentation on in-plan Roth rollovers. If you did not, you can download the handout from our Phone Forum Employee Plans Web page on www.irs.gov/ep.

We received a lot of questions ahead of today's Phone Forum and have worked the answers to most of them right into the presentation. We've organized today's presentation so that we begin by discussing the background of in-plan Roth rollovers; what plans must do to offer these rollovers; other plan administration issues.; what participants can and can't do; the taxability of these rollovers, including some special rules that apply if the rollover is done in 2010; and how plans and participants have to report the in-plan Roth rollovers. Then Roger will take the last 15 to 20 minutes of today's Forum to answer some of the more fact-specific questions. So, with that, let's get started.

In-plan Roth rollovers, it's a new term, a new concept in the retirement plans universe and came about as a result of the Small Business Jobs Act of 2010 (the Act). Just a little background here. Starting in 2010 the income limits that had previously applied to people who wanted to roll over money to a Roth individual retirement account, a Roth IRA, were eliminated and people started taking eligible rollover distributions from their retirement plans, like their 401(k) and 403(b) plans, and rolling those over to Roth IRAs.

In-plan Roth rollovers were designed to give these people a choice on whether to roll over these eligible rollover distributions from a 401(k) and a 403(b) plan into a Roth IRA or to keep them in the plan by rolling them over to the designated Roth account in the same plan.

Specifically, section 2112 of the Act permits, but does not require, 401(k) and 403(b) plans to offer in-plan Roth rollovers under certain conditions. On a side note, Section 2111 of the Act also allows Code section 457(b) governmental plans for the first time to add designated Roth accounts to the plan after December 31, 2010, and then allow in-plan Roth rollovers. But today's presentation is about 401(k) and 403(b) plans, so let's get back to these.

The Act allows 401(k) and 403(b) plans to offer in-plan Roth rollovers; however, there are certain conditions that must be met. Let me lay out these conditions and then talk about them one by one.

The conditions are that the only amounts that can qualify for these in-plan Roth rollovers are eligible rollover distribution and only eligible rollover distribution made after September 27, 2010 qualify for these rollovers. Only eligible rollover distribution made from an account other than an account that holds designated Roth contributions are eligible. The terms of the plan have to permit the eligible rollover distribution and the in-plan Roth rollover must meet all rollover requirements.

Now, before we start discussing the conditions I've just mentioned, I also want to point out that Section 2112 of the Small Business Jobs Act also states that if a participant does an in-plan Roth rollover in 2010, then he or she qualifies for a two-year income tax deferral period. This is the same as for people who do a rollover or a conversion to a Roth IRA in 2010.

This two-year income tax deferral period means a participant can include half of the taxable amount of the in-plan Roth rollover in gross income in 2011 and half in 2012, or they can elect to include the entire taxable amount in 2010 gross income.

So, let's talk about the conditions for an in-plan Roth rollover. The first condition, as I mentioned, is that only an eligible rollover distribution qualifies for this type of rollover. So, what's an eligible rollover distribution?

This is answered by saying it is any distribution that is not a required minimum distribution; a hardship distribution; or any of a series of substantially equal periodic distributions paid at least once a year over the participant's lifetime or life expectancy, the participant's and his or her beneficiary's lifetime or life expectancies or for a period of ten or more years. It's also not an excess contribution, excess deferral, excess annual addition or other corrective distribution or any earnings on these amounts. It's also not a loan that's treated as a distribution because it didn't satisfy all the loan requirements when the loan was made or later, unless the participant's accrued benefits are reduced to repay the loan.

An eligible rollover distribution is also not dividends on employer securities or the cost of life insurance coverage. Now, this list of what is not an eligible rollover distribution is available in our Publication 560, Retirement Plans for Small Business, which is available on www.irs.gov.

Now, by the way, we talk about an in-plan Roth rollover of an eligible rollover distribution, but this distribution word, this can really mean the moving of the eligible amount. In other words, the participant doesn't actually have to touch the distribution, but can simply direct that it be moved from the plan's non-Roth account into the plan's designated Roth account.

The second condition I mentioned is that only eligible rollover distributions made after September 27, 2010 are eligible for in-plan Roth rollovers. And this comes directly from the Act, Section 2112(b), which states that only distributions after the Act was signed into law are eligible for in-plan Roth rollovers. Because the Act was signed into law on September 27, 2010, only distributions starting on September 28, 2010, are eligible to be rolled over into the designated Roth account in the same plan.

So, if an eligible rollover distribution was made to a participant, let's say on September 15, 2010, the plan then decides to offer in-plan Roth rollovers and that participant now wants to rollover that September 15th distribution to the designated Roth account in the same plan; well, unfortunately the participant can't do it.

So, the next condition is that only eligible rollover distributions made from an account other than an account that holds designated Roth contributions are eligible.

Now, some of the other accounts that a plan may have that do not hold designated Roth contributions include for example, accounts that hold after tax contributions (these are different from designated Roth contributions), pre-tax elective deferrals, rollover contributions, employer safe-harbor matching or non-elective contributions and profit sharing contributions, which are also sometimes referred to as discretionary employer contributions.

The fourth condition is that the terms of the plan have to allow the eligible rollover distribution. Now, there are different rules under the Internal Revenue Code, the regulations and some older revenue rulings for different types of plan accounts on when the plan can distribute money from those accounts.

Now, plans can be more restrictive than the rules that are laid out under the Code, the regulations and some of these older revenue rulings. We're going to talk a little bit more about this when we discuss in-service distribution. But at this point the important thing to remember is that the eligible rollover distribution must be made under the terms of the plan to qualify for an in-plan Roth rollover.

The fifth condition is that the in-plan Roth rollovers meet all rollover requirements and basically, the rollover requirements are one, timing and two, destination.

The timing issue involves whether the rollover is done as a direct or a 60-day rollover. If done directly it is called the in-plan Roth direct rollover and it's where the plan trustee transfers the participant's eligible rollover distribution from the plan's non-Roth account to the designated Roth account in the same plan.

Then there is also the in-plan Roth 60-day rollover and this is where the distribution is made to the participant who then deposits all or part of that distribution into the designated Roth account of the same plan within 60 days of receiving it. So, those are the timing requirements.

The destination requirement is pretty easy here because, of course, the destination has to be the designated Roth account in the same plan in order for it to even be an in-plan Roth rollover.

The Small Business Jobs Act created the in-plan Roth rollover concept and gave us the general parameters for these rollovers, the conditions we just talked about. But, of course, additional details were needed, such as when plans can allow these types of rollovers, how they can allow them and, the rules for participants.

So, as soon as the Act was passed, the guidance folks here at Employee Plans, Treasury and Counsel sprung into action. Roger and these other guidance folks worked hard to fill in the details and even though guidance like this would typically take six months or even longer to produce, they were able to issue Notice 2010-84 in less than two months. This notice was issued on November 26, 2010, the day after Thanksgiving. Let's talk about some of the major components of Notice 2010-84.

One of the major provisions in this Notice is the extension of time for 401(k) and 403(b) plans to adopt amendments to permit in-plan Roth rollovers. The primary purpose of extending these amendment adoption deadlines is to enable plans to offer participants the ability to do an in-plan Roth rollover in 2010 and take advantage of that two-year income tax deferral period. So, the adoption deadline for certain plan amendments are extended as long as the amendment's effective date is the date a plan first operated in accordance with that amendment.

So, the extended deadlines for 401(k) plans, is the later of the last day in the year in which the amendment is effective or December 31, 2011. For Safe Harbor 401(k) plans, it is 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, 201. For 403(b) plans, the extension is the later of the plans' remedial amendment period as described in Announcement 2009-89 or the last day of the first plan year in which the amendment is effective.

Now, remember under Announcement 2009-89 a plan sponsor that adopted a 403(b) plan on or before December 31, 2009, that was intended to satisfy Code Section 403(b) and the 2007 403(b) regulations has an extended remedial amendment period in which to correct defects in the form of the plan. The remedial amendment period is extended to the time that the plan sponsor adopts a pre-approved 403(b) plan with a favorable opinion letter or applies for an individual determination letter once these programs are available.

Now, the extended deadlines don't apply for all types of amendments. They apply specifically to amendments to add a qualified Roth contribution program that permits elective deferrals to be designated as Roth contributions and, if needed, a change to the election frequency period for elective deferrals currently offered by the plan. The extended deadlines also apply to allow designated Roth accounts to accept rollover contributions, to offer in-plan Roth rollovers and to add an in-plan Roth rollover option for new in-service distribution.

There is a notable exception here. The extended amendment deadlines do not apply to an amendment to add a cash or deferred arrangement, also known as CODAs. Now, this is a very important detail because remember than an in-plan Roth rollover can only be done to a designated Roth account and that designated Roth account can't simply be set up to accept in-plan Roth rollovers.

In other words, it has to be a fully functioning designated Roth account, which means it has to be able to accept designated Roth contributions and therefore the plan has to have a CODA. I guess practically speaking unless the plan already has a CODA feature, it would be difficult to get this into place before the end of 2010.

Now, under Notice 2010-84, the designated Roth account has to be in place before an in-plan Roth rollover contribution can be made and under the notice, the plan's designated Roth account is in place only when eligible employees are given an opportunity to elect to have designated Roth contributions made to the plan.

Now, note that it is the opportunity, not that actual designated Roth contributions have to be made to the plan. This is to cover the situation where a plan puts the designated Roth account into place, but the plan participants don't elect to make designated Roth contributions for whatever reason. But that's okay, because a designated Roth account is still considered in place because the participants have the opportunity to make designated Roth contributions and that's all that's required.

The next thing we want to talk about is new in-service distribution and this is an area that can be a bit confusing and I know we received lots and lots of questions about this.

So, the first rule is that a plan may allow new in-service distributions that a participant can receive only if he or she rolls that distribution over in an in-plan Roth direct rollover. However, if the plan already allows in-service distribution, it cannot now amend to limit those existing in-service distributions to instances where the participant will do an in-plan Roth rollover because this, of course, would violate the anti-cutback rules that apply to plans.

Let's talk about the in-service distribution rules. As I mentioned earlier a plan may have various accounts other than a designated Roth account and can allow in-service distributions from those accounts. The in-service distribution rules under the Code, the regulations and other guidance are different depending upon the type of plan account and to make matters more confusing, the plan can be more restrictive as to when it will allow in-service distributions from any plan account, more restrictive than the requirements under the Code, the regulations and the guidance.

Of course, only amounts that are vested are available for distribution. So when we are talking about in-service distributions for purposes of in-plan Roth rollovers, what we're really discussing are eligible rollover in-service distributions, which, of course, does not include hardship distributions, since those aren't eligible rollover distributions or distributions because a plan has been terminated because, of course, then there is no longer a designated Roth account in the plan.

Let's talk about the easier rules first. Under Revenue Ruling 2004-12 if a plan separately accounts for rollover and after-tax contributions, then the plan may permit an in-service distribution at any time of those contributions and any earnings on those amounts.

A plan may only permit an in-service distribution of pre-tax elective deferrals for the purposes of an in-plan Roth rollover if the participant has reached the age of 59 and a half, died, become disabled or the distribution is made as a qualified reservist distribution. Qualified reservist distribution is a term that's defined in Publication 560, Retirement Plans for Small Business.

Next are the accounts that hold matching contributions or non-elective contributions or profit-sharing accounts that hold employer discretionary contributions. Under Treasury Regulation Section 1.401-1 the plan may allow an in-service distribution of these contributions after a fixed number of years, the attainment of a stated age or any other stated event.

Now, the fixed number of years means that the funds have accumulated in the account for at least two years and this is according to Revenue Ruling 71-295, or that the participant has been in the plan for at least five years and this is under Revenue Ruling 68-24.

However, there are different rules for qualified matching contributions, (QMACs), qualified non-elective contributions (QNECs), safe harbor matching or safe harbor non-elective contributions; basically, all the employer contributions that are made to help the plan pass non-discrimination testing.

These QMACs (qualified matching contributions), QNECs (qualified non-elective contributions), and the safe harbor contributions, both non-elective and matching, these are treated the same as pre-tax elective contributions. Therefore they cannot be part of an in-service distribution eligible for an in-plan Roth rollover unless a participant has reached the age of 59 and a half, has died, become disabled or they are distributed as part of a qualified reservist distribution.

We've talked a lot about in-plan Roth rollovers and plans basically amending to allow these, but exactly who is eligible to do an in-plan Roth rollover? Well, it's plan participants, including surviving spouse beneficiaries and alternate payees who are current or former spouses. These are the participants that are eligible to do an in-plan Roth rollover. If you think about it, basically under the Internal Revenue Code, these are the people that are treated like employees by the plan.

Rollover notices: Now, this is one of the administrative steps that 401(k) and 403(b) plans that allow in-plan Roth rollovers have to do. They have to amend their rollover notice, also known as a 402(f) notice, if they offer in-plan Roth rollovers to explain this rollover option to participants who receive an eligible rollover distribution.

Now, Notice 2010-84 contains examples of how plans that use the safe harbor explanations can modify the language in those explanations to explain the in-plan Roth rollover option. If a plan conditions new in-service distribution on the participant doing an in-plan Roth direct rollover the notice must eliminate all other options for a participant who receives that in-service distribution. Eliminate here means that the plan has to make it clear to that participant that's receiving one of these conditioned in-service distributions that they can only roll it over in an in-plan Roth direct rollover. So, effectively a plan can still have only one rollover notice for all the participants as long as that notice clearly spells out the options for the different types of distributions and doesn't really need to have two or three separate rollover notices.

In-plan Roth rollovers are not treated as distributions for certain purposes and one of those purposes is plan loan. So, if the repayment terms remain the same a participant that has an outstanding loan and was eligible to receive the amount of that loan as an eligible rollover distribution, they can rollover the outstanding balance of that loan as an in-plan Roth rollover and as long as the repayment terms remain the same, it is not considered a distribution.

An in-plan Roth rollover that's done directly is also not considered a distribution for purposes of requiring spousal consent. And if you think about this it makes sense because basically the money is still in the plan, although in a different plan account.

The right to defer distribution; the rolled over amount is taken into account in determining whether a participant's accrued benefit exceeds $5,000 and if it does then that participant can't be cashed out by the plan.

Optional form distribution rights are not eliminated so that a participant's right to receive a distribution of any amount that's rolled over in an in-plan Roth rollover, those are preserved even after the rollover.

As I just mentioned outstanding loans are eligible for an in-plan Roth rollover and as long as there is no change in the repayment terms, they are not considered a distribution.

For the participant the taxable amount of any loan that's rolled over as part of an in-plan Roth rollover it's the outstanding balance of the loan at the time of the rollover.

Re-characterization rights; what are these? Basically, this is a right that's associated with IRAs, individual retirement accounts, and it's a right associated with rollovers and conversion to IRAs and it allows a person to "undo" the rollover. A participant that does an in-plan Roth rollover, however, cannot re-characterize that rollover. This is one of the major differences for participants between doing an in-plan Roth rollover and doing a rollover to a Roth IRA.

So, for example, a participant that rolls over an eligible rollover distribution from a retirement plan to a Roth IRA, can re-characterize that rollover and that's done by doing a trustee-to-trustee transfer of the rolled over amount from the Roth IRA to a traditional IRA, not back to the plan.

Now, re-characterizing a rollover to a Roth IRA allows a person to effectively remove the taxable amount of the rollover from their gross income in the year in which the distribution was made that was rolled over. However, with an in-plan Roth rollover the participant can't re-characterize and, if you think about this again, it makes sense because the money never went into an IRA to begin with and, as I said, re-characterization rights are something that are associated with IRAs.

Let's talk next about taxability issues. Now, the taxable amount of an in-plan Roth rollover is the fair market value of the distribution that is rolled over, minus the participant's basis, if any, in that amount. Generally the taxable amount of the rollover would be included in gross income in the year in which the distribution occurs. But there are special rules for 2010 in-plan Roth rollovers and if that in-plan Roth rollover is done in 2010 the two-year income tax deferral is the default reporting method.

Basically, again what this is, is that the participant includes half of the taxable amount of the in-plan Roth rollover in gross income in 2011 and half in 2012. Or, they can elect to include the entire taxable amount of the in-plan Roth rollover in their 2010 income.

Now, because with an in-plan Roth rollover the money stays in the plan, there is no 10% additional tax on early distribution if that tax was to apply at all. This 10% additional tax would not apply, for example, if the participant doing the in-plan Roth rollover was over the age of 59 and a half because that is one of the exceptions to the 10% additional tax.

However, if there is no exception to this 10% additional tax, there are special recapture rules that will apply and we'll talk about those shortly. If the rollover is done as an in-plan Roth direct rollover there is no 20% withholding required, but participants may have to make estimated tax payments or increase their withholding for the quarter in which the distribution was made. You can get the complete details on estimated taxes and the underpayment of tax penalty in Publication 505, Tax Withholding and Estimated Tax, again, available on www.irs.gov/ep.

With an in-plan Roth 60-day rollover, unlike the in-plan Roth direct rollover, there is a mandatory 20% withholding. Now, let's say if the eligible distribution is made in 2010. The plan allows in-plan Roth rollovers, the participant rolls over the eligible rollover distribution within 60 days for the designated Roth account in the same plan, but the participant does not make up the 20% amount that was withheld out-of-pocket. That 20% withheld amount has to be included in income for 2010 and it's not eligible for the two-year income deferral that would otherwise apply to this 2010 in-plan Roth rollover. This makes sense because the 20% withheld amount was not, in fact, rolled over, however, what about if the participant wants to make up the 20% withheld amount? Well, this is allowed.

The participant could come up with the 20% withheld amount from out-of-pocket; deposit it into the designated Roth account in the same plan within 60 days. Now the participant, as long as the distribution was made by December 31, 2010 and was deposited into the designated Roth account in the same plan within 60 days of the distribution date, now the participants can take advantage of the two-year income tax deferral on the entire amount that was distributed and rolled over.

There are some special recapture rules; I just mentioned those; if any amount of an in-plan Roth rollover is distributed within a five taxable year period, the 10% additional tax on early distribution applies unless there is an exception to this tax, the distribution is allocable to the non-taxable portion of the in-plan Roth rollover, or if the distribution is rolled into another designated Roth account or to a Roth IRA though it may apply if there is later a distribution from the rolled over designated Roth account or the rolled over Roth IRA within the five taxable year period. The five taxable year period begins on January 1st in the year in which the rollover is done for calendar year taxpayers and ends five years after that date.

2010 in-plan rollovers; let's define these first. A 2010 in-plan Roth rollover means that the eligible rollover distribution was made no later than December 31, 2010 and was either directly rolled over into the designated Roth account in the same plan or was deposited into the designated Roth account in the same plan within 60 days of the distribution date. Again, the benefit for the participant is that two-year income tax deferral, which is the same benefit as if a participant had done a rollover to a Roth IRA in 2010. Again, it allows a participant to include half the taxable amount in gross income for 2011 and half in 2012 or elect to include the entire taxable amount in 2010 gross income.

This election to include the entire taxable amount of an in-plan Roth rollover in 2010 income, well this election would apply to all of the participant's in-plan Roth rollovers. So, if they had done an in-plan Roth rollover in Plan A and Plan B, unfortunately they could not make separate tax elections with regards to both of those. Basically, they would either need to take advantage of the default method of deferring both of those until 2011 or 2012 or electing to include both of those in 2010 income.

However, it does not apply to any election by a participant's spouse. So, one spouse can include the taxable amount of the in-plan Roth rollover, half in 2011 income and half in 2012 income while the other spouse can elect to include the entire taxable portion of his or her in-plan Roth rollover in 2010 income. In short, spouses can make different elections. An election, however, once made cannot be revoked after the due date, including extensions of the participant's 2010 tax return and it is independent of any election to include in 2010 income the taxable amount of any rollover or conversion to a Roth IRA in 2010.

Special income acceleration rules: Now, these were spelled out in Notice 2010-84 and really these address the scenario where a participant does an in-plan Roth rollover in 2010 and uses the default method of including half of the taxable amount of the rollover in 2011 income and half in 2012 income. But then that participant receives a distribution of the amount of the in-plan Roth rollover in either 2010 or 2011. What happens then?

Really the special income acceleration rules are designed to avoid participants being able to have the money in their pocket, but not pay the tax for the deferred period. Under these special income acceleration rules the participants must increase gross income in the year of the distribution by the amount of the distribution that would have been deferred to 2012 or 2011 if the distribution is made in 2010 and it is more than one-half of the taxable portion of the 2010 in-plan Roth rollover.

Notice 2010-84 includes an example of how this rule is applied, but I thought we could run through a quick example using slightly different numbers. So, let's say a participant does a $10,000 taxable in-plan Roth rollover in 2010 and that participant uses the default method, includes $5,000 in 2011 income and $5,000 in 2012 income, but now the participant receives a $5,000 distribution of the in-plan Roth rollover in 2010. Well, if that happens, that participant has to include $5,000 in gross income in 2010 and $5,000 in 2011.

If instead the participant receives $5,000 not in 2010, but rather in 2011 they would need to include $5,000 in 2011 income and $5,000 in 2012 income. How about if $6,000 was distributed in 2011 instead of $5,000? Well, then the participant would report $6,000 in 2011 income and $4,000 in 2012 income. Again, there is another good example of how these rules are applied directly in Notice 2010-84.

Well, to know the amount of an in-plan Roth rollover that's being distributed you need to understand the allocation rules. These are the rules that are used to determine what portion of a distribution from a designated Roth account comes from the in-plan Roth rollover. Basically, these rules are specifically important for applying the special acceleration into income and the special recapture rules that we just discussed.

Now, generally, a distribution from a designated Roth account is treated as coming pro-rata from basis and earnings in the account. So, step one is to prorate the distribution between the basis and the earnings in the entire account. The next step is to determine how much of the basis portion comes from the regular designated Roth contribution versus the in-plan Roth rollover amount.

If the plan has a separate account for in-plan Roth rollovers, the plan allows a distribution only from that separate account and the distribution is made only from that separate account, then the basis is from the in-plan Roth rollover. Otherwise, the basis is treated as coming first from the regular designated Roth contribution and then from an in-plan Roth rollover. Again, Notice 2010-84 also contains an example on how to apply these rules.

Once you've applied the allocation rules the next step is to apply the ordering rules The distribution from an in-plan Roth rollover is treated as first coming from the oldest in-plan Roth rollover, first in, first out basis, and then first from the taxable amount of that rollover.

Just briefly, I want to talk about how plans record in-plan Roth rollovers on Form 1099-R The plan would include the amount rolled over in box 1, gross distribution; include the taxable amount rolled over in box 2A, taxable amount; record the basis in the amount rolled over in box 5, employee contributions; and use distribution code G in box 7. Now, just on a side note I think some commercially available tax preparation software has not yet been updated for in-plan Roth rollovers, but follow up with the provider of that software.

Now, how must plans report a distribution in 2010 of any amount of an in-plan Roth rollover? Well, they would report it on a Form 1009-R as a regular designated Roth account plan distribution, but they would enter the amount of the distribution that's allocable to the in-plan Roth rollover in the blank box to the left of box ten.

Participants; well, participants if they do an in-plan Roth rollover in 2010 would File Form 8606, *Non-Deductible IRAs*, with their 2010 tax return and complete Part III to report their in-plan Roth rollover. If they receive a distribution in 2010 of any amount of their in-plan Roth rollover they would need to complete certain lines of the same Form 8606 Part IV.

Now, if a participant also does a rollover or conversion to a Roth IRA in 2010, he or she would report any amount converted from a non-Roth IRA to a Roth IRA in 2010 by completing Part II of the same Form 8606 on which they report their 2010 in-plan Roth rollover. However, if they rolled over amounts from a qualified retirement plan to a Roth IRA in 2010 they would need to file a separate Form 8606 and complete Part III.

I'm going to turn this over to Roger now to answer some of the questions, but I just wanted to remind you again of our two Employee Plans newsletters; there is one, *Employee Plans News,* for Benefit Professionals and two, *Retirement News For Employers,* for Business Owners, Plan Sponsors and Tax Professionals. I would encourage you to subscribe to one or both of these newsletters so that you can have links to the latest retirement planews delivered directly to your inbox.

Also I wanted to point out that on slide 33 or page 33 of your handout you will find several ways to send in any questions that you may have after today. I would also encourage you to visit our website often to learn about upcoming Phone Forums on different retirement plan topics.

With that, thank you very much and I'm going to turn it over to Roger.

R. Kuehnle: Thank you, Anita. I think Anita did a fabulous job there. She put in 99% of the effort into this Forum. I've been occupied for the last five or so days with qualified charitable distributions, which was signed into law by the President and that's giving us quite a headache with the January qualified charitable distributions being allowed to be treated as made in 2010, so a big problem for us and for those of you involved in 1099-R reporting.

Unfortunately, Anita answered pretty much all the questions that you've sent in, but nevertheless I'll read them and answer them again in case they need more attention. Some of these questions, by the way, were sent in before we put the FAQs on the website so I think a lot of them were answered there. If you want to go to the FAQs it may be that your questions will be answered now.

The first question deals with what does the amendment in Q&A 17 of the notice apply to? It allows you to amend the plan after the fact, after, in fact, you operate in accordance with Section 2112 of the Small Business Jobs Act.

It asks if a plan amendment can be retroactive merely to allow a restricted in-plan Roth rollover to the Roth account or can you amend the plan later to allow any age, 59 and a half distribution in the occasion of a plan that doesn't have one before?

I think the answer could be either and let me caveat here, for all these answers they are my answers and not necessarily the thoughts of the IRS as a whole. I think it could be applied to either, the words in the Notice say that the extension applies to amendments related to Section 2112 of SBJA. Any of those reasonably related would pass muster, I think.

This question also asks if the plan limits deferral elections only quarterly. Of course, it's December now, would an amendment to a more frequent deferral options pass muster? I think so; I think you could add a retroactive amendment for that as well.

The next question, I think these are answered, but I think on the views on the website as well. It asks, "Who is responsible to track the separate years in-plan Roth rollovers?" I think we said at the very beginning it's the plan responsibility. They're the ones with the information certainly for the after-tax amounts, the pre-tax amounts and what's actually in these accounts.

There is nothing new because plans are required to track this information anyway. This is different to the Roth IRAs where most of the information, certainly the pre-tax and after-tax, is exclusively in the knowledge of the taxpayer, the IRA owner.

Of course, IRAs that may have more than one IRA in the institution because … know that and it wouldn't really matter in a plan. It doesn't matter how many plans you have; they're treated separately. So, I think a draft of the 8606 is also on the website and this question that asks did the, I guess along the same lines, is it the plan's or the individual's responsibility?

Well, the plan, as Anita said, will have to report any distributions allocable to an in-plan Roth rollover on the 1099-R and then on the 8606 the individual makes some calculation as to whether some of that will be included in income in 2010 or 2011.

The instructions for the 1099-R, they were modified last month or the beginning of this month I think and I don't think they'll be changed again, but anything can happen with the new laws that are passing fast and furiously.

The question continues as to whether there has to be separate accounts for if there is, for example, after-tax amounts rolled into it as a Roth account. Under Code section 72, it can be separate contracts for after-tax amounts and for other plan accounts. Similar rules apply for designated Roth accounts.

The question asks if the amounts are rolled over from after-tax accounts into the designated Roth account, do they lose their other separate account. The answer yes; they're Roth contributions basically for purposes of the separate accounts in Code section 72. So, if you have a designated Roth account and other accounts, there's two accounts for Code section 72 purposes and I think we say this in the Notice, that if you get a distribution with a designated Roth account you treat everything in the designated Roth account as one contract. That's how you do the pro rata basis versus income allocation.

The next question asks if a plan can limit the number of in-plan Roth rollovers. To make it easier, I guess, rather than have them every month or twice a year or whatever. I think the answer is I think you could do that. It may be a discrimination issue and I think something like that, I believe a rollover is a distribution option or Code section 4 11(d)(6) option and I think it should be in the plan.

Somebody else asked if a plan can limit in-plan Roth rollovers to active participants who are eligible for in-service withdrawals after 59 and a half. Again, I think this is a benefit right or feature issue that's addressed in the Code section 401(a)(4) Regs and if we want to limit it just to active or currently employed individuals and not for terminated vested participants, people that still have an account there, that's also a discrimination issue and that's in the 401(a)(4) Regs at section 10 and it's a discrimination issue there.

As Anita mentioned, a lot of the questions were around do we have to be 59 and a half to make an in-plan Roth rollover and, as Anita said, there has to be a distributable event under the plan and the plan has to follow their statutory rules.

So, as she said, the statues, regulations and revenue rulings, etc., they have limits. But the plan can be more restrictive. For example, elective deferrals can be taken out in service at age 59 and a half. A lot of plans just may not allow that, so it depends on what your plan says, but the plan is limited by the Code, the regs, and the rev rules, so, again, the statutes apply and you cannot just take a distribution from an account where you couldn't otherwise under the rules, under the law.

Again, there's another question, age 59 and a half for participants and, again, it's statutory for elected deferrals and also for QNECs and QMACs. So it may be an issue for a plan that's a safe harbor 401(k) plan because they are pretty much all elective deferrals, QNECs and QMACs. So the plan if it has an in-plan Roth rollover provision solely for people who are 59 and a half can take advantage of it if, in fact, the plan allowed distributions at age 59 and a half. I guess they would amend it to allow in-plan distributions for those who are 59 and a half.

Another question asks about loans from all sources within the plan and is there a prohibition against borrowing against Roth accounts? No, you can borrow against the Roth account; it can be against all the accounts in the plan. In fact, under the rules under Code section 72(p) they do take into account all the assets in the plan, a loan as a distribution for the 50% and $50,000 rule.

Another question, "If I'm under 59 and a half can I get a distribution from a 401(k) plan?" The answer is no. "Are there limitations on the amount an individual at 59 and a half can convert to a Roth?" Well, again, it has to be a distributable event and, of course, as Anita said, you have to be a vested amount because you can only roll over non-forfeitable amounts.

Anita also touched on the separate account issue. From what I understand talking to the record keepers and the systems people, that could be quite a problem for plans that want to offer this if they have to keep track separately of in-plan Roth rollovers within the designated Roth account and track these rollovers, each one, separately for five years. That's a lot of extra accounts and a lot of money and it may be prohibitive. So, for some record keepers, unless you can restrict it to people who are age 59 and a half, that would be one option. So, we have a question here that says, "Do I have to keep separate accounts?" And, well, like a lot of things that depends.

If it's a 60-day rollover then I think that's where it's distributed to the individual and the individual rolls it back within 60 days. I can't see that they are going to occur, really, because it just sets up a situation for problems, it seems.

Anyway, if it is a 60-day rollover you can put it in a rollover account or you can mix it with the regular Roth contributions and impose the same distribution restrictions as apply to a regular Roth contribution. So, it's up to the individual to put into the designated Roth account and thereby incur perhaps greater restrictions on distributions than he had before. Obviously, they'll have to get the 60-day rollover in the first place.

The rules are different if it's a direct rollover, as Q&A 3 says in the Notice 2010-84. It will have to be in a separate rollover account and retaining all the distribution options, but if the distribution options are the same as the regular Roth contributions. In other words, the guy is 59 and a half or whatever, it's always limited to people 59 and a half, then there is no need for a separate account, but you still need to track the in-plan Roth rollovers at five years if the employee was under 59 and a half, for example. Also, for the first two years as well no matter whether the guy is 59 and a half or not, for the income acceleration rules.

Another question says, "How separate do the accounts have to be?" As I just mentioned, you need separate accounts if there are different distribution options that apply to the in-plan Roth rollover amounts, just as the regular Roth contributions.

There's another question here on the same thing, "Are there different sets of eligibility requirements for pre-tax selected deferrals and profit-sharing balances?" As Anita said, yes, there are different requirements for different types of accounts in plan.

I guess this came as a surprise to a lot of people. I don't know whether they were reading the press or what, people thought that anybody under 59 and a half could roll over pre-tax elected deferral accounts.

Here's another one basically—a lot of these questions are on the same theme, as the 59 and a half—and here's one, "Will an employee's December 2010 signed written election to have his vested profit-sharing account transferred to his Roth account and the plan be recognized by the IRS? With… plan and tax purposes as having been made in 2010 even though the plan record keeper wouldn't be able to physically implement the transfer on his computer system until January of 2011?"

Generally, the answer to that would be no. Most of these are going to be done just simply by a few keystrokes somewhere. They're going to be director rollovers and really want some action to be taken rather than somebody filling out a form and not being gotten to until January or February. The law was passed later in the year. It does present problems for all of us but it does require that the rollover takes place in 2010 to get the advantage of the few year spread.

Moderator: Pardon the interruption, five minutes remain.

R. Kuehnle: Okay, I still have a few more questions, although as I said, Anita has answered most of them. The one on the 402(f) notices directly addressed a question in regards to, “Do I need to have two separate 402(f) notices, one for people who have in-plan Roth rollovers and one for everybody else?”

It may be easier just to do that. Certainly if you’ve got restricted in-plan Roth direct rollovers where probably 90% of the 402(f) notice don’t apply, it may be easier just to give them half a page or a one page notice. But alternatively, if you wanted one that applies to everybody I think you could just say that if you do an in-plan Roth direct rollover pages two through 94 don’t apply to you and leave it at that. But it’s still that we’re not requiring separate 402(f) notices, just be fairly clear to who they’re addressed to.

The teleprompter is moving really fast at this point. Here’s one for record keepers. It says, “I understand there’s no mandatory withholding,” which is true for all direct rollovers and basically this would be a direct rollover. If it’s a 60-day, obviously, it is subject to the 20% mandatory withholding. It says, “However, would the parties have the option for voluntary withholding to pay tax on the conversion amount?”

Well, we addressed this actually. Apparently, people didn’t realize or we didn’t get the word out fast enough in Notice 2008-30 when plan accounts were being rolled over into Roth IRAs and some people were withholding 20% and I think we said that there was okay, that there could be some voluntary agreements between parties and the employer. But the questioner goes on to point out, correctly, that only money that is directly rolled over is exempt from the 20%, so if any money is paid to these not directly rolled over, for example, it’s paid to the IRS then that is still subject to 20% withholding.

But, of course, you can always have more withholding so the fact that 100% of the amount that’s not directly rolled over is paid to the IRS, that would be okay. But, again, as Anita pointed out if you don’t make up this amount from some other sources, then that is treated as a distribution and could be subject to the 10% early withdrawal tax if you’re under 59 and a half.

It says, “Are we required to provide participants the volunteer withholding option?” No, I don’t believe so. We always encourage, as the IRS, to have as much withholding or adequate withholding as necessary so they don’t come up short in time to pay the piper in April.

I think that's about it. There is one on Code section 416; somebody asks why didn't we mention 416, what happens under 416? Is one of these in-plan Roth rollovers counted for top heavy purposes? This actually was one of the questions addressed in Q&A3 originally. We certainly wanted it to count since it was in the same plan, but then looking at the regs, the Code §416 regs, the T32 actually, this is called a related rollover because it's made to a plan maintained by the same employer.

So, it is counted actually in the reg; it says that it's not counted by the transferring plan, but it is counted by the receiving plan, which in this case is the same plan. So, we didn't address it. We got lots of comments and questions from all the interested parties, AICPA and the bar associations, insurance companies. We addressed all the questions that we thought there were issues with and this one seemed pretty obvious, so it just wasn't in there. But that's the answer, it is counted, it's in the regs.

I think time is up, is it?

M. O'Donnell: Well, thanks to everyone for listening in on our Phone Forum on In-Plan Roth Rollovers. Thanks, particularly to our speakers, Anita Bower and Roger Kuehnle. Good day, everyone.

Moderator: That does conclude our conference for today. Thank you for your participation and for using AT&T Teleconference Service. You may now disconnect.