STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DENNIS SCIULLO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2018-0288
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
______________________________	)	

FINAL ORDER

This matter was initiated by Petitioner through the filing of a Petition for Hearing, dated September 28, 2018. The petition requests that Petitioner be granted the ability to withdraw only those funds from his Florida Retirement System ("FRS") Investment Plan account that already had been subjected to tax at the time they were contributed to the account and that, therefore, would not be subject to tax at the time of withdrawal.

For the reasons explained in detail below, the Petition for Hearing filed in this case is being dismissed, with prejudice, because Petitioner is not entitled to a hearing to determine whether the State Board of Administration ("SBA") may allow him to withdraw only the funds in his Investment Plan account that were paid into the account on an after-tax basis. Petitioner's issues need to be determined in another forum where the jurisdiction to make such determinations properly lie.

STATEMENT OF THE ISSUE

The Statement of the Issue is whether the Petitioner is entitled to withdraw only those funds in his FRS Investment Plan account that were placed into his account on an after-tax basis.

FINDINGS OF FACT

The Findings of Fact are as follows:

1. In September 1973, Petitioner, an employee of the Broward County School Board, originally enrolled in the FRS. At that time, only the FRS Pension Plan, a defined benefit retirement plan, was offered to eligible employees. Under Internal Revenue Code ("IRC") Section 414(d), a governmental plan, such as the FRS, is an IRC Section 401(a) retirement plan.

2. When Petitioner initially enrolled in the FRS, contributions were required to be made both by employers and employees. The mandatory employee contribution rate was 4% for Regular Class members, such as Petitioner. Employee contributions were considered as being made on an after-tax basis.

3. From 1975 through June 30, 2011, the FRS was non-contributory for employees. That is, during that time period, only employer contributions were made to an FRS Plan member's account.

4. During the period September 1, 2002 through November 30, 2002, Petitioner was given the option to elect between continuing membership in the FRS Pension Plan or joining the newly-created FRS Investment Plan, a defined contribution retirement plan. On October 14, 2002, Petitioner affirmatively elected to continue participation in the FRS Pension Plan.

5. In 2004, Petitioner purchased one year of a leave of absence. The payment made by Petitioner's personal remittance also was an after-tax contribution to Petitioner's FRS Pension Plan balance.

6. On March 6, 2007, Petitioner used his one-time second election and completed a Form ELE-2, electing to transfer from the FRS Pension Plan to the FRS Investment Plan. The transfer became effective April 1, 2007. At the time of transfer, Petitioner had 33.75 years of service.

7. Pursuant to Section 121.4501(3)(b), Florida Statutes, the dollar amount transferred from Petitioner's FRS Pension Plan account to his FRS Investment Plan account was the present value of the Petitioner's accumulated benefit obligation under the FRS Pension Plan. This amount was based upon Petitioner's estimated creditable service and estimated average final compensation, adjusted, if necessary, as of the Petitioner's actual initial date of participation in the FRS Investment Plan.

8 Petitioner claims in his petition that it is not possible under any IRS rule to commingle pre-tax and after-tax funds into one account and also to prohibit him from withdrawing only any after-tax funds from such account.

CONCLUSIONS OF LAW

9. IRS Notice 2014-54, Guidance on Allocation of After-Tax Amounts to Rollovers, a copy of which is appended hereto as Exhibit A, specifically provides that:

> If a participant's account balance **in a plan qualified under § 401(a)** *** includes both after-tax and pretax amounts, then, under § 72(e)(8), each distribution from the account (other than a distribution that is paid as part of an annuity, which is subject to a different rule) **will include a pro rata share of both after-tax and pretax amounts.**
> [emphasis added]

This means, as the IRS website notes, that a participant cannot take a distribution of only the after-tax amounts in the participant's account and leave the remainder in the plan. Any partial distributions from the plan **must** include some of the pretax amounts. *See,* Exhibit B attached hereto.

10. As a tax-qualified IRC Section 401(a) retirement plan, the FRS Investment Plan must be in compliance with the IRS rules, regulations and guidance applicable to such plans. As such, the SBA must abide by the guidance set forth in IRS Notice 2014-54 without exception in order to ensure the continued tax qualified status of the FRS Investment Plan.

11. Petitioner's dispute as to his ability to withdraw only the after-tax funds present in his FRS Investment Plan account is with the IRS, not the SBA. State law cannot provide the SBA with any ability to circumvent the IRS requirements for tax-qualified retirement plans.

12. Chapter 120, Florida Statutes, known as the "Administrative Procedure Act" or "APA," requires a Florida governmental entity, such as the SBA, to afford a hearing to individuals who are "substantially affected" by agency action. Sections 120.569 and 120.57, Florida Statutes. "Agency action" is defined by the APA as:

> the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request made under s. 120.54(7).

See, Section 120.52(2), Florida Statutes. "Order" itself is not defined by the APA, but a "final order" is defined as a final written decision which is not a rule, that results from a rule challenge proceedings, a request for a declaratory statement, a proceeding affecting a substantial interest (including informal and formal proceedings and bid protests), a mediation or summary hearing of such a proceeding. A "rule" is defined in pertinent part as "each agency statement of general applicability that implements, interprets, or prescribes law or policy..." Section 120.52(16), Florida Statutes.

13. Since the APA is concerned only with agency action (whether a rule or an order), it is not geared toward giving the public a right to challenge every step that a Florida government agency takes. The APA allows challenges to agency action (i.e., a rule or order) only by those who have sufficient "substantial interests." In order to demonstrate sufficient substantial interests for standing, a party must show that (a) he or she will suffer an injury of sufficient immediacy to be entitled to a hearing, and that (2) his or her substantial injury is of the type or nature which the proceeding is designed to protect. *See*, *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981). Simply being a Florida resident is not sufficient to confer standing to challenge agency action.

14. While there is no doubt that the ultimate determination as to Petitioner's ability to withdraw only certain funds from his FRS Investment Plan account may cause economic injury to the Petitioner, the specific issue as to whether or not the funds to be withdrawn may consist only of after-tax funds is a matter solely within the purview of the IRS. The SBA's actions in merely following IRS requirements applicable to tax-qualified retirement plans does not meet the definition of a rule or order under the APA. As such, the SBA has not taken agency action against Petitioner that has substantially affected him. As a result, Petitioner does not have a right to a hearing to contest whether the SBA should allow Petitioner to receive a distribution of only the after-tax funds that are present in his FRS Investment Plan account.

15. This Final Order should not be interpreted as a rejection of Petitioner's assertion that he is entitled to withdraw only the after-tax funds present in his FRS

Investment Plan account. That is an issue to be determined in another forum where the jurisdiction to make such a determination properly lies.

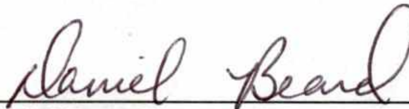
ORDER

The Petitioner's request for a hearing to demonstrate entitlement to withdraw only the after-tax funds present in his FRS Investment Plan account hereby is denied, with prejudice.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

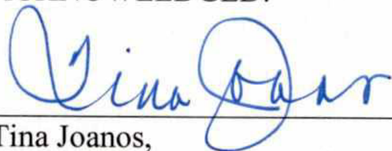
DONE AND ORDERED this 30th day of November, 2018, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION



Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by email to vitacol3@comcast.net, and by UPS to [redacted], this 30th day of November, 2018.

Ruth A. Smith
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

Guidance on Allocation of After-Tax Amounts to Rollovers

Notice 2014-54

I. PURPOSE

This notice provides rules for allocating pretax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan described in § 401(a) of the Internal Revenue Code. These rules also apply to disbursements from a § 403(b) plan or a § 457(b) plan maintained by a governmental employer described in § 457(e)(1)(A) (a "governmental § 457(b) plan"). Section VI of this notice provides transition rules.

II. BACKGROUND

Section 402(a) provides generally that any amount distributed from a trust described in § 401(a) that is exempt from tax under § 501(a) is taxable to the distributee under § 72 in the taxable year of the distributee in which distributed. Under § 403(b)(1), any amount distributed from a § 403(b) plan is also taxable to the distributee under § 72. (Under § 72(d), a different allocation method applies to annuity distributions.)

If a participant's account balance in a plan qualified under § 401(a) or in a § 403(b) plan includes both after-tax and pretax amounts, then, under § 72(e)(8), each distribution from the account (other than a distribution that is paid as part of an annuity, which is subject to a different rule) will include a pro rata share of both after-tax and pretax amounts.

Under § 402A(d)(4), a designated Roth account in an applicable retirement plan is treated as a separate contract from other amounts in the plan when applying the rules of § 72.

Section 402(c) provides taxability rules for amounts that are rolled over from qualified trusts to eligible retirement plans, including individual retirement accounts or annuities ("IRAs"). Subject to certain exceptions, § 402(c)(1) provides that if any portion of an eligible rollover distribution paid to an employee from a qualified trust is transferred to an eligible retirement plan, the portion of the distribution so transferred is not includible in gross income in the taxable year in which paid.

Under § 402(c)(2), the maximum portion of an eligible rollover distribution that may be rolled over in a transfer to which § 402(c)(1) applies generally cannot exceed the portion of such distribution which is otherwise includible in gross income. However, under § 402(c)(2)(A) and (B), the general rule does not apply to such distribution to the extent that--

> (A) such portion is transferred in a direct trustee-to-trustee transfer to a qualified trust or to an annuity contract described in section 403(b) and

EXHIBIT A

such trust or contract provides for separate accounting for amounts so transferred (and earnings thereon), including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or

(B) such portion is transferred to an [IRA].

In addition, § 402(c)(2) provides the following special rule:

> In the case of a transfer described in subparagraph (A) or (B), the amount transferred shall be treated as consisting first of the portion of such distribution that is includible in gross income (determined without regard to [§ 402(c)(1)]).

Under § 402A, an applicable retirement plan, defined in § 402A(e)(1) to include a plan qualified under § 401(a), a § 403(b) plan, or a governmental § 457(b) plan, may include a designated Roth account. Section 402A(d) provides that a qualified distribution (as defined in § 402A(d)(2)) from a designated Roth account is not includible in gross income.

Section 1.402A-1, Q&A-5(a), of the Income Tax Regulations provides taxability rules for a distribution from a designated Roth account that is rolled over. The regulations provide in part that "any amount paid in a direct rollover is treated as a separate distribution from any amount paid directly to the employee."

Section 402(f) requires that the plan administrator of a plan qualified under § 401(a) provide any recipient of an eligible rollover distribution with a written explanation describing certain provisions of law. Notice 2009-68, 2009-2 C.B. 423, provides two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy § 402(f). The safe harbor explanation with respect to distributions not from a designated Roth account provides in part (under the heading "If your payment includes after-tax contributions") that "[i]f you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you, each of the payments will include an allocable portion of the after-tax contributions." Similarly, for distributions from a designated Roth account, the safe harbor explanation provides in part (under the heading "How do I do a rollover?") that "[i]f you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you, each of the payments will include an allocable portion of the earnings in your designated Roth account."

Sections 403(b)(8)(B) and 457(e)(16)(B) provide that the rules of § 402(c)(2) through (7), (9), and (11) and the rules of § 402(f) also apply to § 403(b) plans and governmental § 457(b) plans.

In response to Notice 2009-68, comments were received requesting changes to the rules regarding the allocation of basis among simultaneous disbursements to multiple

destinations from a retirement plan that contains both after-tax and pretax amounts. Commenters indicated that some plan providers were treating disbursements to separate destinations not as separate distributions but rather as a single distribution of the aggregate disbursement amounts. These plan providers permitted allocation of all the after-tax amounts included in the disbursements to a Roth IRA. The commenters also pointed out that even under the allocation method described in Notice 2009-68 a participant who wishes to disburse after-tax amounts to one destination and pretax amounts to another could accomplish this result in a series of steps. First, the participant could take an eligible rollover distribution as a single cash distribution. Second, by taking advantage of the rule in § 402(c)(2) that distribution amounts that are rolled over are treated as consisting first of pretax amounts, the participant could roll over the pretax amounts included in the distribution to one destination, such as a traditional IRA. The remaining amount of the distribution would be after-tax, which the participant could either roll over into a Roth IRA or retain without incurring any tax liability. The option to roll over all after-tax amounts into a Roth IRA, however, would only be available to taxpayers with sufficient funds available outside of the plan to be able to roll over the entire amount distributed, including the 20 percent of the taxable portion of the distribution paid to the IRS as withholding pursuant to § 3405(c).

As described in section VI of this notice, this notice is being issued in conjunction with proposed regulations that would modify § 1.402A-1, Q&A-5(a).

III. GUIDANCE ON THE ALLOCATION OF AFTER-TAX AND PRETAX AMOUNTS

For purposes of determining the portion of a disbursement of benefits from a plan to a participant, beneficiary, or alternate payee that is not includible in gross income under the rules of § 72, all disbursements of benefits from the plan to the recipient that are scheduled to be made at the same time (disregarding differences due to reasonable delays to facilitate plan administration) are treated as a single distribution without regard to whether the recipient has directed that the disbursements be made to a single destination or multiple destinations.

If the pretax amount with respect to the aggregated disbursements that are treated as a single distribution is less than the amount of the distribution that is directly rolled over to one or more eligible retirement plans, the entire pretax amount is assigned to the amount of the distribution that is directly rolled over. In such a case, if the direct rollover is to two or more plans, then the recipient can select how the pretax amount is allocated among these plans. To make this selection, the recipient must inform the plan administrator of the allocation prior to the time of the direct rollovers.

If the pretax amount with respect to the aggregated disbursements in a distribution equals or exceeds the amount of the distribution that is directly rolled over to one or more eligible retirement plans, the pretax amount is assigned to the portion of the distribution that is directly rolled over up to the amount of the direct rollover (so that each direct rollover consists entirely of pretax amounts). Any remaining pretax amount is next assigned to any 60-day rollovers (that is, rollovers that are not direct rollovers)

up to the amount of the 60-day rollovers. If the remaining pretax amount is less than the amount rolled over in 60-day rollovers, the recipient can select how the pretax amount is allocated among the plans that receive 60-day rollovers.

If, after the assignment of the pretax amount to direct rollovers and 60-day rollovers, there is a remaining pretax amount, that amount is includible in the distributee's gross income. If the amount rolled over to an eligible retirement plan exceeds the portion of the pretax amount assigned or allocated to the plan, the excess is an after-tax amount.

IV. REPORTING REQUIREMENTS

Even though certain multiple disbursements to different destinations are treated as a single aggregated distribution under the first paragraph of section III of this notice, each disbursement may be required to be reported on a separate Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., in accordance with the Instructions to Form 1099-R. In preparing the Form 1099-R, the assignment and allocation rules in section III must be taken into account in determining the amount of pretax contributions assigned or allocated among direct rollovers and any amounts paid to the recipient.

V. EXAMPLES

Example 1. Employee C participates in a qualified plan that does not contain a designated Roth account. Employee C's $250,000 account balance consists of $200,000 of pretax amounts and $50,000 of after-tax amounts. Employee C separates from service and is entitled to, and requests, a distribution of $100,000. Under § 72(e)(8), the pretax amount with respect to the distribution is $80,000 ($100,000 x $200,000/$250,000). Employee C specifies that $70,000 is to be directly rolled over to the qualified plan maintained by his new employer and that $30,000 is to be paid to Employee C. Because the pretax amount exceeds the amount directly rolled over, the amount directly rolled over to the new plan consists entirely of pretax amounts. The amount paid to Employee C (prior to application of withholding) consists of $10,000 in pretax amounts and $20,000 in after-tax amounts. Prior to the 60th day after the distribution, Employee C chooses to roll over $12,000 to an IRA. Because the amount rolled over in the 60-day rollover exceeds the remaining pretax amounts, the amount rolled over to the IRA consists of $10,000 of pretax amounts and $2,000 of after-tax amounts.

Example 2. The facts are the same as in Example 1, except that Employee C chooses to transfer $82,000 in direct rollovers -- $50,000 to the new qualified plan and $32,000 to an IRA. The remaining $18,000 is paid to Employee C. The new qualified plan separately accounts for after-tax contributions. Because the amount rolled over exceeds the pretax amount, the direct rollovers consist of $80,000 in pretax amounts and $2,000 in after-tax amounts. Employee C is permitted to allocate the pretax amounts between the new qualified plan and the IRA prior to the time the direct rollovers are made.

Example 3. The facts are the same as in Example 2, except that the new qualified plan does not separately account for after-tax contributions. In this case, it is impermissible for the $2,000 (which represents the after-tax portion of the distribution) to be rolled over to the new qualified plan. Thus, the entire $50,000 rolled over to the plan must consist of pretax amounts. The $32,000 rolled over to the IRA consists of $30,000 of pretax amounts and $2,000 of after-tax amounts.

Example 4. The facts are the same as in Example 1, except that Employee C chooses to make a direct rollover of $80,000 to a traditional IRA and $20,000 to a Roth IRA. Employee C is permitted to allocate the $80,000 that consists entirely of pretax amounts to the traditional IRA so that the $20,000 rolled over to the Roth IRA consists entirely of after-tax amounts.

VI. PROPOSED REGULATIONS AND TRANSITION RULES

The allocation rules of section III of this notice generally apply to distributions made on or after January 1, 2015.

Concurrent with this notice, the Federal Register has filed for public inspection proposed regulations under § 402A (REG-105739-11, filed for public inspection by the Federal Register on September 18, 2014). The proposed regulations would limit the applicability of the requirement in § 1.402A-1, Q&A-5(a), applicable to distributions from designated Roth accounts that "any amount paid in a direct rollover is treated as a separate distribution from any amount paid directly to the employee." Under the proposed regulations, that separate distribution requirement would not apply to distributions made on or after the applicability date of the Treasury decision finalizing the proposed regulations. The applicability date of the regulations is proposed to be January 1, 2015. However, in accordance with § 7805(b)(7), taxpayers are permitted to apply the proposed regulations to distributions made before the applicability date, so long as such earlier distributions are made on or after September 18, 2014. For distributions from designated Roth accounts, the allocation rules of section III of this notice will apply to distributions made on or after the applicability date.

For distributions made on or after September 18, 2014 but before the allocation rules of section III of this notice apply, taxpayers may apply a reasonable interpretation of the last sentence of § 402(c)(2) to allocate after-tax and pretax amounts among disbursements made to multiple destinations. In the case of such disbursements, a reasonable interpretation of the last sentence of § 402(c)(2) includes utilizing the separate distribution allocation rule described in § 1.402A-1, Q&A-5(a). For example, it would be reasonable for a plan administrator to treat each disbursement as a separate distribution that receives a pro rata share of pretax amounts and for the recipient to determine taxability in accordance with that allocation. It would also be reasonable for the plan administrator to allocate pretax amounts in the manner described in section III of this notice as timely selected by the recipient of disbursements made to multiple destinations. In addition, it would be reasonable for a plan administrator to switch from

allocating pretax amounts using the separate distribution allocation rule to allocating pretax amounts in the manner described in section III of this notice as timely selected by the recipient.

For distributions made prior to September 18, 2014, taxpayers may generally apply the same reasonable interpretation standard described in the preceding paragraph. However, if such a distribution is made from a designated Roth account, the allocation of the pretax amounts must be made in accordance with the rules set forth in the § 402A regulations that were in effect on the date of the distribution.

The IRS also intends to revise the safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy § 402(f) to reflect this revised method for applying the last sentence of § 402(c)(2).

DRAFTING INFORMATION

The principal author of this notice is Kathleen Herrmann of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to RetirementPlanQuestions@irs.gov.

Rollovers of After-Tax Contributions in Retirement Plans

Many savers have made after-tax contributions to a 401(k) or other defined contribution retirement plan. If your account balance contains both pretax and after-tax amounts, any distribution will generally include a pro rata share of both.

> **Example:** Your account balance is $100,000, consisting of $80,000 in pretax amounts and $20,000 in after-tax amounts. You request a distribution of $50,000. Your distribution consists of $40,000 pretax and $10,000 after-tax.

Rollovers to multiple destinations

Distributions sent to multiple destinations at the same time are treated as a single distribution for allocating pretax and after-tax amounts (Notice 2014-54). This means you can roll over all your pretax amounts to a traditional IRA or retirement plan and all your after-tax amounts to a different destination, such as a Roth IRA.

> **Example:** You withdraw $100,000 from your plan, $80,000 in pretax amounts and $20,000 in after-tax amounts. You may request:
>
> - A direct rollover of $80,000 in pretax amounts to a traditional (non-Roth) IRA or a pretax account in another plan,
> - A direct rollover of $10,000 in after-tax amounts to a Roth IRA, and
> - A distribution of $10,000 in after-tax amounts to yourself.

Can I roll over just the after-tax amounts in my retirement plan to a Roth IRA and leave the remainder in the plan?

No, you can't take a distribution of only the after-tax amounts and leave the rest in the plan. Any partial distribution from the plan must include some of the pretax amounts. Notice 2014-54 doesn't change the requirement that each plan distribution must include a proportional share of the pretax and after-tax amounts in the account. To roll over all of your after-tax contributions to a Roth IRA, you could take a full distribution (all pretax and after-tax amounts), and directly roll over:

- pretax amounts to a traditional IRA or another eligible retirement plan, and
- after-tax amounts to a Roth IRA.

Can I roll over my after-tax contributions to a Roth IRA and the earnings on

EXHIBIT B

my after-tax contributions to a traditional IRA?

Yes. Earnings associated with after-tax contributions are pretax amounts in your account. Thus, after-tax contributions can be rolled over to a Roth IRA without also including earnings. Under Notice 2014-54, you may roll over pretax amounts in a distribution to a traditional IRA and, in that case, the amounts will not be included in income until distributed from the IRA.

Prior distribution rules

Prior to the 2014 guidance, each distribution from a participant's account contained a pro rata share of both the pretax and after-tax amounts. For example, if a participant's account was 80% pretax, then each distribution or rollover was made up of 80% pretax and 20% after-tax. A transfer of pretax amounts to one destination and after-tax amounts to another could have been done through a 60-day rollover, but the distribution was subject to mandatory 20% withholding on the pretax amounts.

Transition rules

Taxpayers can use the new rule for distributions on and after September 18, 2014. For distributions prior to September 18, 2014, taxpayers can also use the new rule, except for distributions from designated Roth accounts.

Additional resources

- Rollovers of Retirement Plan and IRA Distributions
- Rollover Chart
- Individual Retirement Arrangements (IRAs)
- Types of retirement plans
- FAQs: Waivers of the 60-Day Rollover Requirement

Page Last Reviewed or Updated: 30-Jul-2018