AMERICAN BENEFITS
COUNCIL

May 25, 2022

CC:PA:LPD:PR (REG-105954-20)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted electronically via www.regulations.gov

Re: Proposed Required Minimum Distribution Regulations

Dear Sir or Madam:

On behalf of the American Benefits Council ("the Council"), we are writing to provide comments on the proposed regulations relating to the required minimum distribution (RMD) rules that apply to employer-sponsored retirement plans and individual retirement arrangements (IRAs). We appreciate the efforts of the U.S. Treasury Department and Internal Revenue Service (IRS) in issuing this substantial and complex proposal.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

I. SUMMARY OF COMMENTS

Although the Council appreciates the efforts that went into the proposal, we have also found that it includes provisions that are contrary to a plain reading of the legislative changes included in the Setting Every Community Up for Retirement

Enhancement (SECURE) Act of 2019, fails to provide enough time for plans and participants to implement its surprising interpretations, and adds unnecessary complexity to RMD issues that are unrelated to the SECURE Act's changes. Thus, in addition to requesting clarification on many of the issues covered by the proposal, the Council is requesting that Treasury and IRS significantly rewrite critical portions of the proposed regulations. More specifically, and as discussed in greater detail below, the Council's letter requests that Treasury and IRS:

- Delay the effective date for all of the proposed changes until, at the earliest, the first calendar year beginning at least nine months after the regulations are finalized, and make reasonable, good-faith relief available until then.

- Consider extending the amendment deadline described in Section 601 of the SECURE Act.

- Revise the proposed interpretations of the SECURE Act's new 10-year rule so that the regulations reflect the most natural interpretation of the SECURE Act's amendments and longstanding IRS guidance.

- Eliminate the proposed changes that are unrelated to legislative or other regulatory changes, including the new limitation for eligible designated beneficiaries who are older than a deceased employee, the new hypothetical RMD calculation, and the new deadline for surviving spouses to elect to treat a deceased spouse's IRA as their own.

- Refrain from making changes that would apply the RMD rules for qualified plans to 403(b) plans, instead of the RMD rules for IRAs.

- Clarify that plans are permitted to specify (or require) different distribution methods for different eligible designated beneficiaries who are inheriting interests from the same employee.

- Permit eligible designated beneficiaries to self-certify their disability or chronic illness, and clarify that the disability and chronic illness documentation requirements do not apply to IRA trustees, custodians, or issuers.

- Clarify that plans are permitted, but not required, to adopt the increased required beginning date age.

- Clarify that the separate accounting rules may be used to determine whether the SECURE Act's changes apply upon the death of a designated beneficiary who inherited his or her interest from an employee who died before January 1, 2020.

- Clarify that the SECURE Act's grandfathering for contracts annuitized before December 20, 2019, applies to irrevocable elections made by beneficiaries.

- Clarify whether the SECURE Act's after-death RMD changes apply to non-governmental tax-exempt 457(b) plans.

- Permit plans, but do not require them, to specify the distribution method that will apply in the absence of an eligible designated beneficiary's election when an employee dies before the required beginning date.

- Clarify that, in the case of an employee who dies before the required beginning date, a plan may specify that the life expectancy rule will apply to eligible designated beneficiaries, rather than the 10-year rule.

- Clarify that plan administrators are not required to accept trust documents provided by an employee or trustee that is seeking to apply see-through trust treatment.

- Clarify the withholding rules that apply to distributions made to non-spouse beneficiaries.

- Clarify that the exception permitting eligible designated beneficiaries to switch their method for determining RMDs only applies when the decedent's plan or IRA does not give the eligible designated beneficiary an option to apply the life expectancy rule, and when this election is made, the plan administrator is permitted to treat the entire amount distributed to the eligible designated beneficiary as an eligible rollover distribution.

- Clarify that 401(*l*) distributions used to pay for the health and long-term care insurance expenses of eligible retired public safety officers count towards an employee's RMD obligation.

- Permit the minimum income threshold test to be calculated taking into account annuity payment increases.

II. Effective Dates & Good-Faith Relief

A. General Effective Date/Good-Faith Relief

The proposed changes to the RMD rules include a regulatory effective date that, if adopted, will make the changes to the RMD regulations applicable for calendar years beginning on or after January 1, 2022. In addition to this regulatory effective date, the proposal states that for the 2021 distribution calendar year, taxpayers must apply the existing regulations taking into account a reasonable, good-faith interpretation of the SECURE Act's amendments. Furthermore, the changes to the rollover rules described in Treasury Regulation Section 1.402(c)-2 are proposed to apply to distributions made on or after January 1, 2022 – a date that precedes the proposal's release.

The Council is very concerned with these proposed effective dates and urges Treasury and IRS to delay the regulatory effective dates described in the proposal. Based on the currently scheduled May 2022 comment deadline and June 2022 public hearing, the Council does not expect Treasury and IRS to publish final RMD and rollover regulations until 2023. At that point, it simply will not be possible for plans and service providers to implement all of the changes by the end 2022. And in the case of the proposed rollover regulations that were released in February 2022, it was never possible for plans to prepare for the January 1, 2022, effective date that applies to that portion of the proposal.

Because of the delayed release of the proposal, the surprising positions asserted in the proposal, the complexity of the proposed changes and the far-reaching impact of any changes to the RMD and rollover rules, the Council requests that Treasury and IRS delay the effective date for all of the proposed changes until, at the earliest, the first calendar year beginning at least nine months after the regulations are finalized. At the same time, we are also urging Treasury and IRS to make relief for reasonable, good-faith interpretations available until then.[1]

B. Effective Date for Multiple Beneficiaries

According to the proposal, in the case of an employee who dies with more than one designated beneficiary before the Internal Revenue Code ("Code") Section 401(a)(9)(H) effective date – generally January 1, 2020 – the application of the amendments made by Section 401 of the SECURE Act will depend on when the oldest of those beneficiaries dies.[2] Accordingly, if the oldest designated beneficiary dies before the Code Section 401(a)(9)(H) effective date, the SECURE Act's changes are not applicable. And if the oldest designated beneficiary dies after the Code Section 401(a)(9)(H) effective date, any remaining account balance must be distributed within 10 years of the oldest designated beneficiary's death.

We understand that this position makes sense for the application of the proposed regulations to see-through trusts, which will generally depend on the death of the oldest trust beneficiary. However, outside of the see-through trust context, the Council is requesting clarification that this "oldest beneficiary rule" does not preclude a plan from applying the separate accounting rules of Proposed Treasury Regulation Section 1.401(a)(9)-8(a) when determining whether Section 401 of the SECURE Act will apply to different designated beneficiaries. Any rule to the contrary would create unnecessary implementation challenges and contradict how the existing regulations broadly apply the separate accounting principles.

[1] This request is consistent with the effective date and good-faith relief requests made in the March 25, 2022, joint trades letter signed by the Council.

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

Thus, for example, the Council believes that if an employee dies before the Code Section 401(a)(9)(H) effective date with multiple designated beneficiaries, in the case of a plan that provides for separate accounting, the application of the 10-year payout rule following the death of each designated beneficiary (as if they were an eligible designated beneficiary (EDB)) should depend on the date of death for each designated beneficiary. In this case, the interests of designated beneficiaries who die before the Code Section 401(a)(9)(H) effective date would be subject to the pre-SECURE Act rules, without regard to when any other beneficiary dies; and the interests of designated beneficiaries who die after the Code Section 401(a)(9)(H) effective date would be subject to the SECURE Act rules that treat a designated beneficiary as an EDB for purposes of applying the 10-year rule following the designated beneficiary's death, without regard to when any other beneficiary dies.

C. Effective Date for Contracts Annuitized by Beneficiaries

The SECURE Act included an important exception from the new post-death RMD rules in the case of annuity contracts for which an irrevocable election as to the method and the amount of annuity payments was made before December 20, 2019. The purpose of this exception is to permit individuals who made irrevocable decisions based on the rules in effect prior to the SECURE Act to continue relying on those rules without regard to the SECURE Act's changes.

However, notwithstanding this apparent intent, the proposed regulations include an example suggesting that this exception only applies to irrevocable elections made by *employees* and it does not apply to irrevocable elections made by *beneficiaries*.[3] This position would apparently contradict the policy reasons supporting the exception for existing annuity contracts and would be unfair to beneficiaries who made decisions in reliance on the rules in effect at the time of their election to annuitize. Accordingly, the Council requests that Treasury and IRS modify the proposal to clarify that the exception for existing annuity contracts described in Section 401(b)(4) of the SECURE Act applies to irrevocable elections made by *beneficiaries* prior to December 20, 2019, in addition to irrevocable elections made by *employee-participants*.

III. AMENDMENT DEADLINES / ANTI-CUTBACK RELIEF

Section 601 of the SECURE Act generally provides that a retirement plan (1) shall be treated as being operated in accordance with its terms, and (2) shall not fail to satisfy

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[3] Prop. Treas. Reg. Section 1.401(a)(9)-1(b)(3)(vi). In this example, an employee dies in 2017 before the required beginning date with a designated beneficiary who elected to receive lifetime annuity payments with a 1five-year period certain, starting in 2018. Despite this election before December 20, 2019, the example suggests that the SECURE Act's new 10-year payout rule would apply upon the death of the designated beneficiary.

the anti-cutback requirements of Section 411(d)(6) of the Code or Section 204(g) of the Employee Retirement Income Security Act (ERISA) as a result of a plan amendment made pursuant to the SECURE Act or the regulations thereunder, provided that: (a) the amendment is adopted no later than the last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024, in the case of governmental and collectively bargained plans), or such later date as the Secretary of the Treasury may prescribe; (b) the amendment applies retroactively to the effective date; and (c) the plan is operated as if the amendment were in effect during the period beginning on the effective date.

The proposed regulations do not address this special relief or how it interacts with the amendment deadlines for individually designed and pre-approved plans that are described in existing IRS guidance.

Consistent with the requests made in the March 25, 2022, joint trade association letter[4] signed by the Council, many of the Council's members support Treasury and IRS using the authority expressly granted to them to extend the amendment deadline described in Section 601(b)(1)(B) of the SECURE Act until the last day of the first plan year (calendar year for IRAs) that begins after the later of (1) the effective date of final RMD regulations or (2) the date the IRS publishes updated Listings of Required Modifications for the particular plan type or IRA. These members believe that additional relief is warranted given the delayed release of the proposal, the surprising positions asserted in the proposal, the complexity of the proposed changes, and the far-reaching impact of any changes to the RMD and rollover rules. Critically, to the extent that Treasury and IRS provide an extended amendment deadline, a plan that is amended by such deadline should not only be treated as being operated in accordance with its terms prior to amendment, it should also be eligible for the anti-cutback relief described in Section 601(a)(2) of the SECURE Act.

Such relief would be especially important for pre-approved plans because, unlike individually designed plans that can wait to adopt amendments until after the relevant changes are included on the IRS Required Amendments List, pre-approved plans must generally adopt interim amendments 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. For pre-approved plans that are calendar year plans, that deadline will generally coincide with the statutory amendment relief included in Section 601 of the SECURE Act – i.e., the amendment deadline is the end of 2022. Given that the Council does not expect the final RMD regulations to be published until 2023, it simply will not be possible for pre-approved plan amendments to incorporate the final regulations by the end of 2022.

While most of the Council's members support a delay of the SECURE Act's special amendment deadline, we must also note that some of our members who are responsible

[4] https://www.americanbenefitscouncil.org/pub/D8F01439-1866-DAAC-99FB-CAF36B636333

for preparing pre-approved plan amendments would prefer that Treasury and IRS not extend the amendment deadline. Because it takes significant time to prepare, distribute, and complete pre-approved plan amendments, these members have already started to distribute amendments reflecting the SECURE Act's changes, even though Treasury and IRS have not finalized their rules. These companies have had to move forward with the amendment process in the absence of clear guidance because they operationally reached the point where they could no longer take the chance that IRS would not provide additional relief.

IV. APPLICATION OF RMD RULES

A. Application of RMD Rules to 403(b) Plans

The preamble to the proposal indicates that Treasury and IRS are considering additional changes to the RMD rules for 403(b) plans so that they more closely follow the RMD rules for qualified plans, rather than the rules for IRAs. For example, under such an approach, the proposal states that each 403(b) plan would be required to make RMDs with respect to the plan, rather than relying on the employee to request a distribution from any plan in an amount that satisfies the RMD.

The Council does not believe that these changes should be made and urges Treasury and IRS not to pursue such changes. Such changes would require 403(b) plan sponsors, contract issuers, and other service providers to build costly new systems for calculating and forcing out RMDs to participants. These changes would be particularly burdensome for church plan sponsors and other multiple employer plans. Additionally, these changes would be difficult for 403(b) annuity contracts that have already been issued without provisions to force out RMDs. If, however, Treasury and IRS choose to move forward on this project, the Council strongly urges them to propose and consider this change as part of a separate rulemaking. We are concerned that such a change would likely raise issues requiring additional Treasury and IRS guidance, as well as additional relief or grandfathering for 403(b) contracts that have already been issued.

B. Non-Governmental Tax-Exempt 457(b) Plans

Since the enactment of the SECURE Act, questions have been raised about whether the SECURE Act's changes to the post-death RMD rules apply to 457(b) plans maintained by non-governmental tax-exempt employers. Code Section 401(a)(9)(H) applies "in the case of a defined contribution plan" and Code Section 401(a)(9)(H)(vi) clarifies that, for this purpose, "all eligible retirement plans (as defined in Section 402(c)(8)(B), other than a defined benefit plan described in clause (iv) or (v) thereof or a qualified trust which is a part of a defined benefit plan) shall be treated as a defined contribution plan."

The questions surrounding this issue are generally due to the fact that the plans listed under Code Section 402(c)(8)(B) do not include 457(b) plans maintained by non-governmental tax-exempt employers. Thus, there has been uncertainty about whether the reference to Code Section 402(c)(8)(B) should be read as: (1) providing a non-exhaustive list of examples of plans that shall be treated as a defined contribution plan; or (2) providing an exhaustive list of plans that shall be treated as a defined contribution plan. We request that Treasury and IRS provide clarification on this point and, to the extent that such guidance treats the reference to Code Section 402(c)(8)(B) as merely offering a non-exhaustive list of examples, Treasury and IRS should provide good-faith relief to any plans that interpreted the reference to Code Section 402(c)(8)(B) as an exhaustive list of the plans that shall be treated as a defined contribution plan for purposes of Code Section 401(a)(9)(H).

V. PROPOSED INTERPRETATIONS OF NEW 10-YEAR RULE

A. Pre-SECURE Act Rules

Prior to the SECURE Act, if an employee died before the required beginning date, the employee's remaining interest generally had to be distributed to a designated beneficiary: (1) by the end of the calendar year which contained the fifth anniversary of the date of the employee's death ("the five-year rule"); or (2) over the life of the designated beneficiary, or over a period not extending beyond the life expectancy of the designated beneficiary, provided that such distributions commenced by the end of the calendar year following the employee's death ("the life expectancy rule").[5] If the employee died on or after the required beginning date, the remaining interest had to be distributed at least as rapidly as under the method of distribution being used as of the date of death ("the at-least-as-rapidly-rule").[6] Longstanding Treasury regulations indicate that the at-least-as-rapidly-rule is satisfied if a designated beneficiary receives annual distributions over a period based on the longer of the life expectancy of the designated beneficiary or the life expectancy of the deceased employee.[7]

B. SECURE Act Amendments

In the case of a defined contribution plan, new Code Section 401(a)(9)(H)(i) states that, except in the case of a beneficiary who is not a designated beneficiary, the five-year rule described in Code Section 401(a)(9)(B)(ii) shall be applied by substituting "10 years" for "five years"; and such rule "shall apply whether or not distributions of the employee's interests have begun in accordance with [Code Section 401(a)(9)(A)]" – i.e.,

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[5] Treas. Reg. Section 1.401(a)(9)-3, Q&A-1.

[6] Treas. Reg. Section 1.401(a)(9)-5, Q&A-5(a).

[7] *Id*.

whether or not distributions have begun on or after the employee's required beginning date. Code Section 401(a)(9)(H)(ii) indicates that the life expectancy rule described in Code Section 401(a)(9)(B)(iii) is only available to EDBs.

Because Code Section 401(a)(9)(H)(i) applies to all designated beneficiaries and it applies "whether or not distributions of the employee's interests have begun in accordance with [Code Section 401(a)(9)(A)]," the Council believes that the most natural interpretation of the SECURE Act's amendments would apply the new 10-year rule to all designated beneficiaries, including EDBs, regardless of whether the employee died before, on, or after the required beginning date. Based on the language in Code Section 401(a)(9)(H)(ii), the Council also believes that all EDBs should be permitted, but not required, to receive distributions pursuant to the life expectancy rule described in Code sections 401(a)(9)(H)(ii) and 401(a)(9)(B)(iii). Additionally, based on the existing and proposed Treasury regulations that interpret the five-year rule described in Code Section 401(a)(9)(B)(ii) as *not* requiring any distributions to be made until the end of the five-year period following the employee's death,[8] the Council believes that, when the new 10-year rule applies, the most natural reading of Code Section 401(a)(9)(H)(i) would similarly not require designated beneficiaries to receive any distributions until the end of the calendar year that includes the tenth anniversary of the date of the employee's death.

C. Surprising Regulatory Interpretations

Notwithstanding these apparent interpretations of the SECURE Act's changes, the proposal includes a series of unanticipated interpretations that would significantly impact designated beneficiaries inheriting an interest from an employee who dies on or after the required beginning date. Additionally, these unanticipated interpretations would impact: (i) minor children EDBs who are subject to the 10-year rule upon reaching the age of majority; and (ii) beneficiaries of EDBs who are receiving life expectancy payments.

- *Life Expectancy Payments in Addition to 10-Year Rule:* According to the proposal, the new 10-year rule described in Code Section 401(a)(9)(H)(i) would apply in addition to the at-least-as-rapidly-rule described in Code Section 401(a)(9)(B)(i) when a plan participant dies on or after the required beginning date with a designated beneficiary that is not an EDB.[9] Additionally, the proposed regulations would impose a similar rule – i.e., a 10-year rule in addition to any applicable life expectancy payment rule – when an EDB who is a minor child

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[8] *See* Treas. Reg. Section 1.401(a)(9)-3, Q&A-2; Prop. Treas. Reg. Section 1.401(a)(9)-3(c)(2) (indicating that if an employee dies before the employee's required beginning date and Code Section 401(a)(9)(B)(ii) applies, distributions will satisfy the five-year rule, "if the employee's entire interest is distributed by the end of the calendar year that includes the fifth anniversary of the date of the employee's death.").

[9] Prop. Treas. Reg. Section 1.401(a)(9)-5(d)(1)(i); Prop. Treas. Reg. Section 1.401(a)(9)-5(e)(2).

reaches the age of majority and upon the death of an EDB who is receiving life expectancy payments.[10] Pursuant to these interpretations and notwithstanding the application of the 10-year rule, life expectancy payments would need to be made every year during the 10-year period following the death of an employee who died on or after the required beginning date, when an EDB who is a minor child receiving life expectancy payments reaches the age of majority, and following the death of an EDB who is receiving life expectancy payments.

- *EDBs Must Use At-Least-as-Rapidly-Rule:* According to the proposal, the EDB of an employee who died on or after the required beginning date must receive annual life expectancy payments beginning in the year following the year of the employee's death. In this case, an EDB is not permitted to satisfy the RMD rules by receiving the employee's entire interest by the end of the calendar year that includes the tenth anniversary of the date of the employee's death. *Surprisingly, this interpretation applies notwithstanding the fact that Code Section 401(a)(9)(H)(i) says the 10-year payout rule applies to all designated beneficiaries "whether or not distributions of the employee's interests have begun in accordance with [Code Section 401(a)(9)(A)]" – i.e., whether or not distributions have begun on or after the employee's required beginning date.*

D. The Council's Requests

The Council disagrees with the proposed interpretations described in the preceding paragraphs. Accordingly, the Council requests that Treasury and IRS adopt final regulations that interpret the new 10-year rule in a manner that:

- Applies the new 10-year rule to all designated beneficiaries, including EDBs, regardless of whether the employee dies before, on, or after the required beginning date;

- Recognizes a life expectancy exception for all EDBs; and

- Applies the new 10-year rule consistent with longstanding IRS interpretations of the five-year rule.

That is, regardless of when an employee dies, all designated beneficiaries, including EDBs, would be treated as satisfying the RMD rules if the employee's entire interest is distributed by the end of the calendar year that includes the tenth anniversary of the date of the employee's death. As an alternative, EDBs would also be permitted to satisfy the RMD rules by receiving distributions over their life or life expectancy, subject to the 10-year limit that applies to minor children. In the case of the life expectancy payment exception for minor children, the RMD rules would be satisfied if an employee's

[10] Prop. Treas. Reg. Section 1.401(a)(9)-5(e)(3); Prop. Treas. Reg. Section 1.401(a)(9)-5(e)(4).

remaining interest is distributed by the end of the calendar year that includes the tenth anniversary of the child-EDB reaching the age of majority. Additionally, upon the death of an EDB who is receiving life expectancy payments, the RMD rules would be satisfied if any remaining interest is distributed by the end of the calendar year that includes the tenth anniversary of the EDB's death.

- *Alternative Request for Relief*: If Treasury and IRS retain their unanticipated interpretations of the SECURE Act's 10-year rule, the Council urges Treasury and IRS to expressly clarify that the above-described interpretation of the 10-year rule is a reasonable, good-faith interpretation of the SECURE Act's changes and eligible for the extended good-faith relief requested in Section II above. Accordingly, to the extent that designated beneficiaries, including EDBs, have made decisions based on this reasonable, good-faith interpretation of the new 10-year rule – e.g., by opting not to receive annual life expectancy payments in 2021 and 2022, or choosing to roll over the full amount of a distribution from an inherited account – they should not in any way be penalized for their reasonable, good-faith interpretation. This means that, in the case of employees who died in 2020 or 2021, designated beneficiaries electing the 10-year rule contrary to the IRS's surprising interpretation should not be subject to a 50% penalty for failing to receive life expectancy distributions. Similarly, they should not be forced to unwind any rollovers completed based on the belief that the entire amount received from a deceased employee's account was an eligible rollover distribution. Similar relief should also be made available to children beneficiaries who reached the age of majority in 2020 or 2021, and the beneficiaries of EDBs who died in 2020 and 2021.

VI. EMPLOYEE DEATHS BEFORE THE REQUIRED BEGINNING DATE

A. Newly Required Plan Provision

Under the existing RMD regulations, in the case of an employee who dies before the required beginning date, a plan may provide designated beneficiaries with an election as to whether the five-year rule or life expectancy rule will apply. If a plan provides for such an election, it *may* also specify the distribution method that will apply in the absence of a beneficiary election. Alternatively, if no election is made and the plan does not specify a default, then the distribution method is determined based on a set of default rules that are described in the regulations and that depend on the type of beneficiary involved.[11]

[11] Treas. Reg. Section 1.401(a)(9)-3, Q&A-4.

In contrast, the proposed RMD regulations include a similar, but materially different rule, involving a plan that offers EDBs an election between the 10-year rule and the life expectancy rule when an employee dies before the required beginning date. Pursuant to the proposal, if a plan offers such an election, "[t]he plan *must* specify the method of distribution that applies if neither the employee nor the designated beneficiary makes the election."[12] With respect to this change, the Council requests that Treasury and IRS remove the new provision that would require a specific plan provision and replace it with permissive language that is similar to the existing regulations. Thus, a plan would be permitted to specify the distribution method that would apply in the absence of an EDB's election, or, in the absence of such a provision, a regulatory rule would apply by default. Such a change would not only provide greater flexibility for drafting plan documents, it would also help to prevent unnecessary omissions from forthcoming plan amendments that must already incorporate a wide array of complex changes into each plan's design.

B. Distribution Requirements Imposed by Plan Terms

According to the preamble to the proposal, in the case of an employee who dies before the required beginning date, "the plan may provide either that the 10-year rule applies or that the life expectancy payments rule applies."[13] However, the actual text of the regulation only indicates that "[a] defined contribution plan will not fail to satisfy Section 401(a)(9) merely because it includes a provision specifying that the 10-year rule described in paragraph (c)(3) of this Section (rather than the life expectancy rule described in paragraph (c)(4) of this section) will apply with respect to some or all of the employees who have an eligible designated beneficiary."[14] Thus, the text of the regulation does not expressly state that the reverse is also permitted – i.e., a defined contribution plan may specify that the life expectancy rule will apply to EDBs, rather than the 10-year rule. The Council requests that Treasury and IRS expressly clarify in the regulatory text that a defined contribution plan is also permitted to specify that the life expectancy rule will apply to EDBs, rather than the 10-year rule.

In this same circumstance, the proposed regulations state that "a plan need not have the same method of distribution for the benefits of all employees in order to satisfy Section 401(a)(9)."[15] The proposal does not, however, state that a plan is permitted to specify (or require) different distribution methods for different types of EDBs who are inheriting interests from the same employee. For example, it does not say that a plan could specify that all EDBs, *other than spouses*, must use the 10-year, while also permitting spouses to elect between the 10-year rule and the life expectancy rule.

[12] Prop. Treas. Reg. Section 1.401(a)(9)-3(c)(5)(iii)(A).

[13] 87 Fed. Reg. 10504, 10508 (Feb. 24, 2022).

[14] Prop. Treas. Reg. Section 1.401(a)(9)-3(c)(5)(ii).

[15] *Id.*

Although the proposal would apparently not prevent this type of design, the Council requests that Treasury and IRS expressly clarify that a plan may specify different distribution methods for different types of EDBs when an employee dies before the required beginning date.

VII. UNNECESSARY CHANGES UNRELATED TO THE SECURE ACT'S AMENDMENTS

In addition to proposing changes to the RMD regulations that were made necessary by the SECURE Act and other legislative and regulatory changes, the proposal would make a series of significant changes to the RMD rules that are not required or related to other legislative and regulatory changes. In general, these changes would make the RMD rules more restrictive, more complicated, and require beneficiaries to receive distributions more quickly than they would otherwise be permitted under the existing regulations. The Council is concerned that all of these changes are adding unnecessary complexity to the RMD rules at a time when plans and service providers will need to significantly redesign and program their systems to address fundamental RMD issues, and then communicate all of these changes to plan participants. In many instances, the Council also finds it very troubling that, in the absence of relevant legal changes, Treasury and IRS are announcing new interpretations of certain aspects of the RMD rules that will accelerate the payments that must be made to beneficiaries. To avoid unnecessary confusion, complexity, and costs associated with these changes that are not required by law, the Council requests that Treasury and IRS remove the provisions described in this Section below.

A. New Limitation for EDBs Who are Older Than a Deceased Employee Dying on or After RBD

According to the proposal, in addition to satisfying other applicable distribution requirements that apply to defined contribution plans, in the case of an eligible designated beneficiary who is older than an employee dying on or after the required beginning date, the participant's entire interest must be distributed by the end of the year in which the EDB's life expectancy would be equal to or less than 1 if their life expectancy (instead of the employee's) had been used to determine the distribution period.[16] Thus, to administer this new limitation properly, plans and older EDBs must calculate RMDs based on the life expectancy of the EDB and the life expectancy of the deceased participant, even if RMDs are generally scheduled over the life expectancy of the deceased participant.

The Council is concerned with how this new limitation would accelerate the statutory requirement to make distributions in accordance with the at-least-as-rapidly-rule. That is, in addition to completing distributions "at least as rapidly" as they would

[16] Prop. Treas. Reg. Section 1.401(a)(9)-5(e)(5).

be made to the deceased employee, this new requirement would create a new cap on the at-least-as-rapidly-rule based on the life expectancy of the beneficiary. This is concerning because, if adopted as final, Treasury and IRS would be accelerating the distribution requirements in relation to an aspect of the RMD rules that was not affected by the SECURE Act. It is also concerning because, if Treasury and IRS believe that they can interpret the at-least-as-rapidly-rule as requiring distributions to be made *more rapidly* to a beneficiary than to a participant, this raises questions about the extent to which Treasury and IRS could further accelerate the pace at which RMDs must be taken by beneficiaries who are subject to the at-least-as-rapidly-rule – e.g., by saying that the at-least-as rapidly-rule newly requires a full distribution of the participant's account by the end of the calendar year following the year of the participant's death. Because of these concerns, and to limit the complexity that is being added to the RMD rules through the proposal, the Council requests that Treasury and IRS remove this new limitation, which is not required by the SECURE Act, from its final regulations.

B. Hypothetical RMDs for Spouses Who Have Reached Age 72

Under the proposed regulations, surviving spouses of plan participants and IRA owners who died before their required beginning date would be required to calculate a "hypothetical RMD" if: (1) the surviving spouse is subject to the 5- or 10-year payout rule; and (2) the surviving spouse rolls over a portion of the inherited account to their own plan or IRA in or after the year in which the surviving spouse reaches age 72.[17] The "hypothetical RMD" amount applicable in this situation would roughly match the amount of RMDs that the surviving spouse would have been required to take beginning in the year in which the surviving spouse attained age 72 (or the year in which the deceased spouse would have reached age 72, if later) had the surviving spouse elected life expectancy payments instead of electing the 5- or 10-year payout rule. Importantly, this hypothetical RMD amount would not be an eligible rollover distribution under the proposed regulations.

The Council requests that Treasury and IRS remove this new hypothetical RMD rule from its final regulations. This new rule is not required by the SECURE Act and will unnecessarily complicate the rules for determining whether a distribution is an eligible rollover distribution. This issue already exists in the context of the five-year rule under the existing regulations, yet Treasury and IRS never interpreted the statutory provisions as requiring a similar rule in the past. In addition to these policy concerns, we also have two technical concerns with the proposed hypothetical RMD requirement:

- *Withholding Determinations:* As proposed, the new hypothetical RMD requirement raises a number of questions about a plan administrator's withholding obligations. In the circumstances in which the hypothetical RMD requirement would apply, the entire amount distributed to a surviving spouse

[17] Prop. Treas. Reg. Section 1.402(c)-2(j)(3)(iii).

will generally be an eligible rollover distribution, if the hypothetical RMD amount did not apply. Thus, any distribution made to a surviving spouse would be subject to mandatory 20% withholding. However, to the extent that a distribution consists of a hypothetical RMD, that portion of the distribution will not be subject to mandatory 20% withholding because it is not an eligible rollover distribution.

Under the proposal, however, it is unclear how plan administrators are supposed to determine withholding when the hypothetical RMD amount could apply. Plan administrators making distributions directly to a surviving spouse will not know whether the amount will be rolled over to a plan or IRA, and if rolled over to an IRA, whether a surviving spouse will elect to treat the IRA as his or her own IRA. Furthermore, even in cases in which plan administrators can reasonably determine that a distribution will be rolled over, this new requirement would add significant new burdens on plan administrators and recordkeepers to ensure that the withholding and reporting rules are properly implemented.

- *Hypothetical RMD Calculation:* The proposal includes a complex formula under which the hypothetical RMD will equal the excess (if any) of: (1) the hypothetical RMDs that the spouse would have been required to receive had the life expectancy rule applied to the spouse beginning as of the later of the calendar year in which he or she attains 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* ("the HRMD Calculation").

The proposed regulations also provide that an "adjusted account balance" is used to calculate the hypothetical RMD amounts for an individual account. The adjusted account balance is the account balance that otherwise would be used to determine RMDs for the year of the distribution to the spouse, reduced by the excess (if any) of: (1) the sum of the hypothetical RMDs beginning with the "first applicable year" and ending with the calendar year preceding the calendar year of the determination, over (2) *the distributions actually made to the surviving spouse during those calendar years* ("the AAB Calculation").

If the intent of the proposal is to provide spousal beneficiaries who are subject to the hypothetical RMD requirement with "credit" for distributions actually received during the applicable period, the simplest way to provide that credit would be to only account for those distributions actually received as part of the HRMD Calculation. Providing credit under the HRMD Calculation and the AAB Calculation adds unnecessary complexity to an already complex provision.

C. New Deadline for Spousal Continuation.

Under existing IRS guidance, the surviving spouse of an IRA owner may elect to treat the deceased spouse's IRA as the surviving spouse's own IRA "at any time after the individual's date of death."[18] Under the proposal, however, a surviving spouse would be required to make this election by the later of: (1) the end of the calendar year in which the surviving spouse reaches age 72, and (2) the end of the calendar year following the calendar year of the IRA owner's death. Because this new rule is not required by the SECURE Act or other legislative changes, we encourage Treasury and IRS to remove this new deadline from its final regulations so as to avoid adding unnecessary complexity to the retirement savings systems changes that are required by the SECURE Act.

VIII. Beneficiaries

A. Age of Majority

The Council supports the proposal's use of age 21 for the age of majority for purposes of the new RMD rules that apply to EDBs.

B. Documentation for Disabled and Chronically-Ill EDBs

In order for a beneficiary to be treated as an EDB based on disability or chronic illness, the proposal would require that the plan administrator receive documentation of the disability or chronic illness no later than October 31 of the calendar year following the calendar year of the employee's death.[19] However, the proposal only elaborates on the type of documentation that the plan administrator should seek in the case of chronic illness. Additionally, for purposes of applying the RMD rules, the IRA trustee, custodian, or issuer is treated as the plan administrator.[20]

The Council requests that Treasury and IRS amend the proposal to permit plan administrators to rely on a designated beneficiary's self-certification (or that of the beneficiary's guardian or other legal representative) that the designated beneficiary is an EDB due to disability or chronic illness. Such certification could, for example, require a designated beneficiary (or his or her guardian or other legal representative) to certify that: (1) the Commissioner of Social Security has determined that the designated beneficiary is disabled; or (2) the designated beneficiary has received a written determination or certification from a licensed health care practitioner indicating that the designated beneficiary is disabled or chronically ill, as those terms are defined by the Code and IRS regulations.

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[18] Treas. Reg. Section 1.408-8, Q&A-5.

[19] Prop. Treas. Reg. Section 1.401(a)(9)-4(e)(7).

[20] Prop. Treas. Reg. Section 1.408-8(a)(3).

The Council also requests that Treasury and IRS clarify that IRA trustees, custodians, and issuers are not required to collect any documentation or certifications in order for a beneficiary of an IRA owner to be treated as an EDB due to disability or chronic illness. As the proposal reaffirms, IRA owners and beneficiaries are responsible for ensuring that they receive IRA distributions that satisfy the RMD rules.[21] Thus, unlike the plan administrator for a plan that is qualified under Code Section 401(a), an IRA trustee, custodian, or issuer should not have any responsibility for determining when an IRA owner or beneficiary must receive an RMD, whether based on their status as disabled or chronically ill or based on any other criteria.

C. Documentation for See-Through Trusts

Under the existing and proposed regulations, see-through trust treatment generally requires a plan administrator to either: (a) receive a copy of the trust instrument from the employee or trustee; or (b) receive a list of all of the beneficiaries of the trust along with a series of certifications from the employee or trustee.[22] With respect to this requirement, the Council is requesting that Treasury and IRS clarify that a plan administrator may require an employee or trustee to use either method for documenting that the see-through trust requirements have been satisfied. For example, it would be helpful for plan administrators to have clear guidance confirming that they are not required to accept trust documents provided by an employee or trustee that is seeking to apply see-through trust treatment.

D. Conflict Between 401(a)(9)(H) and QJSA Requirements

The proposed regulations include a rule, similar to the current regulations, that a "former spouse to whom all or a portion of the employee's benefit is payable pursuant to a qualified domestic relations order described in Section 414(p) (QDRO) is treated as a spouse (including a surviving spouse) of the employee for purposes of satisfying the requirements of Section 401(a)(9), including the minimum distribution incidental benefit requirement under Section 401(a)(9)(G), 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."[23]

The proposed regulations do not, however, explicitly address a situation in which there is a survivor benefit due to a former spouse and there is no QDRO in place. This could cause a conflict between the 10-year rule and the qualified joint and survivor annuity ("QJSA") requirements in Code sections 401(a)(11) and 417. For example, assume a married participant in a money purchase plan retires and receives a QJSA

[21] *See* Prop. Treas. Reg. Section 1.408-8(e).

[22] Treas. Reg. Section 1.401(a)(9)-4, Q&A-6; Prop. Treas. Reg. Section 1.401(a)(9)-4(h).

[23] Prop. Treas. Reg. Section 1.401(a)(9)-8(d).

which provides for a 50% survivor annuity for the life of the participant's spouse. (The QJSA rules require the payment of the survivor annuity to whomever is the spouse on the annuity starting date.) Further assume that after the annuity starting date the participant and spouse divorce, there is no QDRO with respect to the QJSA, and then the participant dies. If the now former spouse is more than 10 years younger than the participant, the former spouse would apparently not be an EDB, and the lifetime payments due to the former spouse under the QJSA would violate the 10-year rule.

Under prior law, this was not an issue because a former spouse could receive distributions based over his or her life, but now the former spouse can do so (at least with respect to a defined contribution plan) only if the former spouse is an EDB. We think the right answer is that the RMD requirements should never result in a violation of the spousal protection rules. The Council therefore requests that Treasury and IRS clarify that a former spouse can always receive survivor payments over his or her life if required by Code sections 401(a)(11) and 417.

IX. WITHHOLDING ISSUES

A. Withholding for Distributions Made to Non-Spouse Beneficiaries

The proposed regulations state that "a distribution to a non-spousal distributee does not constitute an eligible rollover distribution under Section 402(c)(4) and is not subject to the 20-percent income tax withholding under Section 3405(c)."[24] It appears that this language, which is generally retained from the existing regulations, is incorrect because it does not account for statutory changes that occurred after the existing regulations were published.[25] Accordingly, the Council requests that Treasury and IRS provide clarification on this point, and relief for plans and providers who have applied good-faith, faith reasonable interpretations to the relevant issues.

The Code's withholding rules for eligible rollover distributions state that the term "eligible rollover distribution" has the meaning given such term by Code Section 402(f)(2)(A).[26] Code Section 402(f)(2)(A) says that an eligible rollover distribution includes "any distribution to a designated beneficiary which would be treated as an eligible rollover distribution by reason of Subsection (c)(11), or Section 403(a)(4)(B), 403(b)(8)(B), or 457(e)(16)(B), if the requirements of Subsection (c)(11) were satisfied." Many plan sponsors and service providers interpret these Code provisions as collectively requiring mandatory 20% withholding for distributions that are made to a non-spouse designated beneficiary when such distributions would be eligible rollover

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[24] Prop. Treas. Reg. Section 1.402(c)-2(j)(2).

[25] *See* Section 108(f)(2) of the Worker, Retiree, and Employer Recovery Act of 2008, Pub. L. No. 110-458.

[26] Code Section 3405(c)(3).

distributions but for the fact that non-spouse designated beneficiaries are not permitted to indirectly roll over amounts that they receive from a plan.

B. RMD for EDBs Switching to Life Expectancy Payout Rule

Under the proposal, when a plan participant or IRA owner dies before the required beginning date, the method for determining RMDs for a beneficiary under the decedent's plan or IRA will also generally apply to any IRA that receives a rollover from the decedent's plan or IRA.[27] As an exception to this rule, the proposal would permit an EDB who is not given an election to apply the life expectancy rule under the decedent's plan or IRA to switch to the life expectancy rule through a rollover to an inherited IRA that is made before the deadline for receiving life expectancy payments. However, in this situation, for the year of the rollover, the proposal states that "the designated beneficiary must determine the portion of the distribution that is a required minimum distribution that is not eligible for rollover using" the life expectancy rule.[28]

With respect to these rules, the Council requests clarification that the exception permitting EDBs to switch their method for determining RMDs only applies when the decedent's plan or IRA does not give the EDB an option to apply the life expectancy rule. Additionally, we request clarification that the distributing plan is permitted to treat the entire amount distributed to the EDB as an eligible rollover distribution.

X. RBD Increase to Age 72

Section 114 of the SECURE Act increased the age that determines an employee's required beginning date under Code Section 401(a)(9)(C)(i)(I) from age 70½ to age 72. With regard to this change, the Council is requesting express clarification that plans are permitted, but not required, to adopt the increased required beginning date age. That is, Treasury and IRS should expressly clarify that plans may continue to commence distributions in accordance with their terms beginning in or for the year in which an employee attains age 70½.

Because the RMD rules establish minimum requirements for commencing distributions, we do not believe that they should be interpreted as preventing a plan from commencing distributions to employees more rapidly than what is required under Code Section 401(a)(9). Treasury Regulation Section 1.411(a)-11 specifically allows a plan to require that distributions commence when a participant reaches the later of age 62 or the plan's normal retirement age. Thus, for example, if a plan would like to retain

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[27] Prop. Treas. Reg. Section 1.408-8(d)(2).

[28] Prop. Treas. Reg. Section 1.402(c)-2(j)(3)(ii).

age 70½ (or a lower age) as its required beginning date age for purposes of determining lifetime RMDs, it should be allowed to do so.

Moreover, if a plan currently provides for distributions to begin on the "required beginning date" through a cross reference to Code Section 401(a)(9), the anti-cutback relief in the SECURE Act should be available to the plan, to amend the plan to continue to require that distributions commence at age 70½.

XI. PUBLIC SAFETY OFFICER INSURANCE EXPENSES

According to the proposal, "[d]istributions of premiums for accident or health insurance under § 1.402(a)-1(e)(1)(i)" are *not* taken into account in determining whether the RMD has been made for a distribution calendar year.[29] The Council requests that Treasury and IRS clarify that this exclusion from amounts that will be counted towards a participant's RMD obligation does not apply to distributions described in Code Section 402(*l*) – which are used to pay for the health and long-term care insurance expenses of eligible retired public safety officers. Because 402(*l*) distributions are described in Subparagraph (3) of Treasury Regulation Section 1.402(a)-1(e), and not under Subparagraph (1)(i), we do not believe Treasury and IRS intended to treat 402(*l*) distributions as not counting towards a participant's RMD for a distribution calendar year. Nevertheless, clarification on this issue would be very helpful.

XII. QLACS

The proposal would change the existing rule that prohibits a qualified longevity annuity contract (QLAC) from making available any commutation benefit, cash surrender value, or other similar feature so that this prohibition would only apply after the employee's required beginning date.[30] The Council supports this change because we believe it will provide greater flexibility to participants who may be considering the use of longevity insurance to help manage their assets through retirement, but are concerned about the liquidity restrictions that are otherwise imposed on QLACs.

In connection with the QLAC changes included in the proposal, the Council is also requesting that Treasury and IRS expressly clarify that, to the extent a QLAC is subject to the restrictions on commutation benefits, cash surrender values, or other similar features after an employee's required beginning date, any amount that a participant is entitled to receive pursuant to a "free look period" under state law will not be treated as violating those liquidity restrictions.

[29] Prop, Treas. Reg. Section 1.401(a)(9)-5(h); Prop. Treas. Reg. Section 1.402(c)-2(c)(3)(ix).

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

XIII. MINIMUM INCOME THRESHOLD TEST

The current RMD regulations significantly limit the ability of qualified retirement plans to provide benefits as a stream of annuity payments that increase over time. For example, in the case of annuities purchased from insurance companies, the rules often prohibit even modest annual percentage increases in payments that are needed to protect retirees from the financially corrosive effects of inflation. This is because such increases, along with certain other types, are permitted only if the annuity satisfies a test that has become known as the minimum income threshold test ("the MITT"). The Council appreciates Treasury and IRS adding new exceptions to the MITT in the proposed RMD rules for lump sum return of premium death benefits, short-term payment advances, and accelerations that are needed to comply with the 10-year rule. However, the MITT continues to hinder retirees' ability to achieve financial security through lifetime income that meets their needs.

The MITT requires the "total future expected payments" to exceed "the total value being annuitized." Under the current RMD rules, the total future expected payments must be determined "without regard to any increases in annuity payments."[31] This limitation, in particular, has prevented common and popular forms of annuity payout options from being made available under qualified retirement plans, including payout options that are intended to help retirement plan participants combat inflation risks and provide liquidity if their circumstances change over time.

The Council was pleased to see that the February 24, 2022, version of the proposed RMD rules would have permitted the "total future expected payments" to be determined by taking into account annuity payment increases, and we were conversely disappointed to see Treasury and IRS reverse this aspect of its proposal through a correction published in the Federal Register on May 20, 2022. Although we appreciate Treasury and IRS making clear their views on the MITT prior to the comment deadline, the Council urges Treasury and IRS to delete the language that requires the total future expected payments to be calculated without regard to any increases in annuity payments.[32] This restriction unnecessarily limits the ability of plans to help participants achieve financial security throughout retirement, and makes some participants unwilling to select annuities as their form of benefit. This is particularly troublesome and unwarranted in light of the fact that defined benefit plans can provide the exact same types of "increasing" annuity streams without having to satisfy the MITT.

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

[32] As an alternative, the Council believes that Treasury and IRS could eliminate many of the unnecessary barriers that are created by the MITT by amending the RMD regulations in a way that is consistent with the MITT changes included in the bipartisan suite of legislative proposals commonly referred to as "SECURE 2.0". *See* Section 201 of the Securing a Strong Retirement Act of 2021, H.R. 2954 (117th Congress) & Section 202 of the Retirement Security and Savings Act of 2021, S. 1770 (117th Congress).

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Thank you for considering our comments on the proposed RMD regulations. If you have any questions or we can be of further assistance, please contact me at 202-289-6700 or at ldudley@abcstaff.org.

Sincerely,

Lynn D Dudley

Lynn Dudley
Senior Vice President, Global Retirement & Compensation Policy