The COMMITTEE of ANNUITY INSURERS

1455 Pennsylvania Avenue NW, Suite 1200, Washington, DC 20004
(202) 347-2230 | www.annuity-insurers.org

May 25, 2022

UPLOADED TO WWW.REGULATIONS.GOV

Internal Revenue Service
Attention: CC:PA:LPD:PR (REG-105954-20)
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Proposed RMD Regulations (REG-105954-20)

To whom it may concern:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") to comment on the Notice of Proposed Rulemaking that the Treasury Department and Internal Revenue Service ("IRS") published in the Federal Register on February 24, 2022, titled "Required Minimum Distributions." The proposed regulations relate to required minimum distributions ("RMDs") from qualified plans, section 403(b) annuity contracts, section 408 individual retirement accounts and annuities ("IRAs"), and section 457 eligible deferred compensation plans.

The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. The Committee's 30 member companies represent approximately 80% of the annuity business in the United States and are among the largest issuers of annuity contracts to employer-sponsored retirement plans and as individual retirement annuities. A list of member companies is attached.

The Committee thanks the Treasury Department and IRS for their tremendous efforts in updating the regulations to reflect the SECURE Act and other changes in law. We also greatly appreciate this opportunity to comment on the proposed regulations. Our comments are set forth below. The Committee also requests to testify at the public hearing on June 15, 2022. An outline of topics that the Committee currently plans to discuss at the public hearing is attached at the end of this letter.

Table of Contents

1. **Prop. Treas. Reg. § 1.401(a)(9)-1** ……………………………………………………………………. 4
   A. Extend the deadline for amending plan and IRA documents ………………………………………... 4
   B. Delay the effective date of the proposed regulations and provide relief for reasonable, good faith interpretations until final regulations are effective …………………………………………………... 5

C. Clarify that "separate accounting" principles apply in cases where an employee died before 2020 and has multiple beneficiaries 6

D. Clarify the SECURE Act's special effective date rule for qualified annuity contracts 8

1. Clarify that the SECURE Act's special effective date rule for qualified annuity contracts applies to beneficiaries who annuitized before December 20, 2019 8

2. Clarify how the SECURE Act's special effective date rule for qualified annuity contracts applies to DIAs and QLACs 9

E. Clarify whether the SECURE Act changes to the RMD rules apply to non-profit 457(b) plans 10

2. <u>Prop. Treas. Reg. § 1.401(a)(9)-2</u> 11

A. Clarify that annuity payments from DC plans and IRAs must comply with the 10-year rule 11

3. <u>Prop. Treas. Reg. § 1.401(a)(9)-3</u> 13

A. Clarify that if a plan permits elections between the available RMD rules in cases where an employee dies before their RBD, the plan "may" rather than "must" specify which rule applies in the absence of an election 13

B. Clarify that DC plans may require different distribution methods for different types of EDBs in cases where the employee dies before the RBD 14

4. <u>Prop. Treas. Reg. § 1.401(a)(9)-4</u> 15

A. Clarify the treatment of former spouses as eligible designated beneficiaries 15

B. Clarify that plan administrators can rely upon certifications by the individual or trustee as to how the RMD rules apply to a trust and eliminate the rule that permits the trustee to provide a copy of the trust instrument 16

C. Provide examples of the rules for applicable multi-beneficiary trusts 18

D. Expand the circumstances in which separate accounting is permitted for multiple beneficiaries of a see-through trust 18

E. Permit plan administrators to rely on certifications they receive from beneficiaries at any time regarding an individual's status as a disabled or chronically ill EDB 20

1. Background 21

2. Allow Administrators to rely on beneficiary certifications of disability or chronic illness 21

3. Clarify that if annuity payments commence from a DC plan while the employee is alive, documenting a beneficiary's disability or chronic illness as of the annuity commencement date is sufficient to establish their EDB status 22

4. Clarify that a licensed health care practitioner's certification of chronic illness "as of the date of the certification" is sufficient to establish EDB status 22

5. Eliminate the October 31 deadline for documenting disability or chronic illness and allow the documentation to be provided at any time 23

5. <u>Prop. Treas. Reg. § 1.401(a)(9)-5</u> 24

A. Reconsider the interpretation of the 10-year rule 24

1. Reinterpret the 10-year rule so that no distributions are required during the 10-year period and re-propose regulations reflecting that view 24

2. If the Treasury Department and IRS do not adopt the alternative interpretation of the 10-year rule, clarify when that rule requires distributions to continue throughout the 10-year period 27

3. If the Treasury Department and IRS do not adopt the alternative interpretation of the 10-year rule, provide specific relief for taxpayers who adopted that interpretation for 2021 or 2022 30

B. Eliminate the special rule that applies to EDBs who are older than an employee who dies on or after their RBD, or at least clarify that the special rule does not apply to annuity payments ……….. 32

6. Prop. Treas. Reg. § 1.401(a)(9)-6 …… 33

A. Re-propose the regulations regarding annuity payments …….. 33

B. Clarify whether and how the 10-year rule applies to annuity payments …… 34

1. Clarify whether the 10-year rule applies to annuity payments …… 34

2. Add examples of the 10-year rule applying to annuity payments ……... 35

C. Clarify the rules for determining the designated beneficiary and their status when distributions are made in the form of an annuity ……..... 38

D. Modify, rationalize, and clarify the proposed rules for increasing payments under commercial annuities …… 39

1. Simplify and rationalize the rules for increasing payments by (a) exempting certain additional types of benefits from the MITT, and (b) excusing any prior inadvertent failures of the MITT that would not have occurred under the final regulations ……... 39

2. Clarify the rule for accelerations required to comply with the 10-year rule ……... 42

3. Clarify the definitions of "total future expected payments" and "total value being annuitized" 43

a. Background …….. 43

b. Clarify which of several definitions of "total value being annuitized" applies to deferred annuities that are issued as IRAs …….. 44

c. Clarify when the "total future expected payments" and "total value being annuitized" are determined for purposes of the MITT, by using a term other than "annuitized" to describe the relevant date ……..45

d. Clarify when "total future expected payments" are determined for purposes of the definition of "an acceleration of payments" …… 47

e. Expand upon the examples in the regulations to explain how "total future expected payments" were calculated in each example ……... 48

4. Clarify the new exception to the prohibition on increasing payments provided for short-term payment accelerations ……..... 48

E. Permit spouses to elect a joint life annuity with a period certain based on their joint life expectancy…….. 49

F. Clarify and improve the rules for QLACs …… 49

1. Clarify certain implications of surrendering a QLAC ……49

a. Clarify how the surrender of a QLAC affects the limitations on premiums if the employee subsequently purchases another QLAC …… 50

b. Clarify what reporting requirements apply in connection with the surrender of a QLAC ….. 50

c. Clarify that if a QLAC is surrendered as part of an exchange for another QLAC, only the surrender value of the exchanged contract is treated as a premium for the new contract 51

2. Clarify the QLAC premium limits to facilitate purchases via rollovers from qualified plans to IRAs …… 51

3. Clarify QLAC spousal death benefits in the event of divorce …… 53

7. **Prop. Treas. Reg. § 1.402(c)-2** 56

A. Eliminate the hypothetical RMD requirement 56

B. Confirm whether or not mandatory 20% withholding applies to non-spouse beneficiaries and provide relief for prior years 57

8. **Section 403(b) Plans** 59

A. Do not apply the qualified plan RMD rules to section 403(b) contracts that are not maintained under a written plan 59

9. **Prop. Treas. Reg. § 1.408-8** 61

A. Do not impose a deadline by which a surviving spouse beneficiary must elect to treat an IRA as their own 61

B. Simplify the rules by which a surviving spouse who indirectly inherits a decedent's IRA through a trust or estate may treat that IRA as their own 64

C. Treat deemed distributions from an IRA under section 408(e) and (m) as RMDs 65

10. **Prop. Treas. Reg. § 54.4974-1** 66

A. Extend the deadline for the RMD that is due in the year of death, rather than providing an automatic waiver of the excise tax for such year 67

1. PROP. TREAS. REG. § 1.401(a)(9)-1

Prop. Treas. Reg. § 1.401(a)(9)-1 addresses, among other things, the types of plans to which the RMD rules apply and the effective dates of the SECURE Act and the proposed regulations. The Committee's comments on these provisions are set out below.

A. Extend the deadline for amending plan and IRA documents.

The Treasury Department and IRS should issue guidance ***as soon as possible*** to extend the deadline for amending plans and IRAs to reflect the SECURE Act by at least one full plan year (calendar year for IRAs) from the later of (1) the effective date of final RMD regulations, or (2) the date the IRS publishes updated Listings of Required Modifications ("LRMs") that reflect the new RMD rules for the relevant type of arrangement.

The SECURE Act provides that qualified plans and IRAs must amend their governing documents to reflect the SECURE Act by the last day of the first plan year beginning on or after January 1, 2022, "or such later date as the Secretary of the Treasury may prescribe."[1] While employers using individually-designed plans generally can wait to amend the plan until a change in the law is published on the Required Amendments List, those employers using calendar year pre-approved plans – which is the overwhelming majority of plans – would need to be amended by the end of 2022.[2]

[1] The Setting Every Community Up for Retirement Enhancement ("SECURE") Act, Pub. L. No. 116-94, Div. O, § 601(b)(1)(B), 133 Stat. 3137, 3181 (2019). The deadline for certain collectively-bargained and governmental plans is two years later. *See also* Notice 2020-68, 2020-38 I.R.B. 567, § G-1 (confirming that the first deadline applies to IRAs).

[2] *Compare* Rev. Proc. 2016-37, 2016-29 I.R.B. 136 and Rev. Proc. 2019-39, 2019-42 I.R.B. 945 (generally providing that the remedial amendment deadline for an individually-designed 401(a) or 403(b) plan that has a

The Committee urges the Treasury Department and IRS to exercise their delegated authority to extend the SECURE Act deadline as described above. Revising plan and IRA governing documents is no small task. It requires extensive legal review and vetting, which is difficult in the absence of final rules. In addition, insurance companies that issue annuity contracts affected by the SECURE Act, such as 408(b) individual retirement annuities and 403(b) tax-sheltered annuities, typically must obtain approval from state insurance regulators to amend their forms, which takes time. We respectfully submit that it is not reasonable to expect any plan or financial institution to even start the process of amending their governing documents until final regulations are available. Otherwise, they may need to revise the documents again to reflect any changes in the final rules.

Further, many (if not most) plans and financial institutions rely on IRS model language (LRMs) to make any necessary amendments to their documents. We understand that the LRMs will be updated, but the updates are not yet available and the IRS has suspended its prototype approval program for IRAs in the meantime.[3] In other words, the Treasury Department and IRS have determined that they need more time to develop appropriate language. The private sector does, too. Moreover, it is imperative to annuity providers that an extension of the deadline is announced *as soon as possible* because, after working with their legal teams to draft the language, they will need to obtain approvals from state insurance regulators before the revised documents can be delivered to annuity contract owners. The Committee has serious concerns that a deluge of state form filings towards year-end will create a bottleneck for the necessary regulatory approvals that makes it difficult or impossible to satisfy the December 31, 2022, deadline.

B. Delay the effective date of the proposed regulations and provide relief for reasonable, good faith interpretations until final regulations are effective.

The Treasury Department and IRS should issue guidance that (1) delays the effective date of any new RMD regulations until the first calendar year beginning at least nine months after final regulations are published, in order to give taxpayers and service providers adequate time to implement the regulations, and (2) until that date, provides taxpayers relief for their reasonable, good faith interpretations of the underlying statutory rules.

---

disqualifying provision arising as a result of a change in the law is the end of the second calendar year that begins after the issuance of a Required Amendment List on which the change in law appears) *with* Rev. Proc. 2021-37, 2021-38 I.R.B. 385 and Rev. Proc. 2021-38, 2021-38 I.R.B. 425 (generally providing that an interim amendment for a pre-approved 401(a) or 403(b) plan is timely if adopted by the end of second calendar year following the calendar year in which the change in the qualification requirements is effective with respect to the plan).

[3] *See* Announcement 2022-6, 2022-13 I.R.B. 934. In April 2022, the IRS posted updated LRMs for section 403(b) pre-approved plans. The update, however, does not include RMD language reflecting the SECURE Act. The update states that "[b]ecause the terms of § 403(b) annuity contracts and custodial accounts under the plan must satisfy the requirements of Code § 401(a)(9), it is not necessary that those requirements be set forth in a § 403(b) Pre-approved Plan." *See Section 403(b) Pre-Approved Plans LRM and Information Package*, INTERNAL REVENUE SERV. (Apr. 2022), https://www.irs.gov/pub/irs-tege/403b-lrm-042022.pdf. Prior versions of these LRMs nonetheless included "alternative provisions" that a plan could use to state the minimum distribution requirements in the plan, if desired. The update simply deletes those alternative provisions rather than amending them to reflect the SECURE Act. Thus, the "updated" LRMs for 403(b) pre-approved plans contain no model language regarding the SECURE Act's changes to the RMD rules.

The proposed regulations were issued on February 24, 2022, and state that they apply with respect to RMDs for the 2022 calendar year.[4] They also state that new rules regarding rollovers (including required tax withholding) apply *retroactively* to distributions made after 2021.[5] These effective dates should be delayed as described above.

The SECURE Act made significant changes to the RMD rules for certain qualified plans and IRAs, generally starting in 2020.[6] There has been little guidance on these changes until the proposed regulations, which are voluminous and complex. They contain many new concepts and present administrative challenges, which will take individuals, their advisers, and the organizations that administer retirement benefits substantial time to understand and address. Also, the final regulations could make further changes, which could require financial institutions to undo or modify steps they took (or attempted) to implement the proposed regulations.

Given these circumstances, the Committee urges the Treasury Department and IRS to promptly issue guidance to delay the effective dates and provide interim relief for reasonable, good faith interpretations of the statutory rules. For purposes of the latter relief, the guidance should be clear that although compliance with the proposed regulations will be deemed to satisfy the reasonable, good faith standard, such compliance is not the sole means of satisfying that standard. We further note that the proposed regulations already extend similar relief with respect to the 2021 tax year.[7]

C. Clarify that "separate accounting" principles apply in cases where an employee died before 2020 and has multiple beneficiaries.

Final regulations should clarify that "separate accounting" principles apply for purposes of the general effective date of the SECURE Act's changes to the after-death RMD rules in cases where an employee died before 2020 and has multiple beneficiaries.[8]

The SECURE Act's amendments to the after-death RMD rules generally apply with respect to employees who die after 2019 (2021 for certain collectively bargained and governmental plans) (the "General Effective Date").[9] However, if an employee dies before the General Effective Date and their designated beneficiary dies on or after that date, prior law continues to apply while the beneficiary is alive but the beneficiary is treated as an eligible designated beneficiary ("EDB") so

---

[4] Prop. Treas. Reg. § 1.401(a)(9)-1(d). *See also* Prop. Treas. Reg. §§ 1.402(c)-2(a)(3); 1.403(b)-6(e)(9); 1.408-8(j); 54.4974-1(h).

[5] Prop. Treas. Reg. § 1.402(c)-2(a)(3).

[6] The statutory changes generally are effective with respect to individuals who die after 2019 (2021 for collectively bargained and governmental plans), although the CARES Act waived RMDs for 2020. SECURE Act § 401(b); The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2203, 134 Stat. 281, 343-34 (2020).

[7] 87 Fed. Reg. 10504, 10521 (Feb. 24, 2022).

[8] Unless the context requires otherwise, our use of the term "employee" throughout this letter also refers to an IRA owner.

[9] SECURE Act § 401(b)(1)-(3).

that the 10-year rule of section 401(a)(9)(H)(iii) applies upon their death (the "Bene Effective Date").[10]

The proposed regulations address how the Bene Effective Date rule applies in cases where the deceased employee had more than one designated beneficiary. In such cases, the proposed regulations provide that whether prior law continues to apply upon the death of a beneficiary or whether, instead, the 10-year rule of section 401(a)(9)(H)(iii) applies upon such a death depends on when the ***oldest*** of those beneficiaries dies.[11] This has the following consequences:

- If the oldest beneficiary dies *on or after* the General Effective Date, the 10-year rule applies to ***all*** of the remaining beneficiaries, including any successor beneficiaries. In such case, RMDs must continue over the (deceased) oldest beneficiary's remaining life expectancy, but the distribution period is capped at 10 years.

- If the oldest designated beneficiary dies *before* the General Effective Date, the SECURE Act's after-death RMD rules do not apply to *any* of the remaining beneficiaries or their successors, even if they die on or after the General Effective Date.

The proposed regulations are silent on whether the rule for multiple beneficiaries discussed above applies if the employee's interest in the plan had been properly divided into "separate accounts" for each beneficiary.[12] The existing regulations, however, provide that if such separate accounts are established in accordance with certain requirements, "the rules in section 401(a)(9) separately apply to [each] such separate account."[13] The proposed regulations retain this rule.[14]

Because these separate accounting provisions result in "the rules in section 401(a)(9)" applying separately to each beneficiary, and because the Bene Effective Date is among the "rules in section 401(a)(9)," it follows that in cases where separate accounting treatment otherwise applies, such treatment extends to the Bene Effective Date rule. Thus, in cases where separate accounting was timely established, the determination of whether the 10-year rule of section 401(a)(9)(H)(iii) applies or whether prior law applies upon the death of a beneficiary after the General Effective Date would be made separately with respect to each beneficiary for which a separate account was established.[15]

Final regulations should clarify that separate accounting applies in this manner. If it does not, we are concerned that the Bene Effective Date will be extremely difficult to administer. For

---

[10] SECURE Act § 401(b)(5).

[11] Prop. Treas. Reg. § 1.401(a)(9)-1(b)(2)(iii)(B).

[12] *See* Prop. Treas. Reg. § 1.401(a)(9)-1(b)(2)(iii)(A) (describing the effective date rule that applies if an employee "has only one designated beneficiary," but not mentioning separate accounting).

[13] Treas. Reg. § 1.401(a)(9)-8, Q&A-2(a)(2). Unless otherwise indicated, "section" means a section of the Internal Revenue Code of 1986, as amended ("Code").

[14] Prop. Treas. Reg. § 1.401(a)(9)-8(a)(1).

[15] The proposed regulations and the preamble give examples of the multi-beneficiary rule for the Bene Effective Date, but the examples involve multiple beneficiaries of a see-through trust. The separate accounting rule does not apply with respect to multiple beneficiaries of a see-through trust. Thus, the examples do not address situations where separate accounting applied to a deceased employee's account. *See* Prop. Treas. Reg. § 1.401(a)(9)-1(b)(3)(iv) and (v); 87 Fed. Reg. at 10507-08.

example, assume that a deceased employee has three beneficiaries, and that the RMD rules are being applied separately to each beneficiary in accordance with the separate accounting rules in the existing regulations. Assume further that after the employee's death, each beneficiary directly rolled over their interest to an inherited IRA with a different provider. If the separate accounting rule is not respected, the death of one of those beneficiaries could affect the distribution requirements under each of the other two inherited IRAs. This would place a significant burden on each of the three beneficiaries and each of the three IRA providers to share information about each inherited IRA. Such burdens are unwarranted in light of the general applicability of the separate accounting rules discussed above.

D. Clarify the SECURE Act's special effective date rule for qualified annuity contracts.

The SECURE Act provides that its amendments to the after-death RMD rules do not apply to a "qualified annuity" that meets certain requirements.[16] For this purpose, the term "qualified annuity" means, with respect to an employee, a commercial annuity under which annuity payments are made in accordance with the existing RMD regulations over (a) the life of the employee or the joint lives of the employee and a designated beneficiary, or (b) a period not extending beyond the life expectancy of the employee or joint life expectancy of the employee and a designated beneficiary. In addition, the annuity payments must have either (1) begun to the employee before December 20, 2019, pursuant to an "irrevocable election" the employee made before such date as to the "method and amount" of the annuity payments to the employee or any designated beneficiaries, or (2) been set to begin after December 19, 2019, pursuant to an irrevocable election the employee made before December 20, 2019, as to the method and amount of the annuity payments to the employee or any designated beneficiaries. The Committee has the following comments on these provisions.

1. Clarify that the SECURE Act's special effective date rule for qualified annuity contracts applies to beneficiaries who annuitized before December 20, 2019.

Final regulations should clarify that the SECURE Act's special effective date rule for qualified annuity contracts applies (and thus the SECURE Act's changes to the after-death RMD rules do not apply) in situations where a beneficiary, rather than the employee, annuitized their inherited interest before December 20, 2019.

As discussed above, the SECURE Act provides that the new after-death RMD rules do not apply to an annuity contract with respect to an employee if the employee made an irrevocable election before December 20, 2019, as to the method and amount of annuity payments to the employee or any designated beneficiaries.[17] An example in the proposed regulations suggests that this relief is available only if it was the employee, not the beneficiary, who made the annuitization decision.[18]

The example involves an employee who died in 2017 before their required beginning date ("RBD"). The beneficiary elected an annuity that pays over their lifetime with a 15-year period certain, starting in 2018. The beneficiary dies in 2024. The example concludes that the 10-year

[16] SECURE Act § 401(b)(4).

[17] SECURE Act § 401(b)(4)(B)(iii)(I).

[18] Prop. Treas. Reg. § 1.401(a)(9)-1(b)(3)(vi).

rule of section 401(a)(9)(H)(iii) will apply upon the beneficiary's death, so that the annuity may not provide distributions any later than the end of 2034.[19] The example does not mention the potential applicability of the special effective date relief for qualified annuity contracts discussed above, even though the contract was annuitized prior to December 20, 2019. This omission and the conclusion that the 10-year rule applies suggest that the special effective date relief for qualified annuity contracts does not apply under the example's facts. If that relief applied, the example would have concluded that the 10-year rule does not apply to the contract regardless of when the beneficiary (annuitant) died.

The special effective date relief for qualified annuity contracts evidences a congressional intent not to force taxpayers to unwind irrevocable annuitization elections they made before Congress changed the rules.[20] This is a matter of fairness and equity. Those same principles apply whether it was the employee or their beneficiary who made the irrevocable annuity election prior to December 20, 2019. Accordingly, final regulations should clarify that the SECURE Act's special relief for qualified annuity contracts applies in situations where a beneficiary, rather than the employee, annuitized their inherited interest before that date.

2. Clarify how the SECURE Act's special effective date rule for qualified annuity contracts applies to DIAs and QLACs.

Final regulations should include the following clarifications of how the special effective date rule for annuity contracts applies to deferred income annuities ("DIAs") and qualifying longevity annuity contracts ("QLACs"):

- Clarify the extent, if any, to which the payment of a premium on or after December 20, 2019, into a DIA or QLAC that is otherwise a "qualified annuity" under section 401(b)(4) of the SECURE Act causes the contract to fail to be treated as a "qualified annuity," and

- Clarify that a DIA or QLAC that allows the individual to accelerate or defer the starting date of the annuity payments, *e.g.*, by up to five years, and is otherwise a "qualified annuity" under section 401(b)(4) of the SECURE Act, will not cause the contract to fail to be treated as a "qualified annuity."

As discussed above, the SECURE Act provides that its amendments to the after-death RMD rules do not apply to a "qualified annuity" that meets certain requirements.[21] As relevant here, one of those requirements is that if annuity payments did not start to the employee before December 20, 2019, the employee must have made an "irrevocable election" before that date as to the "method

---

[19] The numbers in the example may need to be changed to make this point. Under the assumed facts, the period certain would have ended in 2033 (15 years after 2018), which is before the end of the 10-year period that the example says applies (year-end 2034). Thus, as structured, the annuity would not provide annuity payments after the end of the 10-year period, so the 10-year rule has no effect under the assumed facts.

[20] *See* STAFF OF J. COMM. ON TAX'N, 116TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 116TH CONGRESS 164 (Comm. Print 2022) (hereinafter "Bluebook") (discussing the special effective date rule for annuities and referring to a qualified annuity "with respect to an individual" and an irrevocable election made by "the individual," without referring to such individual as the "employee.").

[21] Section 401(b)(4) of the SECURE Act.

and amount" of the annuity payments to the employee or any designated beneficiaries.[22] This rule extends the special effective date relief to DIAs, including QLACs, that were purchased before the SECURE Act changed the law.

In general, a DIA is a deferred annuity contract that provides for annuity payments commencing on a specified future date, with no cash benefits prior to that date. A QLAC is a type of DIA that satisfies certain requirements in the RMD regulations.[23] DIAs and QLACs will qualify for the special effective date relief under the SECURE Act even if the annuity payments are scheduled to start on or after December 20, 2019, provided that, before such date, the owner made the irrevocable election described above. In that regard, DIAs and QLACs often provide the owner with the following rights that, if elected, can affect the future annuity payments:

- *Additional premiums* – DIAs and QLACs often allow for additional premiums to be paid after they are purchased. Such additional premiums increase the dollar amount of the annuity payments that are scheduled to start in the future. In other words, each additional premium purchases an additional fixed amount of "paid up" annuity benefit that is determined under the terms of the contract as originally issued, and the additional amount will be paid under the same terms as the original annuity benefits, starting on the same date and lasting for the same duration.

- *Start date flexibility* – Some DIAs and QLACs provide a limited right to change the annuity starting date, *e.g.*, to accelerate it up to five years or defer it up to five years (subject to the requirements in the RMD regulations). For example, if a DIA provides for annuity payments to start on January 1, 2030, the contract may provide the owner with a one-time election to start the annuity payments as early as January 1, 2025, or as late as January 1, 2035. If the owner makes this election, the dollar amount of the annuity payments is adjusted up or down to reflect the different start date, with such adjustment being made pursuant to the terms of the contract as originally issued.

Because these product features can affect the amount and timing of the annuity payments thereunder, they present a question whether, and if so to what extent, they affect the availability of the SECURE Act's special effective date rule for annuity contracts. Final regulations should address these issues by (1) clarifying the extent, if any, to which the payment of a premium on or after December 20, 2019, into a DIA or QLAC that is otherwise a "qualified annuity" under section 401(b)(4) of the SECURE Act causes the contract to fail to be treated as a "qualified annuity," and (2) clarifying that a DIA or QLAC that allows the individual to accelerate or defer the starting date of the annuity payments by up to five years, and is otherwise a "qualified annuity" under section 401(b)(4) of the SECURE Act, will not cause the contract to fail to be treated as a "qualified annuity."

E. <u>Clarify whether the SECURE Act changes to the RMD rules apply to non-profit 457(b) plans.</u>

Final regulations should clarify whether the new after-death RMD rules in section 401(a)(9)(H) apply to a section 457(b) plan of a tax-exempt entity (a "non-profit 457(b) plan") that

[22] Section 401(b)(4)(B)(iii) of the SECURE Act.

[23] *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-17; Prop. Treas. Reg. § 1.401(a)(9)-6(q).

is structured as a defined contribution plan. The proposed regulations do not directly address whether non-profit 457(b) plans are subject to section 401(a)(9)(H). By its terms, that section applies "in the case of a defined contribution plan." For this purpose, section 401(a)(9)(H)(vi) states that "all eligible retirement plans (as defined in section 402(c)(8)(B), other than [defined benefit plans]) shall be treated as a defined contribution plan."[24]

Section 402(c)(8)(B) defines "eligible retirement plan" to include: (1) an individual retirement account described in section 408(a); (2) an individual retirement annuity described in section 408(b) (other than an endowment contract); (3) a qualified trust; (4) an annuity plan described in section 403(a); (5) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A) (*i.e.*, a governmental section 457(b) plan); and (6) an annuity contract described in section 403(b). The definition in section 402(c)(8)(B) does not include a non-profit 457(b) plan. Thus, there is some question as to whether such plans are subject to the new post-death RMD rules.

It appears that section 401(a)(9)(H)(vi) was not intended to provide an exclusive list of defined contribution plans that are subject to the new post-death RMD rules. Rather, that section can be read as specifying certain plans that will be *treated* as defined contribution plans. For instance, by referencing section 402(c)(8)(B), section 401(a)(9)(H)(vi) has the effect of including IRAs, which otherwise would not be considered defined contribution plans as that term is defined in section 414(i). It seems that section 401(a)(9)(H) similarly should apply to a non-profit 457(b) plan that is structured as a defined contribution plan (as most are in practice), but this is unclear. In light of the uncertainty, final regulations should clarify whether section 401(a)(9)(H) applies to non-profit 457(b) plans.

2. PROP. TREAS. REG. § 1.401(a)(9)-2

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 1.401(a)(9)-2, regarding RMDs commencing during an employee's lifetime.

A. Clarify that annuity payments from DC plans and IRAs must comply with the 10-year rule.

Final regulations should modify Prop. Treas. Reg. § 1.401(a)(9)-2 to clarify that annuity payments from defined contribution ("DC") plans and IRAs must comply with the 10-year rule. That section specifies which RMD rules apply to distributions commencing from a DC plan or IRA during the employee's life and which rules apply to distributions from such a plan or IRA after the employee's death. With respect to lifetime distributions, the proposed regulation states that "[f]or the method of determining the required minimum distribution in accordance with section 401(a)(9)(A) and (G) in the case of *annuity payments* from a defined benefit plan or *under an annuity contract*, see §1.401(a)(9)-6."[25] Similarly, with respect to distributions after the employee's

[24] The term "eligible retirement plan" is defined in section 402(c)(8)(B) to include a governmental 457(b) plan but not a non-profit section 457(b) plan.

[25] Prop. Treas. Reg. § 1.401(a)(9)-2(a)(2) (emphasis added).

death, the proposed regulation states that "[i]n the case of *annuity payments* from a defined benefit plan or *under an annuity contract*, see §1.401(a)(9)-6."[26]

The Committee understands the foregoing references to "annuity payments … under an annuity contract" to include annuity payments from an annuity contract that is purchased in connection with a DC plan or IRA. However, the references to DB plans in the same sentence that references annuity payments "under an annuity contract," without any reference to DC plans or IRAs, is confusing. In addition, the statements quoted above cross-reference only §1.401(a)(9)-6, which does not incorporate the 10-year rule.[27] In contrast, Prop. Treas. Reg. § 1.401(a)(9)-5(a)(5) provides that annuity payments under a commercial annuity purchased in connection with a DC plan or IRA must satisfy *both* Prop. Treas. Reg. § 1.401(a)(9)-6 *and* Prop. Treas. Reg. § 1.401(a)(9)-5(e), the latter of which implements the 10-year rule.

Prop. Treas. Reg. § 1.401(a)(9)-2 should be clarified to avoid any confusion about whether and when the 10-year rule applies to annuity payments under a commercial annuity that is purchased in connection with a DC plan or IRA. To do so, the Committee recommends amending the relevant provisions as follows (additions underlined and deletions stricken through):

> Prop. Treas. Reg. § 1.401(a)(9)-2(a)(2):
>
> "… For the method of determining the required minimum distribution in accordance with section 401(a)(9)(A) and (G) in the case of annuity payments under an annuity contract purchased in connection with a defined contribution plan as described in §1.401(a)(9)-5(a)(5)(i), see §1.401(a)(9)-6 and §1.401(a)(9)-5(e). In the case of annuity payments from a defined benefit plan ~~or under an annuity contract~~, see §1.401(a)(9)-6."
>
> Prop. Treas. Reg. § 1.401(a)(9)-2(a)(4):
>
> "… For the method of determining the required minimum distribution in accordance with section 401(a)(9)(B)(i) from an individual account under a defined contribution plan, see §1.401(a)(9)-5. In the case of annuity payments under an annuity contract purchased in connection with a defined contribution plan as described in §1.401(a)(9)-5(a)(5)(i), see §1.401(a)(9)-6 and §1.401(a)(9)-5(e). In the case of annuity payments from a defined benefit plan ~~or under an annuity contract~~, see §1.401(a)(9)-6."

[26] Prop. Treas. Reg. § 1.401(a)(9)-2(a)(4) (emphasis added).

[27] Prop. Treas. Reg. § 1.401(a)(9)-6 does not directly implement the 10-year rule; it only alludes to it. *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(ii) (permitting an acceleration of annuity payments under a commercial annuity that is required to comply with Prop. Treas. Reg. § 1.401(a)(9)-5(e)); Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(ii)(C)[A] (requiring after-death annuity payments to a non-spouse beneficiary under a QLAC to satisfy Prop. Treas. Reg. § 1.401(a)(9)-5(e)). Note that Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(ii) has two subclauses that are numbered "(A)," the second of which presumably will be corrected to "(C)," since it appears after "(B)."

3. PROP. TREAS. REG. § 1.401(a)(9)-3

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 1.401(a)(9)-3, regarding death before the required beginning date ("RBD").

A. Clarify that if a plan permits elections between the available RMD rules in cases where an employee dies before their RBD, the plan "may" rather than "must" specify which rule applies in the absence of an election.

Final regulations should clarify that if a plan permits elections between the available RMD rules in cases where an employee dies before their RBD, (1) the plan "may" rather than "must" specify which of those rules applies in the absence of an election, and (2) if the plan does not so specify, the default rules that apply in the absence of a plan provision will apply to the beneficiary. This clarification would be consistent with how the existing regulations address elections between the available RMD rules for deaths before the RBD and how plans and IRA providers have amended their forms and established their systems, practices, and procedures.

In that regard, the proposed regulations provide that in cases where a participant in a defined contribution ("DC") plan dies before their RBD and has named an eligible designated beneficiary ("EDB"), the plan may permit an election between the 10-year rule of section 401(a)(9)(B)(ii) and the "stretch" exception to that rule in section 401(a)(9)(B)(iii).[28] The proposed regulations include a corresponding rule for defined benefit ("DB") plans, permitting elections between the 5-year rule and stretch exception for designated beneficiaries.[29] For both types of plans, the proposed regulations also provide that if the plan permits these elections, the plan also "must specify" which RMD rule applies in the absence of an election.[30]

These provisions closely track the existing regulations, except for the requirement that the plan "must" specify which rule applies in the absence of an election. Instead, the existing regulations provide that if a plan permits these types of elections, the plan (1) "may also specify" which rule applies in the absence of an election, and (2) if the plan does not so specify, the stretch exception applies because it is the applicable rule under the regulations in the absence of a plan provision.[31] Final regulations should adopt this approach as well, eliminating the requirement that the plan "must specify" which rule applies in the absence of an election and instead applying the stretch exception in such cases, because that is the rule that applies under the proposed regulations in the absence of a plan provision.[32]

There does not seem to be a compelling tax policy reason for the proposed regulations to change the requirement from "may also specify" to "must specify," since the regulations already address what rule applies in the absence of any plan provision. In that regard, if the regulations do

[28] Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii).

[29] Prop. Treas. Reg. § 1.401(a)(9)-3(b)(4)(iii).

[30] Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii)(A) (DC plans); Prop. Treas. Reg. § 1.401(a)(9)-3(b)(4)(iii)(A) (DB plans).

[31] Treas. Reg. § 1.401(a)(9)-3, Q&A-4(a) and (c).

[32] Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C) (DC plans); Prop. Treas. Reg. § 1.401(a)(9)-3(b)(4)(i)(B) (DB plans).

not require a plan to include *any* provision regarding which RMD rule applies when the employee dies before their RBD, why should the plan be required to specify a default rule merely because it permits elections? Both situations can be adequately addressed by the provisions in the regulations that apply when there is no plan provision, as the existing regulations have done for several decades.

Furthermore, some employers and IRA providers may have already amended their plan or IRA documents, in good faith, to address the SECURE Act. Such plans and IRAs may not specify a default distribution method when an employee or beneficiary fails to make an election in the circumstances described above. Such a drafting decision would have been perfectly reasonable, considering that no prior guidance required a default rule to be included in a plan or IRA, whether the plan or IRA permits elections or not. If the proposed regulations do not revert to the standard in the existing regulations, employers and IRA providers may need to further amend their documents and incur associated expenses to do so. This seems unnecessary considering that the approach in the existing regulations adequately addresses the issue, and has for many years.

Accordingly, final regulations should eliminate the "must specify" requirement and clarify that if a DC plan or DB plan permits elections between the available RMD rules in cases where an employee dies before their RBD, (1) the plan "may" rather than "must" specify which of those rules applies in the absence of an election, and (2) if the plan does not so specify, the default rules that apply in the absence of a plan provision will apply to the beneficiary. If the regulations do not adopt this approach and a plan document inadvertently fails to specify a default in the absence of an election, beneficiaries will be left with no direction on which rule applies.

B. Clarify that DC plans may require different distribution methods for different types of EDBs in cases where the employee dies before the RBD.

Final regulations should clarify that in cases where a DC plan participant dies before their RBD, the plan may require different methods of distributions for different types of EDBs. In that regard, the proposed regulations addressing death before the RBD state that a DC plan will not fail to satisfy section 401(a)(9) merely because the plan provides that the 10-year rule (rather than the stretch exception to that rule) applies "with respect to some or all of the employees who have an eligible designated beneficiary."[33] This is consistent with a more general provision in the proposed regulations, which states that a plan may include optional provisions governing plan distributions that do not conflict with section 401(a)(9).[34]

The proposed regulations do not, however, explicitly address whether a DC plan can require different distribution methods for different types of EDBs with respect to the *same decedent*. For example, a plan may decide to provide for the stretch exception to the 10-year rule only for EDBs who are spouses or who are not more than 10 years younger than the employee, and to apply the 10-year rule to all other types of EDBs. In such case, if an employee dies before their RBD and names their spouse and adult child as beneficiaries, the surviving spouse could stretch their benefits over life or life expectancy whereas the adult child could not. Such a distinction based on the type of EDB should be allowed, since the regulations already allow plans to apply different rules to

[33] Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(ii). The proposed regulations include a corresponding rule for DB plans. *See* Prop. Treas. Reg. § 1.401(a)(9)-3(b)(4)(ii).

[34] Prop. Treas. Reg. § 1.401(a)(9)-1(c)(2).

different employees and are permitted to adopt optional provisions that do not violate section 401(a)(9). It would be helpful, however, if final regulations could confirm this.

4. PROP. TREAS. REG. § 1.401(a)(9)-4

Prop. Treas. Reg. § 1.401(a)(9)-4 reflects the statutory definitions of a "designated beneficiary" and an "eligible designated beneficiary" ("EDB").[35] In addition to requesting clarification of certain rules for determining the designated beneficiary when distributions are made in the form of an annuity, discussed below beginning on page 33, the Committee respectfully submits the following comments on the determination of the designated beneficiary under this section of the proposed regulations and certain related provisions of Prop. Treas. Reg. § 1.401(a)(9)-5, Prop. Treas. Reg. § 1.401(a)(9)-8, and Prop. Treas. Reg. § 1.408-8.

A. Clarify the treatment of former spouses as eligible designated beneficiaries.

Final regulations should (1) clarify that a former spouse who is treated as a spouse of an employee for purposes of section 401(a)(9) by reason of a qualified domestic relations order ("QDRO") will be treated as an EDB of the employee, and (2) clarify that a former spouse of an IRA owner is treated as the owner's surviving spouse for purposes of the definition of EDB if the former spouse is entitled to benefits under the decedent's IRA by virtue of a divorce or separation instrument or the terms of the IRA annuity contract.

The proposed regulations reflect the provisions of section 401(a)(9)(E) that an EDB of an employee includes the employee's surviving spouse, and that the determination of whether a designated beneficiary is an EDB is made as of the date of the employee's death.[36] The latter rule might suggest that a former spouse cannot be an EDB as a "surviving spouse" because they were not still married to the employee when the employee died.

However, the proposed regulations also retain the special rule in the existing regulations that a former spouse to whom some or all of an employee's benefit is payable pursuant to a QDRO continues to be treated as a spouse (including a surviving spouse) for purposes of section 401(a)(9).[37] It follows from this special rule that such a former spouse will be an EDB of a deceased employee even though they are no longer married when the employee dies. Neither the proposed regulations nor the preamble address this directly, however. Final regulations should clarify that such a former spouse will be treated as an EDB.

The special QDRO rule does not apply to IRAs. However, section 408(d)(6) provides in relevant part that the transfer of an individual's interest in an IRA to a former spouse under a divorce or separation instrument is not a taxable transfer, and the IRA is treated as the former spouse's IRA (not the original owner's IRA) following the transfer. In many situations, this transfer provision will obviate the need for a QDRO-like rule that treats the former spouse as a spouse for RMD purposes, because the former spouse will be treated as the owner of the IRA (and not as a beneficiary) following the transfer. Thus, the original IRA owner's death will be irrelevant to the IRA (or portion thereof) that is transferred to the former spouse in connection with the divorce or

[35] Section 401(a)(9)(E)(i) and (ii); Prop. Treas. Reg. § 1.401(a)(9)-4(a)(1) and (e)(1).

[36] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(1).

[37] Prop. Treas. Reg. § 1.401(a)(9)-8(d)(1); Treas. Reg. § 1.401(a)(9)-8, Q&A-6(a).

separation. In some cases, however, an IRA may not be transferred to the former spouse in connection with a divorce or separation instrument, yet the former spouse may remain entitled to benefits under the decedent's IRA. In such case, a question arises whether the former spouse will be treated as a spouse of the decedent for purposes of the definition of EDB.

In that regard, spousal rights under an IRA may continue after a divorce in two distinct ways. First, a former spouse may have rights under the IRA following the owner's death pursuant to a divorce or separation instrument, such as the instrument prohibiting the IRA owner from naming a beneficiary other than their former spouse. This situation is very similar to a QDRO, and applying a parallel concept to IRAs is supported by the existing regulatory provision that, except as otherwise provided, all of the section 401(a)(9) rules for plans apply to IRAs.[38]

Second, the former spouse may be contractually entitled to benefits originally purchased under an IRA annuity contract, which remain unchanged after a divorce or separation. For example, if the owner of an IRA annuity elects a joint and survivor annuity payout with their spouse as the joint annuitant and the couple later divorces, the former spouse (as joint annuitant) may remain contractually entitled to any life annuity payments that will be paid following the owner's death. In this circumstance, a portion of the IRA annuity may not be transferred to the former spouse pursuant to section 408(d)(6), and the parties may not think they need to specify in the divorce or separation instrument that the former spouse will continue to be the beneficiary of the annuity contract upon the owner's death, because that will occur already under the terms of the contract.

For these reasons, final regulations also should clarify that a former spouse of an IRA owner is treated as the owner's surviving spouse for purposes of the definition of EDB if the former spouse is entitled to benefits under the decedent's IRA by virtue of (1) a divorce or separation instrument, or (2) the terms of the IRA annuity contract.[39] If final regulations do not adopt this view, they should include an example demonstrating why such a former spouse cannot receive a life-contingent survivor annuity that the employee purchased while they were married, along the lines of Example 7 on page 37 of this letter, *infra*. In that regard, we anticipate that if the Treasury Department and IRS determine that the former spouse of an IRA owner is not a surviving spouse for purposes of the definition of EDB, some IRA annuity providers will decide not to offer joint and survivor annuity options to married IRA owners, unless the spouse is no more than 10 years younger than the owner and therefore can be assured of EDB status regardless of a future divorce. This could significantly diminish access to lifetime income protections for spouses.

B. **Clarify that plan administrators can rely upon certifications by the individual or trustee as to how the RMD rules apply to a trust and eliminate the rule that permits the trustee to provide a copy of the trust instrument.**

Final regulations should clarify that, in cases where an employee or IRA owner names a trust as their beneficiary under the plan or IRA, the plan administrator or IRA issuer/trustee

[38] *See* Treas. Reg. § 1.408-8, Q&A-1; Prop. Treas. Reg. § 1.408-8(a).

[39] We further note that in the second scenario described above, where the terms of the annuity contract provide the surviving former spouse with contractual rights to receive a survivor annuity after the employee's death, there would not seem to be any reason why the former spouse of a DC plan participant should not be treated as a surviving spouse and EDB even in the absence of a QDRO.

(collectively, "Administrator") may rely upon certifications by the individual or their trustee for purposes of determining how the RMD rules apply to the trust. The rule that permits a trustee to provide a copy of the trust instrument to the Administrator should be eliminated.

The proposed regulations generally retain the rules from the existing regulations that when a trust is designated as the beneficiary under a plan or IRA, certain beneficiaries of the trust can be treated as designated beneficiaries of the employee if the trust satisfies the requirements of a "see-through trust," including certain documentation requirements.[40] The documentation requirements continue to generally provide that the Administrator must timely receive either (1) a copy of the trust instrument and amendments thereto (the "Trust Instrument Documentation"), or (2) a list of all the trust beneficiaries, including contingent beneficiaries, with a description of the conditions on their entitlement sufficient to establish who are beneficiaries, along with certain other information (the "Beneficiary List Documentation").[41]

Administrators of qualified plans and IRAs are not experts in the intricacies of estate and trust planning. They should not be required to interpret trust instruments when administering the RMD rules – especially in the case of employer plans, where mistakes could jeopardize the plan's qualified status. In that regard, the rules for trust beneficiaries have gotten even more complex under the proposed regulations, posing even greater risks of mistakes in drafting or interpreting trust instruments to achieve particular results under those rules. Administrators are not authorized to provide tax or legal advice, yet they effectively would be required to do so (or beneficiaries could perceive them as doing so) if the Administrator must interpret an employee's trust instrument. Administrators also could be put in the awkward position of disagreeing with the trustee of an employee's trust or the trust's legal counsel regarding how to interpret the trust instrument.

If an employee chooses to engage in estate planning by designating a trust to inherit benefits under a plan or IRA, it should be the sole responsibility of the employee, beneficiary, or trustee to interpret their own trust instrument under the RMD rules and inform the Administrator which rule applies, and any adverse tax consequences of providing such information should fall solely on the parties who established, administer, or benefit from the trust. This is especially the case for IRA issuers and trustees, who are not required to automatically distribute RMDs and are not even required to inform beneficiaries of their RMD obligations or to calculate their RMD amounts for them. That said, many IRA issuers and trustees perform these functions voluntarily, as a customer service.

In light of the foregoing, final regulations should eliminate the rule that permits a trustee to provide a copy of the trust instrument to the Administrator. Instead, in all cases the trustee or beneficiary should be required to provide the Beneficiary List Documentation. If this change is not adopted, final regulations should clarify that an Administrator can always require the Beneficiary List Documentation in lieu of the Trust Instrument Documentation.

---

[40] Prop. Treas. Reg. § 1.401(a)(9)-4(f).

[41] Prop. Treas. Reg. § 1.401(a)(9)-4(h)(2) and (3). The documentation requirements differ in some respects depending on whether the employee is alive or dead. *See* Prop. Treas. Reg. § 1.401(a)(9)-4(h)(1)-(3). In all cases, the Beneficiary List Documentation also requires the employee or trustee to certify that the requirements for see-through treatment are satisfied and to agree to provide a copy of the trust instrument upon request. In addition, Prop. Treas. Reg. § 1.408-8(a)(3) provides that for purposes of applying the RMD rules to IRAs "the IRA trustee, custodian, or issuer is treated as the plan administrator."

Final regulations also should clarify that an Administrator may (1) require the employee, beneficiary, or trustee to include additional certifications when providing the Beneficiary List Documentation regarding which RMD rule applies to the trust, and (2) rely on such certifications when administering the RMD rules. For example, the Administrator should be permitted to require and rely upon a certification from the trustee regarding:

- Whether the employee is treated as having a "designated beneficiary" for RMD purposes and, if so, which trust beneficiary is treated as the designated beneficiary for purposes of applying the RMD rules to the employee's remaining interest;
- Whether or not the designated beneficiary is an EDB and, if so, what type of EDB;
- If the trustee indicates that the EDB is disabled or chronically ill, whether the trustee has obtained the required documentation of such status (which will obviate the need for the Administrator to receive any such documentation);
- Whether the special rules for minor children in Prop. Treas. Reg. § 1.401(a)(9)-4(e)(2)(ii) or Prop. Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii) apply; and/or
- Whether the trust is a conduit trust, accumulation trust, type I applicable multi-beneficiary trust, or type II applicable multi-beneficiary trust.

C. Provide examples of the rules for applicable multi-beneficiary trusts.

Final regulations should include examples of the RMD rules for applicable multi-beneficiary trusts. The SECURE Act added section 401(a)(9)(H)(iv) and (v) to the Code regarding such trusts. The proposed regulations include provisions that interpret the new statutory rules, but do not include any examples illustrating how those rules apply in practice. In contrast, the proposed regulations add and expand upon several examples in the existing regulations regarding trusts other than applicable multi-beneficiary trusts. Those examples are very helpful because the rules for trust beneficiaries are extremely complex. The rules for applicable multi-beneficiary trusts are not only complex, they also are completely new and overlap to some extent with the more general rules for trust beneficiaries. In these circumstances, new examples that specifically address applicable multi-beneficiary trust situations are needed under the final regulations.

D. Expand the circumstances in which separate accounting is permitted for multiple beneficiaries of a see-through trust.

Final regulations should expand the circumstances in which separate accounting is permitted for multiple beneficiaries of a see-through trust.

1. Background.

The proposed regulations set forth an elaborate network of provisions for determining the designated beneficiary under section 401(a)(9) in cases where the employee has named multiple beneficiaries. These provisions include the following general rules, which also have implications in cases involving trusts:

- *All designated beneficiaries must be individuals* – If a person other than an individual is a beneficiary, the employee will be treated as having no designated beneficiary, even if individuals are also designated as beneficiaries.[42]

- *The oldest designated beneficiary controls* – The characteristics of the "oldest" designated beneficiary are used to determine (1) the period by which the entire interest must be distributed after the employee's death, and (2) whether and when a full distribution is required under the 10-year rule.[43]

- *All or none must be EDBs* – If any designated beneficiary is not an EDB, the employee is treated as not having any EDBs.[44]

- *Special rule for minors* – If any designated beneficiary is an EDB because they are a minor child of the employee, the employee is treated as having an EDB even if other designated beneficiaries are not EDBs.[45]

The proposed regulations provide exceptions to each of these general rules to the extent that separate accounting treatment applies under Prop. Treas. Reg. § 1.401(a)(9)-8(a). For such treatment to apply, the separate accounting must, among other things, provide a proper allocation of any distributions and investment gains and losses with respect to each beneficiary's interest. If separate accounting applies, then after the employee's death the RMD rules are applied separately with respect to the separate interests of each of the employee's beneficiaries.

The proposed regulations continue to provide, however, that separate accounting treatment does not apply to the separate interests of each of the beneficiaries of a trust.[46] A limited "special rule" applies to an employee's beneficiary that is a "type I applicable multi-beneficiary trust," which by its terms is divided immediately upon the employee's death into separate sub-trusts for each of the beneficiaries of the type I trust.[47] The proposed regulations include other special rules for trust beneficiaries that do not permit separate accounting, but rather treat the beneficiary under a see-through trust who, depending on the facts, is the oldest individual, oldest EDB, or oldest minor child as the sole designated beneficiary.[48]

---

[42] Prop. Treas. Reg. § 1.401(a)(9)-4(b); Treas. Reg. § 1.401(a)(9)-4, Q&A-3.

[43] Prop. Treas. Reg. § 1.401(a)(9)-5(f)(1) and (2); Treas. Reg. § 1.401(a)(9)-5, Q&A-7(a).

[44] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(2).

[45] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(2)(ii).

[46] Prop. Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(A).

[47] Prop. Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B). Under this "special rule," section 401(a)(9) may be applied separately with respect to the separate interests of the beneficiaries reflected in the separate sub-trusts of the type I trust. It is questionable whether this "special rule" is needed at all, since the automatic splitting of a type I trust into separate sub-trusts for each beneficiary negates the need to separately account for multiple beneficiaries within a single trust. In other words, if the trust is automatically split at death and each of those springing trusts has only one beneficiary, it would seem that separate accounting is already permitted for each sub-trust under the existing regulations. *See*, *e.g.*, PLR 200537044 (Mar. 29, 2005) (applying separate accounting to multiple see-through trusts named as primary beneficiaries under an IRA and, in turn, applying the RMD rules separately to the single individual beneficiary of each trust).

[48] *See* Prop. Treas. Reg. § 1.401(a)(9)-5(e) and (f).

2. Requested change.

The inability to apply separate accounting to beneficiaries of a see-through trust makes the RMD rules incredibly, and unnecessarily, complicated and confusing. It also can produce strange and inequitable results. For example, an employee who reasonably and innocently desires to utilize a trust for their multiple beneficiaries can unwittingly impose much worse tax treatment on them by doing so than if they had named the beneficiaries directly under the plan or IRA. This is troubling, considering that separate interests of the beneficiaries of a see-through trust must be identifiable,[49] and that separate accounting treatment is always conditioned on there being a proper allocation of any distributions and investment gains and losses with respect to each beneficiary's interest.[50]

It is clear that the IRS and Treasury Department have substantial discretion over when to permit or deny separate accounting treatment. A blanket prohibition such as that reflected in the proposed regulations seems unwarranted because it can result in very disparate treatment solely as the result of reasonable estate planning decisions that have no effect on a beneficiary's entitlement to the employee's remaining interest. For this reason, the Committee requests that final regulations expand the circumstances in which separate accounting is permitted for multiple beneficiaries of a see-through trust.

At a minimum, separate accounting should be permitted where the terms of the trust clearly establish each trust beneficiary's allocable share of the decedent's remaining interest in the plan or IRA and do not restrict the beneficiary's rights to take distributions from their allocable shares. For example, assume that an employee's beneficiary under a plan is a trust under which the employee's brother (an EDB) is entitled to 40% of the employee's interest in a plan, the employee's adult daughter (not an EDB) also is entitled to 40% of the employee's plan interest, a charity is entitled to the remaining 20% of the employee's plan interest, and each beneficiary of the trust is permitted at any time to take distributions of part or all of their respective interests. There does not seem to be any compelling reason to preclude separate accounting of those interests so that the brother can "stretch" distributions over his life or life expectancy, the daughter can take her interest under the 10-year rule, and the charity's interest can be distributed under the 5-year rule.

E. <u>Permit plan administrators to rely on certifications they receive from beneficiaries at any time regarding an individual's status as a disabled or chronically ill EDB.</u>

Final regulations should reflect the following changes to the documentation requirements for disabled and chronically ill EDBs:

- Allow plan administrators to rely on beneficiary certifications of disability or chronic illness;
- Clarify that in the case of annuity payments that commence from a defined contribution ("DC") plan while the employee is alive, a beneficiary's disability or chronic illness as of the annuity starting date is sufficient to establish their EDB status;

[49] Prop. Treas. Reg. § 1.401(a)(9)-4(f)(2)(iii).

[50] Prop. Treas. Reg. § 1.401(a)(9)-8(a).

- Clarify that a licensed health care practitioner's certification of chronic illness "as of the date of the certification" is sufficient to establish EDB status; and
- Eliminate the deadline for providing the required documentation and allow the documentation to be provided at any time.

1. Background.

Section 401(a)(9)(E)(ii) defines an EDB as including a designated beneficiary who, "as of the date of death of the employee," is (1) disabled within the meaning of section 72(m)(7), or (2) chronically ill within the meaning of section 7702B(c)(2), except that the requirements of section 7702B(c)(2)(A)(i) are treated as met only if there is a certification that, as of "such date," the period of inability described therein "is an indefinite one which is reasonably expected to be lengthy in nature."[51] The proposed regulations describe when an individual will be treated as disabled or chronically ill for this purpose and condition such treatment on documentation of the disability or chronic illness being provided to the plan administrator ("Administrator") no later than October 31 of the calendar year following the calendar year of the employee's death.[52] For a chronically ill beneficiary, this documentation must include a certification from a licensed health care practitioner that, "as of the date of the certification," the beneficiary meets the applicable requirements for a lengthy period of inability.[53]

If the required documentation is not provided by the October 31 deadline, a disabled or chronically ill beneficiary will not be treated as an EDB (unless they qualify as such for some other reason), will not be permitted to stretch distributions over their life or life expectancy pursuant to section 401(a)(9)(B)(iii) and (H)(ii), and thus will be required to take their interest instead under the 10-year rule.

2. Allow Administrators to rely on beneficiary certifications of disability or chronic illness.

Final regulations should provide that if an Administrator receives a signed statement from a beneficiary (including a trust) that an individual satisfies the requirements to be treated as a disabled or chronically ill EDB, then in the absence of actual knowledge to the contrary, the Administrator can treat that individual as an EDB. This process should eliminate the requirement that the Administrator receive any certification of chronic illness from a licensed health care practitioner. Instead, the beneficiary would attest that they received the required certification from the practitioner. Ultimately, it is the responsibility of the beneficiary to obtain and retain any required documentation of the individual's health status. Administrators should not be required to review personal health records or similar documents merely to administer the RMD rules. It should be sufficient for an Administrator to receive a certification from the beneficiary, and if the IRS and Treasury Department have any lingering concerns with this approach, the certification could be required to include a commitment by the beneficiary to produce documentation if so requested by

[51] Section 401(a)(9)(E)(ii)(III) and (IV).

[52] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(4), (5), and (7). The proposed regulations provide that for RMD purposes an IRA trustee, custodian, or issuer is treated as the "plan administrator." Prop. Treas. Reg. § 1.408-8(a)(3).

[53] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(5) and (7).

the Administrator or IRS, similar to the administration of coronavirus-related distributions and hardship distributions.[54]

3. Clarify that if annuity payments commence from a DC plan while the employee is alive, documenting a beneficiary's disability or chronic illness as of the annuity commencement date is sufficient to establish their EDB status.

Final regulations should clarify that if annuity payments commence from a DC plan while the employee is alive, documenting a beneficiary's disability or chronic illness as of the annuity commencement date will establish their status as an EDB.

The proposed regulations generally provide that an individual's status as an EDB is determined as of the date of the employee's death. An employee who names a disabled or chronically ill individual as a beneficiary with respect to benefits that are annuitized will do so knowing of the individual's status as disabled or chronically ill when the payments commence. It is very unlikely that such a beneficiary would recover from the relevant condition in a manner that would render them unable to satisfy those requirements as of the date of the employee's death. As a result, the requested guidance likely would have little or no effect on the payment of RMDs.

The guidance would, however, provide a helpful clarification so that annuitants can be certain that any joint and survivor annuity payments they elect with a disabled or chronically ill beneficiary as the joint annuitant will remain RMD-compliant for the entire duration of the annuity payout, *i.e.*, that after the employee's death any survivor annuity payments to such a joint annuitant will be permitted. In addition, the requested guidance is consistent with several rules in the proposed regulations requiring that if an employee's benefit is paid in the form of an annuity, the determination of the designated beneficiary is made as of the annuity starting date during the employee's life, rather than as of or after the date of their death.[55] The requested guidance also would be consistent with the rule, discussed next, that a licensed health care practitioner must certify an individual's chronic illness "as of the date of the certification," which could occur before the employee's death.

4. Clarify that a licensed health care practitioner's certification of chronic illness "as of the date of the certification" is sufficient to establish EDB status.

Final regulations should clarify that if a licensed health care practitioner certifies an individual's chronic illness "as of the date of the certification," the certification will be sufficient to establish the individual's status as an EDB. In that regard, the proposed regulations provide that in order for an individual to be treated as a chronically ill EDB, a licensed health care practitioner must certify that, "as of the date of the certification," the individual is unable to perform certain

---

[54] *See*, *e.g.*, *Retirement Topics – Hardship Distributions*, INTERNAL REVENUE SERV. (Apr. 27, 2022), https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-hardship-distributions.

[55] Prop. Treas. Reg. § 1.401(a)(9)-6(b)(2) (if the employee's benefit is paid in the form of a life annuity for the lives of the employee and a designated beneficiary, the designated beneficiary is determined as of "the annuity starting date"); Prop. Treas. Reg. § 1.401(a)(9)-6(k)(1) (if annuity payments start before the employee's RBD, the determination of the designated beneficiary is made as of "the annuity starting date"); Prop. Treas. Reg. § 1.401(a)(9)-6(l) (similar rule for a surviving spouse who begins annuity payments before required under section 401(a)(9)(B)(iv)).

tasks for an indefinite period that is reasonably expected to be lengthy in nature.[56] Nothing in the proposed regulations provides that this certification must attest to the individual's status as of the date of the employee's death. In contrast, section 401(a)(9)(E)(ii) provides that the determination of whether a designated beneficiary is an EDB is made as of the date of the employee's death. In light of this statutory requirement, final regulations should clarify that certifying the individual's chronic illness "as of the date of the certification," as required by the regulations, will suffice to establish the individual's status as an EDB, even if the certification attests to the individual's status as of a date other than the employee's date of death.

5. Eliminate the October 31 deadline for documenting disability or chronic illness and allow the documentation to be provided at any time.

Final regulations should permit the required documentation regarding a designated beneficiary's status as disabled or chronically ill to be provided at any time. Thus, final regulations should eliminate the requirement that such documentation must be provided no later than October 31 of the calendar year following the calendar year of the employee's death.

The documentation of a beneficiary's disability or chronic illness merely confirms their condition as of the date the documentation specifies, such as the date of the employee's death, the "date of the certification," or, as we have suggested above, the date annuity payments commence. A disabled or chronically ill beneficiary's status as an EDB, and thus their ability under section 401(a)(9)(H)(ii) to "stretch" their interests over their life or life expectancy, should not be nullified based solely on when this paperwork is provided. Until the required documentation is provided, a disabled or chronically ill beneficiary who does not otherwise qualify as an EDB is unable take advantage of the rules for EDBs. After the required documentation is provided, however, the beneficiary should be treated as an EDB who is entitled to take distributions as an EDB.

In cases where the employee dies on or after their RBD, the proposed regulations provide that a designated beneficiary must continue taking RMDs each year after the employee's death pursuant to the at-least-as-rapidly rule ("ALAR Rule") of section 401(a)(9)(B)(i), regardless of whether the beneficiary is an EDB or not. As a result, there is no need to establish disability or chronic illness by October 31 of the year following the employee's death. If such status is not established by the end of the 10th year after the employee's death, then the entire remaining interest must be distributed pursuant to the 10-year rule. But if EDB status can be established before that 10th year, distributions should be permitted to continue for the remaining distribution period required by the ALAR Rule, capped at 10 years following the EDB's death.

In cases where the employee dies before their RBD, if a designated beneficiary does not establish their status as an EDB, the 10-year rule of section 401(a)(9)(B)(ii) and (H)(i) will apply, meaning no distributions will be required until the end of the 10th year after the employee's death. But if the beneficiary can document their disability or chronic illness before that 10th year, they should be permitted to take their interests over life or life expectancy pursuant to section 401(a)(9)(B)(iii) and (H)(ii) (the "Stretch Exception"), even if they did not take "stretch" distributions in any particular year following the employee's death. This is because of two notable consequences that would arise in such cases:

---

[56] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(5).

- First, the beneficiary would be subject to the excise tax under section 4974 in any year that they did not receive a distribution that was required under the Stretch Exception. The beneficiary may request that the IRS waive this excise, but a waiver is conditioned on the beneficiary establishing to the satisfaction of the IRS that (1) the RMD shortfall was due to "reasonable error," and (2) "reasonable steps are being taken to remedy the shortfall," such as the beneficiary taking a corrective distribution.[57]

- Second, if the beneficiary were to roll over their interest in a plan directly to an inherited IRA, as permitted under section 402(c)(11), any RMDs that the beneficiary failed to take under the Stretch Exception for prior calendar years would be added to the RMD for the current calendar year and treated as RMDs that cannot be rolled over.[58] Consequently, the RMDs that the beneficiary failed to take for prior years under the Stretch Exception would need to be distributed to the beneficiary in connection with the rollover.

In addition, allowing a beneficiary to provide the documentation of a disability or chronic illness, and thus be treated as an EDB, at any time is consistent with the provisions of the proposed regulations that permit certain beneficiaries of a trust to be added in any year after the employee's death and be treated as beneficiaries of the employee for subsequent years.[59]

5. PROP. TREAS. REG. § 1.401(a)(9)-5

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 1.401(a)(9)-5, regarding RMDs from defined contribution plans.

A. Reconsider the interpretation of the 10-year rule.

1. Reinterpret the 10-year rule so that no distributions are required during the 10-year period and re-propose regulations reflecting that view.

Final regulations should provide that in cases where the 10-year rule of section 401(a)(9)(H)(i) or (iii) applies, no distributions are ever required until the end of the 10-year period. If the Treasury Department and IRS decide to adopt this alternative view, the regulations should be re-proposed to provide additional opportunity for comment on the implementation of the alternative view.

Although unclear from the actual text of the proposed regulations, the preamble reflects an intent to require distributions to continue throughout the 10-year period, in at least some cases. The preamble most clearly expresses this intent in connection with an employee's death on or after the required beginning date ("RBD"), stating that in such cases distributions must continue throughout

[57] Section 4974(d).

[58] Treas. Reg. § 1.402(c)-2, Q&A-7(a); Prop. Treas. Reg. § 1.402(c)-2(f)(1).

[59] Prop. Treas. Reg. § 1.401(a)(9)-4(f)(5)(iv).

the 10-year period regardless of whether that period commences at the employee's death or at an EDB's death.[60]

This interpretation of the 10-year rule reflects the view that the new requirements of section 401(a)(9)(H) apply *in addition to*, rather than *in lieu of*, the existing requirements in section 401(a)(9)(B)(i), regarding death on or after the RBD. Such a view also suggests that distributions must continue throughout the 10-year period following the death of an EDB who was "stretching" benefits they inherited from an employee who died before the RBD. In other words, it seems that the IRS and Treasury Department may be interpreting section 401(a)(9)(H)(iii) to apply *in addition to*, rather than *in lieu of*, section 401(a)(9)(B)(iii) following the EDB's death.

As discussed in our comments beginning on page 27, *infra*, if the foregoing statements accurately reflect the views of the Treasury Department and IRS, final regulations should more clearly state that view. Assuming, however, that the proposed regulations as written would require distributions to continue throughout the 10-year period in the circumstances described above, that interpretation is surprising to the Committee and many other taxpayers. We believe that the statute and legislative history more strongly support a different interpretation of the 10-year rule that is consistent with both the at-least-as-rapidly rule and the 5-year rule of prior law, under which no distributions are required until the end of the 5-year period. This alternative interpretation reflects the following points:

- *ALAR Rule* – Section 401(a)(9)(B)(i) provides that if an employee dies on or after their RBD, distributions must continue to be made at least as rapidly as they were being made when the employee died (the "ALAR Rule").

- *5-Year Rule* – Section 401(a)(9)(B)(ii) provides that if an employee dies before their RBD, the entire remaining interest must be distributed within 5 years (the "5-Year Rule"). The regulations have always interpreted the 5-Year Rule as not requiring any distributions until the end of the 5-year period. This 5-Year Rule applies in lieu of the ALAR Rule in cases where the employee dies before their RBD, *i.e.*, if the 5-Year Rule applies, the ALAR Rule does not also apply.

- *Stretch Exception to the 5-Year Rule* – Section 401(a)(9)(B)(iii) provides an exception to the 5-Year Rule under which a "designated beneficiary" can stretch distributions over their life or life expectancy, starting within a year of the employee's death (the "Stretch Exception").[61] The Stretch Exception is available only in cases where the 5-Year Rule applies.

- *New 10-Year Rule following employee's death* – Section 401(a)(9)(H)(i) provides that, in the case of a defined contribution ("DC") plan, if the employee dies and has a "designated beneficiary" (1) the 5-Year Rule shall apply, but "5 years" is replaced with "10 years,"

[60] *See* 87 Fed. Reg. at 10513-14. We discuss the relevant statements from the preamble and the proposed regulations in more detail beginning on page 27, *infra*, where we ask for clarification on whether and how the 10-year rule applies.

[61] The proposed regulations refer to the Stretch Exception as the "life expectancy rule." We use "Stretch Exception" because the phrase "life expectancy rule" does not appropriately reflect the fact that the statutory rule in section 401(a)(9)(B)(iii) also permits distributions over "life," *i.e.*, a life annuity.

making it a "10-Year Rule" but otherwise implemented under the same Code provision as the 5-Year Rule, and (2) that rule (section 401(a)(9)(B)(ii)) now applies ***whether or not distribution of the employee's interest has begun***, *i.e.*, regardless of whether the employee dies on, before, or after their RBD.

- Thus, the 5-Year Rule (modified to a 10-Year Rule) applies *in lieu of* the ALAR Rule, an interpretation that is supported by the legislative history.[62] The 5-Year Rule has never required distributions to be made during the 5-year period. The fact that the length of the period has been changed to 10 years does not alter this result; the 10-Year Rule is implemented under the same exact Code provision that implements the 5-Year Rule, so they should be interpreted the same.

- In contrast, the proposed regulations effectively interpret these rules as applying the 10-Year Rule *in addition to* the ALAR Rule. However, nothing in the statutory structure or legislative history suggests that Congress intended such an interpretation. If that were the intent, Congress would have amended the ALAR Rule itself to impose a cap on the distribution period under that rule, rather than modifying the 5-Year Rule and applying it on or after the RBD.

- *Stretch Exception to the 10-Year Rule* – Section 401(a)(9)(H)(ii) provides that, in the case of a DC plan, the Stretch Exception is available only to EDBs. As discussed above, the Stretch Exception is relevant only to the 5-Year Rule. Under prior law, the 5-Year Rule applied only if the employee died before their RBD. Now, however, the 5-Year Rule (modified to a 10-Year Rule) also applies if the employee dies on or after their RBD. As a result, the Stretch Exception is now available whether the employee dies before, on, or after their RBD, but only for EDBs.[63]

- *New 10-Year Rule following EDB's death* – Section 401(a)(9)(H)(iii) provides that if an EDB dies before their entire interest has been fully distributed, the Stretch Exception does not apply to the EDB's beneficiary and any remaining benefits must be distributed within 10 years of the EDB's death. As discussed above, the Stretch Exception is relevant only to the 5-Year Rule (and, now, the 10-Year Rule). Thus, by referencing the Stretch Exception, section 401(a)(9)(H)(iii) suggests that the 5-Year Rule (as modified to a 10-Year Rule) applies upon the death of an EDB.[64] Because the 5-Year Rule has never required distributions to be made before the end of the 5-year period, and because the 5-Year Rule

---

[62] *See* Bluebook, *supra* note 20, at 159 and 161 (defining "five-year rule" by reference to section 401(a)(9)(B)(ii) and stating that "the five-year rule is *expanded* to become a 10-year period instead of five years ("10-year rule"), *such that the 10-year rule is the general rule* for distributions to designated beneficiaries after death *(regardless of whether the employee (or IRA owner) dies before, on, or after the required beginning date*)….") (emphasis added).

[63] *See* Bluebook, *supra* note 20, at 161 (stating that "[f]or eligible designated beneficiaries, an exception to the 10-year rule (for death before the required beginning date) applies *whether or not the employee (or IRA owner) dies before, on, or after the required beginning date*. The exception (similar to present law) generally allows distributions over life or a period not extending beyond the life expectancy of an eligible designated beneficiary beginning in the year following the year of death.") (emphasis added).

[64] *See* Bluebook, *supra* note 20, at 161 (defining the "10-year rule" as "the five-year rule … expanded to become a 10-year period" and stating that "the 10-year rule also applies after the death of an eligible designated beneficiary or after a child reaches the age of majority.").

(modified to 10 years) now applies upon the death of an EDB, no distributions are required after the EDB's death until the end of the 10-year period. Using this same logic, no distributions are required until the end of the 10-year period that commences with a minor EDB attaining the age of majority.

- *Continued Relevance of the ALAR Rule* – Obviously, the ALAR Rule remains in the Code and therefore must continue to have some relevance. Accordingly, the SECURE Act amendments should not be interpreted in a way that renders the ALAR Rule a nullity. The interpretation outlined above does not do this. Rather, the ALAR Rule would continue to have relevance to DC plans if there is no "designated beneficiary" and to DB plans regardless of any beneficiary designations.

In light of the foregoing, the Committee believes there is strong support for the view that in cases where the 10-Year Rule applies, no distributions are required until the end of the 10-year period regardless of when or how the 10-Year Rule is triggered. We encourage the IRS and Treasury Department to adopt this view in final regulations. If the Treasury Department and IRS decide to adopt this alternative view, the regulations should be re-proposed to provide additional opportunity for comment on the implementation of the alternative view. ***In that regard, if the Treasury Department and IRS adopt the alternative view, many of our comments in this letter relating to distributions that continue throughout the 10-year period would become moot***.[65]

2. If the Treasury Department and IRS do not adopt the alternative interpretation of the 10-year rule, clarify when that rule requires distributions to continue throughout the 10-year period.

If the Treasury Department and IRS do not adopt the alternative interpretation of the 10-year rule under which no distributions are ever required during the 10-year period, final regulations should clarify when the 10-year rule *does* require distributions to continue throughout that period. Specifically, final regulations should explicitly address the following questions, including by providing specific examples for each scenario:

<u>Scenario A:</u> If the employee dies on or after their RBD and has a designated beneficiary who is not an EDB, must distributions continue throughout the 10-year period that commences with the employee's death?

<u>Scenario B:</u> If the employee dies on or after their RBD and has an EDB, must distributions continue throughout the 10-year period that commences with (1) the EDB's death or (2) a minor EDB's attainment of age 21?

<u>Scenario C:</u> If the employee dies before their RBD and an EDB timely commences distributions pursuant to Stretch Exception of section 401(a)(9)(B)(iii), must distributions continue throughout the 10-year period that commences with (1) the EDB's death or (2) a minor EDB's attainment of age 21?

[65] *See*, *e.g.*, our comments on Prop. Treas. Reg. § 1.401(a)(9)-6, starting on page 33, *infra*.

a. Scenario A.

With respect to Scenario A, involving death on or after the RBD with an individual beneficiary who is not an EDB, the proposed regulations contemplate that distributions must continue throughout the 10-year period that commences on the employee's death. Specifically, Prop. Treas. Reg. § 1.401(a)(9)-5(d)(1) provides that if an employee dies on or after their RBD, "distributions must satisfy [the ALAR Rule of] section 401(a)(9)(B)(i). In order to satisfy this requirement, the applicable denominator after the employee's death is determined under the rules of this paragraph (d)(1)."[66] Applying the "applicable denominator after the employee's death" results in a required distribution each year after the employee's death. Thus, although not explicitly stated in the proposed regulations, -5(d)(1) implies that distributions must continue following the employee's death even if their death triggered the 10-year rule. The preamble is consistent with this implication.[67] Adding examples to the final regulations, rather than leaving just a preamble statement that supports an implication in the proposed regulation, would prevent any confusion and give taxpayers the guidance they need. The examples should address situations where the non-EDB survives to the end of the 10-year period that commenced with the employee's death, and where the non-EDB dies before the end of that period.

b. Scenario B.

Clarification also is needed with respect to Scenario B. That scenario involves an employee who dies on or after their RBD with an *EDB* as beneficiary, and the question is whether distributions must continue throughout the 10-year period that commences on the *EDB's* death pursuant to section 401(a)(9)(H)(iii) (or, if the EDB is a minor child of the employee, the 10-year period that commences with the EDB attaining age 21). The proposed regulations and the preamble appear to provide somewhat contradictory answers to this question:

- *Distributions <u>are not</u> required* – Prop. Treas. Reg. § 1.401(a)(9)-5(d)(1) provides that "[t]he requirement to take an annual distribution in accordance with the [ALAR Rule] applies for distribution calendar years *up to and including the calendar year that includes the beneficiary's date of death.*" (Emphasis added.) The phrase "up to and including" suggests that the requirement to take an annual distribution pursuant to the ALAR Rule stops at the beneficiary's death. This, in turn, suggests that if the beneficiary is an EDB and their death triggers the 10-year rule of section 401(a)(9)(H)(iii), no distributions are required to the successor beneficiary until the end of the 10-year period.[68]

- *Distributions <u>are</u> required* – In contrast to the foregoing, the preamble states that in cases where an employee dies on or after their RBD and the designated beneficiary is an EDB, "if

[66] Prop. Treas. Reg. § 1.401(a)(9)-5(d)(1) also states that distributions must satisfy the requirements of -5(e).

[67] *See* 87 Fed. Reg. at 10514 ("[I]f an employee died after the required beginning date with a designated beneficiary who is not an eligible designated beneficiary, then the designated beneficiary would continue to have required minimum distributions calculated using the beneficiary's life expectancy as under the existing regulations for up to nine calendar years after the employee's death.").

[68] This also raises questions about required distributions following a non-EDB's death before the end of the 10-year period that commenced on the employee's death. In other words, in such case can the successor beneficiary stop distributions until the end of the original 10-year period that commenced on the employee's death? This uncertainty could be addressed by one of the examples we have requested with respect to Scenario A.

the eligible designated beneficiary dies before the entire interest of the employee is distributed, then the beneficiary of that eligible designated beneficiary would continue taking annual distributions using the rules under the existing regulations for up to nine years after the death of the eligible designated beneficiary."[69] This statement contemplates distributions continuing throughout the 10-year period that commences on the EDB's death pursuant to section 401(a)(9)(H)(iii). The preamble does not discuss how these rules apply when a minor EDB reaches age 21, *i.e.*, whether distributions must continue throughout the ensuing 10-year period.

Final regulations should eliminate the apparent inconsistency between the preamble and the actual text of the proposed regulations and also clarify the treatment of minor EDBs. Final regulations also should include at least two examples of how RMDs are determined in Scenario B, one involving an adult EDB and another involving a minor EDB.

c. Scenario C.

With respect to Scenario C, the answers are even less clear. That scenario involves an employee who dies *before* their RBD and the employee's EDB subsequently dies (or, in the case of a minor EDB, attains age 21) after timely commencing distributions pursuant to the Stretch Exception of section 401(a)(9)(B)(iii). The question is whether distributions must continue over the EDB's remaining life expectancy after their death, or whether distributions can stop until the end of the 10-year period that commences with their death pursuant to section 401(a)(9)(H)(iii). A similar question arises where a minor EDB attains age 21, *i.e.*, whether distributions must continue over the ensuing 10-year period or whether they can stop until the end of that period. We are unable to identify any statement in the preamble that directly addresses this Scenario C. The proposed regulations provide as follows:

- Prop. Treas. Reg. § 1.401(a)(9)-3(c)(4) addresses death before the RBD under a DC plan, stating that distributions to an EDB pursuant to the Stretch Exception in section 401(a)(9)(B)(iii) must satisfy Prop. Treas. Reg. § 1.401(a)(9)-5.

- Prop. Treas. Reg. § 1.401(a)(9)-5(d)(2) states that the "applicable denominator" for determining RMDs pursuant to the Stretch Exception is the designated beneficiary's remaining life expectancy.

  - Unlike the rule in -5(d)(1) for death on or after the RBD, the rule in -5(d)(2) for death before the RBD does not state that the requirement to take an annual distribution applies "up to and including the calendar year that includes the beneficiary's death." Thus, arguably the "applicable denominator" continues to apply after the EDB's death, so that any successor beneficiary must continue taking distributions over the deceased EDB's remaining life expectancy. This is not explicitly stated, however.

  - Unlike the rule in -5(d)(1) for death on or after the RBD,[70] the rule in -5(d)(2) for death before the RBD does not state that distributions must satisfy the requirements

[69] 87 Fed. Reg. at 10514.

[70] *See supra* note 66.

of -5(e), which include the 10-year rule under section 401(a)(9)(H)(iii).[71] Thus, even though -3(c)(4) states that distributions under the Stretch Exception must satisfy -5, the rules in -5 do not seem to apply the 10-year rule following the death of an EDB who is stretching their inherited benefit.

- On the other hand, section 401(a)(9)(H)(iii) states that the 10-year rule applies upon the death of an EDB. As we have explained above, this statutory rule is more reasonably interpreted as not requiring any distributions during the 10-year period that commences on the EDB's death.[72] The proposed regulations do not clearly reject this interpretation, although they more generally seem to reject the idea that section 401(a)(9)(H) replaces rather than augments the requirements that otherwise apply under section 401(a)(9)(B).

- Neither the Code nor the proposed regulations seem to contain any provisions regarding whether distributions must continue during the 10-year period that commences with a minor EDB's attainment of age 21.

In light of the foregoing, there is considerable uncertainty regarding how the proposed regulations apply to Scenario C. Final regulations should clarify this, including by adding at least two examples: one involving an adult EDB and another involving a minor EDB.

d. Summary.

In summary, final regulations should be very explicit on whether or not RMDs must continue throughout the 10-year period in each of the foregoing scenarios and should provide detailed examples addressing them. These scenarios present perhaps the biggest unresolved issues under the new statutory rules, they have caused tremendous confusion, and clear guidance from the final regulations is needed.

3. If the Treasury Department and IRS do not adopt the alternative interpretation of the 10-year rule, provide specific relief for taxpayers who adopted that interpretation for 2021 or 2022.

If the IRS and Treasury Department do not adopt the alternative interpretation of the 10-year rule under which no distributions are ever required during the 10-year period, final regulations should provide relief for taxpayers who adopted that interpretation for 2021 or 2022.

Prior to the proposed regulations being released, a number of commentators and financial advisers thought that the 10-year rule would be interpreted as not requiring any distributions during the 10-year period, regardless of when or how the 10-year rule is triggered.[73] In that regard, the

---

[71] *See* Prop. Treas. Reg. § 1.401(a)(9)-5(e)(3).

[72] See the discussion of the alternative interpretation of the 10-year rule that starts on page 24, *supra*.

[73] *See*, *e.g.*, Laura Saunders, *New Tax Rules Force Faster Payouts for Some IRA Holders*, WALL STREET J. (Mar. 11, 2022), https://www.wsj.com/articles/new-irs-tax-rules-force-faster-payouts-for-inherited-iras-and-401ks-11646957321 ("Although the Secure Act's wording was vague, prominent IRA specialists assumed for several reasons that affected heirs could wait until the 10th year before taking any payouts. Instead, the new IRS guidance would require heirs subject to the 10-year rule to take annual withdrawals from the accounts during that period if the original owner died on or after his or her 'required beginning date' for payouts.").

overwhelming majority of comments already submitted on the proposed regulations focus on this point, demonstrating how widely this alternative interpretation was held. We appreciate there were many competing demands for guidance from the IRS and Treasury Department in 2020 and that the IRS updated Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)* in an attempt to clarify the operation of the ALAR Rule during the 10-year period. However, taxpayers cannot rely upon Publication 590-B, and despite several re-writes the publication's description of the 10-year rule remained vague enough that taxpayers have reasonably interpreted the publication as *confirming* the view that distributions were not required during the 10-year period.[74] Ultimately, no formal guidance was issued expressing the view that distributions are required during the 10-year period until the proposed regulations were released in February 2022.[75]

Against this backdrop, it would not be surprising if a significant portion of taxpayers whose RMDs for the 2021 calendar year were affected by this issue determined that no RMDs were due that year, pursuant to the alternative interpretation of the 10-year rule and the lack of any clear guidance. Likewise, for the reasons discussed in Part 5.A.2 above, the proposed regulations do not provide clear guidance on when distributions are required to continue throughout the 10-year period, and this lack of clarity means that taxpayers may reasonably interpret the proposed regulations as not requiring such distributions in situations where the IRS and Treasury Department ultimately clarify that the distributions were required.

We respectfully submit that in these circumstances, specific relief is warranted. In this regard, the preamble to the proposed regulations states that for calendar year 2021 "taxpayers must apply the existing regulations, but taking into account a reasonable, good faith interpretation" of the SECURE Act."[76] Unless the final regulations adopt the alternative interpretation of the 10-year rule, guidance should confirm that the alternative interpretation meets that standard, and therefore the relief described in the preamble applies. In addition, the relief should be extended to the 2022 calendar year for reasonable, good faith interpretations of the SECURE Act and the proposed regulations. In cases where any of this relief applies, taxpayers should not be subjected to any adverse consequences for adopting reasonable interpretations. For example, they should not be required to "make up" any missed RMDs, should not be subject to the 50% excise tax, and should be given a transition period to commence "stretch" distributions prospectively.

[74] *See*, *e.g.*, Ashlea Ebeling, *IRS Nixes 10-Year Stretch For Most Inherited IRAs*, FORBES (Mar. 4, 2022), https://www.forbes.com/sites/ashleaebeling/2022/03/04/irs-nixes-10-year-stretch-for-most-inherited-iras/?sh=68af79bf6ac3 ("In March 2021, the IRS revised Publication 590-B (Distributions from IRAs), hinting that it would require annual RMDs to be paid in years 1-9 and the remaining IRA funds to be paid out in year 10. In a revision in May 2021, the IRS made clear that annual RMDs weren't required under the 10-year rule, after all.").

[75] For example, no Notice was published, which the IRS will sometimes issue to announce what regulations will say where the regulations may not be published in the immediate future, nor was any Announcement published, which the IRS sometimes uses to state what regulations to be published in the immediate future will say. *See Understanding IRS Guidance – A Brief Primer*, INTERNAL REVENUE SERV. (July 21, 2021), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer. In light of the confusion, stakeholders submitted written requests to Treasury and IRS seeking clarification on this issue. *See, e.g.*, the Committee's letter to the IRS and Treasury Department regarding the 2020-21 Priority Guidance Plan, available at https://www.annuity-insurers.org/wp-content/uploads/2020/07/7.22.20.memo_.pdf.

[76] 87 Fed. Reg. at 10521.

B. Eliminate the special rule that applies to EDBs who are older than an employee who dies on or after their RBD, or at least clarify that the special rule does not apply to annuity payments.

Final regulations should eliminate the special rule in Prop. Treas. Reg. § 1.401(a)(9)-5(e)(5) that applies when an employee dies on or after their RBD and has named an EDB who is older than the employee. If final regulations do not eliminate that rule, they should clarify that the rule does not apply to annuity payments.

The proposed regulations provide that if an employee dies on or after their RBD and their beneficiary is an adult EDB, then after the employee's death (1) the "applicable denominator" for determining RMDs is based on the longer of the employee's remaining life expectancy and the EDB's remaining life expectancy, but (2) the entire remaining interest must be fully distributed by the end of the 10th year following the EDB's death.[77] In other words, the 10-year rule acts as a cap on the otherwise-applicable distribution period.

The proposed regulations take this a step further, however, by imposing an *additional cap* on the distribution period, unrelated to the 10-year rule. The additional cap applies if the EDB in the foregoing situation is older than the employee. In such case, Prop. Treas. Reg. § 1.401(a)(9)-5(e)(5) provides that the entire inherited interest must be fully distributed by the end of the calendar year in which the "applicable denominator would have been less than or equal to one if it were determined" using the older EDB's life expectancy, even though the younger employee's life expectancy otherwise determines the applicable denominator.

The effect of this special rule is to require full liquidation of the inherited interest *before* the "at-least-as-rapidly" rule or the 10-year rule otherwise would require. The preamble gives no explanation for imposing such a new limitation,[78] and the limitation does not seem to be supported by the relevant Code provisions, whether before or after the SECURE Act amendments. In that regard, the SECURE Act amendments clearly are intended to impose new restrictions on non-spouse beneficiaries who are *younger* than the employee, not older. Other than adding unnecessary complexity to the RMD rules by requiring the tracking of two individuals' life expectancies, the only thing the new limitation seems to accomplish is to force elderly EDBs to cash out their inherited benefits earlier than otherwise required, thereby incurring tax liabilities that diminish their savings and endanger their financial security while at an advanced age.

Final regulations should eliminate this rule. If final regulations do not eliminate the rule, they should clarify that the rule does not apply to annuity payments under a commercial annuity purchased in connection with a DC plan or IRA. In that regard, the proposed regulations provide that such annuity payments must satisfy the rules in -6 and -5(e) of the proposed regulations.[79] Because the "older EDB" rule discussed above is set forth in -5(e)(5), the proposed regulations

[77] Prop. Treas. Reg. § 1.401(a)(9)-5(d)(1)(i)-(ii) and (e)(3).

[78] The preamble gives an example but no explanation of why the rule is imposed. The example shows that a full liquidation would be required by a 91-year old EDB even if distributions otherwise could continue under the at-least-as-rapidly rule as capped by the 10-year rule. *See* 87 Fed. Reg. at 10514. If this special rule did not apply, then under the facts in the example distributions could continue until the EDB turned 95, based on the younger decedent's life expectancy.

[79] Prop. Treas. Reg. § 1.401(a)(9)-5(a)(5).

suggest that the rule applies to annuity payments. On its face, however, the "older EDB" rule is limited to situations where life expectancies are determined each year after the employee's death for purposes of calculating the denominator in the RMD fraction that applies to non-annuitized individual accounts. Those mechanics do not apply to annuity payments, where the payments simply continue for any period certain following the employee's death.

6. PROP. TREAS. REG. § 1.401(a)(9)-6

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 1.401(a)(9)-6, regarding annuity payments.

A. Re-propose the regulations regarding annuity payments.

The Treasury Department and IRS should re-propose the regulations regarding annuity payments in order to give taxpayers an opportunity to comment on any changes made to the proposed regulations since they were first published.

Annuities are crucial to the retirement security of millions of Americans. Other than Social Security and defined benefit plans, annuities are the only means that Americans have to guarantee they will not outlive their retirement income. In addition, annuitizations typically result in higher distributions in all years than withdrawals from non-annuitized accounts when the same life expectancy and other assumptions are used for both payouts.[80] Thus, in many cases retirees are better off when they annuitize at least a portion of their retirement savings. Accordingly, the RMD rules should facilitate and encourage the use of annuities to provide income throughout retirement.

Unfortunately, the RMD regulations largely have the opposite effect by making the rules for annuities extremely complex. The Committee certainly appreciates the attention that the Treasury Department and IRS have given in the proposed regulations to the application of the SECURE Act to annuities, and we are especially appreciative of the improvements that the proposed regulations make to some of the rules governing "increasing" annuity payments. However, when the SECURE Act requirements are added to the proposed regulations, the result is a set of rules that is largely incomprehensible and barely administrable. Even annuity providers and experienced tax lawyers and accountants will struggle to decipher the labyrinth of rules and restrictions. A typical retiree has almost no chance of understanding these rules. This complexity can only discourage the offering and election of life annuity protections. We urge the Treasury Department and IRS to work towards simplifying and rationalizing this part of the regulations to better facilitate and encourage the use of life annuities to help individuals achieve financial security in retirement.

In that regard, having a high degree of certainty regarding the applicable rules is extremely important to commercial insurers and annuity policyholders, both current and prospective. The RMD rules for annuity payments essentially provide that if an annuity contract is purchased with a provision that violates the -6 regulations, it is an "impermissible annuity distribution option" that could lead to severely adverse consequences for the plan and participant. In addition, since an annuity is a contract between an insurer and the annuity owner that is governed by applicable state law, any changes to annuity forms that may be required to comply with the tax law typically will require the approval of state insurance authorities and may require the consent of the owner.

[80] *See*, *e.g.*, Jeffrey R. Brown, *The New Retirement Challenge* (Sept. 2004).

Accordingly, insurers and their customers need clear regulations on how annuity contracts are treated under the RMD rules.

To help achieve this goal, the Committee is asking for a number of clarifications and changes to the proposed regulations regarding annuity contracts. In light of the number and substance of changes we are requesting, as well as the fact that the proposed regulations were modified substantively less than a week before the deadline for public comments,[81] we request that this section of the proposed regulations be re-issued as new proposed regulations before final regulations are issued. The Treasury Department and IRS followed this process in the last major re-write of the RMD regulations in order to give taxpayers an opportunity to comment on additional changes that were made in response to public comments.[82] The Committee believes that a similar approach is warranted here.

B. Clarify whether and how the 10-year rule applies to annuity payments.

1. Clarify whether the 10-year rule applies to annuity payments.

Final regulations should clarify whether annuity payments under a commercial annuity purchased in connection with a defined contribution ("DC") plan or IRA must satisfy the 10-year rule following the employee's death if the designated beneficiary is not an eligible designated beneficiary ("EDB"). The proposed regulations clearly rest on the premise that this is the case but do not clearly state it. For example:

- Prop. Treas. Reg. § 1.401(a)(9)-5(a)(5) provides that annuity payments under a commercial annuity purchased in connection with a DC plan or IRA must satisfy Prop. Treas. Reg. § 1.401(a)(9)-5(e), which, in turn, implements the 10-year rule.[83]

- On the other hand, Prop. Treas. Reg. § 1.401(a)(9)-5(e) says that it applies only to individual accounts, which do not include annuitized payouts,[84] thereby suggesting that the 10-year rule does not apply to such payouts.

To avoid confusion, the final regulations should directly state whether the 10-year rule applies to annuity payments under a DC plan or IRA. This could be accomplished, for example, by making the following changes to the first sentence of Prop. Treas. Reg. § 1.401(a)(9)-5(e) (additions underlined and deletions stricken through):

[81] 87 Fed. Reg. 30845-46 (May 20, 2022).

[82] *See* 66 Fed. Reg. 3928 (Jan. 17, 2001) (proposed RMD regulations, including proposed rules for annuity contracts); T.D. 8987, 67 Fed. Reg. 18988 (Apr. 17, 2002) (final RMD regulations, but with re-proposed and temporary regulations on annuity contracts "in order to give taxpayers an opportunity to comment on [the additional] changes" to the rules for such contracts); T.D. 9130, 69 Fed. Reg. 33288 (June 15, 2004) (final RMD regulations on annuity contracts).

[83] *See also* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(ii) (permitting an acceleration of annuity payments under a commercial annuity that is required to comply with Prop. Treas. Reg. § 1.401(a)(9)-5(e)); Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(ii)(C)[A] (requiring after-death annuity payments to a non-spouse beneficiary under a QLAC to satisfy Prop. Treas. Reg. § 1.401(a)(9)-5(e)).

[84] *See* Prop. Treas. Reg. § 1.401(a)(9)-2(a)(2).

> Except as provided in paragraph (f) of this section, to the extent that ~~if~~ an employee's accrued benefit is in the form of an individual account under a defined contribution plan or is paid in the form of annuity payments under a defined contribution plan (including under an annuity contract purchased in accordance with paragraph (a)(5)(i) of this section), then the entire interest of the employee must be distributed by the end of the earliest of the calendar years described in paragraph (e)(2), (3), (4), or (5) of this section.

2. Add examples of the 10-year rule applying to annuity payments.

Assuming that the 10-year rule applies to annuity payments, final regulations should include examples of the 10-year rule requiring annuity payments to be accelerated after the employee's death. As discussed above, the proposed regulations reflect the premise that the 10-year rule applies to annuity payments under commercial annuities purchased in connection with DC plans and IRAs. Importantly, this will require annuity payments to be accelerated after the employee's death in some cases.[85] The proposed regulations recognize this by providing that such an acceleration will not violate the general prohibition against increasing annuity payments.[86] However, the proposed regulations do not otherwise discuss the circumstances in which such accelerations will be required.

Annuity providers will need to identify when accelerations are required under the annuities they issue in order to administer compliance with the -6 regulations. They also will need to explain to their customers when, why, and how the acceleration is required to be made. Annuity providers also may need to explain these circumstances to state regulators, who may question why annuity payments that commenced in an RMD-compliant manner must nonetheless be modified after death. When having these conversations with customers and regulators, it would be very helpful if annuity providers could point to provisions in the regulations that explicitly address this issue, rather than having to point to more general provisions that allude to the acceleration requirement without directly discussing it. Accordingly, we request that final regulations include examples along the following lines:

- *Example 1: Period certain with non-EDB* – Assume an employee, age 72, elects a life annuity with a 20-year period certain. The employee dies five years later, with 15 years left in the period certain. The designated beneficiary is not an EDB as of the date of the employee's death. Pursuant to the 10-year rule, all distributions must be completed by the end of the year containing the 10th anniversary of the employee's death. The remaining 15-year period certain would extend beyond this deadline. As a result, the payments must be accelerated so they are completed by the deadline. The acceleration must satisfy Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(iv) (the "Acceleration Rule").

[85] This is largely because a beneficiary's status as an EDB is not determined until the date the employee dies. As a result, a beneficiary's status as an EDB may not be known as of the annuity starting date and could change after that date. It would seem that the only way for a taxpayer to ensure that a future acceleration of period certain annuity payments will never be necessary would be to (1) limit the period certain to 10 years, or (2) irrevocably designate a non-individual (such as an estate) as the beneficiary.

[86] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(ii).

- *Example 2: Period certain with adult EDB* – Assume the same facts as Example 1, except that (1) the designated beneficiary is an adult who is an EDB as of the date of the employee's death, and (2) the EDB dies one year after the employee, when there are 14 years left in the period certain. Pursuant to the 10-year rule, all distributions must be completed by the end of the year containing the 10th anniversary of the EDB's death. The remaining 14-year period certain would extend beyond this deadline. As a result, the payments must be accelerated so they are completed by the deadline. The acceleration must satisfy the Acceleration Rule.

- *Example 3: Period certain with minor EDB* – Assume the same facts as Example 1, except that the designated beneficiary is an EDB by virtue of being the employee's child who is 20 years old as of the date of the employee's death. Pursuant to the 10-year rule, all distributions must be completed by the earlier of (1) the end of the year in which the EDB attains age 31 or (2) the end of the year containing the 10th anniversary of the EDB's death. Assume further that the EDB does not die prior to age 21. As a result, distributions must be completed by the end of the year the EDB attains age 31, which is 11 years after the employee's death. The remaining 14-year period certain would extend beyond this deadline. As a result, the payments must be accelerated so they are completed by the deadline. The acceleration must satisfy the Acceleration Rule.

- *Example 4: EDB annuitization with period certain* – Assume the following facts. An employee has not annuitized their individual account and dies before their required beginning date ("RBD"). The employee's designated beneficiary is an individual who, as of the date of the employee's death, is an adult EDB. The EDB timely elects a life annuity with a period certain of 20 years, which does not exceed their single life expectancy. The EDB dies 5 years later, when there are 15 years left in the period certain. Pursuant to the 10-year rule, all distributions must be completed by the end of the year containing the 10th anniversary of the EDB's death. The remaining 15-year period certain would extend beyond this deadline. As a result, the payments must be accelerated so they are completed by the deadline. The acceleration must satisfy the Acceleration Rule.

- *Example 5: Joint and survivor annuity with minor EDB* – Assume an employee elects a joint and survivor annuity with no period certain. The joint annuitant is an EDB by virtue of being the employee's child who is 20 years old as of the date of the employee's death. The employee dies before the joint annuitant. Pursuant to the 10-year rule, all distributions must be completed by the earlier of (1) the end of the year in which the joint annuitant attains age 31 or (2) the end of the year containing the 10th anniversary of the joint annuitant's death. Assume further that the joint annuitant does not die prior to age 21. As a result, distributions must be completed by the end of the year the joint annuitant attains age 31, which is 11 years after the employee's death. The remaining life-contingent payments that are based on the joint annuitant's life would extend beyond this deadline if the joint annuitant lives more than 11 additional years. In that event, the payments would need to be accelerated to comply with the deadline. The acceleration must satisfy the Acceleration Rule.

- *Example 6: Joint and survivor annuity with non-EDB* – Assume an employee elects a joint and survivor annuity with no period certain. The joint annuitant is the employee's adult child who is not an EDB. The employee dies before the joint annuitant. Pursuant to the 10-year rule, all distributions must be completed by the end of the year containing the 10th

anniversary of the employee's death. The remaining life-contingent payments that are based on the joint annuitant's life would extend beyond this deadline if the joint annuitant lives more than 10 additional years. In that event, the payments would need to be accelerated to comply with the deadline. The acceleration must satisfy the Acceleration Rule.

- *Example 7: Joint and survivor IRA annuity with former spouse* – Assume an IRA owner elects a joint and survivor annuity with no period certain. The joint annuitant is the owner's spouse who is more than 10 years younger. They get divorced. The divorce agreement and the terms of the annuity provide that the former spouse remains entitled to any annuity payments that are payable after the owner's death, but the annuity contract is not transferred to the former spouse pursuant to section 408(d)(6). The owner dies, and as of the date of their death the former spouse is not disabled or chronically ill. As a result, the former spouse is not an EDB (but see the important note below). Pursuant to the 10-year rule, all distributions must be completed by the end of the year containing the 10th anniversary of the employee's death. The remaining life-contingent payments that are based on the former spouse's life would extend beyond this deadline if the former spouse lives more than 10 additional years. In that event, the payments would need to be accelerated to comply with the deadline. The acceleration must satisfy the Acceleration Rule.
    - ***IMPORTANT NOTE:*** This example is needed only if the IRS and Treasury Department do not implement our request, discussed starting on page 15 above, to treat former spouses of IRA owners similarly to former spouses of plan participants for RMD purposes. If such similar treatment is not provided, and as a result a former spouse of an IRA owner is not treated as a spouse for purposes of the definition of an EDB, ***it is critical that a final regulation or other form of published guidance explicitly says so***. Annuity providers, spouses, and financial advisers need to understand that continuing to pay survivor annuity benefits in these circumstances will violate the RMD rules. An example illustrating this will go a long way to preventing unfortunate surprises for surviving (former) spouses. We also note that annuity providers generally do not allow accelerations of life-contingent annuity payments today, largely due to disintermediation risk and the lack of post-issue underwriting. As a result, we anticipate that if the Treasury Department and IRS determine that the former spouse of an IRA owner is not a surviving spouse for purposes of the definition of EDB, some IRA annuity providers will decide not to offer joint and survivor annuity options to married IRA owners, unless the spouse is no more than 10 years younger than the owner and therefore can be assured of EDB status regardless of a future divorce. ***This could significantly diminish access to lifetime income protections for spouses.***

In addition to the forgoing, we note that some annuity providers may prefer to use a "deemed acceleration" approach, rather than an actual acceleration, to satisfy the 10-year rule. For example, rather than actually commuting a life-contingent payout, the annuity provider would permit the beneficiary to elect a deemed acceleration that could be accomplished by removing any IRA endorsement from the annuity contract or otherwise modifying the contract so that it is not an IRA or qualified plan distributed annuity and instead is a non-qualified annuity going forward. The annuity issuer would tax report this contract modification in the same manner as if the beneficiary had received a distribution equal to the fair market value of the contract at the time of the deemed

acceleration.[87] Thereafter, the annuity payments would be taxed under section 72 by treating the contract as a non-qualified immediate annuity with a stepped-up investment in the contract equal to the deemed distribution. This would permit the beneficiary to continue the annuity contract they inherited while still implementing the required tax outcome under the 10-year rule. The IRS has permitted a similar approach involving the after-death distribution rules that apply to non-qualified annuities.[88]

C. Clarify the rules for determining the designated beneficiary and their status when distributions are made in the form of an annuity.

Final regulations should clarify the rules for determining the "designated beneficiary" and their status as an EDB with respect to annuitized forms of benefits. The proposed regulations contain the following rules for when the "designated beneficiary" is determined and when such a beneficiary's status as an EDB is determined:

- *General rule* – A "designated beneficiary" is an individual who is a beneficiary designated under the plan *as of the date of the employee's death* and who remains such a beneficiary as of September 30 of the calendar year following the calendar year of the employee's death.[89]

- *Joint and survivor payments* – If the employee's benefit is paid in the form of a life annuity for the lives of the employee and a "designated beneficiary," then the "designated beneficiary" is determined *as of the annuity starting date*.[90]

- *Early annuitizations* – If annuity payments start before the employee's RBD, "the determination of the designated beneficiary" is made *as of the annuity starting date*.[91] In that regard:

  - The existing regulations express this rule somewhat differently, stating that "the designated beneficiary distributions will be determined as of the annuity starting date," rather than "the determination of the designated beneficiary" will be made as of that date.[92] If this is a substantive change, its meaning is unclear.

---

[87] *See*, *e.g.*, Treas. Reg. § 1.408A-4, Q&A-14 (conversion of traditional IRA annuity contract to a Roth IRA annuity contract results in a deemed distribution equal to the fair market value of the contract).

[88] *See*, *e.g.*, PLR 201302015 (July 13, 2012).

[89] Prop. Treas. Reg. § 1.401(a)(9)-4(a), (b), and (c).

[90] Prop. Treas. Reg. § 1.401(a)(9)-6(b)(2). Although the statement about when the designated beneficiary is determined under a joint life annuity appears in the part of the regulations addressing the MDIB rule, the statement is not expressly limited to situations where the MDIB rule applies. For example, it is not limited to joint annuitants who are more than 10 years younger than the employee, even though that is the only situation where the MDIB rule imposes additional requirements on annuity payouts that are not otherwise reflected in the regulations. In that regard, the MDIB rule generally limits the applicable percentage of payments that can be made after the employee's death to a non-spouse joint annuitant who is more than 10 years younger than the employee.

[91] Prop. Treas. Reg. § 1.401(a)(9)-6(k)(1). *See also* Prop. Treas. Reg. § 1.401(a)(9)-6(l) (similar rule for surviving spouses who begin annuity payments before required under section 401(a)(9)(B)(iv)).

[92] *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-10(a).

- Other than the joint and survivor rule and the early annuitization rule described above, there does not appear to be a similar rule regarding the timing of the "determination of the designated beneficiary" with respect to annuity payments that start *on or after* the employee's RBD while the employee is alive. This suggests that in such cases the general rule described above applies, *i.e.*, the designated beneficiary is determined as of the date of the employee's death rather than as of the annuity starting date. It is not clear why the regulations make such a distinction.

- *EDB status* – The proposed regulations provide that the status of a designated beneficiary as an EDB is determined *as of the date of the employee's death*.[93]

In light of these disparate statements in the proposed regulations regarding when a "designated beneficiary" is determined with respect to an annuitized form of benefit and when that beneficiary's status as an EDB is determined, final regulations should clarify how all these rules interact and provide specific examples. To the extent that the rules provide that the designated beneficiary is determined as of the annuity starting date, the clarification should include (1) whether that rule is limited to certain purposes, such as determining the permitted period certain or the application of the MDIB rule, and (2) whether the beneficiary's status as an EDB also is determined as of the annuity starting date. In that regard, the Committee would prefer a rule that a beneficiary's status as an EDB is determined on the annuity starting date, at least in the case of a joint and survivor annuity, so that employees can annuitize with confidence that their payout choices will comply with the RMD rules without needing to be modified later to comply.

D. Modify, rationalize, and clarify the proposed rules for increasing payments under commercial annuities.

Under the existing regulations, annuity payments generally must be "nonincreasing." Exceptions are available for certain types of increasing payments under an annuity contract that is purchased from an insurance company, including annuity payments tied to a recognized cost-of-living index, lump sum return of premium ("ROP") death benefits, payment accelerations that meet certain requirements, payments of dividends and similar amounts, and payments that increase annually by a fixed percentage. Other than the cost-of-living-index exception, all these exceptions are available under the existing regulations *only* if the payout satisfies a test when payments commence, which has become known as the minimum income threshold test or "MITT." The proposed regulations modify these rules in some respects.[94] We request a number of additional modifications, as set forth below.

1. Simplify and rationalize the rules for increasing payments by (a) exempting certain additional types of benefits from the MITT, and (b) excusing any prior inadvertent failures of the MITT that would not have occurred under the final regulations.

Final regulations should exempt from the MITT the following types of benefits: (1) accelerations of payments even if not required to comply with the 10-year rule; (2) annuity payments that increase annually by a fixed percentage less than 5%; and (3) dividends under

[93] Prop. Treas. Reg. § 1.401(a)(9)-4(e)(1); section 401(a)(9)(E)(ii) (flush language).

[94] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(a) and (o).

participating annuities that are determined based on a reasonable comparison of the actuarial factors assumed when calculating the initial annuity payments and the issuer's experience with respect to those factors. Final regulations also should excuse any inadvertent failures of the MITT that may have occurred under the existing regulations if such failures would not have occurred under the final regulations.

As noted above, the RMD rules for commercial annuities are extremely complex. In that regard, the MITT is a significant yet largely unnecessary source of complexity. The MITT is not compelled by statute, as demonstrated by its inapplicability to DB plans and the fact that the test has not always been part of the regulations regarding commercial annuities. The Treasury Department and IRS added the MITT to the regulations in 2002 to ensure "that annuity payments [under a commercial annuity] start at a high enough amount to prevent inappropriate deferral."[95] The original notice of proposed rulemaking did not explain on what basis a determination was made that some increases provide "inappropriate" deferral while others do not. The preamble to the recently-proposed regulations does not offer any further explanation for this standard other than to observe that the proposed regulations include two exceptions to allow "certain policy features that are popular with policyholders and … do not have a material impact on the amount of expected payments."[96]

While the additional exceptions provided in the proposed regulations are welcome, the unfortunate byproduct of the original decision to impose the MITT has been to widely prevent very common and traditional forms of financial protections from being offered under life annuities over the past 20 years, thereby discouraging their use. For example, ROP death benefits, acceleration rights, and various forms of inflation protection (such as participating annuities and benefits that increase annually at a constant rate) have been often disallowed because of the MITT. These protections are critical to overcoming a natural behavioral reluctance to relinquish the convenient liquidity of an individual account in return for the important protections that only a life annuity can provide.[97] In short, without these types of financial protections, fewer people elect life annuities.

The MITT also leads to irrational, unpredictable, and bizarre results. For example, retirees do not understand why a rule in the RMD regulations precludes the purchase of a particular form of annuity benefit in the year the customer wants to purchase the annuity, even though they would have been allowed to purchase that same annuity in a prior year and might be allowed to purchase that annuity in a future year. Such results occur under the MITT and are difficult to comprehend or

[95] 69 Fed. Reg. at 33291.

[96] 87 Fed. Reg. at 10516-17.

[97] Research suggests that the reasons for this reluctance include (1) a behavioral response to the risk-pooling nature of insurance, *i.e.*, the fear of financially "losing" if early death prevents the payment of at least a significant amount of cash benefits under the contract, and (2) a perceived loss of "control" over one's savings, because converting a lump sum into a series of life annuity payments often involves a corresponding reduction in liquidity with respect to the annuitized sum. *See*, *e.g.*, Jeffrey R. Brown, *Rational and Behavioral Perspectives on the Role of Annuities in Retirement Planning, Working Paper No. 13537*, NAT'L BUREAU OF ECON. RES., Oct. 2007, http://www.nber.org/papers/w13537 (discussing (1) complexity and financial literacy, (2) "mental accounting" and "loss aversion," (3) "regret aversion," and (4) the "illusion of control" as behavioral factors that may contribute to a reluctance to annuitize); Wei-Yin Hu & Jason S. Scott, *Behavioral Obstacles to the Annuity Market*, SOC. SCI. RES. NETWORK, Mar. 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978246 (similar).

justify, especially since in many cases the same exact annuity payout would be allowed under a DB plan.

To help alleviate the problems that the MITT has caused over the years, final regulations should include exceptions to the MITT for benefits that do not raise reasonable concerns over excessive tax deferral. The proposed regulations take helpful and significant steps in that direction by exempting from the MITT certain lump sum ROP death benefits, certain short-term payment accelerations, and certain accelerations of payments that are required to comply with the 10-year rule.[98] The Committee has advocated these exceptions and is very appreciative of their inclusion in the proposed regulations. But the following exceptions are equally warranted:

- Accelerations even if not required to comply with the 10-year rule. Commutations and the shortening of payment periods accelerate the time at which a participant's interest will otherwise be distributed. Accordingly, they should not be treated as involving the type of increasing payments that present a concern about inappropriate deferral, especially since they are still subject to the requirement that the "total future expected payments" must decrease as a result of the acceleration.[99] If concerns over deferral persist, a requirement could be added that the acceleration is determined using reasonable actuarial methods and assumptions, as determined in good faith by the issuer of the contract.

- Annuity payments that increase annually by a fixed percentage less than 5%. This would enable the purchase of annuities that protect against inflation and would be consistent with the annual annuity increases that the regulations allow for DB plans.[100]

- Reasonable dividends under participating annuities. Dividends determined with respect to reasonable investment, mortality, and expense assumptions under a participating contract should not be subject to the MITT.

Adopting these additional exceptions to the MITT would significantly benefit individuals seeking to buy a life annuity and remove considerable complexity from the regulations. These changes also would be consistent with legislative proposals that are currently pending in Congress with strong bipartisan support.[101]

---

[98] Lump sum ROP death benefits, in particular, never should have been subject to the MITT. They were explicitly allowed under the regulations prior to 2002. *See* Prop. Treas. Reg. § 1.401(a)(9)-1, F-3(a)(3) (1987), 52 Fed. Reg. 28070, 28084 (July 27, 1987). They also have always been allowed under DB plans. Now, the new proposed regulations explicitly allow them under DC plans without having to satisfy the MITT.

[99] *See* 67 Fed. Reg. 18991 (Apr. 17, 2002) (preamble to the 2002 proposed and temporary RMD regulations, stating that the restrictions on annuity payment accelerations were "intended to preclude the use of a withdrawal or cash-out feature as a mechanism to distribute deferred actuarial gains."). It is unclear why this concern is not adequately addressed by the separate rule in the regulations that prohibits actuarial gains from being deferred. *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-14(c)(3) and Prop. Treas. Reg. § 1.401(a)(9)-6(o)(3)(ii) (each permitting increases in annuity payments due to actuarial gains only if the actuarial gain is "measured no less frequently than annually and the resulting dividend payments or other payments are either paid no later than the year following the year for which the actuarial experience is measured or paid in the same form as the payment of the annuity over the remaining period of the annuity (beginning no later than the year following the year for which the actuarial experience is measured.").

[100] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(5)(i); Treas. Reg. § 1.401(a)(9)-6, Q&A-14(d)(1).

[101] *See* section 201 of The Securing a Strong Retirement Act of 2022, H.R. 2954, 117th Cong. (2021) (passed by the House of Representatives on March 29, 2022, by a vote of 414-5); section 202 of The Retirement Security and

In addition, final regulations should excuse any inadvertent failures of the MITT that previously may have occurred under the existing regulations, to the extent that such failures would not have occurred if the new MITT under the proposed or final regulations had applied. In that regard, if an existing payout would have passed the revised MITT, the payout necessarily does not present the type of "inappropriate deferral" at which the MITT was directed.

If final regulations retain the MITT for the types of benefits discussed above, we urge the Treasury Department and IRS to include a robust discussion of the reasons for doing so in the accompanying preamble. In particular, the preamble should (1) explain on what basis the Treasury Department and IRS determined that some increases in annuity payments provide "inappropriate" deferral while others do not, (2) identify the particular statutory or regulatory provision that supports imposing the MITT, and (3) explain why the MITT is necessary for commercial annuities even though the MITT does not apply to DB plans that provide the exact same types of increasing payments as a commercial annuity.

2. Clarify the rule for accelerations required to comply with the 10-year rule.

Final regulations should clarify that the new exception to the MITT for "an acceleration of payments … that is required to comply" with the 10-year rule will apply to each and any "acceleration of payments" that occurs during the 10-year period. In that regard, the proposed regulations add a new exception to the MITT for an "acceleration of payments" that "is required to comply with § 1.401(a)(9)-5(e)" of the proposed regulations, which sets forth the 10-year rule.[102] The Committee previously asked the Treasury Department and IRS to include such an exception in the regulations, so we are very appreciative of its inclusion. We have a concern, however, that it may not be clear exactly when or in what form an acceleration is "required" to comply with the 10-year rule, and therefore the specific circumstances to which the new exception applies.

For example, if an employee elects a life annuity with a 20-year period certain and dies five years later, the remaining 15 years on the period certain would not comply with the 10-year rule if the designated beneficiary is not an EDB. In this situation, the remaining annuity payments will need to be accelerated. The questions are when and how is the acceleration "required." Is it "required" only in the last year of the 10-year period because that is the deadline for completing distributions, and is the only acceleration that is "required" a full commutation in that last year? The answers to both of these questions should be no. The exception should apply to any "acceleration of payments" that occurs during the 10-year period. Thus, the exception should apply to all of the following:

- A full commutation at any point during the 10-year period;
- One or more partial commutations at any point during the 10-year period, followed by a full commutation at any point during that period;

Savings Act of 2021, S. 1770, 117th Cong. (2021) (sponsored by Senators Ben Cardin (D-MD) and Rob Portman (R-OH)).

[102] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(ii). The acceleration must satisfy the definition of an "acceleration of payments" in Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(iv), which requires (1) a shortening of the payment period or a full or partial commutation, and (2) a reduction in the "total future expected payments" (including any lump sum received in the acceleration) as a result of the change in payments.

- A shortening of the payment period so that it ends at any point within the 10-year period; and

- A shortening of the payment period as described above, preceded by any partial commutation during the 10-year period and/or followed by any partial or full commutation during that period.

In each of the foregoing situations, the acceleration either itself satisfies the 10-year rule or is part of a series of steps taken to satisfy the 10-year rule. If the 10-year rule did not apply, none of the accelerations described above would need to be made. Thus, each of the foregoing accelerations should be viewed as "required" by the 10-year rule. This treatment also would be consistent with how non-annuitized individual accounts are treated under the proposed regulations, where the beneficiary can choose to take any combination of partial withdrawals or full withdrawals at any point during the 10-year period (subject to the annual minimum distribution under the at-least-as-rapidly rule). Accordingly, we respectfully ask the Treasury Department and IRS to clarify in final regulations that the new exception to the MITT for "an acceleration of payments that is required to comply" with the 10-year rule will apply to each and any "acceleration of payments" that occurs during the 10-year period.

3. Clarify the definitions of "total future expected payments" and "total value being annuitized".

Final regulations should provide additional guidance on the definitions of "total future expected payments" and "total value being annuitized" in order to clarify:

- Which of several definitions of "total value being annuitized" applies to deferred annuities that are issued as IRAs;

- When the "total future expected payments" and "total value being annuitized" are determined for purposes of the MITT, by using a term other than "annuitized" to describe the relevant date; and

- When the "total future expected payments" are determined for purposes of the definition of an "acceleration of payments."

In addition, final regulations should expand upon the examples therein to explain how the "total future expected payments" were calculated in each example.

a. Background.

The definitions of "total future expected payments" and "total value being annuitized" are relevant for several purposes under the proposed regulations, including as components of the MITT.[103] The proposed regulations would modify those definitions in certain respects. The

[103] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(3) (regarding the MITT). *See also* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(iv) (permitting an "acceleration of payments" only if the "total future expected payments" is decreased as a result of the acceleration); Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(i) (providing an exception to the MITT for lump sum death benefits that do not exceed the excess of the "total value being annuitized" over the total payments made before death).

definition of "total future expected payments" would be modified as follows (additions underlined and deletions stricken through):

> the total future payments expected to be made under the annuity contract as of the date the contract is annuitized, ~~of the determination, calculated using the Single Life Table in §1.401(a)(9)-9(b) (or, if applicable, the Joint and Last Survivor Table in §1.401(a)(9)-9(d)) for annuitants who are still alive,~~ based on the mortality rates contained in §1.401(a)(9)-9(e), and without regard to any increases in annuity payments after that date ~~the date of determination, and taking into account any remaining period certain~~.

The revised definition (1) replaces a requirement to use the life expectancy tables in the regulations with a requirement to use the mortality rates on which those life expectancy tables are based, and (2) eliminates a specific reference to reflecting any period certain in the calculation.

The proposed regulations also would modify the definition of "total value being annuitized" in the case of annuity payments under a section 403(a) annuity plan or under a deferred annuity purchased by a section 401(a) trust. In such case, the proposed regulations would require the employee's entire interest [that is] being annuitized to be valued "as of the date the contract is annuitized," whereas the existing regulations require the valuation "as of the date annuity payments commence."[104] The proposed regulations would not modify the definition of "total value being annuitized" in "the case of a defined contribution plan," where the term is defined as "the value of the employee's account balance used to purchase an immediate annuity under the contract."[105]

b. Clarify which of several definitions of "total value being annuitized" applies to deferred annuities that are issued as IRAs.

Final regulations should clarify which of several definitions of "total value being annuitized" applies to deferred annuities that are issued as IRAs. As indicated above, the proposed regulations include several definitions of that term for purposes of the MITT. As relevant here, one definition applies in "the case of annuity payments under a section 403(a) annuity plan or under a deferred annuity purchased by a section 401(a) trust," whereas another definition applies in "the case of a defined contribution plan."[106] The existing regulations generally follow this same approach. There has always been uncertainty as to which of the foregoing two rules applies to an IRA. It would be helpful if final regulations could clarify this issue prospectively.

[104] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(i)(A); Treas. Reg. § 1.401(a)(9)-6, Q&A-14(e)(1)(i).

[105] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(i)(C).

[106] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(i)(A) and (C), respectively. A third definition applies for purposes of DB plans, but that definition is not relevant to IRAs. *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(i)(B).

c. *Clarify when the "total future expected payments" and "total value being annuitized" are determined for purposes of the MITT, by using a term other than "annuitized" to describe the relevant date.*

Final regulations should clarify when the "total future expected payments" and "total value being annuitized" are determined for purposes of the MITT, by using a term other than "annuitized" to describe the relevant date.

As discussed above, the proposed regulations modify the definitions of "total future expected payments" and "total value being annuitized" to require valuations as of the date an annuity contract is "annuitized," rather than as of the date of the "determination" or the date "annuity payments commence."[107] Neither the proposed regulations nor the existing regulations define the term "annuitized." The preamble to the proposed regulations includes only a brief mention of this change, apparently in the context of the definition of total value being annuitized. It states that the change "will have an effect only in situations in which the contract is annuitized on a date earlier than the date on which payments begin."[108] This statement suggests that "the date the contract is annuitized" can occur on or before the date that payments commence, but the statement does not otherwise clarify the meaning of "annuitized." In addition, the use of the term "annuitized" rather than "annuity starting date," which appears elsewhere in the proposed regulations, suggests that those terms have distinct meanings, even though the "annuity starting date" also can occur before payments actually commence.[109]

One possible interpretation is that "annuitized" means an annuity form of benefit has been fixed or "locked in" under the contract, *i.e.*, the purchaser cannot surrender the contract for cash or receive benefits during their lifetime other than annuity payments.[110] Such an interpretation would raise a number of questions, however, including:

- *Right to commute payments* – Does a commutation right prevent a contract from being annuitized? If so, is a contract that provides such a right never annuitized? It seems that the only appropriate answer to these questions is that a commutation right does not prevent a contract from being "annuitized."

- *Right to pay additional premiums* – Does the right to pay additional premiums prevent a contract from being annuitized? If so, when is the contract annuitized? If not, is a contract partially annuitized when each premium is paid?

---

[107] The existing regulations do not define "the date of the determination" as used in the definition of "total future expected payments," but that phrase generally is understood to mean the date that annuity payments commence, because that is the date that the regulations require the "total value being annuitized" to be determined. *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-14(e)(1)(i).

[108] 87 Fed. Reg. at 10516.

[109] "Annuity starting date" has multiple definitions under the Code and regulations and, as defined, can occur on a date prior to the date annuity payments commence. *See*, *e.g.*, section 72(c)(4); section 417(f)(2); Treas. Reg. § 1.72-4(b)(1).

[110] *See*, *e.g.*, Rev. Rul. 2012-3, 2012-8 I.R.B. 383 (concluding that a 401(k) plan participant elected a life annuity for purposes of the QJSA and QPSA rules by allocating a portion of their individual account to purchase a deferred annuity contract under which amounts could not subsequently be transferred out of the contract and under which the participant could not elect to receive amounts in the form of a single-sum payment).

- *Paying multiple premiums for DIAs and QLACs* – Deferred income annuities ("DIAs"), including qualifying longevity annuity contracts ("QLACs") can permit multiple premiums, with each premium locking in specified annuity payments that will commence on a unified future date. When is such a contract "annuitized?" Is each premium payment a separate annuitization to which the MITT applies? Alternatively, is the contract as a whole annuitized when the last premium is paid, with the "total value being annuitized" equaling the sum of all premiums paid before annuity payments commence?

- *Right to surrender a QLAC before the RBD* – The proposed regulations would allow QLACs to provide a cash surrender value prior to the employee's RBD.[111] Does such a surrender right prevent a QLAC from being treated as "annuitized" until the right expires? If so, is the contract annuitized when the surrender right expires, and is the "total value being annuitized" the cash surrender value as of that date? If a QLAC is purchased before the RBD and additional premiums are paid after the date the surrender right expires, when is the contract annuitized and how are the total future expected payments determined?

- *Actuarial present value requirement for deferred annuities* – If "annuitized" means annuity payments have been fixed or "locked in," what are the implications under Prop. Treas. Reg. § 1.401(a)(9)-6(m), which applies the individual account rules to an annuity contract under an individual account plan prior to the date the contract is "annuitized." For example, if the annuity form of benefit is "locked in" during Year 1 but annuity payments do not commence until Year 5, was the contract annuitized in Year 1 and therefore the RMD rules for annuities (rather than the RMD rules for individual accounts) apply in years 2-5 even though no annuity payments are made in those years? Should the individual account rules instead apply to a deferred annuity only prior to the "annuity starting date" or prior to the date that "annuity payments commence?"

As the foregoing demonstrates, a number of questions would arise if the term "annuitized" is retained to describe the date on which the total future expected payments and total value being annuitized are determined for purposes of the MITT. If the term "annuitized" is retained, final regulations should provide additional guidance on all of these questions. Our recommendation, however, is to use a term other than "annuitized" and to expand on the intended meaning when defining the relevant date.

In that regard, although the preamble to the proposed regulations distinguishes "annuitized" from "the date on which payments begin," the preamble does not explain why the change to "annuitized" was made. The Committee is hopeful that the change was intended to address comments we have previously submitted regarding the uncertainty over how to determine the total value being annuitized for deferred annuity contracts that do not provide cash surrender values that are applied to generate annuity payments, such as DIAs, including QLACs.

Because such contracts generally do not provide cash surrender values and because premiums for such contracts generally are paid well in advance of annuity payments commencing, it is unclear under the existing regulations how to determine the "entire interest that is being annuitized" under the contract "as of the date annuity payments commence."[112] As a result, we

---

[111] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(1)(iv).

[112] Treas. Reg. § 1.401(a)(9)-6, Q&A-14(e)(1)(i).

have previously requested that the regulations be amended to allow the total value being annuitized under a DIA or QLAC to be determined at the time of the contract's issue date or as of the last premium payment made for the contract. We recommend implementing that change but otherwise retaining the requirement in the existing regulations that the total value being annuitized is determined as of the date that payments commence, which is a clear and unambiguous standard. In any event, we recommend avoiding the term "annuitized" in light of numerous questions that term would raise, as outlined above, and that if a different term is used the final regulations should clearly explain the meaning of that term.

d. Clarify when "total future expected payments" are determined for purposes of the definition of "an acceleration of payments".

Final regulations should clarify when the "total future expected payments" must be determined for purposes of the definition of "an acceleration of payments." In that regard, the proposed regulations continue to provide an exception to the nonincreasing annuity payment requirement for "an acceleration of payments."[113] For this purpose, the proposed regulations provide that an increase in the payment amount will be treated as an acceleration of payments "only if the total future expected payments under the annuity (including the amount of any payment made as a result of the acceleration) is decreased as a result of the change in payment period."[114] Thus, the "total future expected payments" must be calculated in order to determine whether an acceleration of annuity payments is permitted.

As discussed above, the proposed regulations modify the definition of "total future expected payments" to provide that the amount is determined "as of the date the contract is annuitized."[115] This replaces the standard in the existing regulations, which provide that the calculation is made "as of the date of the determination."[116] The revised definition and its reference to "annuitized" apply for all purposes of Prop. Treas. Reg. § 1.401(a)(9)-6(o), which includes the definition of "an acceleration of payments" discussed above. Thus, it appears that in order for an acceleration to be permitted under the proposed regulations, the acceleration must cause a reduction in the total future expected payments *as of the date the contract is annuitized*.

In contrast, examples in the proposed regulations indicate that the date the contract is annuitized is relevant only for purposes of applying the MITT at the inception of the payout, not for purposes of determining whether a subsequent acceleration satisfies the definition of "an acceleration of payments." The relevant examples involve a full and partial commutation.[117] In both cases, the "total future expected payments" are initially determined on the date the contract is annuitized, but only for purposes of determining whether the MITT is satisfied on that date. When the commutations subsequently occur, the examples indicate that two additional calculations of the "total future expected payments" are required to determine if the commutations satisfy the definition of "an acceleration of payments." Specifically, the "total future expected payments" are determined immediately before and immediately after the commutation, based on the future

[113] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(3)(iii).

[114] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(iv).

[115] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(iii).

[116] Treas. Reg. § 1.401(a)(9)-6, Q&A-14(e)(3).

[117] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(7)(vii) and (viii).

payments that will be made starting on those two dates (and not on the date the contract was originally annuitized).

These examples suggest that even though the proposed regulations define "total future expected payments" as being calculated "as of the date the contract is annuitized," that standard does not apply for purposes of the definition of "an acceleration of payments." Final regulations should eliminate this apparent contradiction by clarifying in the substantive rules (and not merely in examples) what standard applies under the definition of "an acceleration of payments." If final regulations continue to indicate that the definition requires a reduction in total future payments as of the date the contract is annuitized, additional examples should be provided to illustrate how that standard is satisfied for various types of payment accelerations.

e. Expand upon the examples in the regulations to explain how "total future expected payments" were calculated in each example.

Final regulations should expand upon the examples involving increasing annuity payments to explain how the "total future expected payments" were calculated in each example. In that regard, Prop. Treas. Reg. § 1.401(a)(9)-6(o)(7) sets forth nine examples of the rules that permit certain types of increases in annuity payments. Several of the examples describe certain assumed facts and then specify the dollar amount of the "total future expected payments" based on those facts and the mortality rates in the regulations, without providing more detail on how the calculation was made. It would be very helpful to annuity providers if the examples were expanded to provide such additional detail on the calculation, especially in light of the changes to the definition of "total future expected payments" discussed above. Annuity issuers need clear and unambiguous guidance on how and when the restrictions on annuitized forms of payout apply, so they can determine when the regulations forbid a form of annuity payout and explain that determination to any annuity owners or state regulators who ask why.

4. Clarify the new exception to the prohibition on increasing payments provided for short-term payment accelerations.

Final regulations should clarify that the new exception to the MITT for certain short-term payment accelerations does not require the acceleration to satisfy the definition of an "acceleration of payments" in the regulations. This could be accomplished, for example, by final regulations referring to an "advance of payments" rather than an "acceleration of payments."

The proposed regulations provide that the following type of acceleration of annuity payments can be provided under a commercial annuity without regard to the MITT:

> a short-term acceleration of payments under the annuity, under which up to one year of annuity payments that would otherwise satisfy the requirements of this section are paid in advance of when the payments were scheduled to be made.[118]

The Committee previously asked the Treasury Department and IRS to add such an exception to the MITT to the regulations, so we are very appreciative of its inclusion. We have a concern,

[118] Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(iii).

however, that because the exception uses the phrase "acceleration of payments," it might be interpreted as requiring adherence to the definition of an "acceleration of payments" in the proposed regulations, despite not specifically cross-referencing that definition.

We interpret the lack of such a cross-reference to mean that the exception is available even if a short-term acceleration does not meet the definition of an "acceleration of payments."[119] This makes sense because the definition imposes requirements that a short-term acceleration may not satisfy, such as a requirement that the acceleration cause a reduction in the "total future expected payments,"[120] which is why the exception was needed in the first place. However, the proposed regulations also provide that the definition of an "acceleration of payments" applies "[f]or purposes of … paragraph (o)" of Prop. Treas. Reg. § 1.401(a)(9)-6.[121] Because the new exception for short-term accelerations is contained within that paragraph (o), and because the exception is silent on whether the definition of an "acceleration of payments" applies, we are concerned that if read literally the rules could be interpreted as limiting the new exception to instances where that definition is satisfied. This would render the new exception useless. To eliminate any ambiguity on this point, final regulations should explicitly state that a short-term acceleration does not need to satisfy the definition of an "acceleration of payments." This could be accomplished, for example, by final regulations referring to an "advance of payments" rather than an "acceleration of payments."

E. Permit spouses to elect a joint life annuity with a period certain based on their joint life expectancy.

Final regulations should provide that if an employee's sole designated beneficiary is their spouse who is more than 10 years younger, the period certain under an annuity is permitted to equal their joint life expectancy even if the annuity also includes a life contingency. In that regard, the proposed regulations retain the rule from the existing regulations that permits such a period certain only if the annuity does not also provide a life annuity (which the proposed regulations define to include a joint life annuity).[122] Thus, such spouses can have an annuity that pays for their joint life expectancy or their joint lives, but not both. In contrast, employees whose spouses are not more than 10 years younger can have both. This distinction seems unwarranted and should be eliminated in final regulations.

F. Clarify and improve the rules for QLACs.

1. Clarify certain implications of surrendering a QLAC.

Final regulations should include the following clarifications relating to the surrender of a QLAC prior to the employee's RBD: (1) how the surrender affects the limitations on premiums if the employee subsequently purchases another QLAC, (2) what reporting requirements apply in

---

[119] *Compare* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(4)(ii) (cross-referencing the definition of an "acceleration of payments" when describing the new exception to the MITT for accelerations that are required to comply with the 10-year rule).

[120] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(iv).

[121] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6) (introductory language).

[122] Prop. Treas. Reg. § 1.401(a)(9)-6(c)(1); Prop. Treas. Reg. § 1.401(a)(9)-6(a)(2).

connection with the surrender, and (3) if the surrender occurs in connection with an exchange for another QLAC, only the surrender value will be treated as a premium paid for the new contract.

These questions arise because of a change that the proposed regulations make to the definition of a QLAC. The existing regulations define QLAC as a contract that, among other things, "does not make available any commutation benefit, cash surrender right, or other similar feature."[123] The proposed regulations modify this rule so that it applies only after the RBD.[124] Thus, prior to the employee's RBD, a QLAC can provide a cash surrender right. The Committee believes this is a positive development and appreciates the inclusion of this provision in the proposed regulations. Its implementation, however, raises the following questions for which guidance is needed.

a. Clarify how the surrender of a QLAC affects the limitations on premiums if the employee subsequently purchases another QLAC.

QLACs are subject to certain limitations on premiums.[125] The limitations apply based on the aggregate premiums that the employee pays under all contracts that are intended to be QLACs. If a QLAC is surrendered, the aggregate amount that the employee has paid for contracts that are intended to be QLACs should be reduced to reflect that the surrendered contract is no longer in force and therefore is no longer intended to be a QLAC. Accordingly, final regulations should clarify that in such case the premium limits are increased by the surrender proceeds, or at least by the sum of any premiums that the employee paid for the surrendered QLAC.

b. Clarify what reporting requirements apply in connection with the surrender of a QLAC.

The regulations under section 6047 require QLAC issuers to report certain information about those contracts to the IRS and to the individual in whose name the QLAC was purchased.[126] The information is reported on Form 1098-Q and includes, among other things: (1) the amount of each premium paid for the contract during the year and the date of the premium payment, and (2) the cumulative total amount of all premiums paid for the contract through the end of the calendar year.[127] In addition, issuers of annuity contracts generally have an obligation to report distributions from the annuity contracts they issue on Form 1099-R.[128] Final regulations should clarify whether and how the surrender of a QLAC prior to the employee's RBD affects these reporting requirements. For example:

- Does the requirement to file Form 1098-Q terminate once a QLAC is surrendered?

---

[123] Treas. Reg. § 1.401(a)(9)-6, Q&A-17(a)(4).

[124] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(1)(iv).

[125] *See* Prop. Treas. Reg. § 1.401(a)(9)-6(q)(2).

[126] Treas. Reg. § 1.6047-2.

[127] *See* Treas. Reg. § 1.6047-2(a)(2)(v) and (vi); *Instructions for Form 1098-Q*, INTERNAL REVENUE SERV. (rev. Dec. 2019), https://www.irs.gov/pub/irs-pdf/i1098q.pdf.

[128] *See generally* section 6047(d).

- Will the QLAC issuer be required to file a final Form 1098-Q for the year of the surrender that shows negative premiums or a zero for the cumulative premiums paid? Will the Form 1098-Q and its instructions be amended to require any other reporting to indicate that the contract was surrendered?

- Will the Form 1099-R and its instructions be amended to require specific reporting requirements with respect to the surrender of a QLAC, such as a new distribution code?

To the extent that any of the QLAC reporting requirements are modified, the IRS and Treasury Department should provide a notice and comment period and a transition period of at least one full calendar year before any changes become final.

c. Clarify that if a QLAC is surrendered as part of an exchange for another QLAC, only the surrender value of the exchanged contract is treated as a premium for the new contract.

The proposed regulations provide that "if an insurance contract is exchanged for a contract intended to be a QLAC, the fair market value of the exchanged contract will be treated as a premium paid for the QLAC."[129] In some cases, the "fair market value" of a QLAC that is being exchanged could differ from the "cash surrender value" that is available upon the surrender of the QLAC prior to the employee's RBD. In an exchange of a QLAC that provides a cash surrender right, the issuer of the new QLAC likely will receive only the cash surrender value of the old QLAC as consideration for the new QLAC. In recognition of this, final regulations should clarify that only the cash surrender value that the issuer of the new QLAC receives in the exchange is treated as a premium paid for the new QLAC, including for purposes of the issuer's obligations to report QLAC premiums on Form 1098-Q.

This approach would be consistent with how the existing regulations require deferred annuity contracts to be valued in a Roth conversion. In that regard, when a deferred annuity that was issued as a traditional IRA is converted to a Roth IRA, the regulations generally require the fair market value of the traditional IRA annuity contract to be treated as a distribution.[130] This requirement does not apply, however, to a conversion that is accomplished by the complete surrender of the traditional IRA where the cash proceeds are reinvested in a Roth IRA, provided that the surrender extinguishes all benefits and other characteristics of the traditional IRA annuity contract. In such a case, only the cash from the surrendered contract is treated as distributed.[131] Likewise, only the cash surrender value that the issuer of the new QLAC receives in an exchange should be treated as a premium paid for the new QLAC.

2. Clarify the QLAC premium limits to facilitate purchases via rollovers from qualified plans to IRAs.

Final regulations should clarify the QLAC premium limits to facilitate purchases of QLACs in rollovers from qualified plans to IRAs. In that regard, QLACs are readily available in the IRA

[129] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(2)(i); *See also* Treas. Reg. § 1.401(a)(9)-6, Q&A-17(e)(1) (setting forth a similar rule but referring to an "existing contract" that is exchanged for a QLAC on or after July 2, 2014).

[130] Treas. Reg. § 1.408A-4, Q&A-14(a)(1).

[131] Treas. Reg. § 1.408A-4, Q&A-14(a)(2).

market, but it is still relatively rare for a qualified plan to offer a QLAC option directly. As a result, the only way for virtually any participant in a qualified plan to obtain a QLAC is by rolling money out of the plan to an IRA. However, there is considerable uncertainty regarding how the limits on QLAC premiums in the current and proposed regulations apply when an amount is rolled from a qualified plan to an IRA in order to obtain a QLAC. This uncertainty is having a significant adverse effect on the availability of QLACs in the marketplace.

a. Background.

The existing and proposed regulations limit the premiums that an individual can pay for a QLAC to the lesser of $125,000 (indexed) or 25% of the account balance under the plan or IRA.[132] The $125,000 limit applies across all types of arrangements, whereas the 25% limit applies separately to each qualified plan in which the individual participates and collectively to all IRAs that an individual owns.[133] For purposes of the 25% limit, the account balance of a qualified plan is determined as of the most recent valuation date and is adjusted up or down to reflect subsequent contributions or distributions, respectively.[134] In contrast, the account balance of an IRA is determined as of December 31st of the previous calendar year, and there is no specific mention in the current or proposed regulations of any adjustment for subsequent contributions or distributions.[135]

When a QLAC is purchased in a direct rollover from a qualified plan to an IRA, it is not clear which account balance should be used when applying the 25% limit. In other words, it is not clear whether the regulations limit the purchase to 25% of the individual's account balance in the plan or 25% of the account balance in the individual's IRAs. If the limit applies based on the IRA account balance, the QLAC purchase could be unnecessarily complicated and delayed. Moreover, in many cases the individual would need to quadruple the amount of the rollover just to facilitate the QLAC purchase. These problems are illustrated in the following example:

> Assume that an individual has a $500,000 account balance in her former employer's qualified plan. She wants to use 10% of that balance, or $50,000, to purchase a QLAC, but her plan does not offer one. She decides to roll the money from the plan to purchase a QLAC that also qualifies as an IRA annuity. However, she currently does not own any IRAs. If the 25% limit on QLAC premiums applies based on her IRA account balance (which is zero), she will need to roll <u>$200,000</u> from her plan just to facilitate the $50,000 QLAC purchase. Moreover, because the regulations measure her IRA account balance as of the prior year-end (which, again, was zero), she will need to roll the $200,000 from the plan to an IRA, wait until the next year, then transfer $50,000 from the IRA to a QLAC that qualifies as an IRA annuity. After the transaction, the individual would own a QLAC that clearly complies with the intent of the premium limits, but would have unnecessarily moved $150,000 from

---

[132] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(2)(ii) and (iii). The limit was adjusted for inflation to $145,000, effective January 1, 2022. Notice 2021-61, 2021-47 I.R.B. 738.

[133] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(2)(iii); Treas. Reg. § 1.401(a)(9)-6, Q&A-17(b)(3).

[134] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(4)(i)(C); Treas. Reg. § 1.401(a)(9)-6, Q&A-17(d)(1)(iii).

[135] Prop. Treas. Reg. § 1.408-8(h)(2)(iii); Treas. Reg. § 1.408-8, Q&A-12(b)(3).

her plan to an IRA and would have suffered a considerable delay and possibly additional expense in obtaining the QLAC.

Insurance companies are generally interpreting the regulation conservatively and applying the cumbersome approach described in the example above. This, in turn, is limiting the ability of individuals to protect themselves against longevity risk through the purchase of a QLAC.

b. Requested change.

The solution to this problem would be for the final regulations to clarify that the 25% limit applies based on the account balance in the plan. We suggest the following approach:

- The regulations would describe a situation like the one in the example above, involving a direct rollover from a plan to an IRA to purchase a QLAC.
- The regulations would then clarify that in such a situation the 25% limit is applied based on the account balance in the plan as of the most recent valuation date occurring immediately before the rollover, *not* the prior year-end account balance in the IRA.
- This would merely clarify which of two rules in the existing regulations applies to the transaction. Moreover, in the direct rollover context where the distribution is used to directly purchase a QLAC, treating the distribution as coming from the plan for purposes of the 25% limit is entirely consistent with the structure of the regulations, which state that in the context of a rollover, "the amount distributed is still treated as a distribution by the distributing plan for purposes of section 401(a)(9), notwithstanding the rollover."[136]
- The transaction would be reported on existing forms without the need for the IRS to amend those forms.[137]

These technical changes also would be consistent with legislative proposals that are currently pending in Congress with strong bipartisan support. Those proposals, however, would address the foregoing problem by completely eliminating the 25% component of the QLAC premium limitation.[138]

3. Clarify QLAC spousal death benefits in the event of divorce.

Final regulations should clarify the following with respect to employees who elect joint and survivor annuity benefits with their spouse under a QLAC in cases where they divorce after the QLAC is purchased but before the joint and survivor annuity payments commence:

---

[136] Treas. Reg. § 1.401(a)(9)-7, Q&A-1. *See also* Prop. Treas. Reg. § 1.401(a)(9)-7(a) (similar).

[137] Specifically, the applicable IRS forms would be Form 1099-R (reporting the direct rollover), Form 5498 (reporting the contribution to the IRA annuity that qualifies as a QLAC), and Form 1098-Q (reporting the premiums and other information regarding the QLAC).

[138] *See* section 202 of The Securing a Strong Retirement Act of 2022, H.R. 2954, 117th Cong. (2021) (passed by the House of Representatives on March 29, 2022, by a vote of 414-5); section 201 of The Retirement Security and Savings Act of 2021, S. 1770, 117th Cong. (2021) (sponsored by Senators Ben Cardin (D-MD) and Rob Portman (R-OH)).

- The divorce will not affect the permissibility of the joint and survivor benefits previously purchased under the contract if a QDRO (in the case of a retirement plan) or a divorce or separation instrument (in the case of an IRA) provides that the former spouse is entitled to the promised spousal benefits under the QLAC; and

- In the case of a QLAC issued in connection with an IRA or as an IRA, the former spouse joint annuitant will be treated as a spouse for purposes of the QLAC requirements even in the absence of a divorce or separation instrument that addresses the contract, as long as the former spouse remains contractually entitled to the benefits originally purchased under the contract following the divorce.

a. Background.

The proposed regulations retain the provisions from the existing regulations that prescribe very different rules depending upon whether the owner's beneficiary is his or her spouse. If a QLAC owner's sole beneficiary is his or her spouse, the contract can provide *both* a lump sum return of premium death benefit *and* a 100 percent survivor annuity.[139] However, if the owner's sole beneficiary under a QLAC is not his or her spouse, the contract can provide *either* a lump sum return of premium death benefit *or* a survivor annuity (but not both), and a non-spouse survivor annuity is subject to a required reduction in the annuity payments after the owner's death.[140]

The regulations do not address how these death benefit rules apply if the beneficiary is the owner's spouse when the contract is issued, but because of a subsequent divorce is no longer the owner's spouse when annuity payments commence or when the owner dies.[141] If a beneficiary's status as a spouse or non-spouse is determined after a QLAC is issued, *e.g.*, on the date annuity payments commence, a contract that was issued with permissible benefits might be viewed as providing impermissible benefits merely because of the divorce.

If a contract that is intended to be a QLAC provides impermissible benefits, the value of the contract must be included in the account balance used to determine the owner's RMDs. To prevent this potential adverse and unintended result, in theory the issuer could modify the contract's benefits after the divorce. As a business matter, however, this is rarely feasible. When consumers purchase a commercial annuity that provides particular benefits, they expect to receive those benefits. Furthermore, the price and benefits of a QLAC can differ materially based on whether the spouse or non-spouse rules apply, and insurers need to know which rules will apply because the price of the QLAC is set at issue. This also affects how the company invests to support its contractual obligations, *e.g.*, the insurer can invest in longer-term assets if the company knows that a survivor annuity will be provided in lieu of a lump sum return of premium, which in turn affects the benefits that the insurer is willing to promise.

---

[139] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(i); Treas. Reg. § 1.401(a)(9)-6, Q&A-17(c)(1).

[140] Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(ii); Treas. Reg. § 1.401(a)(9)-6, Q&A-17(c)(2).

[141] *Compare* Treas. Reg. § 1.401(a)(9)-6, Q&A-2(b) (spousal status is determined "as of the annuity starting date for annuity payments") *and* Treas. Reg. § 1.401(a)(9)-5, Q&A-4(b)(2) (spousal status for individual accounts is re-determined on January 1st of each year). The analogs to these provisions in the proposed regulations are Prop. Treas. Reg. § 1.401(a)(9)-6(b)(2)(ii) and Prop. Treas. Reg. § 1.401(a)(9)-5(c)(2)(iii).

If a contract failed to be a QLAC following the divorce, the owner could become liable for a 50% excise tax under section 4974. The mere possibility that this problem can arise in the event of a divorce after a QLAC is purchased may prevent a QLAC issuer from offering the maximum permissible death benefit to a spouse beneficiary.

b. Requested change.

The solution to this problem would be for final regulations to clarify that a divorce occurring after a QLAC is purchased but before payments commence will not affect the permissibility of the joint and survivor benefits previously purchased under the contract if a qualified domestic relations order ("QDRO") (in the case of a retirement plan) or a divorce or separation instrument (in the case of an IRA) provides that the former spouse is entitled to the promised spousal benefits under the QLAC. Such a clarification would be consistent with a general rule that already exists in the proposed and existing regulations, which provides that a former spouse is treated as a spouse for purposes of the minimum distribution requirements if certain requirements are met. That rule states:

> A former spouse to whom all or a portion of the employee's benefit is payable pursuant to a QDRO will be treated as a spouse (including a surviving spouse) of the employee for purposes of section 401(a)(9), including the minimum distribution incidental benefit requirement, regardless of whether the QDRO specifically provides that the former spouse is treated as the spouse for purposes of sections 401(a)(11) and 417.[142]

It appears, though not clearly, that this general rule applies to QLACs, but in light of the repercussions of being wrong on this point, the market appears to have generally taken a conservative position on the application of the rule to QLACs, which makes selling QLACs in the plan context very difficult. Accordingly, it is very important that there is confirmation that the above quoted general rule applies to QLACs in the plan context.

In addition, although QDROs are a concept applicable to employer-sponsored plans and not IRAs, a parallel concept should apply to IRAs, but obviously without regard to the technical requirements that apply to QDROs. Applying a parallel concept to IRAs is supported by the existing regulatory provision that, except as otherwise provided, all of the section 401(a)(9) rules for plans apply to IRAs.[143] As a result, clarification that such a parallel concept regarding former spouses applies for purposes of QLACs issued in the IRA market would be both appropriate and very helpful in addressing an uncertainty that has inhibited the QLAC/IRA market. Such a clarification could provide that "divorce or separation instruments"[144] can cause a former spouse to be treated as the spouse for minimum distribution purposes, including QLACs, in the same manner as a QDRO.

---

[142] Treas. Reg. § 1.401(a)(9)-8, Q&A-6(a); *see also* Prop. Treas. Reg. § 1.401(a)(9)-8(d)(1) (similar language).

[143] *See* Treas. Reg. § 1.408-8, Q&A-1(a), which is carried over to Prop. Treas. Reg. § 1.408-8(a)(1).

[144] This term would have the meaning set forth in section 71(b)(2), prior to repeal by section 11051(b)(1)(B) of The Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054, 2089 (2017).

For IRAs, spousal rights may continue after a divorce in two distinct ways. First, a former spouse may have rights under the contract which remain pursuant to a divorce or separation instrument. Second, the former spouse may be contractually entitled to benefits originally purchased under the contract which remain unchanged after a divorce or separation. In the latter case, the parties may not think they need to specify in the divorce or separation agreement that the former spouse will continue to be the beneficiary of the QLAC upon the owner's death. For this reason, final regulations should also clarify that, even in the absence of a formal divorce or separation instrument that addresses the contract, a former spouse is treated as the spouse for purposes of the QLAC requirements as long as the former spouse remains contractually entitled to the benefits originally purchased under the contract following the divorce.

These clarifications would ensure that former spouses can be protected both in plans and IRAs. These changes also would be consistent with legislative proposals that are currently pending in Congress with strong bipartisan support.[145]

7. PROP. TREAS. REG. § 1.402(c)-2

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 1.402(c)-2, regarding eligible rollover distributions.

A. Eliminate the hypothetical RMD requirement.

Final regulations should eliminate the proposal to deny rollover eligibility for a "hypothetical RMD" amount in connection with certain rollovers by surviving spouses to their own plan or IRA. This hypothetical RMD proposal would apply to surviving spouse beneficiaries if (1) the spouse is subject to the 5-year rule or the 10-year rule that applies under section 401(a)(9)(B)(ii) where the employee dies before their required beginning date ("RBD"); (2) a distribution is made in or after the calendar year in which the surviving spouse attains age 72; and (3) the surviving spouse rolls over a portion of that distribution to the spouse's own plan or IRA.[146] In such cases, the proposal would not allow the spouse to roll over the distribution to the extent that it is a "hypothetical RMD" determined under the proposed regulations.[147]

We understand the purpose of this rule is to prevent spouses from obtaining "the best of both worlds" under the RMD regulations, *i.e.*, deferral of an annual RMD obligation under the rules that apply to deaths before the RBD, followed by a deferred commencement of RMDs to the spouse under the rules that apply once the spouse rolls the amount to their own plan or IRA. Despite this intent, the proposed rule should be eliminated for the following reasons.

---

[145] *See* section 202 of The Securing a Strong Retirement Act of 2022, H.R. 2954, 117th Cong., (2021) (passed by the House of Representatives on March 29, 2022, by a vote of 414-5); section 201 of The Retirement Security and Savings Act of 2021, S. 1770, 117th Cong., (2021) (sponsored by Senators Ben Cardin (D-MD) and Rob Portman (R-OH)).

[146] Prop. Treas. Reg. § 1.402(c)-2(j)(3)(iii)(A).

[147] The hypothetical RMD amount generally equals the excess (if any) of (1) the hypothetical RMDs that the spouse would have been required to receive had the "stretch" exception to section 401(a)(9)(B)(ii) applied to the spouse beginning as of the later of the calendar year in which they attain age 72 and the calendar year in which the employee would have attained age 72, over (2) the distributions made to the surviving spouse during those years. Prop. Treas. Reg. § 1.402(c)-2(j)(3)(iii)(B) and (C).

- *Not required by the SECURE Act* – Nothing in the SECURE Act requires the proposed rule to be adopted in regulations. In fact, the SECURE Act evidences an intent to *retain* the existing rules for surviving spouses. Congress intended to change the rules for *non-spouse* beneficiaries who are significantly younger than the deceased employee.

- *Not a new issue* – Surviving spouses have always had the ability to get the "best of both worlds" in the manner described above. The only difference is that now the deferral period in cases of death before the RBD can be as long as 10 years, rather than five years. This is a natural consequence of how Congress wrote the rules, and Congress has not changed the rules on this issue or authorized the Treasury Department or IRS to create a "hypothetical RMD" requirement.

- *Arbitrary calculation with no relation to actual RMD amounts* – The hypothetical RMD amount for any year is intended to equal the amount that would have been an RMD for that year if the section 401(a)(9)(B)(iii) "Stretch Exception" to the 10-year rule of section 401(a)(9)(B)(ii) applied to the surviving spouse.[148] However, the proposed regulations require the amount for each year prior to the rollover to be calculated using a *current* account balance, namely, the year-end account balance that is used to determine RMDs for the year of the rollover. This presents a mismatch that could overstate the hypothetical RMD amount, especially with regard to interest bearing accounts and investments. More importantly, there is no basis in the Code or regulations for retroactively applying the Stretch Exception to a beneficiary to whom it did not actually apply in the past.

- *Difficult to administer* – If we understand the proposed rule correctly, it would appear to require that the plan administrator know whether a spouse is rolling over the amount to an IRA or plan as the owner or to an IRA as a beneficiary. That is the not the kind of information that a plan administrator would be able to know or verify.

- *Just adds more complexity* – The RMD rules are already extremely complex, especially after the SECURE Act requirements are added. The hypothetical RMD rule just makes this complexity worse. Plan administrators will find the rule and the calculation difficult to explain. Individual taxpayers are bound to be very confused by the rule, especially spousal beneficiaries of IRAs, who may need to calculate the hypothetical RMD amounts themselves.

For these reasons, final regulations should eliminate the proposed rule regarding hypothetical RMDs.

B. Confirm whether or not mandatory 20% withholding applies to non-spouse beneficiaries and provide relief for prior years.

Final regulations should (1) confirm whether or not the 20% mandatory withholding requirement in section 3405(c) applies to a distribution from an eligible retirement plan to a non-

[148] Prop. Treas. Reg. § 1.402(c)-2(j)(3)(iii)(C).

spouse beneficiary, and (2) provide relief for prior years to the extent that a plan applied the withholding rules inconsistently with the final regulations.

Section 3405(c) imposes 20% mandatory withholding with respect to eligible rollover distributions that are not directly rolled over to another eligible retirement plan. For this purpose, Prop. Treas. Reg. § 1.402(c)-2(j)(2) retains the rule from the existing regulations that a distribution to a non-spouse beneficiary is not subject to mandatory 20% withholding because the beneficiary cannot roll the distribution over.[149] This makes intuitive sense – a distribution to a non-spouse beneficiary is not eligible for rollover, so how could it be an eligible rollover distribution for withholding purposes?

Despite the foregoing, there is considerable uncertainty on this point in light of changes that Congress made to section 402(c)(11)(A)(i) as part of the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA").[150] Section 402(c)(11)(A)(i), as originally enacted as part of the Pension Protection Act of 2006,[151] stated that a direct transfer by a non-spouse beneficiary to an inherited IRA is treated as an eligible rollover distribution "for purposes of this subsection," *i.e.*, for purposes of section 402(c).[152] In Notice 2007-7,[153] the IRS stated in Q&A-14 that a plan is not required to offer a direct rollover to a non-spouse beneficiary and stated in Q&A-15 that:

> … a direct rollover of a distribution by a nonspouse beneficiary is a rollover of an eligible rollover distribution only for purposes of § 402(c). Accordingly, the distribution is not subject to the direct rollover requirements of § 401(a)(31), the notice requirements of § 402(f), *or the mandatory withholding requirements of § 3405(c)*. If an amount distributed from a plan is received by a nonspouse beneficiary, the distribution is not eligible for rollover. (Emphasis added.)

In 2008, the WRERA struck the phrase "for purposes of this subsection" from section 402(c)(11)(A)(i). As a result, that section now states that a direct transfer by a non-spouse beneficiary to an inherited IRA is treated as an eligible rollover distribution, without limitation. The WRERA also added a new sentence to section 402(f)(2)(A), stating that the term eligible rollover distribution includes a distribution "which *would be* treated as an eligible rollover distribution by reason of subsection (c)(11)."[154] The Joint Committee on Taxation indicated that, following these changes, "*rollovers* by nonspouse beneficiaries are generally subject to the same rules as other eligible rollovers."[155] In Notice 2009-68,[156] the IRS clarified that the WRERA amendments to

[149] The existing regulation on this point is Treas. Reg. § 1.402(c)-2, Q&A-12(b).

[150] Pub. L. No. 110-458.

[151] Pub. L. No. 109-280 § 829(a)(1).

[152] *See also* Prop. Treas. Reg. § 1.402(c)-2(j)(2).

[153] 2007-1 C.B. 395.

[154] Pub. L. No. 110-458 § 108(f)(2)(A) and (B) (emphasis added).

[155] STAFF OF J. COMM. ON TAX'N, 110TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 110TH CONGRESS 553 (Comm. Print 2009) (emphasis added).

[156] 2009-39 I.R.B. 423.

section 402(f) mean that the eligible rollover distribution notice requirements in that section apply to distributions to a non-spouse beneficiary.

Although these developments could be interpreted as treating only *direct rollovers* by non-spouse beneficiaries as eligible rollover distributions, they also could be interpreted as treating actual distributions to non-spouse beneficiaries as eligible rollover distributions, including for purposes of the 20% mandatory withholding rules. There has been no guidance directly addressing this withholding issue. Rather, the guidance seems to be aimed at ensuring that plans provide non-spouse beneficiaries a direct rollover right and a 402(f) notice, which makes sense because of the adverse tax consequences that would ensue if the beneficiary does not elect a direct rollover. In addition, there would not seem to be the same tax policy justification for imposing 20% mandatory withholding on a distribution that a non-spouse beneficiary actually receives, at least to the extent that mandatory withholding is intended to encourage distributees to elect direct rollovers rather than indirect rollovers, since non-spouse beneficiaries cannot choose an indirect rollover to save for their own retirement in any event.

In light of the uncertainty outlined above, plan administrators and recordkeepers may have adopted different positions on whether or not 20% mandatory withholding applies to distributions to non-spouse beneficiaries. Final regulations should clarify this. Regardless of how final regulations resolve the issue, it is important that (a) the IRS clearly explain how the adopted position is consistent with the statutory provisions; (b) allow sufficient time for recordkeepers to make changes to their systems to accommodate the final regulations, and (c) provide relief for reasonable good faith positions taken by plan administrators and their service providers with respect to withholding on distributions to non-spouse beneficiaries prior to the effective date of the final regulations.

8. SECTION 403(b) PLANS

The Committee respectfully submits the following comments on the statements in the preamble to the proposed regulations that the Treasury Department and IRS are considering additional changes to apply the RMD rules for qualified plans to section 403(b) plans.

A. Do not apply the qualified plan RMD rules to section 403(b) contracts that are not maintained under a written plan.

No changes should be made that apply the RMD rules for qualified plans to 403(b) contracts that are not maintained under a written plan.

The proposed regulations, like the existing regulations, provide that section 403(b) contracts are treated as IRAs for purposes of applying the RMD requirements.[157] Consequently, just as IRA trustees, custodians, and issuers are not required to automatically make RMDs to IRA owners or their beneficiaries, section 403(b) plans are not required to automatically make RMDs to participants or their beneficiaries. Also, the trustee, custodian, or issuer of an IRA must notify the IRS if there is an RMD with respect to the IRA owner for the calendar year, and must either notify the IRA owner of the RMD amount or offer to calculate the RMD amount.[158] The IRS has not

---

[157] Treas. Reg. § 1.403(b)-6(e)(2); Prop. Treas. Reg. § 1.403(b)-6(e)(2).

[158] Prop. Treas. Reg. § 1.408-8(f); Notice 2007-27, 2002-18 I.R.B. 814.

extended these RMD notice requirements to section 403(b) contracts,[159] although a number of issuers of section 403(b) annuity contracts that also issue IRA annuity contracts provide a similar RMD notice to 403(b) contract owners, as a customer service.

The preamble to the proposed regulations requests comments on consideration being given by the Treasury Department and IRS to make additional changes to the RMD rules for section 403(b) plans so that they more closely follow the RMD rules for qualified plans, *e.g.*, by requiring each plan to make RMDs calculated with respect to that plan.[160] The preamble explains that the rules treating 403(b) plans like IRAs for RMD purposes were developed before the issuance in 2007 of the existing section 403(b) regulations, which treat section 403(b) plans less like IRAs and more like employer-sponsored qualified plans.[161] In this regard, the preamble notes that the existing section 403(b) regulations require employers to adopt a written plan document that describes employer responsibilities under the plan.[162] Specifically, the existing 403(b) regulations state that a section 403(b) contract must be maintained pursuant to a "written defined contribution plan" that satisfies the requirements of the regulations "in both form and operation."[163]

However, Rev. Proc. 2007-71[164] provides relief from this written plan requirement for the following types of section 403(b) contracts issued prior to the January 1, 2009, general effective date of the existing 403(b) regulations:

- *"Orphaned" contracts* – Section 8 of Rev. Proc. 2007-71 describes two categories of contracts issued prior to 2009 that are not held under an employer's section 403(b) plan, and thus are not subject to the written plan requirement. One category includes section 403(b) contracts issued after December 31, 2004, and before January 1, 2009, by an issuer that has not received contributions under a section 403(b) plan in a year after the contract was issued (*e.g.*, due to the issuer having been discontinued as an issuer under the plan or the issuer having become an issuer under the plan due to the contract having been issued after September 24, 2007, in exchange of section 403(b) contracts permitted under Rev. Rul. 90-24)[165] and has made a reasonable, good faith effort to include the contract as part of the employer's plan.[166] The second category includes section 403(b) contracts issued prior to January 1, 2009, for which the issuer ceased to receive contributions before that date (*e.g.*, due to the issuer having been discontinued as an issuer under the plan, the employer having ceased to exist, or the issuer having become an issuer under the plan due to the contract

[159] Notice 2007-27, 2002-18 I.R.B. at 815.

[160] 87 Fed. Reg. at 10520.

[161] *Id.*

[162] *Id.*

[163] Treas. Reg. § 1.403(b)-3(b)(3)(i).

[164] 2007-51 I.R.B. 1184.

[165] 1990-1 C.B. 97, *declared obsolete by* Rev. Rul. 2009-18, 2009-27 I.R.B. 1. Rev. Rul. 90-24 permitted tax-free direct transfers between section 403(b) contracts without regard to whether the contracts were held under an employer's section 403(b) plan. The treatment of transfers between section 403(b) contracts currently is governed by Treas. Reg. § 1.403(b)-10(b). Treas. Reg. § 1.403(b)-11(g) provides special relief from these rules for exchanges made under Rev. Rul. 90-24 on or before September 24, 2007.

[166] Rev. Proc. 2007-71, 2007-51 I.R.B. at 1186, § 8.01.

having been issued after September 24, 2007, in an exchange permitted under Rev. Rul. 90-24).[167] Pursuant to the relief provided in section 8 of Rev. Proc. 2007-71, these contracts do not fail to be treated as 403(b) contracts merely because they are not covered under the terms of an employer's section 403(b) written plan.

- *"Legacy" contracts* – Section 403(b) contracts that were issued prior to January 1, 2005, and were not issued in an exchange permitted under Rev. Rul. 90-24, also apparently are not subject to the written plan requirement. Rev. Proc. 2007-71 does not expressly provide this treatment of pre-2005 contracts. However, this interpretation is gleaned from section 8.01 of the revenue procedure, which provides relief from the written plan requirement for certain contracts issued after 2004.[168] Absent this interpretation, pre-2005 contracts would be subject to the written plan requirement and would be treated worse under the section 403(b) regulations than the post-2004 contracts. This interpretation has been widely adopted by section 403(b) providers.[169]

Such orphaned and legacy 403(b) contracts are issued directly to the participant, are not maintained under an employer's written plan, and not administered (or able to be administered) by an employer or plan administer as part of a plan. Rather, they are individually administered in accordance with the requirements of section 403(b), just as IRAs are individually administered in accordance with the applicable IRA requirements in section 408. Such contracts remain more like IRAs than employer-sponsored qualified plans. Accordingly, the RMD rules for qualified plans should not be applied to 403(b) contracts that are not maintained under a written plan.

9. PROP. TREAS. REG. § 1.408-8

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 1.408-8 and the related discussion in the preamble, regarding IRAs.

A. Do not impose a deadline by which a surviving spouse beneficiary must elect to treat an IRA as their own.

Final regulations should eliminate the proposed deadline by which the surviving spouse of an IRA owner may elect to treat the IRA as the spouse's own. If the proposed deadline is retained, final regulations at least should (1) codify the rollover option described in the preamble to the proposed regulations, and (2) clarify that the proposed deadline (a) does not apply in cases where the IRA owner died on or after their required beginning date ("RBD"), and (b) does not apply until the decedent would have attained age 72, if the decedent is younger than the surviving spouse.

Pursuant to section 408(d)(3)(C)(ii), if the beneficiary of an IRA is the deceased owner's surviving spouse, the IRA is not treated as an inherited IRA, with the result that the surviving spouse can treat the IRA as their own and roll over part or all of the IRA tax-free to their own IRA or eligible retirement plan. Consistently with this statutory rule, the proposed regulations retain the

[167] Rev. Proc. 2007-71, 2007-51 I.R.B. at 1186-87, § 8.02.

[168] Rev. Proc. 2007-71, 2007-51 I.R.B. at 1186, § 8.01.

[169] This interpretation was confirmed in public comments made by a representative of Employee Plans, Tax Exempt and Government Entities Division of the IRS on a number of occasions after the final 403(b) regulations were issued in 2007.

provision in the existing regulations permitting a surviving spouse of a deceased IRA owner to elect to treat the decedent's IRA as their own if the surviving spouse is the "sole beneficiary of the IRA" and has "an unlimited right to withdraw amounts from the IRA."[170]

Unlike the statute and the existing regulations, however, the proposed regulations prohibit a surviving spouse from making this election after the later of (1) the calendar year in which the surviving spouse reaches age 72, and (2) the calendar year following the calendar year of the IRA owner's death (the "Proposed Deadline").[171] Although not stated in the proposed regulations, the preamble states that a surviving spouse who misses the Proposed Deadline still would be permitted to roll over distributions from the decedent's IRA to their own IRA, subject to the special rule that in cases where the owner died before their required beginning date ("RBD") the amount of a "hypothetical" RMD cannot be rolled over. The hypothetical RMD is intended to approximate the RMDs that would have been paid if the spouse had timely commenced "stretch" distributions as a beneficiary under the decedent's IRA pursuant to section 401(a)(9)(B)(iii) or (iv).[172]

For the following reasons, final regulations should not impose a deadline for an eligible surviving spouse beneficiary to elect to treat an IRA as their own:

- *Requiring liquidation is problematic, especially for annuity contracts* – A rule requiring that a surviving spouse who wishes to elect after the Proposed Deadline to continue a decedent's IRA as their own must instead liquidate the decedent's IRA and roll the proceeds over to a new IRA raises form over substance. This rollover requirement is particularly troublesome for IRA annuity contracts, which may include features and benefits (such as a guaranteed interest crediting rate, guaranteed annuity rates, and a guaranteed living withdrawal benefit) that would be lost upon liquidation of the contract and could not be transferred to the surviving spouse's new IRA. The surviving spouse should not be required to forfeit valuable rights as a condition to continuing their interest in their own IRA.

- *No basis in the statute* – The provisions of section 408(d)(3)(C), which are the basis for the spousal continuation rule for IRAs, do not impose a deadline by which a surviving spouse must elect to treat a deceased spouse's IRA as their own.

- *Hypothetical RMD requirement is not a valid justification* – The statements in the preamble regarding a spouse using a rollover to their own IRA as an end-around the Proposed Deadline appear to be related to the requirement that in some cases the spouse must take a distribution of a hypothetical RMD in connection with the rollover. For the reasons discussed above on page 56, final regulations should eliminate this hypothetical RMD rule, which in turn would seem to obviate the need for the Proposed Deadline. If the hypothetical RMD rule is not eliminated, however, it still is not a valid justification for the Proposed Deadline or for requiring the spouse to liquidate the decedent's IRA.

[170] Prop. Treas. Reg. § 1.408-8(c)(1)(iii); Treas. Reg. § 1.408-8, Q&A-5.

[171] Prop. Treas. Reg. § 1.408-8(c)(1)(ii).

[172] 87 Fed. Reg. at 10519.

- *Hypothetical RMD rule does not apply on/after the RBD* – The proposed hypothetical RMD rule would apply only if the IRA owner died before their RBD.[173] If the owner died on or after their RBD, there would no hypothetical RMD even if the spouse were age 72 or older when they rolled to their own IRA. In such case, the hypothetical RMD requirement is no justification for depriving the spouse of their right to simply elect to treat the IRA as their own. In addition, if the owner dies on or after the RBD:
  - The proposed regulations provide that the at-least-as-rapidly rule of section 401(a)(9)(B)(i) ("ALAR Rule") will apply, so the surviving spouse would need to take RMDs starting in the year after the owner's death. Such RMDs would be based on the longer of the spouse's single life expectancy or the decedent's single life expectancy.
  - If the spouse is over age 72 and is permitted to treat the IRA as their own, RMDs would be based on the spouse's life expectancy under the Uniform Lifetime Table (ULT), rather than the "longer of" the two single life expectancies used in the ALAR Rule. This would almost certainly result in a larger denominator in the RMD calculation fraction, meaning that RMDs before the spousal election would be larger than RMDs after the election. In these circumstances, there is simply no justification for imposing a deadline on the election.
- *Hypothetical RMD rule does not apply to an older spouse until the decedent would have attained age 72*. The hypothetical RMD amount is calculated starting with the "first applicable year," which the proposed regulations define as the later of the calendar year in which (1) the surviving spouse attains age 72, or (2) the decedent would have attained age 72.[174] Thus, if the decedent is younger than the surviving spouse, there is no hypothetical RMD until the decedent would have attained age 72, even if the spouse is age 72 or older. In this situation, prohibiting the spouse from electing to treat the decedent's IRA as their own after the spouse attains age 72 and before the decedent would have attained that age would seem to serve no purpose at all, because the election would occur before "stretch" distributions would have been required to commence to the spouse as a beneficiary of the decedent's IRA.
- *Hypothetical RMD rule does not necessitate a liquidation* – Even in cases where the hypothetical RMD requirement would apply, there is no need to force a spouse to liquidate their IRA merely so they can treat it as their own. Instead, the hypothetical RMD requirement could apply regardless of whether the surviving spouse liquidates the IRA and rolls the proceeds to their own IRA. Under this preferred approach, a spouse could elect to treat the decedent's IRA as their own at any time, subject to the condition that if the election occurs after the date referenced in the Proposed Deadline, the spouse may need to take an additional RMD that is based on the

---

[173] *See* Prop. Treas. Reg. § 1.402(c)-2(j)(3)(iii)(A).

[174] Prop. Treas. Reg. § 1.402(c)-2(j)(3)(iii)(D). The proposed regulations use the term "first applicable year" and "first applicable calendar year," but they appear to mean the same thing.

hypothetical RMD calculation. Thus, there effectively would be no "deadline," but rather an additional RMD requirement.

Based on the foregoing, final regulations should eliminate the Proposed Deadline. If the deadline is retained, final regulations at least should (1) codify the rollover option described in the preamble to the proposed regulations, and (2) clarify that the Proposed Deadline (a) does not apply in cases where the IRA owner died on or after their RBD, and (b) does not apply until the decedent would have attained age 72, if the decedent is younger than the surviving spouse.

B. Simplify the rules by which a surviving spouse who indirectly inherits a decedent's IRA through a trust or estate may treat that IRA as their own.

Final regulations should simplify the rules by which a surviving spouse who indirectly inherits a decedent's IRA through a trust or estate may treat that IRA as their own. The proposed regulations retain the following rules from the existing regulations regarding when a surviving spouse of a deceased IRA owner is eligible to treat the decedent's IRA as the spouse's own IRA for federal income tax purposes:

- The surviving spouse must be the sole beneficiary of the decedent's IRA and have an unlimited right to withdraw amounts from the IRA;[175]

- If a trust is named as beneficiary of the IRA, the foregoing requirement is not satisfied even if the surviving spouse is the sole beneficiary of the trust and even though the trust qualifies as a "see-through" trust under the RMD regulations;[176] and

- If a decedent's estate is designated as a beneficiary under the decedent's IRA, the decedent is treated as not having a designated beneficiary for RMD purposes.[177]

On their face, these rules seem to indicate that if a decedent's IRA passes through a trust or estate, the surviving spouse cannot treat the IRA as their own even if the spouse actually controls the IRA through the trust or estate and is therefore the "real" beneficiary of the IRA. Nonetheless, the IRS has consistently allowed surviving spouses in such instances to follow a circuitous path that ultimately lands them in the same place as if they had simply elected to treat the IRA as their own. In that regard:

- The preamble to the existing regulations states that a surviving spouse who receives a distribution from an IRA may roll over part or all of that distribution to their own IRA, whether or not the surviving spouse is the sole beneficiary of the IRA owner.[178]

- For at least 30 years, the IRS has routinely issued private letter rulings that reach this same conclusion in situations where the surviving spouse inherits an IRA through a trust or estate, including where a distribution is made to the trust or estate first, then to the spouse, then

[175] Prop. Treas. Reg. § 1.408-8(c)(1)(iii); Treas. Reg. § 1.408-8, Q&A-5(a).

[176] *Id.*

[177] Prop. Treas. Reg. § 1.401(a)(9)-4(b); Treas. Reg. § 1.401(a)(9)-4, Q&A-3.

[178] *See* T.D. 8987, 2002-19 I.R.B. 852, 858.

rolled over to the spouse's own IRA.[179] The rulings generally involve situations where the surviving spouse has the power to control the trust or estate, such that no third party can prevent the spouse from directing the disposition of the decedent's IRA. In such cases, the IRS has concluded that the surviving spouse is effectively the individual for whose benefit the decedent's IRA is maintained, *i.e.*, the spouse is the "real" beneficiary.

- The IRS rulings also indicate that a spouse who inherits an IRA through a trust or estate in the foregoing circumstances can *directly* transfer amounts from the decedent's IRA to the spouse's own IRA, rather than having to actually receive the IRA proceeds from the decedent's IRA (or from the trust or estate) in order to complete a rollover.[180]

Based on the foregoing, it seems clear that a surviving spouse who inherits an IRA through a trust or estate that the spouse controls can treat the IRA as their own, but only if they liquidate the IRA and have the proceeds deposited into a new IRA. This begs the question of why a liquidation is required if, in the end, the spouse is treated as the owner of the IRA to the same extent as if they had kept the original IRA intact and been permitted to treat it as their own. The liquidation serves no real purpose and, as discussed in A above, can result in the loss of valuable benefits in the case of an individual retirement annuity. The process could be greatly streamlined by allowing the decedent's IRA to be re-titled in the surviving spouse's name.

Moreover, the fact that taxpayers so frequently feel compelled to request private letter rulings on these issues, and the fact that the IRS routinely grants them, are strong evidence that better guidance is needed. To that end, final regulations should permit surviving spouses to elect to treat a decedent's IRA as their own if the spouse inherits the IRA through a trust or estate that the spouse controls. If this approach is not adopted, final regulations at least should codify the conclusions reflected in the plethora of private letter rulings on these issues, so that taxpayers and the IRS will no longer needlessly expend their time and resources on such rulings.

C. Treat deemed distributions from an IRA under section 408(e) and (m) as RMDs.

Final regulations should not exclude amounts treated as distributed under sections 408(e) or (m), or amounts treated as includible in gross income thereunder, in determining whether the RMD for a year with respect to the IRA is satisfied.

The proposed regulations provide that all amounts distributed from an IRA are taken into account in determining whether section 401(a)(9) is satisfied, with certain exceptions.[181] The enumerated exceptions include (1) amounts that are "treated as distributed" pursuant to section

[179] *See*, *e.g.*, PLR 202210016 (Dec. 13, 2021); PLR 202136004 (Sept. 10, 2021); PLR 202040003 (Oct. 2, 2020); PLR 201944003 (Nov. 1, 2019); PLR 201632015 (Aug. 5, 2016) PLR 200025062 (Mar. 28, 2000); PLR 200008048 (Dec. 3, 1999), modifying PLR 199918065 (Feb. 10, 1999); PLR 9751042 (Sep. 24, 1997); PLR 9427035 (Apr. 29, 1994); PLR 9416039 (Jan. 26, 1994). *See also* section 652(b) (distributions to beneficiary of a simple trust have the same tax character in hands of the beneficiary as in the hands of the trust); section 662(b) (same for complex trusts and estates).

[180] *See*, *e.g.*, PLR 201437029 (June 5, 2014); PLR 201445031 (Aug. 11, 2014); PLR 200011062 (Dec. 20, 1999).

[181] Prop. Treas. Reg. § 1.408-8(g)(1).

408(e), and (2) amounts that are "deemed to be distributed" with respect to collectibles pursuant to section 408(m).[182]

Sections 408(e)(2) and (4) provide that if an individual engages in a prohibited transaction with respect to their individual retirement account under section 408(a), or uses any portion of the account as security for a loan, the account ceases to qualify as an IRA and the fair market value ("FMV") of the account is treated as distributed and is included in the owner's gross income. The proposed regulations would prohibit that deemed distribution from counting towards the RMD with respect to the IRA account for the year of the deemed distribution. Thus, unless the individual has another IRA from which to withdraw the RMD with respect to the disqualified account, the owner would be subject to the 50% excise tax for an RMD failure with respect to the disqualified account even though they were also taxed on the full FMV of that account.

If the individual happens to have another IRA from which they could take a withdrawal to satisfy their RMD with respect to the disqualified IRA account, the owner could avoid the 50% excise tax but still would be taxed on (1) the withdrawal from the "good" account to satisfy the RMD for "bad" account, plus (2) the full FMV of the "bad" account. It appears that a similar problem would arise with respect to an individual retirement annuity under section 408(b) if any amount is borrowed under or by use of the contract, although this is unclear because section 408(e)(3) does not expressly state that the amount included in gross income in such event is treated as a distribution.

A similar problem also would arise under section 408(m)(1), which states that the acquisition by an individual retirement account (or by an individually-directed account under a section 401(a) plan) of any collectible is "treated … as a distribution" from such account in an amount equal to the cost of the collectible to the account.

Accordingly, amounts that are treated under sections 408(e) or (m) as distributed from an IRA for a taxable year, or includible in the IRA owner's gross income for a taxable year, should count towards any RMD for the year with respect to the IRA. This should be the case at least in circumstances where the account or annuity ceases to be an IRA under those sections. It also would be consistent with the general rule in the regulations that the RMD amount will never exceed the entire account balance on the date of the distribution. Hence, final regulations should not exclude these amounts from determining whether the RMD for the year with respect to the IRA is satisfied.[183]

10. PROP. TREAS. REG. § 54.4974-1

The Committee respectfully submits the following comments on Prop. Treas. Reg. § 54.4974-1, regarding the excise tax on accumulations in qualified retirement plans.

[182] Prop. Treas. Reg. § 1.408-8(g)(2)(iv) and (v).

[183] Prop. Treas. Reg. § 1.401(a)(9)-5(a)(1).

A. <u>Extend the deadline for the RMD that is due in the year of death, rather than providing an automatic waiver of the excise tax for such year.</u>

Final regulations should provide that if an individual is required to take an RMD with respect to a calendar year but dies in that year before taking the distribution, the deadline for the beneficiary to take the decedent's final RMD is extended to the end of the year following the year of the decedent's death. This extension would apply in lieu of the automatic waiver of the 50% excise tax under the proposed regulations. In any event, the relief – whether an automatic waiver or extended deadline – should apply starting with RMDs due in the 2021 calendar year.

In that regard, the proposed regulations include a new provision that automatically waives the 50% excise tax for a failure to take a decedent's final RMD by the end of the year they die, provided that the beneficiary takes that RMD by their own tax filing deadline (including extensions) for year of the decedent's death.[184] The Committee appreciates the inclusion of this automatic waiver provision in the proposed regulations. The provision recognizes that it can be difficult to satisfy the decedent's final RMD obligation by year-end, especially if the decedent died late in the year or, as often occurs, the plan administrator receives notice of death late. Although automatically waiving the excise tax for a failure to take this final RMD by year-end is helpful, it can be difficult for these same reasons to satisfy the decedent's final RMD by the tax filing deadline for the year of death. A better solution would be to simply extend the deadline for taking that RMD until the end of the year after the year of death.

Providing such an extension would align the dates by which the beneficiary must take the decedent's final RMD and the beneficiary's first RMD in many cases, *i.e.*, where the employee died on or after the RBD or where an eligible designated beneficiary ("EDB") is "stretching" benefits they inherited from an employee who died before the RBD. An extension from the beneficiary's tax filing deadline until the end of that same year also would not affect the year in which the decedent's final RMD is taxable. Such an extension also would eliminate any question whether the beneficiary should file Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, to claim a waiver of the excise tax, since taking the distribution by the extended deadline would result in compliance with the RMD rules rather than a violation for which a waiver is needed. Regardless of whether or not final regulations adopt this approach, the relief should apply starting with RMDs due in the 2021 calendar year. In other words, either the automatic waiver or the extended deadline – whichever is adopted – should apply starting with 2021 RMDs.

* * * * *

[184] Prop. Treas. Reg. § 54.4974-1(g)(3).

The Committee appreciates this opportunity to comment on the proposed regulations. Should any questions arise regarding the Committee's comments or the attached outline of topics that the Committee plans to discuss at the June 15th public hearing, please contact either of the undersigned.

Counsel to the Committee of Annuity Insurers

Bryan W. Keene
Partner, Davis & Harman LLP
bwkeene@davis-harman.com
202-662-2273

Mark E. Griffin
Partner, Davis & Harman LLP
megriffin@davis-harman.com
202-662-2268

Attachments: List of Committee member companies
Outline of topics for public hearing

The COMMITTEE of ANNUITY INSURERS

AIG Life & Retirement, Los Angeles, CA
Allianz Life Insurance Company, Minneapolis, MN
Ameriprise Financial, Minneapolis, MN
Athene USA, Des Moines, IA
Brighthouse Financial, Inc., Charlotte, NC
CUNA Mutual, Madison, WI
Equitable, New York, NY
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Global Atlantic Financial Group, Southborough, MA
Guardian Insurance & Annuity Co., Inc., New York, NY
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Lincoln Financial Group, Fort Wayne, IN
Massachusetts Mutual Life Insurance Company, Springfield, MA
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
Pacific Life Insurance Company, Newport Beach, CA
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
Sammons Financial Group, Chicago, IL
Security Benefit Life Insurance Company, Topeka, KS
Symetra Financial, Bellevue, WA
Talcott Resolution, Windsor, CT
Thrivent, Minneapolis, MN
TIAA, New York, NY
USAA Life Insurance Company, San Antonio, TX

The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal policies with respect to annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States.

Outline of Topics for Public Hearing

1. Extend (a) the deadline for amending plan and IRA documents, and (b) the effective date of final regulations.

2. Reinterpret the 10-year rule or clarify how it applies, especially to annuity payments.

3. Eliminate barriers to life annuities by further reforming the rules for increasing annuity payments.

4. Permit plan administrators and IRA providers to rely on certifications regarding trust beneficiaries and disabled and chronically ill beneficiaries.

5. Eliminate the hypothetical RMD requirement and the IRA spousal election deadline.

6. Clarify that plan and IRA documents "may," rather than "must," specify the default RMD rule in the absence of an individual's election of an RMD method for death before the required beginning date.