

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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to: Fran Sloan, Supervisory Tax Law Specialist  
Employee Plans Rulings and Agreements

from: Michael J. Roach, Branch Chief, Qualified Plans Branch 1 (Employee Benefits)  
(Tax Exempt & Government Entities)

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subject: Request for assistance on ruling requests under Rev. Proc. 2003-16 arising from death of IRA grantor or plan participant

This memorandum responds to your request for assistance dated May 4, 2006.

ISSUES

What standards to apply to requests from the trustee of an estate for an extension of the 60-day rollover period.

CONCLUSIONS

The death of the recipient of an eligible rollover distribution during the 60-day rollover period should be treated in the same manner as any other event that prevented the distributee from completing the rollover.

LAW

Sections 402(c)(3)(B) and 408(d)(3)(I) of the Internal Revenue Code permit the Secretary to waive the requirement that any rollover of an eligible rollover distribution must occur within 60 days of the distribution "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." These sections were added to the Code by section 644 of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. 107-16.

Rev. Proc. 2003-16, 2003—1 C.B. 359, provides guidance on applying to the Service for a waiver of the 60-day requirement. Rev. Proc. 2003-16 states--

In determining whether to grant a waiver, the Service will consider all relevant

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facts and circumstances, including: (1) errors committed by a financial institution, other than as [otherwise described]; (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.

The guidance provided in Rev. Proc. 2003-16 is supported by the Conference Report to EGTRRA which states—

[T]he Secretary may issue guidance that includes objective standards for a waiver of the 60-day rollover period, such as waiving the rule due to military service in a combat zone or during a Presidentially declared disaster (both of which are provided for under present 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. Rpt. 107-84, 252-253.

Section 6903(a) provides, "Upon notice to the Secretary that any person is acting for another person in a fiduciary capacity, such fiduciary shall assume the powers, rights, duties, and privileges of such other person in respect of a tax imposed by this title (except as otherwise specifically provided and except that the tax shall be collected from the estate of such other person), until notice is given that the fiduciary capacity has terminated." In *Gunther v. United States*, 573 F. Supp. 126 (W.D. Mich. 1982), the court interpreted § 6903(a) to mean that the estate trustee could effect a rollover so long as the decedent would have been able to. But see, AOD 1983-038 (November 10, 1983).

Section 401(a)(9) provides for required distributions from a qualified plan and section 408(a)(6) provides that similar rules shall apply to individual retirement accounts. After the employee dies, the timing of these required distributions depends on whether distributions had already begun, whether the account had a designated beneficiary, and whether the designated beneficiary is the decedent's spouse. Section 401(a)(9)(E) defines designated beneficiary for purposes of § 401(a)(9) as "any individual designated as a beneficiary by the employee." Section 1.401(a)(9)-4, Q&A-4, further provides that "[i]n order to be a designated beneficiary, an individual must be a beneficiary as of the date of death."

## ANALYSIS

Under Rev. Proc. 2003-16 the death of a person who receives an eligible rollover distribution is one of the facts and circumstances that the Service is to consider when deciding whether to grant a waiver of the 60-day rollover requirement. The distributee's death during the 60-day rollover period may help explain the reason for a failure to

make a rollover contribution. For example, if the distributee established an IRA but failed to fund it with the eligible rollover contribution, the decedent's death may explain the failure to make the rollover contribution.

The Service should consider death in the same manner it would consider other facts and circumstances that might explain the reason for a failure to make a rollover contribution. Accordingly, the Service should consider other factors such as the distributee's use of the eligible distribution in the same manner it would consider such factors if the reason for the failure to make a rollover contribution were due to a reason other than death, such as the distributee's hospitalization.

However, the Service should not treat a beneficiary named by an executor as a designated beneficiary under section 401(a)(9). Section 1.401(a)(9)-4, Q&A-4, provides that a designated beneficiary must be a beneficiary as of the date of death. Thus, even if state law would permit an executor to name a beneficiary of a trust, any beneficiary named after the decedent's death cannot qualify as a designated beneficiary. In such cases, for purposes of section 401(a)(9), there is no designated beneficiary as of the date of death.

Finally, any waiver of the 60-day requirement should note that the scope of the executor's powers is a matter of state law. The executor could substantially alter the rights of the heirs if the executor were to move the amount of the eligible rollover distribution from the decedent's checking account into an IRA. The executor's ability to take such action is not a question of federal tax law, and the Service lacks the authority to determine the powers of the executor. Assuming the applicable state law allows the executor to take such action, the federal tax law question is whether the deposit into the IRA is a rollover contribution. Any ruling by the Service must be limited accordingly.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Cathy Vohs at (202) 622-6090 if you have any further questions.