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Internal Revenue Service
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Subject: Notice of Proposed Rulemaking - Required Minimum Distributions (REG–105954–20)

On behalf of the American Council of Life Insurers (ACLI), we offer these comments in response to the issuance by the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") of a Notice of Proposed Rulemaking regarding required minimum distributions ("RMDs") from qualified plans, IRAs, and certain deferred compensation plans (the "Proposal").

ACLI commends the efforts of Treasury and IRS in issuing the Proposal. Updates to the current regulations are needed to address the changes Congress made to the law in the Setting Every Community Up for Retirement Enhancement Act of 2019, P.L. 116–94 (the "SECURE Act"). This Proposal affects a broad swath of taxpayers, many of whom seek or currently receive guaranteed lifetime income payments from annuities. Annuities offered by life insurers are contractual agreements enforceable under state law. Only state licensed life insurers may offer annuity products to savers and retirees. In addition to annuities offered in the retail marketplace, ACLI members provide annuity products and administrative support to employer sponsored retirement plans.

Our comments seek to inform the development of a final regulation that is supportive of existing annuitized contracts that have been issued to taxpayers who made reasonable, good faith efforts to conform their annuity purchase with the changes made by the SECURE Act. We also seek to highlight recommendations for improvements that would further facilitate retirees' use of annuities and the benefit features available to help them address their financial needs and objectives in retirement. Finally, our comments seek to simplify the rules for taxpayers, many of whom are retired, as well as plan administrators and service providers to help ease compliance, foster certainty and mitigate costs.

I. Extend and Delay the Effective Date

ACLI underscores the recommendations made in the March 25, 2022, joint trades letter filed with the Treasury Department and IRS requesting prompt guidance that:

- extends the deadline for amending qualified plan and IRA documents to reflect the SECURE Act's changes to the RMD rules by at least one full plan year (calendar year for IRAs) from the later of (a) the effective date of final RMD regulations or (b) the date the IRS publishes updated Listings of Required Modifications (LRMs) for all impacted plans; and
- delays the effective date of the RMD regulations until at least one full calendar year after the issuance of the final regulations and provides relief for all reasonable, good faith interpretations in the interim.

Of note, a total of 12 separate trade groups representing employers, trusts, retirement plan recordkeepers and service providers signed the joint trades letter, thus reflecting strong consensus among the retirement plan community on the need for the extended dates.

<u>Extension for Amending Qualified Plan and IRA Documents</u>

Absent relief from the Secretary of the Treasury, qualified plans and IRAs must amend their governing documents to comply with legislative changes under the SECURE Act by the end of 2022, which is just months away. The typical challenges associated with updates to these governing documents - including the creation and successful completion of associated complex work streams and obtaining approvals from state regulators with respect to modified annuity contracts underlying these plans - are compounded by the lack of LRMs as well as insufficient time to properly review, analyze and implement the yet-to-be-issued final RMD regulations.

Plans and IRA providers often rely heavily on IRS model language within the LRMs to ensure contemplated amendments conform to applicable federal tax rules. Additionally, the IRS's IRA prototype approval program is another valuable, yet temporarily unavailable, compliance tool for IRA providers. Furthermore, many IRA providers use the IRS model custodial agreements and endorsements such as those found within the Form 5305 series. These model forms permit providers of Traditional, Roth, and SEP-IRAs to adopt amendments without the need for review by outside counsel thus leveling the playing field for IRA providers of all sizes. However, any modification to the forms which includes those required by the SECURE Act and this Proposal, removes them from the safe harbor and puts those firms at risk.

The model forms have yet to be updated by the IRS and even if they were to be updated ahead of the December 31, 2022, deadline there would not be enough time for IRS providers to send the updated forms to clients. In the event plan documents must be updated before LRMs are released, uniformity in language (and potentially interpretation) will needlessly vary. Additionally, plans and IRAs may need to make multiple amendments to comply with SECURE Act changes, which in turn would likely increase participant and IRA owner confusion. To avoid these negative results, we urge Treasury and IRS to issue guidance that extends the deadline for amending qualified plan and IRA documents to reflect the SECURE Act's changes to the RMD rules by at least one full plan year (calendar year for IRAs) from the later of:

(a) the effective date of final RMD regulations; or

(b) the date the IRS publishes updated LRMs for all impacted plans.

Delay Effective Date of RMD Regulations

The SECURE Act ushered in significant changes to the RMD rules. The Proposal marks the only notable guidance on the new RMD rules since the passage of this Act in December of 2019. At present, sponsors and administrators of qualified plans and IRAs are carefully analyzing this guidance to better ensure future compliance. Given the degree of changes, administrative systems, processes and procedures will require updates, some of which may be extensive. Sponsors and administrators will need a reasonable period of time post-release of the final RMD regulations to properly identify and operationalize requisite modifications. However, as currently drafted, the Proposal would apply to RMDs and rollovers as of January 1, 2022. Accordingly, these rules apply retroactively to distributions that occurred in good faith and without abuse *before* the release of the Proposal.

To avoid this inequitable result and provide sufficient time to analyze and implement appropriate processes around the rules in the final RMD regulations, we respectfully urge Treasury and IRS to issue guidance that delays the effective date of the final RMD regulations until at least one full calendar year after the issuance of those regulations and, during this period, provides bona fide relief for all reasonable, good faith interpretations. In addition, Treasury and IRS should extend any deadlines to act that were introduced by the Proposal so that beneficiaries of individuals who died in 2020 and 2021 can take advantage of any such elections. It would be arbitrary and capricious to enforce a deadline that expired prior to the adoption of new rules. For instance, for those who are chronically ill or disabled, the deadline to provide documentation of their circumstances must be extended to allow time to provide the relevant documents. As also requested in the March 15, 2022 joint trades letter, the transitional relief should be clear that compliance with the Proposal is not the sole means of satisfying the reasonable, good faith interpretation.

Secure Act Application to Annuitized Contracts

Under the prior regulations, when an annuity contract is annuitized, it must meet all of the requirements of Treasury Regulation 1.401(a)(9)-6. Insurance companies structure their legally enforceable annuity contracts to comply with these regulations. Once annuitized, there is no ongoing obligation by either the contract owner or the insurance company to determine if the RMD rules have been met. The obligation is completely met when the contract is annuitized. In fact, in many cases the rules for annuitization result in larger payments than would have been otherwise required had the IRA owner decided not to annuitize. However, the Department does not permit the taxpayer to offset these higher payments by reducing RMDs in other non-annuitized IRAs owned by the taxpayer. This is consistent with the long-standing position that once the contract is annuitized the RMD obligation has been met.

The Proposal would change the rules so that payments from many annuitized contracts that fully met the requirements of Treasury Regulation 1.401(a)(9)-6 when annuitized by the beneficiary of an IRA or retirement plan will no longer satisfy the rules upon the death of the beneficiary. Section 1.401(a)(9)-1(b)(iv)(B) of the Proposal would limit the grandfathering of contracts when the employee made an irrevocable election before December 20, 2019, as to the method and amount of annuity payments to the employee and any designated beneficiary. Example 6 makes clear that if the beneficiary of a plan or IRA made an irrevocable election prior to December 20, 2019 to annuitize a contract in accordance with the tax code in effect at that time, such a good-faith election will not be honored if the annuity includes a period certain that stretches the payments beyond the 10-year anniversary of the death of the beneficiary as might be the case had the annuity include a period certain term of payments greater than 10 years. This is an overly technical reading of the term "employee" and is not consistent with the spirit of the grandfathering provision. We do not believe that the intent of Congress when passing the SECURE Act was to limit such elections to employees.

ACLI does not see any policy reason why lawmakers would have intended to exclude beneficiaries from the grandfathering rule. It is common for statutes to reference an "employee" or "plan participant" without a specific reference to a beneficiary. The intent of the lawmakers was to include a beneficiary of an employee or plan participant and to treat them as "stepping into the shoes" of the employee or plan participant. As an example of the lawmakers' intent for a broader meaning, the text of IRC section 401(a)(9) applies to an "employee," yet it was intended to apply to plan participants and IRA owners who are typically no longer "employed" and, thus, no longer "employees."

The Proposal seeks to compel insurers and annuity owners to revise the terms of legally enforceable annuitized contracts (or contracts under which an irrevocable election to annuitize has been made), contracts that met all of the applicable requirements of the Code when issued. It is not appropriate to require that insurers retroactively create a new right to commutation that was not contemplated when the contracts were issued. The Proposal's approach is novel and a marked departure from how the -6 regulations have always been applied

The -6 regulations have historically disfavored commutation provisions. Not all annuity contracts provide a right for a beneficiary or successor beneficiary to commute the contract in the event of the death of the beneficiary. While we appreciate that the Proposal would permit such commutations, we do not believe such relief should be required and unilaterally applied by the government to previously issued legally enforceable contracts.

At a minimum, absent a provision in their annuity contracts that permits commutation, Treasury and IRS should provide excise tax relief to beneficiaries for benefits under a contract in effect on December 19, 2019, that were annuitized or in which an irrevocable election was been made to annuitize.

Finally, we ask that Treasury and IRS confirm that a former spouse that is to be treated as the spouse under the Proposal on account of a qualified domestic relations order is an eligible designated beneficiary for purposes of the Proposal.

II. Scope and Application of 10-year Rule

We urge Treasury and IRS to reconsider the Proposal's requirement that designated beneficiaries subject to the 10-year rule must continue to take minimum distributions at least as rapidly as they were being made prior to the employee's death. Such requirement is addressed in the example in the preamble in section I.E.3.C.(4) which states:

> "For example, if 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. In the tenth year following the calendar year of the employee's death, a full distribution of the employee's remaining interest would be required."

Section 401 of the SECURE Act added the new 10-year rule in Section 401(a)(9)(H) of the Code:

> "(H) Special rules for certain defined contribution plans. –In the case of a defined contribution plan, if an employee dies before the distribution of the employee's entire interest –
>
> (i) In general—Except in the case of a beneficiary who is not a designated beneficiary subparagraph (B)(ii) –
>
> (I) shall be applied be substituting "10 years" for "5 years," and
>
> (II) shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (A)."

From the plain meaning of the text, it is clear that Congress intended the 10-year rule to operate similarly to the 5-year rule except that it would be applied regardless of when the employee died. Under the 5-year rule in Section 401(a)(9)(B)(ii), the only requirement is that the entire interest of the employee is distributed within 5 years after the employee's death. The law does not require distributions to be made during this period. Had Congress sought to apply the law as proposed by Treasury and IRS, this would have been clearly described in the description prepared by the Joint Committee on Taxation for H.R. 1994 (*see JCX-11-19*). However, that report describes merely a change from what was a 5-year rule to what is now a 10-year rule under the law without an indication of support for what is now proposed and described in section I.E.3.C.(4).

If Congress had intended distributions to be required during the 10-year period following the employee's death after their required beginning date, it could have amended the flush language of Section 401(a)(9)(B)(i) to state: "the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of death, *and the entire interest must be distributed within 10 years after such date*." Instead, Congress was deliberate and only referenced Section 401(a)(9)(B)(ii), which does not require current distributions, and clarified that it could be applied regardless of when the employee died.

By imposing the 10-year rule as a cap on post-death distributions for designated beneficiaries, rather than allow for a limited 10-year deferral, as we believe was intended, the Proposal encourages employees to not name a designated beneficiary. Beneficiaries who are not designated beneficiaries (e.g., estates or certain trusts) are not subject to the 10-year rule and may continue to receive distributions over the deceased employee's remaining life expectancy. Thus, an employee with a life expectancy of greater than 10 years may be inclined to not name a designated beneficiary. Again, we do not believe it was Congress' intent to encourage such behavior.

We would also point out that the practical implication of applying the at-least-as-rapidly rule here is to make an already complicated set of rules even more complex. There is a strong practical benefit to simplification and the 10-year rule, when applied like the 5-year rule, is very simple to apply, understand, and provides uniformity. We also suspect that most beneficiaries will take payments periodically during the 10-year period to spread out the taxable income and lower their overall tax burden. In other words, we doubt Treasury would be giving up any significant revenue by applying the 10-year period the way Congress intended.

In the two years since the SECURE Act was enacted, there has been little guidance on the application of the 10-year rule; and what information is out there would lead a beneficiary to believe a distribution was not required. On that point, the current version of IRS Publication 590-B (Distributions from Individual Retirement Arrangements (IRAs)), which was published on February 28, 2022, contains an example of the 10-year rule where the IRS states, "[t]he beneficiary is allowed, *but not required*, to take distributions prior to that date." (emphasis added). Even after the Proposal was published, the IRS' own publication interpreted the 10-year rule as not requiring distributions to be made until end of the 10-year period, so a designated beneficiary should have a good faith reasonable basis for assuming the same. Given the lack of guidance, and the permissive example in IRS Publication 590-B, it is important to expressly clarify that designated beneficiaries who interpreted the 10-year rule as not requiring a distribution in 2021 or early in 2022 had a good faith reasonable basis for doing so and the failure to take such a distribution will not result in any penalty.

<u>Default Rules</u>

As detailed below, the final regulation should not require that a plan specify a default method of distribution under paragraph (b)(4)(iii)(A) and (c)(5(iii)(A) of Prop. Treas. Reg. §1.401(a)(9)-3. Instead, the final regulation should provide for a default method that applies in a manner that is similar to the current structure that exists under the regulations.

Defined Contribution Plans - The default rule for defined contribution plans should be similar to the existing regulations for accountholder deaths before the required beginning date under Prop. Treas. Reg §1.401(a)(9)-3(c)(5)(iii). The Proposal provides that a defined contribution plan may include a provision permitting an eligible designated beneficiary to elect whether the 10-year rule or the life expectancy rule will apply.[1] Unlike the existing regulations, the Proposal would require a plan to specify a default method of distribution when such provision is included in the plan. Specifically, the Proposal requires that a plan "must" specify a default method of distribution that applies if an election is not made.[2] Under the existing regulation, a plan that permits a similar election between the 5-year rule and the life expectancy rule "may" specify a default, and if no default is specified in the plan, then the default rule in the regulation applies.[3] In such case, the

[1] Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii).
[2] Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii)(A).
[3] Treas. Reg. § 1.401(a)(9)-3, Q&A-4(c).

default under the existing regulation simply requires that distributions must be made in accordance with the method which applies in the absence of an optional plan provision.[4]

There are instances where plans have already been updated, in good faith, to address the requirements of the SECURE Act. Such plans may not have specified a default distribution method that applies when a beneficiary does not make an election between the 10-year rule or the life expectancy rule under an optional plan provision. It is reasonable for plans to have expected that the Proposal would follow the approach used in the existing regulations which provide for a default when such optional election is not made by a designated beneficiary. A change to the Proposal to provide a similar default as provided under the existing regulations would avoid costly plan changes which do not serve any clear regulatory purpose. Specifically, we request that the Proposal be modified to substitute the word "may" where the proposed regulation says "must" in the first sentence of paragraph (A) of Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii)(A). We also request that additional language be added in this section of the proposed regulation to provide that if neither the employee nor the designated beneficiary makes the election, and the plan does not specify the method of distribution that applies in the absence of such election, then distributions must be made in accordance with Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(i). This approach would result in the same default method to apply in the absence of an election that would apply when a plan does not provide for an optional provision described in § 1.401(a)(9)-3(c)(5)(iii). This consistent approach complies with applicable distribution methods under the Proposal and avoids costly plan changes which do not serve any clear regulatory purposes.

Defined Benefit Plans - The default rule for defined benefit plans should be similar to the existing regulations for deaths before the required beginning date under Prop. Treas. Reg §1.401(a)(9)-3(b)(4)(iii). Specifically, we request that the Proposal be modified to substitute the word "may" where the proposed regulation says "must" in the first sentence of paragraph (A) of Prop. Treas. Reg § 1.401(a)(9)-3(b)(4)(iii)(A). We also request that additional language be added in this section of the proposed regulation to provide that if neither the employee nor the designated beneficiary makes the election, and the plan does not specify the method of distribution that applies in the absence of such election, then distributions must be made in accordance with Prop. Treas. Reg. § 1.401(a)(9)-3(b)(4)(i).

The above changes would provide needed relief for plans which have already updated plan documents to address the requirements of the SECURE Act based upon the reasonable belief that the Proposal would provide a default method of distribution that applies when an election described under Prop. Treas. Reg § 1.401(a)(9)-3(b)(4)(iii) is not made.

III. Older Eligible Designated Beneficiaries

Under the existing regulations, when an IRA owner dies on or after the required beginning date, a designated beneficiary can take distributions based on the greater of the beneficiary's life expectancy or the IRA owner's life expectancy (calculated as if the IRA owner is not dead). These rules were determined to be consistent with the "at-least-as-rapidly" rule that applied both when the existing regulations were issued and continue to apply today and remain unchanged by the SECURE Act.[5] Under the proposal, Treasury and IRS have introduced a new wrinkle in its

[4] Id.

[5] Except that as noted in section 3 of this letter, Congress specifically exempted 10-year rule payments from the "at-least-as-rapidly" rule altogether.

interpretation of the at-least-as-rapidly rule that requires all payments to end when the life expectancy of the eligible designated beneficiary runs out. This means that older eligible designated beneficiaries are able to take smaller RMD payments based on the life expectancy of the IRA owner but must take a complete distribution when the eligible designated beneficiary's life expectancy would be less than 1. Such a requirement has no basis in the law.

Payments made over the remaining life expectancy of the IRA owner are *at least as rapidly* as the payments made prior to the IRA owner's death. The Proposal requires payments to made more rapidly when the IRA owner names an eligible designated beneficiary that is older than the owner. In general, this would not impact surviving spouses because they are able to recalculate their life expectancy and thus, would have to live to be over 120 before their life expectancy would be less than 1 year. However, this will impact any designated beneficiary who is older than the IRA owner and therefore impacted by this new rule as, by definition, they would be an eligible designated beneficiary. This group includes partners who decided not to marry for a multitude of reasons, siblings, friends, relatives, etc. Treasury and IRS should not substitute its policy preferences for those of Congress.

IV. Minimum Income Threshold Test

ACLI supports the comments submitted to Treasury and IRS by the Committee of Annuity Insurers on May 25, 2022, regarding the Proposal's revisions to the minimum income threshold test at section 1.401(a)(9)-6 of the Proposal, including their call for Treasury and IRS to re-propose any revisions made to the Proposal regarding annuity payments to provide the public an opportunity to comment on any additional changes made in response to these and other public comments submitted on the Proposal.

This Proposal misses the mark with complexity that will frustrate and needlessly constrain retirees. Annuities play a vital role in ensuring Americans have income throughout retirement. Defined contribution plans and IRAs are now the primary source of retirement savings for most Americans. Annuities are the only way retirees can convert their retirement savings to guaranteed lifetime income to supplement Social Security benefits. Treasury and IRS should take every opportunity to simplify the rules for retirees seeking guaranteed lifetime income tailored to meet their individual financial needs and objectives in retirement. We ask that Treasury and IRS rework these rules.

V. Qualified Longevity Annuity Contacts

The Proposal would modify the current rule's prohibition on commutation rights applicable to Qualified Longevity Annuity Contracts (QLACs) to apply the prohibition on or after the required beginning date. All annuity contracts, including QLACs, are subject to state insurance law. Many states impose "free look" periods under which the purchaser may unwind an annuity transaction. These "free look" periods vary by state and can be as long as 30 days from the date of the annuity application for an annuity purchased in that state. For annuities purchased near or after the required beginning date, the regulations should support a commutation right that conforms with the applicable state's free look rule.

The Proposal continues the imposition of a 25% limitation on the purchase of a QLAC. This limit applies separately to qualified plans and IRAs. Under the current rules, when a qualified plan does not offer a QLAC, the plan participant must purchase the QLAC through an IRA in order to maintain the tax qualified status of their retirement funds. As such, for a qualified plan participant without an IRA, the participant must transfer 400% of what is needed to an IRA in the year prior to the QLAC purchase and use that IRA to fund the QLAC purchase in a year following the year of the transfer. This is due to the separate application of the 25% limitation to the qualified plan and to the IRA. This policy encourages participants to transfer more funds than necessary from their qualified plan accounts.

ACLI recommends Treasury and IRS revise the Proposal to accommodate the purchase of a QLACs by individuals in defined contribution plans without annuity features by permitting a direct rollover of no more than 25% of the qualified plan's applicable account balance for the purchase of a QLAC.

V. Trusts

Special Needs Trusts

The Proposal should be modified to create a coherent framework for administration of "special needs" trusts. As currently drafted, the Proposal provide incongruous provisions related to trusts for the benefit of disabled adults, disabled children and chronically ill individuals.

Separate processes apply to trustee certifications intended to qualify the trust as a look-through trust and Medical Certifications intended to establish beneficiaries as eligible designated beneficiaries (EDB). The latter requirements imposed on plan administrators are unworkable as the plan administrator ordinarily has no direct contact with trust beneficiaries. Treasury and IRS can solve this problem by expanding trustee certifications to include the disability or chronic illness status of trust beneficiaries. Instead of providing medical certifications to the plan administrator, with whom they otherwise have no connection, trust beneficiaries would provide these items to the trustee. Trustees would then include a representation that they have received the items and certify the EDB status of the trust beneficiaries to the plan administrator as part of the usual trustee certification. This would enable the plan administrator to deal only with the named beneficiary, i.e., the trust and avoids having the plan administrator or its authorized agent handle private medical information related to trust beneficiaries.

Proposed regulation §1.401(a)(9)-4(b) provides that the designated beneficiary under a retirement plan must be an individual. Under §-4(f), certain individual beneficiaries of a see-through trust that are designated as the employee's beneficiaries under the plan are treated as the employee's beneficiaries under the plan rather than the trust. Certain designated beneficiaries may be classified as "eligible designated beneficiaries" under §-4(e), including beneficiaries who are "(iii) Disabled within the meaning of paragraph (e)(4) of this section; (iv) Chronically ill within the meaning of paragraph (e)(5) of this section…."

Disability is defined differently in §1.401(a)(9)-4(e)(4) for adults and children (under age 18, not under age 21, the age of majority under the regulation). Documentation of disability or chronic illness must be provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the employee's death. For adults, proof of disability under §-4(e)(7) requires either a determination of disability from the Social Security Administration or documentation of the disability. Although the regulation does not specify the nature of the required documentation, we understand that it would include a copy of a medical record or a physician's written statement indicating (in any manner intelligible to a medical professional) that the individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-term and indefinite duration.

Regarding the proposed October 31 deadline, the time at which a plan administrator and/or beneficiary becomes aware of an employee's death will affect the administration of this proposed deadline. This is especially true with respect to the death of a former employee or retiree as the employer sponsoring the plan may no longer be in close contact with such individual. Although the Proposal provides a period that could be as short as 10 months plus a day or as long as 22 months, the time may still prove insufficient as the plan administrator may not become aware of the death for some time. It may well be the case that a disabled beneficiary (or their caregiver) becomes aware of the death no earlier than the plan administrator (it may also be the case that the disabled individual was unaware of the designation as a beneficiary). The final regulations should provide at least 10 months from the later of the date the plan administrator is on notice regarding the death of the employee and has confirmed the death or the date that individual is notified that she is a beneficiary under the plan for the requisite documentation to be prepared and provided to the plan administrator.

Further, we question whether imposing a time limitation on proof of disability is consistent with Congress' decision to treat disabled and chronically ill individuals as eligible to receive lifetime income. In addition to late-reported deaths, a disabled individual may fail to provide required proofs or fail to take required distributions due to the fault of a caregiver. A disabled minor or mentally challenged individual or severely physically handicapped individual is unlikely to be able to perform these tasks without assistance. Existing law already provides that failure to take RMD may be penalized unless reasonable cause for the failure is shown. This should be sufficient legal basis for Treasury to provide relief and will avoid arbitrarily forcing premature distribution of the plan interest inherited by someone who needs lifetime care.

Similarly, for a child, the required documentation would indicate that the individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long continued and indefinite duration. For anyone, chronic illness is established under §-4(e)(5) by a certification from a licensed health care practitioner (as that term is defined in Internal Revenue Code section 7702B(c)(4)). When the chronic illness is based on inability to perform activities of daily living (instead of severe cognitive impairment), §-4(e)(5) requires the health care professional to state that, as of the date of the certification (not as of the decedent's date of death), "the individual is unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for an indefinite period which is reasonably expected to be lengthy in nature (and not merely for 90 days)."

Reg. §1.401(a)(9)-4(f)(2) provides the requirements for treating a trust as a "see-through" trust, including satisfaction of the documentation requirements in §-4(h). Section -4(h)(3) provides that the trustee may, by October 31 of the calendar year of the year following the year the employee (or spouse, if §-3(d) applies) died either 1) furnish to the plan a) final list of trust beneficiaries (including contingent beneficiaries) as of September 30 of that year with a description of the conditions on their entitlement sufficient to establish who are the beneficiaries, b) certify that the see through trust requirements in §-4(f)(2)(i)-(iii) are satisfied and c) agree to provide a copy of the trust instrument upon request or 2) provide a copy of the actual trust instrument.

Nothing in these documentation provisions requires the trustee to specify whether a trust beneficiary is an eligible designated beneficiary. While the plan administrator may be able to discern based on its records who is the surviving spouse or the status of a trust beneficiary based on absolute (under 21) or relative (within 10 years) age, this is not conducive to efficient plan administration particularly in light of the fact that circumstances might change between termination of employment and death (e.g., an employee's marital status might change and might not be reported to his/her former employer). It is more reasonable to place the duty to identify the eligible designated beneficiaries on the trustee of the trust who has a fiduciary relationship with the beneficiaries.

Plan administrators are not experts in the intricacies of estate and trust planning, nor may they provide tax or legal advice. It is unreasonable to require that they interpret trust instruments when administering the RMD rules. Accordingly, the Proposal should be revised to require the trustee to name and classify by type the eligible designated beneficiaries, including disabled and chronically ill individuals, as part of the final list of trust beneficiaries. Also, since the determination of whether an individual is an eligible designated beneficiary cannot be made from the trust instrument alone, and it is unreasonable to require plan administrators to interpret increasingly complicated trust provisions, the regulation should remove the option of providing the trust instrument in lieu of the final list, which would now include the beneficiary classification for purposes of section 401(a)(9)(H).

Once the regulation requires the trustee of a see-through trust to identify eligible designated beneficiaries for the plan administrator, no purpose is served by requiring documentation of disability or chronic illness to be provided to the plan administrator. Instead, the regulation should require the trustee to obtain the required documentation before certifying that an individual is an eligible designated beneficiary. This will ensure orderly plan administration by allowing the plan administrator to deal only with the trustee and avoid having to manage private medical information.

Multi-Beneficiary Trusts

The final regulations should include examples of the rules that apply to applicable multi-beneficiary trusts described under Prop. Treas. Reg. §1.401(a)(9)-4. Although the Proposal provides helpful interpretation of the new "applicable multi-beneficiary trusts" created under section 401(a)(9)(H) of the Internal Revenue Code as a result of the SECURE Act, the Proposal does not provide any examples illustrating how the new regulations apply in practice.[6] The rules for applicable multi-beneficiary trusts are complex. They are also completely new. As a result, examples that specifically address applicable multi-beneficiary trust situations are needed in the final regulations.

VI. Surviving Spouse -Treatment of IRA as Own

Under existing law, a surviving spouse beneficiary of an IRA owner may elect *at any time* to treat the IRA as their own. There is no time limit to make this election and "deemed elections" are allowed under Reg 1.408-8 if the surviving spouse does not make a distribution in accordance with Section 401(a)(9) or "any additional amount is contributed to the IRA."

The existing law provided in this context falls neatly in-line with traditional policy and principles underlying federal tax law, which generally provides favorable treatment of spousal assets, unlimited rights for spouses to make transfers among themselves, ability to make joint returns as

[6]See, Prop. Treas. Reg. §1.401(a)(9)-4(g).

one taxpayer, favorable spousal rights under qualified retirement plans, higher estate, and gift tax transfer exemptions, etc. In fact, the list of favorable benefits given to spouses under the Internal Revenue Code granted by Congress is too extensive to fully include in this letter.

When Congress passed the SECURE Act, it provided similar favorable rights to spouses by ensuring that surviving spouses were designated as "eligible designated beneficiaries" upon the death of a spouse participant or IRA owner. In passing the SECURE Act, Congress did not otherwise address spousal rights at death, nor did Congress direct Treasury to restrict a surviving spouse's rights in any manner.

Under the Proposal, Treasury and IRS would place unreasonable and unnecessary restrictions on such surviving spouse's ability to treat the IRA as their own, contrary to the overarching intention of the SECURE Act and longstanding tax policy.

More specifically, the Proposal places a time limit on when such spouse must begin taking distributions. The spouse must make the election by the *later of*: (1) the end of the calendar year in which the spouse attains age 72, and (2) the end of the calendar year following the calendar year of the IRA owner's death.

The Proposal'snew deadline requirement does not appear authorized by the governing statutory provision, appears overly restrictive to surviving spouses, and will be difficult for surviving spouses to navigate at a challenging time in their lives. The Proposal is also effective retroactively back to the beginning of 2022, so this may impact spousal beneficiaries of IRAs whose owners died in 2021, requiring these surviving spouses to potentially make an election by the end of 2022. These surviving spouses may expect that they have years to make such a decision, yet the Proposal would force them to decide how they want to treat the retirement asset much earlier. We request that the final regulations eliminate the deadline and permit flexibility to spouses so that they may continue to exercise their right to treat the IRA as their own at any time.

Under both the current regulations and the Proposal, a surviving spouse of a decedent who dies before the spouse's required beginning date is able to delay RMDs until the decedent would have reached the decedent's required beginning date. Under the current regulations, if the surviving spouse dies prior to taking any RMDs, the spouse is deemed to have elected to treat the IRA as his or her own. However, under the Proposal, the spouse must make an election by age 72. Presumably, should a surviving spouse die before making an election, the spouse would not be presumed to have made such an election under the Proposal. The net result of this is to force older surviving spouses to decide when they reach age 72 whether to treat the IRA as their own and begin taking RMDs sooner than would have been necessary under the prior regulations or leave the IRA in inherited status thus limiting the options available to the spouse's beneficiaries (which in some cases would be a new spouse). One can argue whether the current rules are too generous to a surviving spouse from a policy perspective. However, it is not the role of Treasury to make policy decisions related to how surviving spouses should be treated here as there is nothing in the SECURE Act or its legislative history to suggest that Congress desired to take rights away from surviving spouses with the changes made to IRC section 401(a)(9).

<u>Spousal Rollovers and "Hypothetical RMDs"</u>

Under the Proposal, the surviving spouse is penalized for missing the deadline to claim the IRA as her own. Under Prop. Reg. Section 1.402(c)-2(j)(3)(iii), if the surviving spouse misses the deadline and is therefore subject to the 10-year rule, the surviving spouse will not be eligible to rollover the entire benefit to her own IRA, but only a portion adjusted for "hypothetical RMDs" that may not be rolled over. Treasury's formulation and application of these "hypothetical RMDs" is without authority under the law, arbitrary, administratively burdensome and will be confusing to taxpayers. The use in the calculation of an account balance that bears no relationship to any previous actual account balances that the IRA may have had were actual RMDs calculated and distributed is perplexing and illogical. The requirement, in general, severely limits the surviving spouse's ability to treat the entire inherited account as their own upon their spouse's death. We respectfully request that the final regulations eliminate the "hypothetical RMD" requirement.

Prop. Reg. Section 1.408-8(c)(1)(iii) states that if a trust is a beneficiary of the IRA and the surviving spouse is the sole trust beneficiary, the surviving spouse cannot treat the IRA as their own but would have to perform a spousal rollover of the account balance to their own IRA (limited by the "hypothetical RMD" rule). In such circumstances, we see no reason why this should be the rule and respectfully request that Treasury provide a more explicit exception that allows spousal rollovers when a trust or estate is the sole beneficiary of an IRA, when the surviving spouse is the sole beneficiary of the trust, the trustee, and she has all rights with respect to the trust.

VII. Preamble Request for Comment on Aligning 403(B) and Qualified Plan Rules

Section 403(b) arrangements vary from employer to employer. Some plans provide for multi-vendor administration. In some cases, this is a function of state law. When applying the RMD rules, there may be a benefit for retirees to have the ability to aggregate RMDs under current rules, e.g., a retiree may be better off economically to take the aggregated RMD from variable investments held under a variable annuity contract verses a rule that requires the retirees to have to take a distribution as well from an annuity contract that provides for a fixed return.

Should the Treasury and IRS look to propose changes to the rules applicable to 403(b) arrangements, we suggest the following:

- When a plan has multiple vendors, the rule should not be a plan level rule, but one that applies on a per an annuity contract basis considering only the assets held under a particular contract issued for the benefit of the participant and not all contracts or accounts under the plan issued for the benefit of the participant.
- There will be a need for a fairly long implementation to make any changes to these arrangements. As stated above, amendments to annuity contracts require state approval. Even plans that are not funded with annuity contracts will need sufficient time to make all necessary changes. Changes to government plans may be subject to approval by legislative bodies that operate on a limited schedule. Church plans may need to be reviewed by a number of supervising entities and collectively bargained plans must follow applicable legal restraints.

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On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with Treasury and IRS.

Respectfully,

James H. Szostek   Howard M. Bard