

**December 2009**

**TO: OUR PENSION CLIENTS AND THEIR ACCOUNTANTS**

**FROM: DANZIGER & MARKHOFF LLP**

**SUBJECT:**

- 1. 2009 Distributions from Pension and Profit - Sharing Plans**
- 2. Life Insurance owned by Plan: P.S. 58 Costs Are Taxable  
Income to Participant**
- 3. Deadline for Depositing 401(k) Contributions**
- 4. Minimum Distributions from Qualified Plans**
- 5. Form W-2: How to Indicate Active Participant Status**
- 6. Reporting 401(k) Contributions on Form W-2**
- 7. Reporting Of Income Tax Withheld from Pensions**
- 8. Unrelated Business Taxable Income**
- 9. Plan Loans Treated as Taxable Distributions**
- 10. Current Value of Assets that are not Publicly Traded**

**1. 2009 DISTRIBUTIONS FROM PENSION AND PROFIT-SHARING PLANS** - IRS requires that Form 1099-R be furnished to each person who received a distribution during 2009 (lump sum distribution or periodic payment). This applies to distributions from either (1) ongoing plans (e.g., pension benefits paid to a terminated employee), or (2) terminated plans which distributed benefits during the year (including benefits directly transferred into other plans or IRA accounts). If your plan assets are invested through a retirement plan investment platform which has agreed to prepare these forms on behalf of your plan, no further action is required by you.

A copy of Form 1099-R must be furnished to benefit recipients by February 1, 2010. Form 1096 transmits Form 1099-R to the IRS and must be filed by March 1, 2010. IRS may impose substantial penalties if these forms are not provided to the recipient and/or IRS.

If your accountant requires any additional data to prepare the necessary forms or if you need further information, please contact your Plan Consultant at our offices immediately.

Our firm will prepare Form 1099-R only if requested, and only if specific information is supplied. A separate fee will be charged to prepare such forms. Please contact your Plan Consultant if you would like our firm to prepare these forms.

2. **P.S. 58 COSTS** - If you have life insurance in your plan, a portion of the insurance protection cost (referred to as "P.S. 58 Cost") is deemed current taxable income to the insured participant. Such amounts are reported to participants on a separate Form 1099-R and must be included in the participant's personal income tax return. Please contact your insurance broker for this information. *Our office does not have access to this data.*

3. **DEADLINE FOR DEPOSITING 401(k) CONTRIBUTION AMOUNTS** - The Employer's contribution to a Retirement Plan may be made after the end of the year. However, contributions of amounts withheld from employees' salaries under 401(k) Plans (referred to as "salary reduction contributions" or "CODAs") are subject to special timing deadlines. Each month's salary reduction amounts *must be deposited into the Plan as soon as administratively feasible*. Under proposed Department of Labor guidelines for Plans with less than 100 participants, 401(k) contributions must be deposited not later than the 7<sup>th</sup> business day after they are withheld.

This rule applies to the contributions of all Plan Participants *including the Owner-group (i.e., Owners or Shareholders)*. Although the rule as to Sole Proprietors and Partners is not completely clear, the recommended course is that they also follow the above timing.

In addition, the fact that 401(k) contribution amounts often *reduce the Employer's cost* for required plan contributions for the staff makes it even more important that all 401(k) contributions (including those of owners, partners, self-employed, etc.) be deposited by the applicable deadline. If you are not certain of the 401(k) contribution amount, please contact us immediately.

4. **MINIMUM DISTRIBUTIONS FROM QUALIFIED PLANS (FOR DEFINED BENEFIT PLANS ONLY)** – *Failure to make Minimum Required Distributions may result in a 50% excise tax on the amount which should have been distributed.* Here are the rules that apply to distributions payable to owners of the business:

a. If you own more than a 5% interest in your business and you reached age 70 ½ prior to 2009, your 2009 Minimum Required Distribution must be paid not later than December 31, 2009.

b. If you own more than a 5% interest in your business and you reached age 70 ½ *during 2009*, you must receive your 2009 Minimum Required Distribution not later than April 1, 2010.

Please note, the Minimum Distribution Rules have been waived for 2009 for Defined Contribution plans only (such as 401(k) profit sharing plans). Also, the Minimum Distribution Requirements have been waived for IRAs for 2009.

If you need assistance calculating the amount of the Minimum Required Distribution, please call our office.

**5. PREPARATION OF FORM W-2: DETERMINATION OF ACTIVE PARTICIPANT STATUS** - The rules differ depending on the type of plan. The definitions below will assist you in properly completing boxes 12 and 13 on Form W-2 relating to “active participation” in a qualified plan during the calendar year. If you have any questions on this topic regarding the completion of your W-2s, please contact your Plan Consultant.

a. Defined Benefit Plan - An active participant in a *defined benefit plan* is an individual who satisfies or meets the eligibility requirements for participation at any time during the plan year ending with or within the calendar year. An individual, generally, is an active participant if the individual is otherwise eligible, even if the individual (a) declines to participate, or (b) fails to complete the minimum period of service for the year’s benefit accrual, or (c) fails to make an employee contribution necessary to accrue a benefit. An individual is not an active participant if the employer has frozen benefit accruals (unless pre-freeze benefit accruals increase as compensation increases).

b. 3% Safe Harbor 401(k), Money Purchase or Target Benefit Pension Plan - An individual is an active participant in a *money purchase, target benefit pension plan, or Safe Harbor 401(k) plan* if, by virtue of the plan formula, an employer contribution or forfeiture is required to be allocated to the individual’s account for the plan year ending with or within the calendar year.

c. Profit-Sharing Plan - An individual is treated as an active participant under a *profit-sharing plan* for the 2009 calendar year *if any one* of the following four requirements is satisfied:

(i) A *forfeiture* is allocated to a participant’s account for the plan year ending within 2009.

(ii) A *contribution* is deposited during 2009 and allocated to a participant’s account for a plan year ending within 2009.

(iii) A participant was eligible to participate in the plan for a plan year ending within 2008, but was not treated as an “active participant” for 2008 because the 2008 contribution was not deposited into the trust until 2009; or

(iv) *Both* of the following conditions are satisfied:

(a) A participant was eligible to participate in the plan for a plan year ending within 2007, but was not treated as an “active participant” in 2007 because the 2007 contribution was not deposited into the trust until 2008, *and*

(b) a second contribution was deposited during 2008 and was allocated to a participant=s account for a plan year ending within 2008.

d. 401(k) Plan - An individual is treated as an active participant for any calendar year in which the individual makes an elective contribution under a 401(k) plan. An individual is *not* an active participant *merely because* he or she is eligible but chooses not to make such elective contribution.

If the employee is an active participant as described in “a”, “b”, “c” or “d” above, check “Retirement Plan” in Box 13.

An individual is not an active participant in a defined contribution plan (Paragraphs “b”, “c” or “d” above) if only earnings (rather than contributions or forfeitures) are allocated to the individual=s account.

6. **REPORTING 401(k) CONTRIBUTIONS ON FORM W-2** - If you have added a Roth feature to your plan for 2009, and employees have elected to designate part or all of their 401(k) deferrals as Roth 401(k) deferrals, these Roth contributions are indicated by inserting Code 'AA' next to the Roth contribution amount. Code 'D' is still used for regular (non-Roth) 401(k) contributions. (Thus, if an employee has deferred both Roth and regular 401(k) contributions into a plan, their W-2 should have two slots filled in Box 12 of Form W-2). You should coordinate with your payroll provider to confirm that the proper codes are inserted to distinguish between the regular 401(k) deferral amounts and the Roth 401(k) deferral amounts on each participant's W-2.

7. **REPORTING OF INCOME TAX WITHHELD FROM PENSIONS** - The IRS has issued Form 945, Annual Return of Withheld Federal Income Tax, and Form 945-A, Annual Record of Federal Tax Liability. Form 945 is used to report income tax withheld from qualified plan distributions. For 2009, Form 945 is generally due by February 1, 2010. We suggest that you coordinate the filing of this return, if applicable, with your accountant.

8. **UNRELATED BUSINESS TAXABLE INCOME** - Although earnings of a qualified pension or profit-sharing trust are generally exempt from tax while held in the trust, an exception to this rule is Unrelated Business Taxable Income (UBTI). Certain investments give rise to UBTI, including securities purchased on margin. Fiduciaries of plans must determine whether UBTI was generated by the trust at any time during the year and the trust must pay income taxes in accordance with calculations made on Form 990-T. We suggest that you confer with your accountant to confirm whether your plan generated UBTI and to coordinate the filing of this return, if applicable.

9. **PLAN LOANS TREATED AS TAXABLE DISTRIBUTIONS** – Loans to participants from a retirement plan must be properly documented and must be repaid at least on a quarterly basis. If plan loan documentation is defective (or has not been prepared), or if the participant does not repay the loan at least on a level quarterly basis, the entire loan amount can become a taxable distribution.

If a participant fails to pay a required installment on the loan repayment, that missed installment payment can generally be made by the end of the following calendar quarter. If the missed installment is not paid by that time, a taxable distribution must be reported with respect to the borrowing participant. [Generally, IRS Form 1099-R is used to report the name of the participant and the amount of the loan treated as taxable income.]

If your plan has loans with respect to which the documentation may be inadequate, or with respect to which a participant has not made the correct installment payments (or has not corrected a missed payment as described above), you should contact your Plan Consultant in our office for guidance on how to properly report this event to the IRS.

10. **CURRENT VALUE OF ASSETS THAT ARE NOT PUBLICLY TRADED** - IRS requires that the current value of real estate, partnership interests and non-publicly traded securities be reported on the annual Form 5500 (or Form 5500-EZ). While there is no absolute requirement that these type of assets be valued each and every year by an independent third-party appraiser, the fair market value of these assets must be determined and reported in good faith by the plan's trustee or other fiduciary. Moreover, an accurate assessment of fair market value is essential to a plan's ability to comply with the Internal Revenue Code qualified plan rules. Therefore, you should either engage an independent third-party appraiser to value such assets or take other reasonable steps to determine their fair market value.

11. **PLAN RESTATEMENTS** - The IRS is requiring that all qualified plans be revised to reflect a series of tax law changes. To ease the burden, the process is being spread out. With respect to volume submitter defined contribution plans, which includes most 401(k), savings and profit-sharing plans prepared by Danziger & Markhoff LLP, the plan must be updated and resubmitted to IRS between now and April 30, 2010.