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RE: Request for Guidance from Treasury Regarding Section 401 of the SECURE Act, Part 2

Dear Ms. Weiser and Mr. Tackney:

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit this Part 2 of our request for guidance from Treasury that will assist taxpayers with issues raised by the changes to the required minimum distributions ("RMDs") after the death of an Employee found in Section 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. 116–94, signed into law by President Donald Trump on December 20, 2019 as part of the Further Consolidated Appropriations Act, 2020 (2020 United States federal budget) (the "SECURE Act").

ACTEC is a professional organization of approximately 2,500 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of personal income tax, transfer tax, and retirement plan rules, and providing advice to IRA and retirement plan administrators on plan administration. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives. ACTEC's comments and recommendations are set forth in the attached memorandum, which is the second of two memoranda ACTEC is providing.

If you or your staff would like to discuss the contents of this memorandum with the ACTEC Fellows who created it, please contact Steven E. Trytten (626-365-6000 ext. 200, strytten@hcesq.com) or Kathleen R. Sherby (314-259-2224, krsherby@bclplaw.com), who head up the task force of the ACTEC Employee Benefits in Estate Planning Committee, or Deborah McKinnon, ACTEC Executive Director, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,

Stephen R. Akers
ACTEC President 2020-2021

Comments of the American College of Trust and Estate Counsel ("ACTEC") on Section 401 of the SECURE Act – Part 2 of 2

This memorandum includes recommendations for guidance from Treasury that will assist taxpayers with issues raised Section 401 of the SECURE Act[1] (the "Act") concerning required minimum distributions ("RMDs") after the death of an Employee. The memorandum begins with an executive summary and detailed comments discussing the issue each recommendation follows. We appreciate the opportunity to provide these comments to Treasury. It is our hope these comments provide helpful insight on issues practitioners have been grappling with since the enactment of the Act, and ACTEC requests Treasury to take the following recommendations into consideration in preparing its guidance as to the meaning and operation of the Act.

EXECUTIVE SUMMARY OF RECOMMENDATIONS

A. Definitions (pages 9-12)

In order to assist in the readability of these comments, terms that are used throughout have been defined. The defined term is then capitalized in these comments to indicate that the term as used has the meaning set out in these definitions.

B. Trusts for Designated Beneficiaries (other than EDBs) (pages 12-21)

1. How are RMDs determined when an Employee dies after the Effective Date having named a See Through Trust to receive her Plan and the trust has DBs other than EDBs as beneficiaries? ACTEC requests Treasury adopt simpler, clearer, and easier to administer rules for determining which trust beneficiaries are counted and which beneficiary's RMD method is used. Revised rules could adapt to the new post-death RMD rules under the Act and modern estate planning trends.

ACTEC suggests counting only "qualified beneficiaries" as defined in the Uniform Trust Code (the "UTC"). Such a definition reaches a similar result as the "mere potential successor rule," but would be much simpler, clearer, and easier to administer.

ACTEC requests Treasury provide guidance on the treatment of permissible appointees under the Act. ACTEC suggests that Treasury's guidance, consistent with applicable trust law of virtually every jurisdiction and the approach taken by Congress with respect to ESBTs, clarify that permissible appointees of a testamentary power of appointment do not hold beneficial interests. In the event Treasury determines that permissible appointees of a testamentary power of appointment are to be included in determining Countable Beneficiaries under the Act, ACTEC requests Treasury also clarify the criteria for determining when the permissible appointees are counted, and when they are not counted.

C. Trusts for Spouse (pages 21-24)

[1] The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub. L. 116–94, was signed into law by President Donald Trump on December 20, 2019, as part of the Further Consolidated Appropriations Act, 2020 (2020 United States federal budget).

2. How are RMDs determined when an Employee dies after the Effective Date having named a See Through Trust to receive her Plan and the Employee's spouse is the sole Current Beneficiary of the trust? ACTEC requests Treasury confirm that if a Conduit Trust for the sole current benefit of the spouse is named as the beneficiary of the Employee's interest in the Plan, the trust would use the Life Expectancy Method and would recalculate the spouse's life expectancy each year through the year of the spouse's death.

If the Employee names a non-Conduit Trust for the spouse as beneficiary of her interest in the Plan, ACTEC suggests (i) the best rule for counting beneficiaries is to count only qualified beneficiaries as that term is defined under the UTC, and (ii) the best rule for determining the RMD method is to give priority to the shortest payout method among Current Beneficiaries.

D. <u>Eligible Designated Beneficiary ("EDB") In General</u> (pages 25-37)

3. What is the meaning of "any beneficiary of such eligible designated beneficiary?" ACTEC requests Treasury confirm that Code § 401(a)(9)(H)(iii) applies to all those succeeding to the balance of the Employee's interest at the EDB's death, regardless of whether the successor beneficiary was named by the EDB.

4. Can developments occurring after the Employee's death change the status of an EDB (other than a minor EDB attaining majority)? ACTEC requests Treasury confirm that the determination of EDB status is a one-time determination based on the circumstances at the time of the Employee's death (even if more time is needed to satisfy any documentation or certification requirements that apply), and that the EDB's status is not affected by subsequent developments (other than death or attainment of majority in the case of the Employee's minor child), even if they occur before the September 30 deadline for post-mortem events.

5. What if an EDB qualifies under more than one category of EDB? ACTEC recommends Treasury clarify that Code § 401(a)(9)(E)(iii) is limited to apply only to EDBs who do not qualify under any EDB category other than as the Employee's minor child.

ACTEC recommends that Treasury provide guidance to clarify whether an EDB who qualifies under more than one category can make use of the rules of more than one category, or whether the EDB must fall into one, specific category. If the EDB must fall into one category, ACTEC requests that Treasury explain how the applicable category is determined for an EDB who qualifies under more than one category. Possible approaches to clarifying this issue include (i) providing that certain categories take preference over others, or (ii) allowing the EDB to select the category that applies. If Treasury determines to prioritize the categories of EDB, ACTEC recommends that the categories of disability and chronic illness be given the highest priority.

6. Can an EDB choose to use the 10 Year Rule instead of the Life Expectancy Method? ACTEC requests Treasury clarify whether the Life Expectancy Method is mandatory for an EDB or whether the EDB is permitted to choose the distribution period the EDB (or the trustee of a trust for that beneficiary) determines would be most appropriate. If Treasury determines that the EDB may elect the distribution period to apply, ACTEC requests Treasury prescribe a method for making this selection of distribution period, and a default method in the event that the EDB did not make the election on a timely basis.

7. How are RMDs determined when an Employee dies after the Effective Date having named a Conduit Trust to receive her Plan and an EDB is the sole Current Beneficiary of the trust? ACTEC requests Treasury confirm that if an Employee dies after the Effective Date having named a Conduit Trust to receive the Employee's Plan interest, and if the individual Current Beneficiary of the Conduit Trust is an EDB, the RMDs for the Conduit Trust are determined in accordance with Code §§ 401(a)(9)(B)(iii) and (H)(ii).

8. How are RMDs determined when an Employee dies after the Effective Date having named a See Through Trust to receive her Plan and the trust directs the trustee to divide the trust into separate Conduit subtrusts for each Current Beneficiary of the trust, at least one of whom is an EDB who is not disabled or chronically ill? ACTEC requests that Treasury clarify whether or not, after a post-death division of a multi-beneficiary trust into separate Conduit subtrusts for EDBs who are not disabled or chronically ill, the EDB would be required to use the life expectancy of the oldest beneficiary of the multi-beneficiary trust prior to such division for purposes of determining the Applicable Distribution Period.

9. How are RMDs determined when an Employee dies after the Effective Date having named an Accumulation Trust to receive her Plan and an EDB is the sole Current Beneficiary of the trust? ACTEC requests Treasury provide guidance on whether an Accumulation Trust with an EDB who is not disabled or chronically ill as the sole Current Beneficiary can use the Life Expectancy Method provided for in Code § 401(a)(9)(H)(ii) in determining the RMDs from a Plan received by the trust on the death of an Employee. In such guidance, ACTEC requests that Treasury update the applicable See Through Trust rules as ACTEC has suggested in its discussion of Examples A and B, or if Treasury concludes that a different rule should apply, to clarify how such rules may now apply under the Act.

10. How are RMDs determined when an Employee dies after the Effective Date having named an Accumulation Trust to receive her Plan and the trust has more than one EDB as Current Beneficiaries? ACTEC requests Treasury provide guidance on whether a "pot" Accumulation Trust with multiple EDBs, but no DBs who are not EDBs, as Current Beneficiaries can determine RMDs based on the life expectancy of the oldest EDB Current Beneficiary, when none of the EDB Current Beneficiaries is disabled or chronically ill. In such guidance, ACTEC requests Treasury update the applicable See Through Trust rules as ACTEC has suggested, or if Treasury concludes that a different rule should apply, to clarify how such RMDs are determined as part of its guidance under the Act.

11. Can an EDB who succeeds to an EDB's interest in the Plan on the EDB's death continue to receive EDB Treatment? ACTEC requests Treasury provide guidance on whether there may be circumstances in which an individual who qualifies as an EDB as of the Employee's death but who is a remainder beneficiary of a portion of the Employee's interest in the Plan can continue as an EDB of such portion of the Employee's interest in the Plan after the death of the EDB who was the Current Beneficiary of such portion of the Employee's interest in the Plan.

E. Minor Child Beneficiary and Age of Majority (pages 37-46)

12. What is the meaning of "child" of the Employee? ACTEC requests Treasury provide guidance on the meaning of "child of the Employee" under the Act. ACTEC recommends that "child of the Employee" be determined under the law of the state of the Employee's residence at death.

13. What is the rule for determining when an EDB who is a minor child of the Employee "reaches majority"? ACTEC requests Treasury provide guidance on (i) whether Treasury will use the specific age of 26 as the "age of majority" or some other age or state law to determine when a child has not reached the age of majority, and (ii) whether Treasury will also require that the child has not completed a "specified course of education." If Treasury determines that the child will have to be shown not to have completed a "specified course of education" in order to be found not to have reached majority, ACTEC requests Treasury to provide guidance as to what "a specified course of education" means.

ACTEC requests Treasury provide in its guidance that a minor child of the Employee who becomes disabled or chronically ill during minority will continue to be treated as not having reached the age of majority so long as the child remains disabled or chronically ill.

ACTEC recommends that whatever guidance Treasury provides as to the meaning of "reaching majority" under Code § 401(a)(9)(E)(ii)(II) should apply to and have the same meaning for Code § 401(a)(9)(E)(iii).

14. If the Employee's interest in the Plan is distributable to a custodian for a minor pursuant to the applicable state Uniform Transfers To Minors Act ("UTMA"), will that qualify the minor child for EDB treatment? What if such an account continues in existence until age 25 under applicable state law? ACTEC requests Treasury confirm that if the Employee names as beneficiary of her interest in the Plan a custodial account under the UTMA for the Employee's minor child, valid under applicable state law, would enable the custodian of such UTMA to use the minor child's life expectancy for determining the Applicable Distribution Period until the minor child reaches majority, even if the age of termination for the UTMA is as high as age 25.

15. Will the Employee's minor child be treated as an EDB if the Employee names a Conduit Trust for the benefit of his minor child and the terms of the trust authorize distributions using a "facility of payment" provision? ACTEC requests Treasury confirm that a Conduit Trust may contain a facility of payment provision that would authorize the trustee to make distributions to (1) the minor's legal guardian, if any, (2) the minor's parent, as the minor's natural guardian, (3) a UGMA or UTMA custodian for the minor, or (4) any provider of goods or services to the minor, as direct payment of such expenses, and confirm that such a distribution would constitute a direct distribution of the Plan distribution to the minor child beneficiary to qualify the trust as a Conduit Trust.

16. Can there be a single Conduit Trust for multiple minor children of the Employee, treating the minor children as EDBs and using the age of the oldest minor child to determine the Applicable Distribution Period? If so, when does the Life Expectancy Method convert to a 10 year distribution period? ACTEC requests that Treasury clarify that

(i) a pot trust for the Employee's minor children will qualify as a Conduit Trust if the trust is structured (a) to require the trustee to immediately distribute all amounts received from the Plan to (or for the benefit of) the minor children; and (b) to prohibit accumulation of Plan distributions in the trust as long as any minor child of the Employee is living; (ii) the life expectancy of the oldest minor child of the Employee will be used for purposes of determining the Applicable Distribution Period; and (iii) the date there is any beneficiary of such Conduit Trust who is no longer a minor child EDB is the date that triggers conversion to the 10 year distribution period.

F. <u>Disabled and Chronically Ill EDBs</u> (pages 47-51)

17. How is the disability or chronic illness determined? How is the disability or chronic illness to be documented and when does the documentation need to be in place? ACTEC requests Treasury provide in its guidance the criteria and documentation required to establish the EDBs disability or chronic illness and that such documentation is to be provided by October 31 of the year following the year of the Employee's death. For a minor child who becomes disabled or chronically ill during minority, ACTEC requests Treasury provide in its guidance that the diagnosis of disability or chronic illness must be made prior to the minor reaching the age of majority, with the documentation to be provided by October 31 of the year following the year after reaching the age of majority.

ACTEC further requests Treasury provide in its guidance (i) whether any documentation will be required to be provided periodically to retain the status of a chronically ill EDB, (ii) whether such status, once attained, can be lost, and (iii) if it can be lost, whether the Life Expectancy Method will then transition to the 10 year distribution period.

18. Will a provision in a See Through Trust for a disabled or chronically ill person that restricts or eliminates that person's interest if it adversely affects qualification for public assistance, disqualify the disabled or chronically ill person as an EDB? ACTEC requests that Treasury state specifically whether the terms of a trust for a disabled or chronically ill individual could provide that the disabled or chronically ill person could lose his or her interest in the trust if it would disqualify the disabled or chronically ill person from essential benefits and still qualify as an AMBT.

G. <u>Applicable Multi-Beneficiary Trust</u> (pages 51-62)

19. What requirements must be satisfied for a trust to qualify as an AMBT? ACTEC requests Treasury confirm that the requirement in Code § 401(a)(9)(H)(v)(III) of the existence of at least one beneficiary of the trust being an EDB is focused on the *Current Beneficiaries* of the trust (as opposed to any remainder beneficiary of the trust).

ACTEC requests Treasury confirm that a Conduit Trust is not an AMBT because it has only one Current Beneficiary.

ACTEC requests Treasury confirm that an Employee's revocable trust can qualify as an AMBT at the Employee's death, provided it meets the See Through Trust requirements of Reg. § 1.401(a)(9)-4, A-5(b) and the AMBT requirements under Code § 401(a)(9)(H)(v) with respect to the trust beneficiaries with an interest in the Plan.

ACTEC requests Treasury confirm that the documentation required to be provided to the plan administrator is sufficient for AMBTs, or identify any additional documentation required to qualify as an AMBT.

20. What additional requirements must be satisfied for an AMBT to qualify as a trust described in Code § 401(a)(9)(H)(iv)(I)? ACTEC requests that Treasury confirm that the "terms of the trust" requirement will be met by reviewing such terms as they exist on September 30 of the year following the Employee's death even if such terms resulted from a post death modification that was completed prior to that date.

ACTEC requests Treasury confirm that a trust that calls for division of the trust upon the death of the Employee will satisfy this requirement of *immediate* division, and that it is not necessary for the trust to use the term "immediate" in describing the division in order to comply with this requirement.

ACTEC requests Treasury confirm that the "immediate division" requirement is satisfied even if immediate division is not possible due to the existence of a common disaster or survivorship requirement under the trust, and that Treasury specifically state whether the survivorship period must be limited to no more than six months after the Employee's death, the time period allowed under Code § 2056(b)(3). If the trust does not contain a common disaster or survivorship provision, but state law contains such a provision, ACTEC requests Treasury confirm that the terms of the trust are not required to negate applicable state law relating to post-death survivorship.

ACTEC requests Treasury confirm that the separate trusts required in Code § 401(a)(9)(H)(iv)(I) are only required for each Current Beneficiary. If Treasury concludes otherwise, ACTEC requests Treasury set out how a separate trust might be established for a Contingent or Successor Beneficiary as part of its guidance on the Act.

21. How must the division of an AMBT be conducted under AMBT Rule I? ACTEC requests Treasury confirm that only the AMBT's interest in the deceased Employee's Plan need to be the subject of the division directed by the terms of the trust.

ACTEC requests Treasury confirm that the Employee's interest in the plan need not be divided equally among the separate trusts and that the terms of the trust do not need to establish the size of the shares.

ACTEC requests Treasury confirm that the terms of the separate trusts need not be the same after the division.

ACTEC requests Treasury confirm that the division of an AMBT into separate trusts can be on a non-pro rata basis.

ACTEC requests Treasury to clarify whether there is an absolute time limit for the trustee to complete the division into separate trusts called for on the death of the Employee under the terms of the trust.

22. How are RMDs determined after an AMBT divides under AMBT Rule I? ACTEC requests Treasury confirm that (i) the phrase "portion of the employee's interest that is payable to" any disabled or chronically ill EDB refers only to such interest in an Employee's Plan as is allocated to a separate trust that has a disabled or chronically ill EDB as the sole *Current Beneficiary*, and (ii) the phrase "shall be applied separately" requires the rules of Code § 401(a)(9) be applied to each separate trust for a disabled or chronically ill EDB with respect to the portion of an Employee's Plan that is "payable to" the AMBT for such disabled or chronically ill EDB, in the manner provided in Reg. § 1.401(a)(9)-8, A-2(a)(2), notwithstanding the rule of Reg. § 1.401(a)(9)-4, A-5(c).

ACTEC requests Treasury provide guidance on whether the life expectancy of a disabled or chronically ill EDB is always used for the separate trust of such EDB after division of an AMBT, regardless of whether the trust satisfies AMBT Rule II, but if such life expectancy is not always used, ACTEC requests Treasury provide guidance concerning the circumstances under which such EDB's life expectancy is to be used.

ACTEC requests guidance as to whether there are circumstances in which a trust created from a division under AMBT Rule I may not satisfy the "separate trusts for each beneficiary" requirement under Code § 401(a)(9)(H)(iv)(I), and if so, that Treasury indicate what those circumstances may be and whether such a trust would qualify for the Life Expectancy Method under the portion of Code § 401(a)(9)(H)(iv) that applies to divisions under AMBT Rule I. If Treasury determines that such trust would not qualify for the Life Expectancy Method, ACTEC requests that Treasury provide guidance as to how RMDs are determined for such a trust.

ACTEC requests Treasury confirm that a post-mortem event, such as a disclaimer, that is completed prior to the September 30 of the calendar year following the year of the Employee's death, may be taken into account for purposes of determining whether a separate trust has been created for a disabled or chronically ill EDB after a division of an AMBT.

23. What additional requirements must be satisfied for an AMBT to qualify as a trust described in Code § 401(a)(9)(H)(iv)(II)? ACTEC requests Treasury confirm that the provisions of Code § 401(a)(9)(H)(iv)(II) that provide no individual (other than a disabled or chronically ill EDB) "has any right to the employee's interest in the plan until the death of all such EDBs with respect to the trust" refers to rights as a *Current Beneficiary* in the Employee's Plan, and the phrase "the employee's interest in the plan" refers only to such portion of the Employee's Plan that either is designated by the Employee as payable to the AMBT, or is allocated to the AMBT as part of a division of the trust.

24. How are RMDs determined for an AMBT that satisfies the requirements of AMBT Rule II? ACTEC requests Treasury confirm that when a disabled or chronically ill EDB is the sole Current Beneficiary of the AMBT, RMDs from such interest are determined using that EDB's Life Expectancy Method during that EDB's lifetime, and after that EDB's death, the RMDs are determined based on a 10 year distribution period.

ACTEC requests Treasury confirm that the phrase "any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary" means that such other beneficiaries of the AMBT who are not disabled or chronically ill EDBs shall not be counted as a trust beneficiaries under the See Through Trust rules that might otherwise apply to the AMBT.

ACTEC requests that if there is more than one disabled or chronically ill EDB that are Current Beneficiaries of an AMBT, Treasury provide guidance as to which life expectancy is to be used and whether that Life Expectancy Method can continue to be used as long as any disabled or chronically ill EDB is a Current Beneficiary of the AMBT before changing to a 10 year distribution period.

H. **Not More Than 10 Years Younger** (pages 62-63)

25. How is the age difference determined for purposes of determining whether an individual is not more than 10 years younger than the Employee? ACTEC requests Treasury provide guidance on how the relative ages of the Employee and the beneficiary are determined for purpose of determining whether the beneficiary is not more than 10 years younger than the Employee.

DETAILED COMMENTS

A. DEFINITIONS

In order to eliminate repetition and to provide clarity as to the terms used in this memorandum, we have provided the following definitions for terms frequently used throughout this memorandum.

1. An **"Accumulation Trust"** is a trust named as beneficiary of a deceased Employee's Plan that qualifies as a See Through Trust, all of the Countable Beneficiaries of which are individuals, but is not a Conduit Trust. That is, the trust does not require that all amounts distributed from the Plan be distributed from the trust upon receipt, leaving open the possibility that some amounts distributed from the Employee's Plan may be accumulated in the trust for the ultimate benefit of different beneficiaries. Note that one example of such a trust is described in Reg.[2] § 1.401(a)(9)-5, A-7(c)(3), Example 1.

2. **"Applicable Distribution Period"** refers to the time period over which the Plan of an Employee or a deceased Employee must be distributed which, under pre-SECURE Act law, was based on the life expectancy tables prescribed in the regulations for different scenarios. Reg. § 1.401(a)(9)-5, A-4, A-5, and A-6.

3. An **"Applicable Multi-Beneficiary Trust"** or **"AMBT" -** refers to a trust meeting all of the requirements set out in Code[3] § 401(a)(9)(H)(v), , with respect to an Employee's Plan.

4. The **"At Least As Rapidly Rule"** refers to a rule that arises in Code § 401(a)(9)(B)(i), and is further developed in Reg. § 1.401(a)(9)-5, A-5. Code § 401(a)(9)(B)(i) states the rule that if the Employee dies after distribution of the Employee's interest has begun (generally on or after the Employee's RBD), the remaining portion of the Employee's interest is distributed "at least as rapidly" as under the method of distribution being used by the Employee as of the date of death.

[2] "Reg." refers to Treasury Regulations.
[3] "Code" refers to the Internal Revenue Code.

Reg. § 1.401(a)(9)-5, A-5 provides that if the Employee has a DB, in order to satisfy Code § 401(a)(9)(B)(i) the Applicable Distribution Period is the longer of (i) the remaining life expectancy of the Employee's DB, and (ii) the remaining life expectancy of the Employee.

5. A **"Conduit Trust"** is a trust named as beneficiary of a deceased Employee's Plan that qualifies as a See Through Trust, and provides that all amounts distributed from the deceased Employee's Plan will, upon receipt by the trustee, be paid directly to a particular individual beneficiary for as long as that beneficiary is living, or otherwise falls within the rule of Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. This regulation provides that such individual beneficiary is the DB of the deceased Employee's Plan, and all other beneficiaries of the trust are not counted for purposes of determining the Employee's beneficiary with the shortest life expectancy and whether any beneficiary of the Employee is not an individual.

6. A **"Contingent Beneficiary"** is, with respect to a See Through Trust, a trust beneficiary (other than a Current Beneficiary or a Successor Beneficiary) who could become entitled or eligible to receive distributions from the trust that could be satisfied with an Employee's interest in the Plan. Note that a Contingent Beneficiary's entitlement to an Employee's benefit after the Employee's death is generally a contingent right. Note also that a Contingent Beneficiary of a See Through Trust other than a Conduit Trust is considered a beneficiary of the Employee for purposes of determining (i) the Employee's beneficiary with the shortest life expectancy and (ii) whether any beneficiary of the Employee is not an individual. Reg. § 1.401(a)(9)-5, A-7(b).

7. **"Countable Beneficiaries"** refers to those trust beneficiaries of a See Through Trust who are either a Current Beneficiary or a Contingent Beneficiary and are thus considered a beneficiary of the Employee for purposes of determining (i) the Employee's beneficiary with the shortest life expectancy and (ii) whether any beneficiary of the Employee is not an individual. Reg. § 1.401(a)(9)-4, A-5(a). The term "Countable Beneficiaries" may also be used to refer to those beneficiaries who are counted under an alternative rule proposed for Treasury's consideration under the Act, as the context indicates.

8. A **"Current Beneficiary"** refers to a beneficiary of a See Through Trust entitled or eligible to receive current distributions from the trust that could be satisfied with an Employee's interest in the Plan.

9. **"Deceased Employee's Life Expectancy Method"** refers to the method for calculating RMDs after Employee's death using an Applicable Distribution Period consisting of the remaining life expectancy determined using the age of the deceased Employee in the year of death. Reg. § 1.401(a)(9)-2, A-5(c)(3).

10. **"Designated Beneficiary"** or **"DB"** – refer to any individual designated as a beneficiary by the Employee. Code § 401(a)(9)(E)(i). An individual may be designated as a beneficiary under the Plan either by the terms of the Plan or, if the Plan so provides, by an affirmative election by the Employee (or the Employee's surviving spouse) specifying the beneficiary. Reg. § 1.401(a)(9)-4, A-1. Any DB who is an EDB will be referred to as an EDB, and the abbreviation DB standing alone may refer to a DB who is not an EDB, as the context indicates.

11. "**Effective Date" –** refers to the date after which the amendments contained in SECURE Act § 401(a) generally apply, which date is identified in SECURE Act § 401(b)(1) as December 31, 2019. For purposes of these comments, it can be assumed that any Plan discussed in these

comments is subject to the general rule, and not the exceptions to the general rule provided in SECURE Act §§ 401(b)(2)-(4).

12. **"Eligible Designated Beneficiary"** or **"EDB"** – refer to any Designated Beneficiary who falls within any of the five categories described in Code § 401(a)(9)(E)(ii) with respect to any Employee,, specifically: (i) surviving spouse of Employee, (ii) child of Employee who has not reached majority, (iii) disabled individual, (iv) chronically ill individual, or (v) individual not more than ten years younger than Employee.

13. **"Employee"** – refers broadly to an Employee, participant, account holder, IRA owner, or Roth IRA owner of any retirement account subject to the rules of Code § 401(a)(9).

14. **"Life Expectancy Method"** refers to the method for calculating RMDs after an Employee's death using an Applicable Distribution Period consisting of the life expectancy of the DB under pre-SECURE Act law pursuant to Code § 401(a)(9)(B)(iii) and Reg. § 1.401(a)(9)-2, A-5(c)(1). This method is also prescribed for an EDB while living under Code § 401(a)(9)(H)(ii), subject to Code § 401(a)(9)(E)(iii), which provides that a minor child EDB ceases to be an EDB upon reaching the age of majority.

15. **"Life Expectancy Method for Spouse as Sole DB"** refers to the method for calculating RMDs after an Employee's death using an Applicable Distribution Period consisting of the remaining life expectancy of the Employee's surviving spouse who is sole DB, redetermined annually. Reg. § 1.401(a)(9)-2, A-5(c)(2).

16. **"Plan"** – refers broadly to any retirement Plan, retirement Plan account, IRA, Roth IRA and any other retirement Plan or account subject to the rules of Code § 401(a)(9) and the regulations thereunder, as set forth in Reg. § 1.401(a)(9)-1, A-1 and to the Employee's interest in such Plan, as the context indicates.

17. **"Required Beginning Date"** or **"RBD"** – refers to the date specified in Code § 401(a)(9)(C) for an Employee as the date the Employee must start taking Required Minimum Distributions.

18. **"Required Minimum Distribution"** or **"RMD"** – refers to the amount required to be distributed from a Plan in a given calendar year pursuant to the minimum distribution requirements of Code § 401(a)(9) and the regulations thereunder.

19. A **"See Through Trust"** is a trust named as the beneficiary of an Employee's Plan meeting all of the requirements set out in Reg. § 1.401(a)(9)-4, A-5(b) so that the beneficiaries of the trust (and not the trust itself) are treated as having been designated as beneficiaries of the Employee under the Plan pursuant to Reg. § 1.401(a)(9)-4, A-5(a). Depending on the terms of the trust, a See Through Trust may be a Conduit Trust, an Accumulation Trust or neither.

20. The terms **"Successor Beneficiary"** or **"Mere Potential Successor Beneficiary"** are synonymous and each refers to a beneficiary of a See Through Trust who, pursuant to Reg. § 1.401(a)(9)-5, A-7(c)(1), will not be considered a beneficiary of an Employee's interest in the Plan (for purposes of determining who is the beneficiary with the shortest life expectancy or whether a person who is not an individual is a beneficiary) merely because the trust beneficiary could become the successor to the interest of one of the other trust beneficiaries after the death of that other beneficiary. For example, if the first beneficiary is entitled to receive all of the income

of the trust, and the second beneficiary will receive the principal of the trust on the death of the first beneficiary, the second beneficiary is a Contingent Beneficiary and not a Successor Beneficiary.

21. **"5 Year Rule"** refers to the rule described in Code § 401(a)(9)(B)(ii) whereby the entire interest of a deceased Employee is to be distributed within 5 years after the death of such Employee. Reg. § 1.401(a)(9)-3, A-2 specifically provides that in order to satisfy this rule, the Employee's entire interest must be distributed by the end of the calendar year that contains the fifth anniversary of the date of the Employee's death.

22. **"10 Year Rule"** refers to the rule described in Code § 401(a)(9)(H)(i) whereby Code § 401(a)(9)(B)(ii) shall be applied by substituting "10 years" for "5 years." For simplicity, with respect to a DB of an Employee who dies on or after his RBD, a reference to the 10 Year Rule implies the 10 Year Rule or any longer period that may be allowed under the At Least As Rapidly Rule.

B. TRUSTS FOR DESIGNATED BENEFICIARIES (OTHER THAN EDBs)

1. How are RMDs determined when an Employee dies after the Effective Date having named a See Through Trust to receive her Plan and the trust has DBs other than EDBs as beneficiaries?

(a) General Review of See Through Trust Rules.

ACTEC requests Treasury update the See Through Trust rules to reflect the new post-death RMD rules under the Act. A general review of current See Through Trust rules in the context of the new post-death RMD rules of the Act demonstrates the need to update these rules for trusts for DBs other than EDBs.

Existing Rules for See Through Trusts. Before the Act, when an Employee died having named an individual DB as beneficiary of his Plan, the Applicable Distribution Period for post-death RMDs consisted of the DB's remaining life expectancy[4] (or the deceased Employee's remaining life expectancy if longer and death was on or after the Employee's RBD).[5] If the deceased Employee named a See Through Trust as beneficiary of his interest in his Plan, certain beneficiaries of the trust who were beneficiaries with respect to the trust's interest in the Employee's Plan (and not the trust itself) were counted and treated as having been designated as the Employee's beneficiaries under the Plan for purposes of determining the Applicable Distribution Period.[6]

Such a trust can potentially have multiple beneficiaries with widely varying life expectancies. The final regulations promulgated by Treasury in 2002 (referred to throughout as the "2002 regulations") created very complex rules about Countable Beneficiaries in an effort (i) to prevent the life expectancy of a younger Current Beneficiary of the trust to be used as the Applicable

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[4] Reg. §§ 1.401(a)(9)-5, A-5(a) and (b).
[5] Reg. § 1.401(a)(9)-5, A-5(a).
[6] Reg. § 1.401(a)(9)-4, A-5(a).

Distribution Period if any older beneficiary had a meaningful interest in the Plan,[7] and (ii) to prevent the use of the Life Expectancy Method if any charity or other non-individual beneficiary of the trust had a meaningful interest in the Plan.

Under the 2002 regulations, if the See Through Trust was a Conduit Trust, only the Current Beneficiary of the trust was treated as the DB, and his or her life expectancy was used as the Applicable Distribution Period.[8] The interests of all other beneficiaries of the Conduit Trust were not meaningful enough for them to be counted, and they were disregarded.[9] If the See Through Trust was an Accumulation Trust, the Current Beneficiaries and Contingent Beneficiaries were counted and the Successor Beneficiaries were disregarded.[10] If all of the Countable Beneficiaries were DBs, then the DB with the shortest life expectancy was used for purposes of determining the Applicable Distribution Period.[11] If any Countable Beneficiary was not a DB, RMDs were determined as if the deceased Employee had no DB. [12]

Why ACTEC Requests These Rules Be Updated to Reflect the Act. These regulations for See Through Trusts, finalized in 2002, made the Life Expectancy Method the default method for determining a DB's RMDs. However, the Act now applies a 10 Year Rule to most DBs and allows the Life Expectancy Method only for certain DBs who qualify as EDBs, and then only until death (or attainment of majority in the case of an Employee's minor child). Thus, under the Act neither a DB nor an EDB will utilize the life expectancy method that was originally envisioned in 2002 when these regulations were finalized. ACTEC requests Treasury update these rules as part of providing guidance on the Act, particularly the following aspects of these rules:[13]

Applicable Distribution Period. The Applicable Distribution Period concept in the 2002 regulations assumed that distributions would be made over the DB's life expectancy regardless of how long the DB lived. This assumption no longer applies under the Act, because neither a DB nor an EDB will utilize the life expectancy method that was originally envisioned in 2002 when these regulations were finalized.

Determining Appropriate RMD Method. Under the 2002 regulations, there was a direct correlation between the life expectancy of each Countable Beneficiary and the distribution period associated with that beneficiary. The Act has eliminated that correlation for all except EDB, but only during the life (or minority) of the EDB. The 10 Year Rule now applies to all DBs regardless of age, except for EDBs. The Life Expectancy Method still applies to EDBs, but only

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[7] ACTEC's understanding of the purpose of the 2002 rules is based on numerous conversations that Kathleen Sherby, Steven Trytten, and others had with Marjorie Hoffman and other representatives of Treasury regarding the See Through Trust rules. These conversations occurred during the years leading up to the issuance of 2000 proposed regulations, 2002 final regulations, and thereafter. If this understanding is incorrect, ACTEC requests that Treasury clarify. All citations to the Regulations are to the Final Regulations promulgated in 2002.

[8] Reg. § 1.401(a)(9)-4, A-5(a); Reg. § 1.401(a)(9)-4, A-5(c)(1) and (2) and A-7(c)(3), Example 2. If the sole DB is the deceased Employee's spouse, his or her life expectancy may be recalculated each year through the year of the spouse DB's death.

[9] Reg. § 1.401(a)(9)-4, A-5(c)(1) and A-7(c)(3), Example 2.

[10] Reg. § 1.401(a)(9)-4, A-5(c); Reg. § 1.401(a)(9)-5, A-7(c)(1) and (3), Example 1.

[11] Reg. § 1.401(a)(9)-5, A-7(a)(1).

[12] Reg. § 1.401(a)(9)-4, A-3; the separate account rule of Reg. § 1.401(a)(9)-8, A-2 and A-3 does not apply to multiple beneficiaries of a trust that has been named as beneficiary, Reg. § 1.401(a)(9)-4, A-5(c).

[13] The Act defines a new category of trust, the Applicable Multi-Beneficiary Trust ("AMBT"). Code §§ 401(a)(9)(H)(iv) and (v). These rules are discussed later in Section G.

until death (or attainment of the age of majority in the case of an Employee's minor child). Thus, an older beneficiary who is an EDB can now have a longer distribution period than a younger beneficiary who is a DB but not an EDB. And the age or life expectancy of multiple beneficiaries who are DBs and not EDBs is no longer relevant, as all will have exactly the same distribution period – the 10 Year Rule. Under the Act, life expectancy for a DB or for an EDB after death (or after reaching the age of majority) is no longer a meaningful attribute for purposes of identifying the Applicable Distribution Period.

Under the Act, the Rules Can Now Be Less Complex. ACTEC requests Treasury update the criteria for determining which trust beneficiaries are counted and which beneficiary's RMD method is used, to adapt to the new post-death RMD rules under the Act. The new rules under the Act and certain trends in estate planning support making these rules less complex while still carrying out Congressional intent.

Now that the Life Expectancy Method is no longer the default, the 2002 regulations, based on the Life Expectancy Method that applied prior to the Act, do not translate well to the 10 Year Rule. Under the changes made by the Act, the 10 Year Rule will apply either on the death of the Employee or on the later death (or attainment of the age of majority) of the EDB. ACTEC anticipates that the great majority of individuals who could potentially be Countable Beneficiaries of a See Through Trust will be DBs who are not EDBs, and, accordingly, that the 10 Year Rule will likely apply most of the time. With the 10 Year Rule, there should no longer be a need to determine whether an older more remote trust beneficiary has a meaningful interest in the Plan. Even if a trust is primarily for the benefit of an EDB and the trust qualifies to use the EDB's life expectancy, the Life Expectancy Method applies only until the EDB's death (or reaching majority in the case of a minor child EDB), and after the death (or reaching the age of majority) of the EDB, a 10 year distribution period for Contingent Beneficiaries applies. Therefore, the life expectancy of such EDB will not affect distributions to the next trust beneficiary.

Trends in estate planning have likewise changed since 2002. Many individuals use revocable trusts (instead of wills) to carry out their dispositive intent, and estate plans often include various types of continuing trusts for gifts to children and other beneficiaries. The primary objectives for using trusts almost always involve non-tax objectives, such as the following:

- *Regulate Timing, Amount, and Purpose of Distributions.* There are numerous reasons why an individual might want a trust for a beneficiary to include provisions as to the timing and amount of distributions to or for the benefit of the beneficiary. These reasons may include, for example, concern that the trust beneficiary may be too young, a spendthrift, susceptible to substance abuse, susceptible to undue influence by a spouse or other person, disabled, chronically ill, in an unstable marriage, or vulnerable to creditors. Applicable Multi-Beneficiary Trusts for disabled and chronically ill beneficiaries are discussed in greater detail in Section G.

- *Facility of Payment.* Individuals often want a trust to provide flexibility as to when distributions are made directly to a beneficiary, and when they are made in other ways authorized under a "facility of payment" clause. These other methods of helping the beneficiary may include, for example, direct payment to vendors or service providers of the beneficiary's expenses, taxes, payment to the beneficiary's legal guardian or conservator, payment to a custodian of a Uniform Transfers to Minors Account for the beneficiary, or payment to another trust for the beneficiary.

- *Professional Management.* A trust may also provide professional management of the assets intended for the beneficiary because of the complexity of the assets being left in trust, concern that the trust beneficiary may lack the interest or skills to manage the assets, and the various concerns listed above with respect to distributions.

- *Creditor Protection.* An individual may want to protect the assets intended for a beneficiary from the beneficiary's creditors. Inherited IRAs are not protected in federal bankruptcy,[14] and enjoy little or no creditor protection in many jurisdictions.[15] Thus, naming a spendthrift trust as beneficiary may be essential if the individual wants to protect an inherited IRA from reach by a beneficiary's creditors.

- *Support Beneficiary's Qualification for Benefits.* An individual may want to provide for a beneficiary who is disabled or chronically ill in a way that will not disqualify that beneficiary from receiving benefits to which the beneficiary is entitled from federal, state, or local governments or organizations.

Not only are the primary objectives for using trusts almost always non-tax objectives, it is more likely than not that federal income taxes will be *higher* if the assets intended for a beneficiary are left in trust, due to the compressed federal income tax rates that apply to trusts.[16] This will be particularly noticeable with trusts that accumulate distributions received from Plans, especially if these distributions are received over a 5 or 10 year distribution period. And yet, the trend in estate planning is that many individuals use long-term continuing trusts despite the higher federal income tax cost because of important non-tax objectives.

The laws governing trusts in most jurisdictions have also been modernized since 2002. The UTC was first promulgated in 2000 by the Uniform Law Commission, but by 2002 (when the 2002 regulations were finalized), only one state, Kansas, had adopted a version of the UTC. As of 2019, thirty-four states and the District of Columbia have now adopted a version of the UTC, and many UTC concepts can be found in the statutes of the sixteen remaining states, including California, Georgia, Indiana, Texas, and Washington.

Simplicity, Clarity, and Ease of Administration. The See Through Trust regulations finalized in 2002 are complicated and susceptible to multiple interpretations. Much of the confusion arises in connection with determining whether a particular beneficiary is a Contingent Beneficiary who is counted or a Successor Beneficiary who is not counted, because the existing criteria for determining whether a beneficiary is a Contingent Beneficiary or a Successor Beneficiary are not easy to apply. The rule for determining when a beneficiary is a Successor Beneficiary (sometimes called the "mere potential successor" rule) is articulated in Reg. § 1.401(a)(9)-5, A-7(c)(1) as follows:[17]

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[14] *Clark v. Rameker*, 134 S. Ct. 2242 (2014).
[15] See the 50 State Inherited IRA Chart on the ACTEC website (www.actec.org).
[16] Code §§ 1(e) and 1(j)(2)(E). In 2020, the top income tax bracket applies to a trust's taxable income in excess of $12,950, Rev. Proc. 2019-44.
[17] Reg. § 1.401(a)(9)-5, A-7(c)(1).

> "(c) Successor beneficiary. (1) A person will not be considered a beneficiary for purposes of determining who is the beneficiary with the shortest life expectancy under paragraph (a) of this A-7, or whether a person who is not an individual is a beneficiary, *merely because the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death. However, the preceding sentence does not apply to a person who has any right (including a contingent right) to an employee's benefit beyond being a mere potential successor to the interest of one of the employee's beneficiaries upon that beneficiary's death*. Thus, for example, if the first beneficiary has a right to all income with respect to an employee's individual account during that beneficiary's life and a second beneficiary has a right to the principal but only after the death of the first income beneficiary (any portion of the principal distributed during the life of the first income beneficiary to be held in trust until that first beneficiary's death), both beneficiaries must be taken into account in determining the beneficiary with the shortest life expectancy and whether only individuals are beneficiaries." (emphasis added)

The italicized phrases in this regulation are critical in applying this rule, but the exact meaning of these phrases has proven to be elusive at best.[18] This confusion no longer seems appropriate under the 10 Year Rule.

As mentioned earlier, determining the RMD method after the Countable Beneficiaries of a See Through Trust have been identified is yet another area of confusion that arises under the new rules of the Act. The existing rule of identifying the DB with the shortest life expectancy (assuming no non-DBs) breaks down when the 10 Year Rule is the default for most DBs, regardless of their life expectancy.

ACTEC requests Treasury make these rules for counting beneficiaries and for determining the RMD method simple, clear, and easy to administer as part of updating these rules to reflect the post-death RMD changes under the Act. Complex rules that are not easy to apply make the process of drafting a trust complex and expensive, with greater chance for error. Complex rules also lead to uncertainty as to the outcome for See Through Trusts under the RMD rules, and they make analysis of these trusts, compliance by taxpayers, administration by Plan administrators and IRA custodians, and administration of the tax laws by Treasury considerably more difficult. Set out below are ACTECs suggestions for Treasury's consideration of ways that these rules could be made simpler, clearer, and easier to administer, without compromising Treasury's concerns that underlie the 2002 regulations.

Increase from Two Categories of Beneficiaries to Seven. Before the Act, beneficiaries came in two general classes: non-DB and DB (and a variation where a spouse named as sole DB could redetermine his or her life expectancy each year). Under the Act, there are now *seven* categories of beneficiaries, each with different rules: (i) non-DB, (ii) DB, (iii) Employee's spouse EDB, (iv) Employee's minor child EDB, (v) disabled EDB, (vi) chronically ill EDB, and (vii) no more than ten years younger than Employee EDB. Just as the Act has made post-death RMD methods more context-sensitive (with seven possible categories for a beneficiary), ACTEC suggests that it

[18] ACTEC requested guidance on how to interpret these rules in its letter to Treasury, first submitted on March 27, 2003.

is possible that context-sensitive rules that apply specifically to certain categories may be helpful. Suggestions for context-sensitive rules are included in certain other sections that follow.

(b) Determination of RMDs of See Through Trusts for DBs (other than EDBs).

1. *Conduit Trust for DB (other than EDB).*

Example A: Employee Ann names a Conduit Trust to receive her interest in the Plan at her death, and dies after the Effective Date. Bob, who is a DB but not an EDB, survives Ann and is the Current Beneficiary of the Conduit Trust.

The rules seem clear that Bob is the only beneficiary who is counted. Since Bob is not an EDB, the 10 Year Rule applies. If Treasury arrives at a different result, ACTEC requests Treasury explain any such different result as part of its guidance on the Act.

2. *Accumulation Trust for DBs (other than EDBs) and Non-Individual.*

With an Accumulation Trust for DBs (who are not EDBs), the only relevant purpose in counting trust beneficiaries now is determining whether a person other than an individual is deemed to have been designated as beneficiary by the Employee.[19]

Example B: Employee Ann names a See Through Trust to receive her interest in her Plan at her death and dies after the Effective Date. The trust pays all income for life to her son Bob, and the remainder at Bob's death outright to her niece Chris, or if Chris fails to survive Bob, to Davidson University (a charity). Bob and Chris survive Ann, and neither are EDBs.[20]

In Example B, under the 2002 rules, the DBs would be Bob and Chris. Bob is counted as a Current Beneficiary, and since some Plan distributions could be accumulated in the trust for Chris's benefit, Chris is counted as a Contingent Beneficiary. [21] ACTEC believes that Davidson University would be a Successor Beneficiary that is not counted under the existing mere potential successor rule.[22] Thus, the 10 Year Rule applies. If Treasury reaches a different conclusion, ACTEC requests Treasury explain any such different result as part of its guidance on the Act.

Example C: The facts are the same as Example B, except the trust pays all income to Bob until he reaches age 35, at which time the remaining principal is distributed outright to Bob. If Bob dies before reaching age 35, the trust continues for Chris, paying all income to her until she reaches age 35, at which time the remaining principal is distributed outright to Chris, but if Chris dies before reaching age 35, the balance of the trust is distributed to Davidson University (a charity). Bob and Chris are age 25 at Ann's death.

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[19] Under the Act, (i) the 10 Year Rule applies to all individual beneficiaries who are DBs and not EDBs, and (ii) either the 5 Year Rule or the Employee's remaining life expectancy applies to a non-individual beneficiary, such as a charity, depending on whether the Employee dies before her RBD.

[20] Example B is similar to Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 1.

[21] *Id.*

[22] *Id*. This interpretation is implied but not explicitly discussed in the regulation, and is followed in PLRs 2004-38044, 2005-22012, 2006-08032, and 2006-10026.

In Example C, Bob is counted as a Current Beneficiary, and because some Plan distributions may be accumulated in the trust for Chris's benefit, Chris is counted as a Contingent Beneficiary. In determining whether Davidson University is a Contingent or Successor Beneficiary, the mere potential successor rule is unclear because it is susceptible to multiple interpretations. Under one interpretation, Davidson University is a Successor Beneficiary and not counted, because it only receives an interest in Ann's Plan if Bob and Chris both die before reaching age 35 and there is less than a 1% probability that this would occur. However, some might interpret the mere potential successor rule as classifying Davidson University as a Contingent Beneficiary, reasoning that if Bob dies immediately after Ann's death, Chris becomes a current beneficiary and some Plan distributions may be accumulated in the trust for Davidson University's benefit, making Davidson a Contingent Beneficiary. This second interpretation does not consider the less than 1% chance that both Bob and Chris would die before the termination of the trust and that Davidson would only benefit from Ann's Plan if neither Bob nor Chris lives out their life expectancy. ACTEC believes this second interpretation leads to an inappropriate result given that the likelihood of Davidson University receiving an interest in the Plan is much less than in Example B, in which Davidson University is not counted.

ACTEC requests Treasury announce rules under the Act that, if applied to the facts in Example C, would treat Davidson University as a Successor Beneficiary that is not counted. If Davidson University is not counted, the 10 Year Rule applies.[23]

ACTEC is aware that there is considerable confusion in the estate planning community about how the mere potential successor rule works when there are age contingencies involved such as those in Example C. This example is just one of many different scenarios where the mere potential successor rule is hard to apply, and causes significant uncertainty, which makes planning, death administration, plan administration, and Treasury's administration of these rules more difficult.

ACTEC offers some alternative rules for Treasury's consideration that are simpler, clearer, and easier to administer, as follows:

Count Only Current Beneficiaries. A rule that counts only Current Beneficiaries would be simple, clear, and easy to administer. With the changes in the Act, the reasons to have a complicated test for determining RMD methods between a DB and a non-DB no longer exist for trusts that do not have EDBs. Although this rule does not count Contingent Beneficiaries, under the Act's 10 Year Rule, the distribution period is limited to 10 years regardless of whether or when the Current Beneficiary dies. However, Treasury may be reluctant to adopt this simple rule because it would allow a trust to use the 10 Year Rule even if a person other than an individual is next in line to receive the trust when the Current Beneficiaries' interests end.

Count Only "Qualified Beneficiaries" as Defined Under the Uniform Trust Code. In the years since the mere potential successor rule was finalized in 2002, the UTC has been adopted in most jurisdictions. The UTC incorporates the concept of the "qualified beneficiary," which identifies

[23] If Davidson University is counted, the Applicable Distribution Period either would be a few years shorter under the 5 Year Rule or would potentially be longer using the Employee's remaining life expectancy, depending on whether Ann dies before her RBD.

the trust beneficiaries to whom certain notices must be given or consents received.[24] A trust's qualified beneficiaries can be loosely described as "the Current Beneficiaries plus the next tier of Contingent Beneficiaries."[25] Section 103(13) of the UTC defines qualified beneficiaries as follows:

> (13) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined:
>
> (A) is a distributee or permissible distributee of trust income or principal;
>
> (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or
>
> (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Incorporating this definition to distinguish between those beneficiaries who are counted and those who are not is another approach that would make the rules simpler, clearer, and easier to administer. In using the qualified beneficiary concept for establishing Countable Beneficiaries under the Act, Treasury would be recognizing that the age of a DB is not relevant under the Act, and that the existence of a remote non-individual beneficiary is likewise not relevant under the short Applicable Distribution Periods now predominant under the Act, i.e., the 10 Year Rule, the 5 Year Rule and the Deceased Employee's Remaining Life Expectancy.

ACTEC suggests that replacing the current mere potential successor rule with either the "Current Beneficiary" or the "Qualified Beneficiary" rule would result in a rule for counting beneficiaries that is simple, clear, and easy to administer. ACTEC suggests that the "Qualified Beneficiary" approach is a particularly attractive option for counting beneficiaries that is similar to the mere potential successor rule but much simpler, clearer, and easier to administer. [26]

Current Beneficiary's Testamentary Power of Appointment.

Another trend in estate planning is that most modern trusts grant a testamentary power of appointment to the current beneficiary of the trust.[27] A testamentary power of appointment may be either "general" or "limited" for purposes of estate tax inclusion in the powerholder's estate, depending on whether the powerholder's creditors, estate, or creditors of the estate are

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[24] Section 103(13) of UTC and comments thereto. "Qualified beneficiaries" are referenced, for example, in § 705 to define the class to whom notice must be given of a trustee resignation, in § 813 to define the class to be kept informed of the trust's administration, in § 417 to define the class to receive notice before a trust is combined or divided, in § 704 to define the class who must consent to appointment of a successor trustee, and in § 108(d) to receive notice prior to transfer of a trust's principal place of business.

[25] *Id.,* which describes qualified beneficiaries as, "… the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen."

[26] Once the appropriate beneficiaries have been counted, there remains the task of determining the appropriate RMD method. Although this was not an issue when none of the DBs are also EDBs, it is an issue when EDBs are involved as will be discussed more fully in sections that follow.

[27] Traditionally, a testamentary power of appointment must be exercised through the powerholder's will. Modern trusts usually authorize exercise through a lifetime instrument that takes effect at the powerholder's death. For purposes of this memorandum, the term "testamentary power of appointment" refers to both variations.

permissible appointees.[28] The scope of permissible appointees can be further limited (or not limited) on a case by case basis to carry out the grantor's intentions. For example, a grantor might limit the class of permissible appointees to her descendants.

Example D: Employee Ann names a See Through Trust to receive the interest in her Plan at her death and dies after the Effective Date. The trust pays all income for life to her son Bob, and the remainder at Bob's death to her niece Chris, or if Chris fails to survive Bob, to Davidson University (a charity). Bob and Chris survive Ann, and neither are EDBs. The trust also provides Bob with a testamentary power of appointment that allows Bob to appoint the trust to any person, including charities, other than Bob's creditors, Bob's estate, or the creditors of Bob's estate.[29]

If the permissible appointees of Bob's power of appointment are considered trust beneficiaries, and are to be counted, and charities or other non-individual persons are among the permissible appointees, then either the 5 Year Rule or the Employee's remaining life expectancy applies, depending on whether Ann dies before or after her RBD. Otherwise, the 10 Year Rule applies.

There is scant authority as to whether the permissible appointees of a power of appointment such as Bob's are viewed as trust beneficiaries for purposes of the See Through Trust rules, and when, if ever, they are counted as such.[30]

Generally, under state law, the permissible appointees under a testamentary power of appointment are not recognized as having a beneficial interest in the trust containing such power. Section 103(3) of the UTC defines "Beneficiary" to include the holder of a power of appointment but omits the permissible appointees of such a power. "Qualified beneficiaries" as defined under § 103(13) of the UTC can include takers in default of the exercise of a power of appointment, but not the permissible appointees. The comments to Section 103(13) of the UTC state, "… Because the exercise of a testamentary power of appointment is not effective until the testator's death, the qualified beneficiaries do not include appointees under a power of appointment held by a living person. Nor would the term include the objects of an unexercised inter vivos power."

In at least one other area of the federal tax law in which it is necessary to count beneficiaries, the legislation disregards any unexercised power of appointment. When an "electing small business trust" (ESBT) holds shares in an S corporation, each "potential current beneficiary" of the ESBT is counted for purposes of the 100 shareholder S corporation limitation under Code § 1361(c)(2)(B)(v). Congress amended Code § 1361(e)(2) in 2004 to disregard any unexercised power of appointment in determining the potential current beneficiaries of an ESBT, codifying a rule that was previously promulgated in Notice 97-49.[31] (Note that a testamentary power of appointment remains "unexercised" until the death of the power holder.)

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[28] Code § 2041(b)(1).
[29] Example D is identical to Example B except for Bob's testamentary power of appointment.
[30] The following PLRs analyzed See Through Trusts that provided the current beneficiary with a testamentary power of appointment but did not provide any specific analysis with respect to the power of appointment: PLR 1999-03050, PLR 2004-38044 (power of appointment was disclaimed); and PLR 2006-20026 (which involved a conduit trust).
[31] Code § 1361(e)(2) after amendment under the 2004 Jobs Act, Pub. L. No. 108-357, 108th Cong., 2d Sess. (2004), § 234, 118 Stat. 1418.

ACTEC is aware that there may be some uncertainty among estate planners whether the permissible appointees of a testamentary power of appointment are counted as beneficiaries under the See Through Trust rules, even though there does not appear to be any authority to support this position. ACTEC requests Treasury provide guidance on the treatment of permissible appointees under the Act. ACTEC suggests that Treasury's guidance, consistent with applicable trust law of virtually every jurisdiction and the approach taken by Congress with respect to ESBTs, clarify that the permissible appointees of a testamentary power of appointment do not hold beneficial interests for purposes of determining the post-death RMDs under the Act. In the event Treasury determines that the permissible appointees of a testamentary power of appointment should be viewed as beneficiaries of the trust under the Act, ACTEC requests that Treasury then clarify the criteria that determine when the permissible appointees are counted, and when they are not counted. In this regard, ACTEC suggests that even if the permissible appointees under a testamentary power of appointment are viewed as beneficiaries, they have no contingent beneficial interest and thus are Successor Beneficiaries who are not counted.

C. TRUST FOR SPOUSE

2. How are RMDs determined when an Employee who dies after the Effective Date having named a See Through Trust to receive her Plan and the Employee's spouse is the sole Current Beneficiary of the trust?

If an Employee dies after the Effective Date and names her spouse as the beneficiary of her interest in the Plan, the Employee's spouse is an EDB, and the Life Expectancy Method is used to determine the spouse's RMDs.[32]

If that same Employee names a Conduit Trust for her spouse, the spouse is treated as the Employee's sole DB.[33] ACTEC requests Treasury confirm that, since the spouse is an EDB, the Conduit Trust would determine RMDs using the Life Expectancy Method and would recalculate the spouse's life expectancy each year through the year of the spouse's death.[34] After the spouse's death, a 10 year distribution period would apply. Although these conclusions seem clear, if Treasury reaches a different conclusion, ACTEC requests Treasury to explain any such differences as part of its guidance on the Act.

There are many important non-tax reasons that would cause an Employee to prefer to name a trust for her spouse that is not a Conduit Trust. [35] The rules concerning trusts and Plans require beneficiaries to be counted for the purpose of two tests: (i) determining whether a person other than an individual is deemed to have been designated as beneficiary by the Employee and (ii) determining the appropriate RMD method taking into account the Countable Beneficiaries. Unlike the Accumulation Trust for DBs who are not EDBs discussed above in Section B, an Accumulation Trust for a spouse is likely to involve the spouse EDB and other beneficiaries who are DBs. If the Employee names an Accumulation Trust for the spouse as beneficiary of her interest in the Plan, the consequences under the Act are examined in the following example.

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[32] Code § 401(a)(9)(E)(ii)(I).

[33] Reg. § 1.401(a)(9)-4, A-5(a); Reg. § 1.401(a)(9)-4, A-5(c)(1) and A-7(c)(3), Example 2.

[34] Reg. § 1.401(a)(9)-5, A-5(c)(2) and A-7(3), Example 2.

[35] For more on the important non-tax reason for using a trust, see the bullets beginning on page 14 of Section B.

Example A: Employee Doris names a See Through Trust to receive her interest in her Plan at her death. The trust provides for all income to be paid to her spouse, Eric (age 60) for life,[36] and the remainder at Eric's death to be distributed outright to Doris's only child, Flo (age 35), but if Flo does not survive Eric, to Davidson University (a charity). Flo is a healthy adult. No one has the power to appoint principal to anyone other than Eric during Eric's life. Eric is also granted the power to compel the trustee to withdraw from the Plan an amount equal to the income earned inside the Plan and to distribute that amount to him. Thus, if Eric exercises this power, the trustee will withdraw from the Plan the greater of the income earned in the Plan or the RMD each year, and will distribute the income to Bob and accumulate the principal.

Example A is a very common estate plan and is identical in substance to Example 1 in Reg. § 1.401(a)(9)-5, A-7(c)(3) except for assuming only one child and for the addition of a charity as the ultimate contingent remainder beneficiary. Example 1 states that no one has a beneficial interest in the trust other than the primary remaindermen, i.e., the children of the Employee. Of course, if the children in Example 1 did not survive the life income beneficiary, the trust property must pass to some person or entity, either by the terms of the governing instrument or applicable state law. Presumably, this regulation contemplates that these alternate takers are Successor Beneficiaries who are not counted, but this is not explicitly stated.[37]

Another point that is not explicitly stated in this regulation is that this trust will qualify for the estate tax marital deduction as a so-called "QTIP Marital Trust" under Code § 2056(b)(7) if the deceased Employee's executor makes a valid QTIP election with respect to the trust. The trust also contains appropriate language required to support a valid QTIP election with respect to the Plan.[38]

If Doris had died on or before the Effective Date, the existing rules count Eric as a Current Beneficiary and Flo as a Contingent Beneficiary because some Plan distributions may be accumulated in the trust for her benefit.[39] We assume Davidson University is a Successor Beneficiary and therefore not counted. Thus, the trust has two DBs. Eric is the DB with the shortest life expectancy and his life expectancy is used to determine the Applicable Distribution Period.

However, ACTEC requests guidance on how RMDs are determined under the Act if Doris dies after the Effective Date. Example A is a very common estate plan and ACTEC believes that the guidance sought regarding this Example will have a far reaching effect on simplifying the understanding of the rules. Eric's status as Doris's spouse qualifies him as an EDB who, if designated outright, will use the Life Expectancy Method to determine RMDs (changing to a 10 year distribution period after his death). Flo is a DB and not an EDB, who if designated outright will use the 10 Year Rule to determine RMDs. The following sections discuss the difficulties involved with applying the existing rules subsequent to the Act, describe several alternate rules for Treasury's consideration, and discuss how these alternatives might be used to determine

[36] It is assumed in this and all following examples that no one has the power to appoint trust principal to any person other than the named income beneficiary.
[37] This interpretation is followed in PLRs 2004-38044, 2005-22012, 2006-08032, and 2006-10026.
[38] Rev. Rul. 2006-26, 2006-1 C.B. 939 and Rev. Rul. 2000-2, 2000-1 C.B. 305, address the requirements to obtain the marital deduction for both the Plan and the trust when a Plan interest is designated to a marital trust.
[39] Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 1.

RMDs for the See Through Trust in Example A under the Act. Each method articulates both (i) which trust beneficiaries are counted, and (ii) how the RMD method is determined.

1. *Existing Rules*: Current and Contingent Beneficiaries are counted using the mere potential successor rule both to determine whether there are any non-DBs and to identify the appropriate RMD method. Eric is the DB with the shortest life expectancy, but Flo is the DB with the shortest payout method under the Act. Under the existing regulations, it is unclear whether the shortest life expectancy, the shortest payout method, or some other criterion takes priority for determining the RMD method.

a. *Existing Rules – Life Expectancy Takes Priority*. If the shortest life expectancy takes priority, Eric's payout method controls because he is older than Flo, and the trust determines RMDs using the Life Expectancy Method during Eric's lifetime since he is an EDB, but without recalculation since he is not the sole DB. After Eric's death, a 10 year distribution period applies. However, in other scenarios where the Contingent Beneficiary is older than the Current Beneficiary, this rule could provide an undesirable result. For example, if the Current Beneficiary is a DB and the older, Contingent Beneficiary is an EDB, this rule could result in using the older EDB's life expectancy and then switching to a 10 year distribution period when the Contingent Beneficiary dies, even if the Current Beneficiary is still living.

b. *Existing Rules – Shortest Payout Method Takes Priority.* If the shortest payout method takes priority, Flo's payout method controls because her 10 Year Rule produces a shorter distribution period than Eric's Life Expectancy Method, and the trust determines RMDs using the 10 Year Rule. This approach produces a substantially worse outcome for Eric than the life expectancy method that would have been allowed under pre-Act rules if Doris had died on or before the Effective date. Congress identified the Employee's spouse as one of five categories of protected DBs who may continue to use the Life Expectancy Method as EDBs under the Act.[40] Limiting the surviving spouse to a 10 Year Rule under the Act does not seem to be consistent with Congress's intent in including the spouse in this protected category.

c. *Existing Rules – Shortest Payout Method Among Current Beneficiaries Takes Priority.* Under this approach, the shortest payout method among Current Beneficiaries takes priority. In Example A, Eric is the sole Current Beneficiary and his payout method controls. Thus, the trust determines RMDs using the Life Expectancy Method during Eric's lifetime since he is an EDB, but without recalculation since he is not the sole DB. After Eric's death, a 10 year distribution period applies.

ACTEC suggests that using the shortest payout method among Current Beneficiaries is the best of these three possible criteria for determining the RMD method, and further suggests that for this purpose a 10 year distribution period be treated as equivalent to a 10 year life expectancy for purposes of determining whether it is longer or shorter than some other life expectancy.

2. *Count Only Current Beneficiaries – Shortest Payout Among Them.* As discussed in section B above, a rule that counts only Current Beneficiaries would be simple, clear, and straightforward to administer. It could be argued that even when the Current Beneficiary is an EDB, the Contingent Beneficiaries who are DBs are not receiving an inappropriate benefit, since the distribution method will switch to a 10 year period at the Current Beneficiary's death. The

[40] Code § 401(a)(9)(E)(ii)(I).

result of this rule for Example A would be that Eric's payout method controls and the trust determines RMDs using the Life Expectancy Method during Eric's lifetime since he is an EDB. If Eric is the sole Countable Beneficiary, he would be the sole DB and allowed to recalculate his life expectancy each year. However, counting only Current Beneficiaries could result in allowing a trust to use a Current Beneficiary's RMD method, even if the next beneficiary with an interest in the trust on the death of the Current Beneficiary is not a DB, which would not be permitted under the existing regulations.

3. *Count Only Qualified Beneficiaries Under Uniform Trust Code.* As discussed in Section B, a rule that counts only qualified beneficiaries within the meaning of Section 103(13) of the UTC is similar to the mere potential successor rule and is simple, clear, and straightforward to administer.

ACTEC suggests that this rule may be the most appropriate for purposes of determining whether a non-individual has been designated. Applying this rule to Example A, Eric and Flo would be the Countable Beneficiaries for purposes of determining whether a non-individual has been designated. A rule in which all qualified beneficiaries are counted eliminates complexity and confusion in counting beneficiaries.

ACTEC suggests that one of the three criteria discussed above should also be identified as the appropriate criterion for determining the RMD method to be used. In that regard, ACTEC suggests that the "shortest payout method among Current Beneficiaries" described in 1.c. above will produce the most appropriate result in a wide range of scenarios for determining the RMD method. In Example A, Eric is the only Current Beneficiary and his payout method would control.

4. *Spouse of Marital Trust Recognized as Sole DB (in the context of Employee's spouse EDB).* The tax law favors and protects surviving spouses in many contexts, including for estate tax purposes. An estate tax marital deduction is allowed with respect to gifts from the decedent to his or her surviving spouse provided the surviving spouse has a sufficient ownership interest to cause estate tax inclusion in the spouse's gross estate on his or her later death.[41] These rules have evolved over many years and the criteria for a trust to qualify for the marital deduction are well-settled. These criteria could be incorporated for purposes of creating a context-sensitive exception for the Employee's spouse EDB that treats the spouse as the sole DB of a See Through Trust, if both the See Through Trust and the Employee's Plan qualify for the estate tax marital deduction allowed under Code § 2056(b)(7) (or would so qualify if the deceased Employee's executor makes a valid QTIP election with respect to the trust and the Plan). Applying this method to Example A, Eric is the only beneficiary counted, the trust determines RMDs using Eric's life expectancy, Eric is allowed to recalculate his life expectancy each year as the sole DB, and a 10 year period applies after Eric's death. The "Marital Deduction Trust" approach is an example of a context-sensitive rule that may be appropriate for the spouse EDBs.

In conclusion, ACTEC suggests that <u>the best rule for counting beneficiaries is to count only qualified beneficiaries</u> as that term is defined under the UTC, and that <u>the best rule for determining the RMD method is to give priority to the shortest payout method among Current Beneficiaries</u>. The "qualified beneficiary rule" is similar to the mere potential successor rule,

[41] Code § 2056(a) and (b).

and is clear, simple, and easy to apply. The “shortest payout method among Current Beneficiaries rule” works best under the new rules under the Act. These two rules, together, will combine to produce a reasonable outcome in a wide range of scenarios under the Act in a manner that will be consistent with the original objectives behind the existing rules when they were finalized in 2002. (ACTEC suggests that a 10 year distribution period be treated as equivalent to a 10 year life expectancy for purposes of determining whether it is longer or shorter than some other life expectancy.)

Although the Marital Deduction Trust approach discussed above illustrates a context-specific rule that could be used for See Through Trusts that are also Marital Trusts, ACTEC suggests that it will not be necessary to have a context-specific rule for spouse EDBs. This is because the approach described in the preceding paragraph – that of counting only qualified beneficiaries and adopting the shortest payout method among Current Beneficiaries as the RMD method – will work well for most or all EDBs and will not require a special rule for the spouse EDB.

D. ELIGIBLE DESIGNATED BENEFICIARY (“EDBs”) IN GENERAL.

3. What is the meaning of “any beneficiary of such eligible designated beneficiary?”

Code § 401(a)(9)(H)(iii) states, with respect to an EDB of an Employee who dies after the Effective Date, that if the EDB dies before the entire interest in the Plan has been distributed, life expectancy distributions permitted under Code § 401(a)(9)(H)(ii) “shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary.”

ACTEC believes there is a question of whether this section applies only to those beneficiaries specifically named by the EDB to take the balance of the Employee’s interest at the EDB’s death or whether it applies to all those succeeding to the balance of the Employee’s interest at the EDB’s death, whether or not specifically named by the EDB? ACTEC requests Treasury confirm that Code § 401(a)(9)(H)(iii) applies to all those succeeding to the balance of the Employee’s interest at the EDB’s death, regardless of whether the successor beneficiary was named by the EDB.

4. Can developments occurring after the Employee’s death change the status of an EDB (other than a minor EDB attaining majority)?

A DB who qualifies as the Employee’s EDB is authorized to use the Life Expectancy Method rather than the 10 Year Rule in determining distributions from the Plan.[42] Code § 401(a)(9)(E)(ii) provides that the determination of whether a DB is an EDB is made as of the date of the Employee’s death.[43]

ACTEC is aware that some have raised the question whether subsequent events could cause an EDB to cease to be an EDB, or cause an EDB who qualified under one category to be treated as qualified under another category, particularly if the subsequent event occurs before the September 30 deadline for post-mortem events under Reg. § 401(a)(9)-4, A-4(a). Examples of subsequent events include, in the case of a disabled or chronically ill EDB, a recovery from such

[42] Code § 401(a)(9)(H)(ii).
[43] Code § 401(a)(9)(E)(ii).

disability or chronic illness or a change from disabled status to chronically ill status (or vice versa).

ACTEC requests that Treasury confirm that the determination of EDB status is a one-time determination based on the circumstances at the time of the Employee's death (even if more time is needed to satisfy any documentation or certification requirements that apply),[44] and that the EDB's status is not affected by subsequent developments (other than death[45] or attainment of majority[46] in the case of the Employee's minor child), even if they occur before the September 30 deadline for post-mortem events.

If Treasury determines not to adopt this one-time determination approach, ACTEC requests that Treasury explain when and how events subsequent to the Employee's death affect the method for determining RMDs, and whether, when and how the EDB is required to notify the plan administrator or Treasury of such events.

5. What if an EDB qualifies under more than one category of EDB?

Pursuant to Code § 401(a)(9)(E)(ii) a DB of an Employee can qualify as an EDB as of the Employee's death if the individual is: (i) the Employee's surviving spouse, (ii) a child of the Employee who has not reached majority, (iii) a disabled individual, (iv) a chronically ill individual, or (v) an individual who is not more than 10 years younger than the Employee and does not fall into any of the other four categories.[47]

Although it is not possible for a DB to qualify as an EDB under the "not more than 10 years younger" category if the DB also qualifies under any of the other categories,[48] it is possible for a DB to qualify as an EDB under more than one of the other four EDB categories. For example, the Employee's spouse or minor child may also be disabled or chronically ill, or an individual may be both disabled and chronically ill. Different rules may apply, depending on the applicable category, such as:

- If the EDB is the Employee's spouse and is the sole beneficiary, he or she may calculate RMDs under the Life Expectancy Method for Spouse as Sole DB redetermined annually.[49]

- If the EDB is the Employee's minor child, the Life Expectancy Method is available only until the child reaches majority, and then the remaining Plan interest must be distributed within 10 years of the date the child reaches majority. [50]

- If the EDB is disabled or chronically ill, he or she is eligible to be a Current Beneficiary of an Applicable Multi-Beneficiary Trust if the Employee has chosen to provide such a

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[44] Please see discussion in Subsection F.16, and in ACTEC's letter dated March 31, 2020 regarding "2020 Guidance from Treasury Regarded Selected Provisions of the SECURE Act."
[45] Code § 401(a)(9)(H)(iii).
[46] Code § 401(a)(9)(E)(iii)
[47] Code § 401(a)(9)(E)(ii).
[48] Code § 401(a)(9)(E)(ii)(V).
[49] Reg. § 1.401(a)(9)-2, A-5(c)(2).
[50] Code § 401(a)(9)(E)(iii)

trust, which may provide advantages compared to the trust design options available to other categories of EDBs.[51]

- If the EDB is disabled or chronically ill, additional steps may be required to document this status that are not necessary with other EDB categories, and the documentation and procedure for qualifying as disabled may vary from that needed to qualify as chronically ill.

Code §§ 401(a)(9)(E)(ii) only requires that the determination of a DB's status as an EDB be made as of the date of the Employee's death and does not address which category applies to an EDB who qualifies under more than one category. Further, Code § 401(a)(9)(E)(ii) does not provide any prioritization as to selection among these categories if the DB could qualify as an EDB under more than one category.

For example, if a minor child is chronically ill as of the date of the Employee's death, specific guidance is needed regarding Code § 401(a)(9)(E)(iii), which provides that an EDB "…shall cease to be an eligible designated beneficiary as of the date the individual reaches majority and any remainder of the portion of the individual's interest to which subparagraph (H)(ii) applies shall be distributed within 10 years after such date." This provision could be interpreted as terminating EDB status when an EDB who qualifies as both a minor child of the Employee and chronically ill as of the Employee's death subsequently reaches majority. ACTEC believes such an interpretation is inconsistent with Congress' intent to protect disabled and chronically ill EDBs. ACTEC recommends Treasury clarify that Code § 401(a)(9)(E)(iii) is limited to apply only to EDBs who do not qualify under any EDB category other than as the Employee's minor child.

General guidance is also needed to clarify which category applies in all other situations where an EDB qualifies under more than one category. For example, if an EDB is both a spouse and disabled, does the EDB qualify to (i) calculate RMDs under the Life Expectancy Method for Spouse as Sole DB redetermined annually, (ii) be a Current Beneficiary of an Applicable Multi-Beneficiary Trust, or (iii) both? As another example,[52] if an EDB is both disabled and chronically ill, may the EDB choose which condition to document and certify?

ACTEC recommends that Treasury provide guidance to clarify whether an EDB who qualifies under more than one category can make use of the rules of more than one category, or whether the EDB must fall into one, specific category. If the EDB must fall into one category, it is recommended that Treasury explain how the applicable category is determined for an EDB who qualifies under more than one category. Possible approaches to clarifying this issue include (i) providing that certain categories take preference over others, or (ii) allowing the EDB to select the category that applies.

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[51] Code § 401(a)(9)(H)(iv) and (v).

[52] This example assumes that Treasury's guidance will require some sort of documentation and certification to support an EDB's status as disabled or chronically ill as of the Employee's death, and to allow such documentation and certification to be accomplished within a reasonable time after the Employee's death, as ACTEC previously recommended in its letter dated March 31, 2020 regarding "2020 Guidance from Treasury Regarded Selected Provisions of the SECURE Act."

Providing that certain categories take precedence over others avoids the complexity of an election, but is rigid and may not produce the most appropriate outcome in some cases. Another possible disadvantage of requiring certain categories to take precedence over other categories is that, in certain situations, an EDB might have to go to extra effort to document that he or she *does not* fall into one category to be certain they will qualify in another category. If Treasury decides to clarify this issue by providing that certain categories take precedence over others, ACTEC recommends that the categories of disability and chronic illness be given the highest priority, consistent with Congress's intent to protect disabled and chronically ill DBs.

Allowing an EDB to select the category would likely produce the most appropriate outcome in most cases, but it adds an election procedure to a post-death administration process that is already complex and becomes one more task that could be forgotten or done incorrectly.

ACTEC suggests that Treasury consider the following approach instead, whereby a DB's decision whether to provide documentation and certification also serves as the DB's election of a particular EDB category.[53] Given that a DB cannot qualify under the "no more than 10 years younger than Employee" category if the DB qualifies under any other category,[54] and if one assumes that it is not possible for a DB to qualify as both Employee's spouse and Employee's minor child, then it follows that any EDB who qualifies under more than one category must qualify under either or both of the disabled and chronically ill categories. Treasury could provide that the EDB indicates its selection of category in the following manner, without adding an election procedure:

(i) if the EDB documents and certifies status as either disabled or chronically ill, the EDB is deemed to qualify under that category, and

(ii) if the EDB does not certify status as either disabled or chronically ill, and also qualifies as either the Employee's spouse or Employee's minor child, the EDB is deemed to qualify as spouse or minor child, as the case may be.

6. Can an EDB choose to use the 10 Year Rule instead of the Life Expectancy Method?

Under Code § 401(a)(9)(E)(ii), an EDB is authorized to use the Life Expectancy Method for determining the Applicable Distribution Period (although for a minor child of the Employee only until reaching the age of majority). However, it is unclear under the Act whether the EDB must use the Life Expectancy Method, or whether the EDB could choose between using either the EDB's life expectancy or the 10 Year Rule.

The Act provides EDBs favorable status over other DBs who must use the 10 Year Rule. It does not appear that Congress intended to cause a detriment to the EDB by requiring the use of the EDB's life expectancy if that life expectancy is shorter than 10 years, or shorter than the Deceased Employee's Remaining Life Expectancy if the Employee dies after his or her RBD.

[53] This approach assumes that Treasury also decides to require some sort of documentation and certification to support an EDB's status as disabled or chronically ill as of the Employee's death and to allow such documentation and certification to be accomplished within a reasonable time after the Employee's death.

[54] Code § 401(a)(9)(E)(ii)(V).

For example, if an 83-year-old Employee dies having named his 81-year-old sister as his DB, she would qualify as an EDB because she is not more than 10 years younger than the Employee. However, the sister's life expectancy the year following the Employee's death would be 9.1 years and the Deceased Employee's Remaining Life Expectancy would be even less. In all respects, she will better off if she can use the 10 Year Rule for her distribution period. It is unclear, however, if the sister can choose to apply the 10 Year Rule instead of the Life Expectancy Method. The same question would apply if a chronically ill or disabled person age 80 or older was designated as the DB. Using the life expectancy of the EDB instead of the 10 Year Rule would potentially disadvantage such chronically ill or disabled person. The Act does not address whether to authorize a choice between the Life Expectancy Method and the 10 Year Rule. ACTEC requests Treasury provide such a choice as part of its guidance under the Act.

Accordingly, ACTEC requests that Treasury issue guidance clarifying whether the Life Expectancy Method is mandatory for an EDB, whether the longest of the available distribution periods is mandated for the EDB, or whether the EDB is permitted to choose the distribution period the EDB (or the trustee of a trust for that beneficiary) determines would be most appropriate. If Treasury determines that the EDB may elect the distribution period to apply, ACTEC requests Treasury also prescribe a method for making this selection of distribution period, and a default distribution period in the event that the EDB does not make the election on a timely basis.

7. How are RMDs determined when an Employee dies after the Effective Date having named a Conduit Trust to receive her Plan and an EDB is the sole Current Beneficiary of the trust?

When an Employee names a Conduit Trust as the sole beneficiary of her Plan, the individual Current Beneficiary of the Conduit Trust is recognized as Employee's sole DB and RMDs are determined as if the Employee had named that individual instead of the trust itself.[55] The DB of an Employee who dies after the Effective Date must generally use the 10 Year Rule to calculate RMDs.[56] An exception to this general rule allows an EDB to use the Life Expectancy Method while living (or until reaching the age of majority in the case of a minor child EDB.)[57]

ACTEC requests Treasury confirm that if an Employee dies after the Effective Date having named a Conduit Trust to receive the Employee's Plan interest, and if the individual Current Beneficiary of the Conduit Trust is an EDB, the RMDs for the Conduit Trust are determined in accordance with Code §§ 401(a)(9)(B)(iii) and (H)(ii), the same manner as if such individual had been named as beneficiary directly instead of the Conduit Trust.

8. How are RMDs determined when an Employee dies after the Effective Date having named a See Through Trust to receive her Plan and the trust directs the trustee to divide the trust into separate Conduit subtrusts for each Current Beneficiary of the trust, at least one of whom is an EDB, but such EDB is not disabled or chronically ill?

Reg. § 1.401(a)(9)-4, A-5(c) provides that the Applicable Distribution Period is determined under the multiple beneficiary rule set out in Reg. § 1.401(a)(9)-5, A-7 in the event a multi-

[55] Reg. § 1.401(a)(9)-4, A-5(a); Reg. § 1.401(a)(9)-4, A-5(b); Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2.
[56] Code § 401(a)(9)(H)(i).
[57] Code § 401(a)(9)(H)(ii).

beneficiary trust is named by the Employee as beneficiary of his interest in the Plan, that is, the life expectancy of the DB having the shortest life expectancy was to be used for purposes of determining the Applicable Distribution Period. Numerous private letter rulings have interpreted this regulation and upon division of the initial trust have required RMDs to be taken by each separate trust after the division over the life expectancy of the oldest beneficiary of the initial trust.[58]

It is not unusual for an Employee to name a multi-beneficiary trust (such as a revocable trust) as the beneficiary of the Employee's Plan. In a multi-beneficiary trust, the Employee can easily address contingencies (such as the allocation of a predeceasing child's share). By naming a multi-beneficiary trust as the beneficiary, the Employee's Plan will be correctly divided by the trustee based on the facts and circumstances that exist at the time of the Employee's death.

Although it is theoretically possible to accomplish this by including contingencies in the Plan beneficiary designation, as a practical matter, this alternative is not available in most cases. The beneficiary designation forms required by Plan administrators and many IRA custodians do not accommodate such contingencies, and Plan administrators and many IRA custodians do not accept customized beneficiary designations. Even if an IRA custodian is willing to accept a customized beneficiary designation, the cost of preparing that beneficiary designation can be quite high, as it is typically prepared by the Employee's attorney.

Code § 401(a)(9)(H)(iv)(I) specifically allows the use of the disabled or chronically ill EDB's separate life expectancy after the post-death trust divisions in the case of an AMBT, negating the application of the multiple beneficiary rule found in Reg. § 1.401(a)(9)-4, A-5(c) to such trusts after division,[59] but the Act is silent as to how the Applicable Distribution Period is to be determined after a division of a trust that is not subject to this provision. The absence of a corresponding provision for other EDB categories suggests that, as the law was enacted, the special separate account rule available to AMBTs may not be available to multi-beneficiary trusts for an Employee's other beneficiaries who are EDBs as of the Employee's death.

Accordingly, ACTEC requests Treasury issue guidance that clarifies how RMDs are determined when an Employee dies after the Effective Date having named a See Through Trust, with multiple beneficiaries, at least one of whom is an EDB but none of whom is disabled or chronically ill, where the trust directs the trustee to divide the trust into separate Conduit subtrusts. Specifically, ACTEC requests Treasury provide guidance as to whether, after such division, the trustee of a Conduit subtrust for an EDB would be able to use the Life Expectancy Method even though the EDB is not disabled or chronically ill, and if so, would the EDB's life expectancy be used or would the life expectancy of the oldest trust beneficiary prior to the division be used.

9. How are RMDs determined when an Employee dies after the Effective Date having named an Accumulation Trust to receive her Plan and an EDB is the sole Current Beneficiary of the trust?

An Employee who dies after the Effective Date may need to provide for her family members in trust, rather than outright, even though those individuals fall into one or more categories of DB

[58] See e.g., PLR 200410020, PLR 200444033, PLRs 200432027-29, PLR 201128036

[59] This assumes that Treasury accepts the interpretation suggested by ACTEC in Subsection G.21.

identified by Congress as EDBs, for which the Life Expectancy Method is authorized in Code § 401(a)(9)(H)(ii).[60] This is particularly likely to occur where the family member is the Employee's spouse, the Employee's minor child, or a disabled or chronically ill individual.[61]

Before the Act, an Employee could designate an Accumulation Trust for an individual beneficiary and obtain the same post-death RMD payout period as if the Employee had designated the individual beneficiary outright, provided the other trust beneficiaries who were treated as having been designated by the Employee did not have shorter life expectancies than the individual beneficiary did.

Under the Act, an Employee can designate an Accumulation Trust for an individual who is a DB and not an EDB and receive the same outcome as if the Employee had designated the individual outright. The RMD payout period would be established by the 10 Year Rule. This is discussed in Section B.

ACTEC requests Treasury provide guidance on this topic specifically to address Accumulation Trusts and EDBs. Specifically, ACTEC seeks guidance to clarify that an Employee may designate an Accumulation Trust for an EDB and receive the same outcome as if the EDB was designated individually. To accomplish this, ACTEC believes that the existing See Through Trust rules need to be updated to adapt to the new rules under the Act.

Section C above discusses considerations when an Employee has named a trust for her spouse to receive her Plan. Example A in Section C analyzes Accumulation Trusts for a spouse EDB in detail and concludes by suggesting that the best rule for determining the Countable Beneficiaries under the Act is to count only qualified beneficiaries as that term is defined under the Uniform Trust Code, and that the best rule for determining the RMD method is to determine and use the shortest payout method among Current Beneficiaries. ACTEC suggests that these same rules are equally applicable to any EDB. The "qualified beneficiary rule" is similar to the mere potential successor rule, and is clear, simple, and easy to apply. Determination of the RMD method using the shortest payout method among Current Beneficiaries is the rule that works best under the new RMD requirements of the Act. These two rules, together, will combine to produce a reasonable outcome in a wide range of scenarios under the Act in a manner that will be consistent with the original objectives behind the 2002 regulations, after considering the changes made under the Act.

The following examples illustrate ACTEC's suggested approach with EDBs other than spouses.

Example A: Employee Adam wants to provide for his minor child, Bill (age 7). In order to protect Bill, Adam names a trust to receive his Plan and dies after the Effective Date. The trust provides discretionary distributions of income and principal to Bill until Bill reaches age 35, when the trust terminates and is distributed to Bill. If Bill dies before reaching age 35, the trust continues and provides discretionary distributions of income and principal to Adam's nieces, Candice (age 5) and Darlene (age 12) until Candice and Darlene have both reached age 35, when the trust terminates and is distributed to them in equal shares. If either Candice or Darlene dies before reaching age 35, the trust continues until the survivor reaches age 35, when the trust

[60] The non-tax reasons for using trusts are described in more detail in Section B.

[61] Applicable Multi-Beneficiary Trusts for disabled and chronically ill EDBs are discussed separately in Section G.

terminates and is distributed to her. If all of Bill, Candice, and Darlene die prior to reaching age 35, the trust terminates and is distributed to Everett University (a charity).

In the very common fact pattern set out in Example A, the Countable Beneficiaries include Bill, an EDB who is the sole Current Beneficiary, and Candice and Darlene, who are DBs but not EDBs and are each Contingent Beneficiaries. Whether Everett University counts as a beneficiary is ambiguous under current law and guidance, as more fully discussed in Example C set out in Section B.[62] ACTEC suggests that the most appropriate interpretation is that Everett University is not counted. ACTEC recommends replacing the mere potential beneficiary rule with the "qualified beneficiary rule" discussed above. If the "qualified beneficiary rule" is applied, the result is clear – Bill, Candice and Darlene but not Everett University are the Countable Beneficiaries.

The existing See Through Trust rules are particularly problematic in determining the appropriate RMD method under the Act, as highlighted by the facts of Example A where the Countable Beneficiaries of the trust include an EDB (Bill) and DBs (Candice and Darlene). Under the existing regulations, it is unclear whether the shortest life expectancy, the shortest payout method, or some other criterion takes priority for determining the RMDs for the trust. Results vary significantly depending on which criterion is used.[63] For this reason, ACTEC recommends that the best rule for determining the RMD method is to give priority to the shortest payout method among just the Current Beneficiaries. Applying this approach to Example A, the Life Expectancy Method applies using Bill's life expectancy until Bill attains the age of majority or dies. After that, a 10 year distribution period applies.

<u>Example B</u>: Employee Gab wants to provide for both his older brother Henry, who is not disabled or chronically ill, and for Gab's children, Isaac and Julie (ages 24 and 22, respectively). Gab decides to provide first for Henry, since Henry has some significant needs now and Isaac and Julie have other resources. Gab names an Accumulation Trust for Henry to receive his Plan because he wants to make sure that Henry will qualify for public assistance if Henry exhausts his own funds in the future, as well as protect any funds that Henry will not need for his own children. Gab dies at age 54 when Henry is age 59. The trust provides discretionary distributions of income and principal to Henry for Henry's lifetime. After Henry's death the trust provides discretionary distributions of income and principal for Isaac and Julie until both have reached age 35, when the trust terminates and is distributed to them equally. If either Isaac or Julie dies before reaching age 35, the trust continues until the survivor reaches age 35, when the trust terminates and is distributed to the survivor. If at any time during the continuance of the trust all of Henry, Isaac and Julie have died, the trust terminates and is distributed to Kellogg Hospital (a charity).

ACTEC suggests that Kellogg Hospital should not be counted in Example B for the same reasons discussed under Example A, above. Example B is another illustration of a fact pattern where the existing See Through Trust rules do not work well in determining the appropriate RMD method. Henry is an EDB, who is not more than 10 years younger than Gab, and is the sole Current Beneficiary of the trust. Under the "shortest payout method among the Current Beneficiaries rule" that ACTEC suggests, the Life Expectancy Method would apply using

[62] Pp. 17-19.
[63] Pp. 21-25.

Henry's life expectancy until Henry dies. On Henry's death, the trust would transition to using the 10 year distribution period.

ACTEC requests Treasury provide guidance on whether an Accumulation Trust with an EDB who is not disabled or chronically ill as the sole Current Beneficiary can use the Life Expectancy Method provided for in Code § 401(a)(9)(H)(ii) in determining the RMDs from a Plan received by the trust on the death of an Employee. In such guidance, ACTEC requests that Treasury update the applicable See Through Trust rules as ACTEC has suggested in its discussion of Examples A and B, or if not clarify how such rules may now apply under the Act.

10. How are RMDs determined when an Employee dies after the Effective Date having named an Accumulation Trust to receive her Plan and the trust has more than one EDB as Current Beneficiaries?

Congress identified several categories of DBs as EDBs, and the Life Expectancy Method is authorized in Code § 401(a)(9)(H)(ii) when an EDB is designated as the beneficiary of the Employee's interest in the Plan. Where the Employee has minor children, a very common estate plan is to create a single "pot" trust for their collective benefit. Such a trust is essential when the Employee wants to provide the trustee with sufficient discretion to address each child's unique needs (typically education, support, and medical needs) just as the Employee would do while alive, even though these needs may vary substantially from one child to the next. In many cases, an individual may want to create a trust to meet those needs using funds from the "pot" that are not charged against the shares each child will ultimately receive at some future date. This way all funds stay in the "pot" until the needs of all of the children have been met during minority.

Before the Act, an Employee could designate a "pot" Accumulation Trust for her minor children and obtain a post-death RMD payout period based on the life expectancy of the oldest child, provided no other Countable Beneficiaries were older than the oldest child so as to have a shorter life expectancy.

An Employee can designate an Accumulation Trust for multiple individuals who are DBs and not EDBs, and receive the same outcome as if the Employee designated the individuals as beneficiaries outright or if the individuals were all beneficiaries of separate Accumulation Trusts. In either such case, the RMD payout period would be established by the 10 Year Rule. ACTEC requests Treasury issue guidance to allow an Employee to designate a "pot" Accumulation Trust for her minor children or other multiple EDBs and qualify for the Life Expectancy Method as if the Employee named the EDBs beneficiaries individually or as beneficiaries of separate trusts, so long as there are no DBs who are not EDBs as Current Beneficiaries of such an Accumulation Trust.

The existing See Through Trust rules need to be updated to adapt to the new rules under the Act authorizing the use of an EDB's life expectancy.

As discussed in several Subsections above, ACTEC suggests that <u>the best rule for determining the Countable Beneficiaries under the Act is to count only "qualified beneficiaries"</u> as that term is defined under the Uniform Trust Code, and that <u>the best rule for determining the RMD method is to determine and use the shortest payout method among Current Beneficiaries</u>. The "qualified beneficiary rule" is similar to the mere potential successor rule, and is clear, simple, and easy to apply. Determination of the RMD method using the shortest payout method among Current Beneficiaries is the rule that works best under the new RMD requirements of the Act. These two rules, together, will combine to produce a reasonable outcome in a wide range of scenarios under the Act in a manner that will be consistent with the original objectives behind the existing regulations when they were finalized in 2002, after considering the changes made under the Act. The following example illustrates the outcome if these rules are applied in connection with a "pot" Accumulation Trust for minor children.

<u>Example A</u>: Employee, Virginia, a single mother, is suffering from stage 4 breast cancer and has decided that she needs to provide a discretionary "pot" trust for the benefit of her minor children, Warren (age 14), Yvette (age 12) and Zack (age 9). She names her sister as trustee and provides the trustee with discretion to use the income and principal of the trust as she would do if living for each of her children while under age 21. The trust terminates when her youngest living child reaches age 21, and is distributed outright to all three children or, if none of the children survive, to her sister, or if her sister also does not survive, to a charity. She dies shortly after setting up this "pot" Accumulation Trust for her children and naming the trust as the beneficiary of her Plan.

ACTEC suggests that the "qualified beneficiary rule" be applied to determine the Countable Beneficiaries, and to determine if any non-individual person is counted. Under this rule, Warren, Yvette and Zack are all minor child EDBs and are the only Current Beneficiaries of the Accumulation Trust that receives Virginia's interest in her Plan. The Employee's sister is also counted as a Contingent Beneficiary. The charity is not counted.

ACTEC suggests that the RMDs for Virginia's Plan be determined under the "shortest payout method among the Current Beneficiary rule." Thus, the RMDs are determined under the Life Expectancy Method using Warren's life expectancy, since he has the shortest payout period of the three Current Beneficiaries. The Life Expectancy Method would continue until the earlier of Warren's death or reaching majority. Thereafter, a 10 year distribution period applies.

ACTEC requests Treasury provide guidance on how RMDs are determined when an Employee dies after the Effective Date after naming an Accumulation Trust to receive her Plan, where the trust has more than one EDB as Current Beneficiaries. In such guidance, ACTEC requests Trust to update the applicable See Through Trust rules as ACTEC has suggested, or if Treasury concludes that a different rule should apply, to clarify how such RMDs are determined as part of its guidance under the Act.

11. Can an EDB who succeeds to an EDB's interest in the Plan on the EDB's death continue to receive EDB Treatment?

Code § 401(a)(9)(H)(ii) referenced in Code § 401(a)(9)(H)(iii) provides that the Life Expectancy Method is only available to EDBs who qualify as EDBs as of the death of the Employee. ACTEC is aware that there is some question of whether Code § 401(a)(9)(H)(ii) could be interpreted as allowing continued life expectancy distributions for a beneficiary who succeeds to this interest who also qualified as an EDB at the date of the Employee's death. ACTEC requests that Treasury provide guidance as to whether there may be circumstances in which an individual who qualifies as an EDB as of the Employee's death but who is a remainder beneficiary of a portion of the Employee's interest in the Plan can continue as an EDB of such portion of the

Employee's interest in the Plan after the death of the EDB who was the Current Beneficiary of such portion of the Employee's interest in the Plan.

The following discussion provides several examples of instances in which an individual qualifies as an EDB but does not become the beneficiary of a portion of the Employee's interest in the Plan until after the death of the prior EDB Current Beneficiary.

Example A: Ginny has two children, Helen (age 10) and Isabelle (age 7), both of whom are minors. Ginny named two trusts she created for Helen and Isabelle as the equal beneficiaries of her interest in her Plan. Both Helen and Isabelle qualify for EDB status as Ginny's minor children, and Helen, who has been blind from birth, also qualifies as a disabled EDB. Isabelle is the remainder beneficiary of Helen's Trust and Helen is the remainder beneficiary of Isabelle's Trust. The trustee of each of these trusts commences taking distributions using the Life Expectancy Method based on Helen's life expectancy as the oldest countable beneficiary of both trusts, as is currently required under Reg. § 401(a)(9)-4, A-5 and Reg. § 1.401(a)(9)-5, A-7. Tragically, after Ginny's death and before reaching the age of majority, Isabelle is diagnosed with optic nerve atrophy, the same disease her sister has, and she, too, becomes blind, thereby becoming disabled before reaching the age of majority and before Helen's death. Helen dies, survived by Isabelle, before the entire balance of Ginny's interest in the Plan has been distributed to Helen's Trust, and the remaining balance in the Plan continues in trust for the benefit of Isabelle on the same terms as in the trust for Helen.

In Example A, Isabelle qualified as an EDB at the time of her mother's death as a minor, and became disabled before reaching the age of majority. Isabelle continues to be disabled at the time of Helen's death when Isabelle became the beneficiary of the portion of Ginny's interest in the Plan that was in Helen's trust. Since Isabelle's EDB status was in effect at the Employee's death (she was a minor) and her subsequent disability from a genetic defect was identified before reaching the age of majority, it is unclear if Isabelle may qualify for EDB status on Helen's death of the portion of the Employee's interest in the Plan that was in Helen's trust. This sequence of events is likely to be rare, but possible, especially for families with inherited disabilities. Because there have not been any intervening, non-EDB beneficiaries, ACTEC believes there are grounds for Isabelle's status as an EDB to continue even if Isabelle is a disabled adult at the time of Helen's death.

Isabelle was a minor EDB at Ginny's death, became disabled before reaching majority, and continues as a disabled individual at the time of Helen's death. Reg. § 1.401(a)(9)-6, A-15 states that "a child who is disabled within the meaning of § 72 (m)(7) when the child reaches the age of majority may be treated as not having reached the age of majority so long as the child continues to be disabled." In that situation, the benefit of minority status would continue beyond childhood for determining life expectancy distributions. Under this regulation, Isabelle would still be an EDB Current Beneficiary of her trust as a minor child EDB and would be a minor child EDB at the time of Helen's death and thereafter as long as she had a disability. ACTEC believes that under these circumstances, it may be appropriate to determine RMDs for the portion of Ginny's Plan allocated to Helen's Trust by postponing the transition to a 10 year period and continuing the Life Expectancy Method based on Helen's remaining life expectancy until Isabelle's status as an EDB terminates, at which time the transition to a 10 year distribution period would occur.

Example B: The facts are the same as Example A except that both Helen and Isabelle are blind as of Ginny's death.

In Example B, both Isabelle and Helen are disabled EDBs at the time of Ginny's death. After Helen's death, Isabelle remains disabled and is a disabled EDB remainder beneficiary of Helen's trust. ACTEC believes that in these circumstances it is also appropriate, as in Example A, to determine RMDs for the portion of Ginny's Plan allocated to Helen's Trust by postponing the transition to a 10 year period and continuing the Life Expectancy Method based on Helen's remaining life expectancy until Isabelle's status as an EDB terminates, at which time the transition to a 10 year distribution period would occur.

Example C: The facts are the same as Example A except that Isabelle becomes blind prior to reaching majority but after Helen's death. However, Isabelle had not yet reached majority at the time of Helen's death.

In Example C, Isabelle is still a minor child EDB at the time of Helen's death and the trustee is still using Helen's life expectancy to determine the RMDs for Isabelle's trust. ACTEC believes that in these circumstances it is also appropriate, as in Examples A and B, to determine RMDs for the portion of Ginny's Plan allocated to Helen's Trust by postponing the transition to a 10 year period and continuing the Life Expectancy Method based on Helen's remaining life expectancy until Isabelle's status as an EDB terminates, at which time the transition to a 10 year distribution period would occur.

Example D: The facts are the same as Example A except that Isabelle becomes blind after reaching the age of majority but before Helen's death.

In Example D, however, Isabelle reached the age of majority before Helen's death and before becoming disabled. At that time, Isabelle's trust would have transitioned to the 10 year distribution period. When Isabelle becomes disabled after reaching majority, Reg. § 1.401(a)(9)-6, A-15 would not cause her to continue as an EDB or once again to become an EDB. Therefore, ACTEC believes that under these circumstances, the life expectancy distribution should not continue on Helen's death because Isabelle had lost her status as an EDB before Helen's death, even though Isabelle was disabled at the time of Helen's death.

Example E: The facts are the same as Example A except that Isabelle becomes blind after reaching majority and after Helen's death.

In Example E, Isabelle clearly would not be an EDB at the time of Helen's death and even though she becomes disabled after Helen's death, ACTEC believes there would be a transition to the 10 year distribution period at Helen's death. There is no justification for reverting to a life expectancy distribution when Isabelle later becomes disabled.

Example F: The facts are the same as Example A except that neither Helen nor Isabelle was disabled and Helen died during minority prior to Isabelle reaching majority.

Finally, in Example F, Isabelle was still a minor child EDB at the time of Helen's death. As in Examples A and B, ACTEC sees no policy reason for requiring Helen's trust to transition to the 10 year distribution period for Isabelle at the time of Helen's death. By creating a special category of EDB intended to benefit and protect the Employee's minor children during minority so long as the minor child had not yet reached the age of majority, ACTEC suggests that Congress would want to continue this benefit so long as Isabelle continues to be a Current Beneficiary of a portion of the Employee's interest in the Plan as of the Employee's death.

Each of the Examples sets out possible scenarios that may be rare but could occur from time to time.[64] ACTEC requests that Treasury provide guidance with respect to the scenarios set out in each of these Examples. ACTEC suggests that postponing the transition to a 10 year distribution period and allowing RMDs to continue to be calculated under the Life Expectancy using the original EDB's remaining life expectancy may further the legislative policy embodied in the Act to provide life expectancy treatment to EDBs.

E. MINOR CHILD EDBs AND "AGE OF MAJORITY"

12. What is the meaning of "child" of the Employee?

One of the five categories of individuals who can qualify as an EDB, as described in Code § 401(a)(9)(E)(ii)(II), is "a child of the employee who has not reached majority within the meaning of [Code § 401(a)(9)](F)." For purposes of determining whether an individual is an EDB under Code § 401(a)(9)(E)(ii)(II), ACTEC believes guidance will be needed in interpreting the meaning of "child of the Employee".

Who constitutes a "child of the Employee" for purposes of EDB treatment under the Act can be a very complex issue. Guidance will be needed to clarify when an individual is a "child of the Employee" in circumstances common in modern families, including adopted children, stepchildren, where applicable state law treats the stepchild as equitably adopted or adopted by estoppel, and children conceived through artificial reproductive techniques and the Employee participated in such techniques.

Each state has its own rules with respect to whether an individual is or is not a "child" of another. In some situations there may be uncertainty as to which state's laws apply due to connections to multiple states or movement from one state to another. In addition, most Plan documents include a governing law clause that states the Plan will be administered under the laws of a particular state that usually reflects the situs of the administrator, trustee, or custodian of the Plan rather than the residence of the Employee for whom this determination is being made.

Notwithstanding these potential uncertainties, ACTEC believes that the state of the Employee's residence at the time of the Employee's death can be clearly identified in nearly all cases, and recommends that the laws of that state be applied to determine who is or is not a "child of the Employee." This approach strikes a reasonable balance between the primacy of state law in determining the existence of a parent-child relationship and the needs of certainty in determining EDB qualification.

[64] A much more common scenario is where the Employee's spouse and minor child are Current Beneficiaries. The reasoning set out in this #11 would apply equally to that more common scenario, in which the Life Expectancy Method should continue as long as either beneficiaries is living and the minor child has not yet reached maturity.

13. What is the rule for determining when an EDB who is a minor child of the Employee "reaches majority"?

Code §§ 401(a)(9)(E)(ii)(II) and (E)(iii) cross-reference the existing definition of "reaching majority" mentioned in Code § 401(a)(9)(F) and regulations thereunder, which, until now, applied narrowly to certain defined benefit plans and annuities.

Code § 401(a)(9)(E)(ii)(II) includes in the list of EDBs "a child of the employee who has not reached majority (within the meaning of subparagraph (F))." Under this provision, such minor child, as an EDB, is entitled to use the Life Expectancy Method. But Code § 401(a)(9)(E)(iii) provides: "Subject to subparagraph (F), an individual described in clause (ii)(II) shall cease to be an eligible designated beneficiary as of the date the individual reaches majority and any remainder of the portion of the individual's interest to which subparagraph (H)(ii) applies shall be distributed within 10 years after such date." Under this provision, a minor child EDB is not entitled to use the Life Expectancy Method for life, but is required to transition to the 10 year distribution period when the minor child "reaches majority," again subject to determination as provided in Code § 401(a)(9)(F). ACTEC believes guidance will be needed in connection with the following questions that arise in interpreting the language of Code §§ 401(a)(9)(E)(ii)(II) and (iii):

1. What is the meaning of "has not reached majority within the meaning of [Code § 401(a)(9)](F)," for purposes of determining whether a child of the Employee is an EDB under Code § 401(a)(9)(E)(ii)(II)?

2. Does the reference in Code § 401(a)(9)(E)(ii)(II) to Code § 401(a)(9)(F) cause the period during which a child is determined as having not reached majority to be extended if the child becomes disabled or chronically ill during minority?

3. Will the meaning of "reached majority" in Code § 401(a)(9)(E)(ii)(II) and "reaches majority" in Code § 401(a)(9)(E)(iii) be applied consistently in determining when a child ceases to be an EDB and when the child is an EDB, respectively?

Code § 401(a)(9)(F) states, "Under regulations prescribed by the Secretary, for purposes of this paragraph, any amount paid to a child shall be treated as if it had been paid to the surviving spouse if such amount will become payable to the surviving spouse upon such child reaching majority (or other designated event permitted under regulations)."

The only regulation under this subsection, Reg. § 1.401(a)(9)-6, A-15 provides:

> …pursuant to section 401(a)(9)(F), payments under a defined benefit plan or annuity contract that are made to an employee's child until such child reaches the age of majority (or dies, if earlier) may be treated, for purposes of section 401(a)(9), as if such payments were made to the surviving spouse to the extent they become payable to the surviving spouse upon cessation of the payments to the child. For purposes of the preceding sentence, a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26. In addition, a child who is disabled within the meaning of section 72(m)(7) when the child reaches the age of majority may

be treated as having not reached the age of majority so long as the child continues to be disabled.

Code §§ 401(a)(9)(E)(ii)(II) and Code § 401(a)(9)(E)(iii) both refer to Code § 401(a)(9)(F) for deciding whether or not a child of the Employee has reached majority for all purposes dealing with the determination of the Applicable Distribution Period under Code § 401(a)(9). Yet the explanation as to the meaning of this provision found in Reg. § 1.401(a)(9)-6, A-15 refers only to defined benefit plans and annuity contracts. ACTEC requests Treasury to confirm that the reference to Code § 401(a)(9)(F) in the Act is not limited to defined benefit plans and annuities but will also be applied to determining whether a child has reached majority for all qualified plans and IRAs.

Age 26 and Completion of a Specified Course of Education

Reg. § 1.401(a)(9)-6, A-15 focuses on a specific age (age 26) and completion of a "specified course of education" for determining when a child has not reached the age of majority. There is little guidance in this regulation or other authorities as to the meaning of "age of majority" or what constitutes a "specified course of education."

ACTEC requests that Treasury provide guidance as to whether Treasury will apply this regulation literally and use the specific age of 26 as the "age of majority" or will use some other age or state law to determine when a child has not reached the age of majority. If Treasury determines that the "age of majority" is to be determined under applicable state law, guidance will be needed as to which state's law is to apply between the law of the state in which the minor resides or the law of the state in which the Employee resided at death.[65] In addition, states often set different ages for reaching majority for different activities. For example, the state may set different ages for the ability to drive, the ability to drink, the ability to be tried as an adult, as well as for when a guardianship terminates or when a UTMA account terminates.

Although there may be uncertainty as to which state's law applies in some cases, if applicable state law is to determine the meaning of age of majority, ACTEC believes that the state of the Employee's residence at death can usually be identified, and recommends that the laws of that state apply for determining the age of majority for purposes of applying the rules of Code § 401(a)(9)(F) and this regulation in the context of the EDB rules. Guidance will also be needed as to the particular type of state law that should be used to determine the age of majority. Given the lack of consistency in basing the meaning of the age of majority and the complexities in describing the state law that is to apply, ACTEC suggests that Treasury instead select a particular age, such as age 26, as is provided in Reg. § 1.401(a)(9)-6, A-15 before which a child has not yet reached majority.

If Reg. § 1.401(a)(9)-6, A-15 is to be used to determine when a child has not reached the age of majority, ACTEC seeks guidance on whether Treasury will only require that the child not have reached the certain age but also that the child has not completed a "specified course of education." ACTEC believes that the term "specified course of education" will be even more difficult to clarify than clarifying which state's laws apply. Reg. § 1.401(a)(9)-6, A-15 originally addressed reaching the age of majority in a much narrower context than under the Act.

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[65] These two states of residence could be different in the event the Employee is divorced at the time of death and the Employee's spouse or parents have custody of the minor child.

Specifically, Reg. § 1.401(a)(9)-6, A-15 helps clarify when an annuity contract or pension will qualify for certain treatment when payable to a minor child and then to a surviving spouse. It appears that Treasury was comfortable employing an open-ended definition of "specified course of education" in that context. By contrast, the Act applies to every circumstance in which a young child of the Employee is named as a beneficiary of the Employee's Plan.

If Treasury determines that the child will have to be shown as not having completed a "specified course of education" in order to be found as having not reached majority, Treasury will need to provide guidance as to what "a specified course of education" means. A "specified course of education" could: (i) require the child to be attending school, either by attendance in person or online attendance, (ii) include colleges, junior colleges, vocational or other institutions offering courses that could qualify as "a specified course of education," (iii) include studies that are part-time or studies interrupted by "gaps," including those to obtain work experience and needed income before pursuing. Substantial guidance would be required with respect to each of these issues described above in not only defining a "specified course of education" concept but also the documentation needed to meet any definition set out.

ACTEC recommends that the twin dilemma of determining the age of majority under applicable state law and determining whether a child is pursuing a "specified course of education" can be simplified and resolved by setting a fixed age of majority, subject to the exception in Reg. § 1.401(a)(9)-6, A-15 for certain disabled children as discussed below, for all purposes under the Act. ACTEC further recommends that consideration be given to using the age of 26 for this purpose. Such an age is consistent with the upper limit for children who are working on a specified course of education as described in Reg. § 1.401(a)(9)-6, A-15. Such an age allows ample leeway for many different educational paths. This age allows opportunity for graduate studies, as well as for potential "gap years" while students work to generate both experience and some funds before embarking on their graduate studies.

Continuation of Period of Minority During Disability or Chronic Illness

Under the approach that ACTEC recommends, "reaching majority" means attaining age 26 for each child of the Employee as used in Reg. § 1.401(a)(9)-6, A-15. This regulation also goes on to provide that if a child is disabled "within the meaning of section 72(m)(7) when the child reaches the age of majority, the child may continue to be treated as not having reached majority so long as the child is disabled. ACTEC requests that Treasury confirm that Reg. § 1.401(a)(9)-6, A-15 will be applied to extend the period when a child has not reached the age of majority if the child becomes disabled prior to reaching the age of majority.

Often, a disability cannot be definitively diagnosed in young children. Autism is one such common developmental disorder. ACTEC suggests that by creating the EDB categories of a minor child of the Employee and a disabled and chronically ill individual in the Act and referring to Code § 401(a)(9)(F) to define age of majority, Congress intended that a minor child continue to qualify as an EDB so long as the child is disabled. However, it is unclear whether this rule will apply to a minor child whose disability is diagnosed after the Employee's death. ACTEC specifically request guidance as to whether the disability must be diagnosed as of the Employee's death or before the child reaches the age of majority.

Example 1: An Employee, Joe, dies leaving a one-year-old child, Kris, as sole beneficiary of his IRA. The child is an EDB under Code § 401(a)(9) and is entitled to take RMDs using the Life Expectancy Method until the child reaches majority, at which point the 10 Year Rule would normally apply. Because of apparent developmental delays, Kris undergoes formal psychological evaluation at age 4 and is diagnosed with autism. Autism is a developmental disability that in most cases will not be identified until the child has gotten older and has failed to progress. Nevertheless, autism as a disability is genetic and although not identified until later, would have existed genetically at birth. So long as a qualified medical professional certifies that the autism "existed" when the child was the age of one and the severity rises to the level of disability under Code § 72 (m)(7), Kris would otherwise satisfy the requirement that "the determination of whether a designated beneficiary is an eligible designated beneficiary shall be made as of the date of death of the employee." Therefore, Kris should be able to continue to use the Life Expectancy Method for determining RMDs so long as her disability continues to exist after attaining the age of majority.

Example 2: The Employee, Lisa, dies leaving Mike, her 15-year-old child, as sole beneficiary of her IRA. Mike is an EDB and is entitled to take RMDs using the Life Expectancy Method until he reaches the age of majority, at which point the 10 Year Rule would apply. Two years later, when Mike is age 17, he is in a severe auto accident and suffers an injury that results in him becoming a quadriplegic with little hope of recovery. Mike is disabled within the meaning of Code § 72(m)(7) and has a "chronic illness" within the meaning of Code § 7702B(c)(2).

Unlike in Example 1, where the disability or chronic illness was a fact at the death of the Employee, in Example 2, the disability or chronic illness arose after the Employee's death. Nevertheless, the child's EDB status should continue beyond the child's age of majority. Support for this conclusion is found in Reg. § 1.401(a)(9)-6, A-15, which provides in part that "a child who is disabled within the meaning of [the Code §] 72(m)(7) when the child reaches the age of majority may be treated as having not reached the age of majority so long as the child continues to be disabled." There is no requirement in this regulation that the disability be in existence at the time of the Employee's death. Instead, this regulation speaks in terms of the existence of a disability when the child reaches the age of majority that then causes the child to continue to be treated as not having reached majority. ACTEC believes that continuing to treat a child as not having reached majority if a child becomes disabled during minority is consistent with Congressional intent of providing support for both the minor child of the Employee and those who are disabled or chronically ill, by enabling such individuals to qualify as EDBs entitled to use the Life Expectancy Method for determining RMDs. ACTEC requests that Treasury provide in its guidance that if a minor child of the Employee becomes disabled during minority, the child will continue to be treated as not having reached the age of majority so long as the child remains disabled.

Congress also created a category of EDB for an individual who is chronically ill and created the same Applicable Multi-Beneficiary Trust provisions to be used by both the disabled individual and the chronically ill individual. This illustrates Congressional intent to treat these two categories equally. There does not appear to be any policy or other reason to differentiate between the result if a child becomes disabled during minority and the result if a child becomes chronically ill during minority. ACTEC suggests that Treasury consider extending the provision regarding disability in Reg. § 1.401(a)(9)-6, A-15 to a situation in which the minor child does not become disabled within the meaning of section 72(m)(7) before reaching the age of majority but instead becomes chronically ill "(within the meaning of section 7702B(c)(2)."

Accordingly, ACTEC requests that Treasury provide in its guidance that the Employee's minor child would continue to be treated as not having reached majority upon the establishment of the existence of a disability or chronic illness after the Employee's death but before the child reaches the age of majority. If a qualified medical professional certifies that the condition was in existence as of the employee's death, the issue is easier, but would have the same practical result even if it were not in existence at that time. The minor child would have EDB status as of the Employee's death, and if the EDB status continues, albeit for a new or different reason, the EDB requirement that the individual qualify as an EDB as of the Employee's death is still met.

Apply meaning of "reaching majority" consistently in two Code sections

Code § 401(a)(9)(E)(ii)(II) refers to "a child of the employee who has not reached majority within the meaning of [Code § 401(a)(9)](F)." And Code § 401(a)(9)(E)(iii) provides, "Subject to subparagraph (F), an individual described in clause (ii)(II) shall cease to be an eligible designated beneficiary as of the date the individual reaches majority …."

Although these Code sections have slightly different wording, ACTEC believes that Congress intended both references to reaching the age of majority to have the same meaning. ACTEC recommends that whatever guidance is provided as to the meaning of "reaching majority" under Code § 401(a)(9)(E)(ii)(II) should apply to and have the same meaning for Code § 401(a)(9)(E)(iii). Otherwise, confusion will result.

In conclusion, ACTEC recommends the selection of a fixed age of majority as an alternative to determining the "age of majority" under state law, and determining whether a child is pursuing a "specified course of education." This fixed age of majority would remain subject to the exception in Reg. § 1.401(a)(9)-6, A-15 for children who become disabled or chronically ill prior to reaching majority.

14. If the Employee's interest in the Plan is distributable to a custodian for the minor pursuant to the applicable state Uniform Transfers To Minors Act, will that qualify the minor child for EDB treatment? What if such an account continues in existence until age 25 under applicable state law?

When an Employee contemplates that her plan is to pass to an individual who might be a minor at the Employee's death, the Employee needs to consider how to make the designation in a way that allows someone to act for the minor. Otherwise, a court-supervised guardianship procedure may result. In some cases, designating a trust for the individual will solve this problem and may also accomplish other objectives the Employee has in mind. But not every Employee may want the cost and complexity associated with designating a trust.

Nearly all of the states have enacted a version of the Uniform Transfers to Minors Act ("UTMA"),[66] which offers a simple alternative that has been widely utilized over the years. The

[66] Uniform Transfers to Minors Act, promulgated by the Uniform Law Commission in 1983 and amended in 1986, has been enacted by 49 states and the District of Columbia, and enactment is pending in South Carolina.

UTMA updated the prior Uniform Gifts to Minors Act.[67] When property is held in a custodial relationship under the UTMA, the property is held by a custodian until the individual reaches a certain age, and then the custodianship terminates and the property is distributed. While the custodianship is in effect, the property is indefeasibly vested in the minor, not the custodian.[68] Many states that have enacted the UTMA have modified or added certain provisions. As a result, the age of termination could be as low as age 18 or as high as age 25, depending on the state and other circumstances.

The following examples illustrate several issues related to such accounts. Some of these issues are specific to the new rules for EDBs under the Act. Other issues are not specific to the Act, but have been included because ACTEC suggests guidance on these questions would be helpful.

<u>Example A</u>: Employee, Nora, designates her Plan in equal, separate accounts to (i) a custodial account under the UTMA for the benefit of her minor child Olive, and (ii) to a custodial account under the UTMA for the benefit of her minor nephew Pete. Nora dies after the Effective Date when Olive is age 8 and Pete is age 12. The terms of designation and applicable state law result in custodial accounts that will terminate at age 21, but the age at which a guardianship of a minor's estate will terminate under applicable state law is 18.

1. *Does Olive determine RMDs as a minor child EDB with respect to her separate account in Nora's Plan?*

   Olive's custodial account under the UTMA is not a trust. Olive is indefeasibly vested in her separate account under Nora's Plan. Custodial accounts under the UTMA play a vital role in planning for young individuals, as the only other alternatives are legal guardianships and trusts. ACTEC recommends that Treasury confirm that in these facts, Olive would determine RMDs with respect to her separate account in Nora's Plan as a minor child EDB.

2. *Does Pete determine RMDs as a DB with respect to his separate account in Nora's Plan?*

   ACTEC recommends that Treasury confirm that in these facts, Pete would determine RMDs with respect to his separate account in Nora's Plan as a DB.

3. *If Pete is chronically ill at the time of Nora's death, does Pete determine RMDs as a chronically ill EDB with respect to his separate account in Nora's Plan?*

   ACTEC recommends that Treasury confirm that under these facts, if Pete was chronically ill at Nora's death, Pete would determine RMDs with respect to his separate account in Nora's Plan as a chronically ill EDB.

As mentioned earlier, in some states and under some circumstances, it is possible for a custodial account under the UTMA to terminate as late as age 25. A significant number of states provide that under such state's applicable state UTMA, a custodial account would terminate a few years beyond the age at which a guardianship of the estate of a minor would terminate. Although a

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[67] Uniform Gifts to Minors Act, promulgated by the Uniform Law Commission in 1956 and amended in 1966, was enacted in some form by every American jurisdiction.
[68] UTMA § 11(b).

custodial account under the UTMA that terminates at age 25 could potentially hold assets as much as 7 years beyond the age at which a guardianship of a minor's estate would terminate, the assets are indefeasibly vested in that individual the entire time and ultimately are distributed in full no later than age 25.

If Treasury were to set a stricter limit on the age of termination for purposes of determining RMDs, a significant number of Employees in various states may inadvertently provide distribution to custodial accounts under the UTMA that do not comply with the stricter limit. Further, Treasury would need to articulate how RMDs are to be determined with respect to custodial accounts under the UTMA that do not comply with the strict limit. From a policy perspective, the benefit of making it as easy as possible to utilize custodial accounts under the UTMA to provide for and protect young individuals outweighs whatever benefit might be accomplished by imposing a stricter limit on the age of termination.

For these reasons, ACTEC recommends that Treasury provide guidance that confirms that any custodial account under the UTMA that is valid under applicable state law is acceptable for purposes of the RMD issues presented in Examples A and B, even if the age of termination is as high as age 25.

15. Will the Employee's minor child be treated as an EDB if the Employee names a Conduit Trust for the benefit of his minor child, the terms of which authorize distributions using a "facility of payment" provision?

Although a minor can own assets, there are many nontax reasons why that is generally inadvisable. In addition, regardless of whether it is advisable, the minor has no legal ability to deal with the assets: a minor is not a legally competent person. Acknowledging this legal dilemma, trusts for minors routinely include a "facility of payment" provision that allows distributions to be made for the minor's benefit in four primary ways: (i) to the minor's legal guardian, (ii) to the minor's natural guardian, (iii) to a custodian for a minor pursuant to the Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA), and (iv) to providers of goods and services to the minor.

Example A: The Employee Quan names a Conduit Trust for the sole benefit of his daughter Ruth (age 12) as beneficiary of his interest in his Plan. The Conduit Trust instrument includes a "facility of payment" clause that provides that if a beneficiary entitled to an outright distribution from the trust is under age 21, the trustee may instead make the distribution for her benefit to a provider of goods or services for Ruth or to a custodian under the UTMA for Ruth's benefit until Ruth reaches age 21.

Regs. § 1.401(a)(9)-5, A-7(c) Example 2 describes a trust instrument that provides that all amounts distributed from the Employee's Plan to the trustee while the Sole Current Beneficiary is alive will be paid directly to the Sole Current Beneficiary upon receipt by the trustee. In Example A, the existence of the "facility of payment" clause in Ruth's trust means that it is possible that the trustee might make some of Ruth's distributions for Ruth's benefit or to a custodian of a UTMA account for her while she is under age 21. Given that the payment for goods or services for the beneficiary of a trust would be treated as a payment to the beneficiary for income tax purposes, the ability to make such payments should be treated as direct payments for purposes of qualifying the trust as a Conduit Trust. In addition, given that Ruth is indefeasibly vested in property in the UTMA account held in her name, ACTEC suggests that distributions to Ruth's custodian under a UGMA or UTMA account should also be viewed as if made directly to her for purposes of this regulation. See Rev. Rul. 56-86, 1956-1 C.B. 449, Rev. Rul. 59-357, 1959-2, C.B. 212; Rev. Rul. 71-287, 1971-2 C.B. 317. Accordingly, ACTEC recommends that Treasury confirm that under these facts, Ruth would determine RMDs with respect to Quan's interest in the Plan as a minor child EDB.

Payment to a minor's parent, as the minor's natural guardian, to be used for the benefit of the minor, should also be allowed as an additional method for making distributions "directly to" the minor under a facility of payment provision in a Conduit Trust. See Rev. Rul. 71-287, 1971-2, CB 317.

Because a minor is not a legally competent person, ACTEC requests that Treasury's guidance allow a Conduit Trust to contain a facility of payment provision that would authorize the trustee to make distributions to (i) the minor's legal guardian, if any, (ii) the minor's parent, as the minor's natural guardian, (iii) a UGMA or UTMA custodian for the minor, or (iv) any provider of goods or services to the minor, as direct payment of such expenses, and confirm that such a distribution would constitute a direct distribution of the Plan distribution to the beneficiary to qualify the trust as a Conduit Trust.

16. Can there be a single Conduit Trust for multiple minor children of the Employee, treating the minor children as EDBs and using the age of the oldest minor child to determine the Applicable Distribution Period? If so, when does the Life Expectancy Method convert to a 10 year distribution period?

A "pot trust" is a trust with more than one current beneficiary (i.e., a multi-beneficiary trust). The only example in the regulations dealing with a Conduit Trust involves a trust with a single current beneficiary. Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. The Act does not address whether a pot trust can be a Conduit Trust for the Employee's minor children such that only the current minor children beneficiaries are treated as the sole beneficiaries of the trust for purposes of the Applicable Distribution Period.

Before the Act, some practitioners opined that a pot trust could qualify as a Conduit Trust if the trust was specifically drafted (i) to require the trustee to distribute immediately all amounts received from the Plan to the Conduit Trust beneficiaries; and (ii) to prohibit accumulation of Plan distributions in the trust as long as any member of the Conduit Trust group was living to prevent accumulations being distributed in the future to other beneficiaries.[69] In the case of a pot trust designed as a Conduit Trust, the life expectancy of the oldest beneficiary of the Conduit Trust would have been used to calculate RMDs. Reg. § 1.401(a)(9)-5, A-7(a)(1).

Natalie Choate, author of Life and Death Planning for Retirement Benefits, included this pre-Act example involving a conduit pot trust:

"Warren Example: Warren dies leaving his IRA to a trust for his four children all of whom are under age 40. The trust provides that, as long as any child of Warren is living, the trustee must pay out, to one or more of such children, in such proportions as the trustee deems advisable for their education, support, and welfare, any and all amounts the trustee receives from the IRA,

[69] Natalie B. Choate, Life and Death Planning for Retirement Benefits (8th ed. 2019), pp. 439-440.

upon receipt. The trust will terminate when there is no living child under the age of 40, and the IRA is to be transferred in equal shares at that time to such of Warren's children as are then living, or (if no such child is then living), to a charity. Some practitioners believe that Warren's trust qualifies as a conduit trust, since only the children can receive benefits from the IRA as long as any child is living, however, others conclude it may not pass the IRS's tests."[70]

As discussed in Subsection D.7, leaving benefits to a Conduit Trust for a single minor child of the Employee should be treated the same as leaving the benefits outright to the minor child (i.e., the minor child would qualify as an EDB) entitling the Conduit Trust to use the Life Expectancy Method based on the life expectancy of the minor child for purposes of determining the Applicable Distribution Period prior to the child reaching majority. See Code § 401(a)(9)(H)(ii); Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2.

It is not unusual for a parent with minor children to create a pot trust for his children, rather than creating a separate trust for each child. This structure enables the trustee of the pot trust for the minors to serve *in locus parentis*, making distributions among the minor children as a parent would, based on the separate needs of each child. Provided the conduit pot trust for the Employee's minor children is structured (i) to require the trustee to distribute immediately all amounts received from the Plan to the minor children; and (ii) to prohibit accumulation of Plan distributions in the trust as long as any minor child of the Employee is living, it should qualify as a Conduit Trust, using the life expectancy of the oldest minor child to calculate RMDs, until the age of majority. Reg. § 1.401(a)(9)-5, A-7(a)(1).

There are three alternative dates that could trigger conversion to the 10 Year Rule: (i) the date the Employee's youngest child reaches majority or dies (whichever occurs first); (ii) the date the Employee's oldest child reaches majority or dies (whichever occurs first); or (iii) the date any current beneficiary of the pot trust is no longer a minor child EDB. If the first alternative is used, at least one of the trust beneficiaries will necessarily be beyond the age of majority before the conversion occurs. Allowing the Conduit Trust to continue using the Life Expectancy Method when at least one of its beneficiaries is no longer a minor child seems to be inconsistent with the intent of the Act and overreaching. Transitioning the pot trust to the 10 year distribution period when the oldest child dies would also seem not to be consistent with the intent of the Act, because it would require the transition to the 10 year distribution period when there are only minor child EDBs as beneficiaries of the pot trust. The alternative that best fits within the intent of the Act would seem to be requiring transition to the 10 year distribution period on the date that there is any beneficiary of the pot trust who is not a minor child EDB.

ACTEC requests that Treasury provide guidance clarifying that (i) a pot trust for the Employee's minor children will qualify as a Conduit Trust if the trust is structured (a) to require the trustee to immediately distribute all amounts received from the Plan to (or for the benefit of) the minor children, and (b) to prohibit accumulation of Plan distributions in the trust as long as any minor child of the Employee is living; (ii) the life expectancy of the oldest minor child of the Employee will be used for purposes of determining the Applicable Distribution Period; and (iii) the date there is any beneficiary of the pot Conduit Trust who is no longer a minor child EDB is the date

70 Choate, supra at 438.

that triggers conversion to the 10 year distribution period.[71] If Treasury concludes differently, ACTEC requests that Treasury so explain as part of its guidance on the Act.

F. DISABLED AND CHRONICALLY ILL EDBs

17. How is the disability or chronic illness determined? How is the disability or chronic illness to be documented, and when does the documentation need to be in place?

The Act designates individuals who are either disabled or chronically ill as of the Employee's death as EDB. ACTEC requests guidance from Treasury with respect to how such a condition is to be determined and what documentation will be needed to establish the existence of such a condition in order to qualify for EDB treatment using the Life Expectancy Method for determining the Applicable Distribution Period from a plan.

Disabled adults.

New Code § 401(a)(9)(E)(ii) (III) requires that the designated beneficiary be "disabled" within the meaning section 72(m)(7)" of the Code. Under § 72(m)(7) an individual is disabled if "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." This definition of disability is almost identical to the definition of disability in the Social Security Act, 42 U.S.C. § 1382c (a)(3). ACTEC recommends that Treasury confirm that an individual determined to be disabled by the Social Security Administration (SSA) will automatically qualify as disabled for purposes of qualifying as an EDB without any additional documentation. ACTEC also recommends that Treasury's guidance set forth criteria, such as necessary medical reports, to establish disability for other disabled persons who have not been determined as such by SSA. In any case, since such documentation is likely not in place as of the Employee's death unless it was otherwise determined by the SSA, ACTEC requests Treasury include in its guidance that documentation is to be provided by October 31 of the year following the year of the Employee's death, except that in the case of a minor the documentation is to be provided by October 31 of the year following the year after reaching the age of majority.

Disabled minors.

Code § 72(m)(7), which measures disability in terms of participation in "substantial gainful activity," a hallmark of employability, is inapplicable to a minor. Disabled minors are generally supported by their parents and federally mandated educational programs prior to qualification for Social Security disability. Most often disabled minors never have the ability to engage in "substantial gainful activity" even after reaching adulthood and are never be able to support themselves. Also, there would likely not have been a diagnosis prior to the Employee's death. ACTEC requests that Treasury provide in its guidance that the minor may qualify at the Employee's death as a minor EDB and then at any time before reaching majority qualify as an

[71] All references to Conduit Trusts outside this Subsection E.15. may be interpreted based on the definition of Conduit Trust provided in Subsection A.6., which defines a Conduit Trust as having only one Current Beneficiary.

EDB because of disability as determined by Social Security Administration or as a result of additional documentation.

In addition, ACTEC suggests that the guidance issued by Treasury provide that one option for a minor to qualify as a disabled EDB would be if the minor has satisfied the requirements of the SSA for being designated as a "disabled minor" – that is, the individual is under age 18 who "…has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382(a)(3)(C)(i). The statute further defines impairment for minors, whether physical or mental, as "…an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." § 1382 (a)(3)(D).

As in the case of adults, in the absence of a determination of disability by the SSA, Treasury's guidance could set out criteria for qualifying as a minor disabled EDB, such as documentation by medical providers, indicating that the minor has a medically determinable physical or mental impairment, based on anatomical, physiological or psychological abnormalities or developmental delays, which results in marked and severe functional limitations that will last more than twelve months.

Chronic illness.

The Act provides helpful guidance for qualifying an adult as an EDB based on chronic illness, but additional guidance will be needed with regard to qualifying a chronically ill minor as an EDB, including for a situation in which the chronic illness may have commenced or been first diagnosed during minority, but after the Employee's death. The issue with chronic illness with a minor is that the standard for chronic illness is the ability to perform daily acts of self-care, which is generally inapplicable to a minor, at least until older ages.

The Act defines chronic illness with reference to Code § 7702B(c)(2), "except that the requirements of subparagraph (a)(1) of that section shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is expected to be lengthy in nature." Under Code § 7702B(c)(2), "the term 'chronically ill individual' means any individual that has been certified by a licensed health care practitioner as—(i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity, (ii) having a level of disability similar (as determined under regulations prescribed by the Secretary in consultation with the Secretary of Health and Human Services) to the level of disability described in clause (i), or (iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment."

Many minors will be too young at the time of the Employee's death to perform adult tasks of daily living simply because of their age so the standard will not be useful. Indeed, a young minor will never have had the functional capacity to perform the adult tasks of daily living, so such young minor will not have "lost" such functional capacity.

Example: Employee Sam has a child, Teri, and a nephew, Uve. Sam dies when both Teri and Uve are 3 years old. Teri qualifies as an EDB as a child of the Employee, so Teri is able to use the Life Expectancy Method, but Uve is not a child of the Employee and his Applicable Distribution Period would otherwise be governed by the 10 Year Rule.

> Scenario 1. Both Teri and Uve have been diagnosed before Sam's death with a chronic illness which allows both of them to use the Life Expectancy Method.
>
> Scenario 2. Both are diagnosed as chronically ill after Sam's death.

It would seem consistent with Congressional intent to provide relief in such circumstances to allow the Life Expectancy Method to be used in both scenarios. Documentation could be either at Sam's death, if the diagnosis had already been made or by December 31 of the year after the year of the diagnosis, but no later than the date the minor reaches the age of majority. Once chronic illness has been established and documented, guidance is needed as to (i) whether any documentation will be required to be provided periodically to retain the status of a chronically ill EDB, (ii) whether such status, once attained, can be lost, and (iii) if it can be lost, whether the Life Expectancy Method will then transition to the 10 year distribution period.

18. Will a provision in a See Through Trust for a disabled or chronically ill person that restricts or eliminates that person's interest if it adversely affects qualification for public assistance, disqualify the disabled or chronically ill person as an EDB?

History of trusts for the disabled and chronically ill

Most trusts for disabled or chronically ill individuals are drafted as discretionary trusts and are Accumulation Trusts for a number of important reasons. First, a disabled or chronically ill individual may be the recipient of one or more governmental programs, such as Supplemental Security Income (SSI) or Medicaid, essential for their health care and basic survival, and have certain eligibility criteria based on the individual's access to outside assets or income. A fully discretionary trust with spendthrift provisions generally does not count towards the criteria for access to such assets or income. A Conduit Trust for the benefit of a disabled individual disrupts the individual's eligibility for these essential programs simply because the terms of the trust require annual distributions directly to the disabled or chronically ill individual, whether or not the individual can manage or benefit from those distributions. The problem is especially relevant for the disabled or chronically ill because Medicaid eligibility is a prerequisite for such individual's qualification for many state sponsored programs, due to reimbursement for a portion of program costs by the federal government. Often, because the only programs available in a particular area are programs that mandate Medicaid eligibility, Medicaid eligibility may be critical for the disabled or chronically ill individual in order to access programs to meet essential needs.

Congress recognized this precise problem in 1993 and created a new type of discretionary trust for disabled individuals known as OBRA '93 trusts, established pursuant to 42 U.S.C.§ 1396p (d)(4)(A) and (C). These trusts are frequently referred to as special needs trusts (SNTs), and they have been used to hold modest inheritances, retirement accounts, gifts and other financial assets received by a disabled person. In 2003, Congress recognized a second kind of discretionary trust for disabled individuals in the Code § 642(b)(2)(C), known as Qualified Disability Trusts or

QDisTs. QDisTs, by definition, are established for the benefit of one or more individuals who have been determined to be disabled by the SSA. Congress provided QDisTs with an income tax benefit that other trusts for non-disabled individuals do not enjoy. Most recently, in Code § 401(a)(9)(H)(iv), Congress recognized the special needs of disabled or chronically ill individuals, and created the AMBT, a third, parallel trust for the purpose of holding the Employee's interest in a Plan.

Characteristics of trusts for the disabled

All three of these trusts have many similarities. All must exclusively benefit disabled individuals; nondisabled individuals are limited to being residual or remainder beneficiaries, after the disabled initial Current Beneficiary has died. These trusts also contain terms making the trust fully discretionary because their purpose is both to provide for the changing needs of a disabled individual, which typically vary from year to year, and to maintain eligibility for certain benefit programs. A trustee may wish to accumulate money for a number of years in order to purchase a handicapped accessible van or acquire special adaptive technology to help the disabled person communicate. There may be years when the beneficiary's needs are fairly stable, and others when the beneficiary has very high medical or rehabilitative needs due to his or her particular illness or injury. Being able to adjust the flow of funds to suit the disabled or chronically ill person's changing needs is an essential feature of these trusts.

Some have expressed concern that a trustee could simply withhold all distributions from such a trust until the death of the disabled beneficiary, passing on all trust benefits to the non-disabled remainder beneficiaries. In fact, the law provides the opposite. Discretionary language does not mean that the trustee can ignore the needs of the disabled beneficiary and accumulate all income or keep principal intact, in order to save the resources for the next generation beneficiaries, the remaindermen, even if the trustee has substantial or seemingly absolute discretion. The law in all fifty states requires a trustee of such a trust to act in the best interests of the disabled Current Beneficiary, regardless of the level of discretion, and if the trustee does continue to accumulate resources without spending them to benefit the disabled Current Beneficiary, that trustee risks certain removal, surcharge or both. In a well-known case in the New York Surrogates Court, *In Matter of J P Morgan Chase Bank, N.A.*, (Marie H.) 2012 Slip Op 22387, December 31, 2012, the court chastised JP Morgan Chase Bank and the co-trustee for doing just that. The court rebuked the trustees, declined to accept their final accounting, and surcharged the trustees. This decision sent a strong signal to trustees of discretionary special needs trusts across the country that accumulating funds without providing for the disabled Current Beneficiary's needs is impermissible.

<u>Example</u>: The Employee Violet is a widow and has an adult child, Will, who has cerebral palsy, and a non-disabled adult child, Yadi. Will lives in a group home and receives training and rehabilitative programs from Will's state disabilities department. These programs are essential to Will's quality of life and to his medical survival. Will receives SSI and Medicaid. Violet plans to name her revocable trust as the beneficiary of her interest in her Plan. On Violet's death, the terms of the trust direct the trustee to divide the trust assets equally, one-half to pass outright to Yadi, and one-half to fund a discretionary special needs trust for the sole benefit of Will during Will's lifetime. The terms of the trust for Will provide that the trustee is to spend trust assets to supplement Will's needs, including purchasing a van, adaptive equipment or

providing a residence for Will, but gives the trustee full discretion on the timing of these expenditures.

This trust should qualify as an AMBT under Code § 401(a)(9)(H)(iv), and also as a QDisT under § 642(b)(20(C) of the Code. However, Violet also gave the trustee of Will's trust the power effectively to remove Will as a Current Beneficiary and to pay benefits to Yadi, a non-disabled beneficiary, during Will's lifetime, in the event that the trust for Will becomes a countable asset for Will that would disqualify Will for Medicaid and eliminate Will's ability to participate in the programs from Will's state disabilities department. ACTEC seeks guidance on whether the trust for Will would qualify as an AMBT so as to enable the trustee of Will's trust to use the Life Expectancy Method for determining the Applicable Distribution Period. If the trustee could eliminate the disabled Current Beneficiary, the trustee may not owe the required fiduciary duty to the disabled individual; and the trust may not qualify for the Life Expectancy Method. On the other hand, the trust could disqualify the disabled Current Beneficiary from participation in essential programs without inclusion of such provision in the trust. ACTEC requests that Treasury state specifically whether the terms of a trust for a disabled individual could provide that the disabled person could lose his or her interest in the trust if it would disqualify the disabled person from essential benefits and still qualify as an AMBT.

G. APPLICABLE MULTI-BENEFICIARY TRUST (AMBT)

19. What requirements must be satisfied for a trust to qualify as an AMBT?

Before the Act, the rules governing RMDs for a trust named to receive a deceased Employee's Plan arose under regulations finalized in 2002. The Act added Code §§ 401(a)(9)(H)(iv) and (v), which identified a new type of trust, the Applicable Multi-Beneficiary Trust, or AMBT, that was accorded special treatment. Congress added these provisions to the Act sometime after the House of Representatives passed H.R. 1994 on May 23, 2019. Code § 401(a)(9)(H)(v) states:

> For purposes of this subparagraph, the term "applicable multi-beneficiary trust" means a trust—
>
> (I) which has more than one beneficiary,
>
> (II) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph, and
>
> (III) at least one of the beneficiaries of which is an eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii).

In order to meet the requirement in subpart (II), the trust <u>must be a See Through Trust</u> and all of the Countable Beneficiaries of the trust must be DBs and <u>not non-individual persons</u>. In earlier Sections of this memorandum, ACTEC requested Treasury update the 2002 regulations to reflect the changes in the post-death RMD rules and make them simpler and easier to administer. In this regard, ACTEC suggested adopting a rule that counts "qualified beneficiaries" as that term is defined in the Uniform Trust Code.[72] ACTEC requests that Treasury apply this "qualified beneficiary rule" for purposes of determining the trust beneficiaries who are counted for

[72] See Sections B and C, and Subsection D.9.

purposes of subpart (II), or if Treasury concludes otherwise, that Treasury identify clearly the Countable Beneficiaries of an AMBT as part of its guidance on the Act.

ACTEC further suggests the following interpretations of subparts (I), (II) and (III):

- Subpart (III) requires that at least one of the trust's *Current Beneficiaries* is either a disabled EDB or a chronically ill EDB. Although this requirement is not stated in subpart (III), it may be implied by the two requirements described in Code § 401(a)(9)(H)(iv) because an AMBT that does not have either a disabled EDB or chronically ill EDB as a Current Beneficiary will not meet these requirements.

- A Conduit Trust cannot qualify as an AMBT, because a Conduit Trust is treated as having only one beneficiary who is treated as a DB, and subpart (I) requires that an AMBT must have more than one beneficiary.

- An Employee's revocable trust can qualify as an AMBT at the Employee's death, provided it meets the requirements under Code § 401(a)(9)(H)(v).

ACTEC requests that Treasury confirm the above interpretations of subparts (I), (II) and (III) or, if Treasury concludes otherwise, that Treasury provide an explanation of its interpretation of subparts (I), (II) and (III) as part of its guidance on the Act.

One of the requirements for any trust to be a See Through Trust after an Employee's death is that certain documentation be provided to the plan by October 31 of the calendar year following the calendar year of the Employee's death.[73] ACTEC suggests that this existing documentation requirement is sufficient for AMBTs, and requests Treasury to confirm this or to explain any additional documentation requirements that an AMBT must satisfy as part of its guidance on the Act.

20. What additional requirements must be satisfied in the terms of the trust for an AMBT to qualify as a trust described in Code § 401(a)(9)(H)(iv)(I)?

Code § 401(a)(9)(H)(iv) offers two types of special treatment to certain AMBTs, each with its own qualifying requirements. For convenience, ACTEC refers to these two types of special treatment as "AMBT Rule I"[74] and "AMBT Rule II,"[75] referring to the two subparts in that section of the Act that prescribe qualifying requirements for each. The requirements of both AMBT Rule I and AMBT Rule II must be met under the terms of the trust.

Terms of the Trust. Congress makes clear that, in order to satisfy the qualifying requirements of Code § 401(a)(9)(H)(iv) for either or both of AMBT Rule I and AMBT Rule II, certain provisions must be specified in the terms of the trust (the "terms of the trust requirement").[76] Certain post-mortem events may be taken into account in determining the DBs of a deceased Employee's Plan.[77] ACTEC requests guidance from Treasury on whether the "terms of the trust

[73] Reg. §§ 1.401(a)(9)-4, A-5(b)(4), A-6(b).
[74] Code § 401(a)(9)(H)(iv)(I)
[75] Code § 401(a)(9)(H)(iv)(II)
[76] Code § 401(a)(9)(H)(iv) flush language.
[77] Reg. § 1.401(a)(9)-3, A-4(a).

requirement" is satisfied taking into account certain post-mortem events described in the following examples.

Example A: Employee Archie names a trust to receive her interest in her Plan and dies after the Effective Date. The trust qualifies as an AMBT,[78] but the trust does not contain the requisite provisions to meet the "terms of the trust requirement". The trust is judicially modified to include the requisite provisions prior to September 30 of the calendar year following the year of Archie's death.

Example B: Same as Example A, except the trust is modified by a Trust Protector[79] authorized to make such a modification under the terms of the trust instead of by a court.

Example C: Same as Example A, except the trust *does* include the requisite provisions, and the trust also authorizes a Trust Protector to amend or remove provisions of the trust prior to September 30 of the year following Archie's death, among other powers. The Trust Protector does not in fact remove the requisite provisions.

Example D: Same as Example C, except the Trust Protector *does* remove the requisite provisions prior to September 30 of the year following Archie's death.

ACTEC suggests that, under the circumstances described in Examples A, B, and C, the "terms of the trust requirement" is met because the requisite provisions are part of the terms of the trust as of September 30 of the year following the Employee's death. However, under the circumstances described in Example D, the "terms of the trust requirement" is not met. ACTEC requests Treasury to confirm that the "terms of the trust requirement" will be met if the requisite provisions are part of the terms of the trust on September 30 of the year following the Employee's death even if such provisions were not included in the terms of the trust as of the Employee's death or were included but subject to a power of removal. If Treasury concludes otherwise, ACTEC requests that Treasury so explain as part of its guidance on the Act.

Requirements Specific to AMBT Rule I. In order to meet the requirements of AMBT Rule I, the provisions that must be specified under the terms of the trust are that (i) the trust is to be "divided immediately upon the death of the employee"[80], (ii) into "separate trusts for each beneficiary."[81]

Immediate Division. In practice, when a trust is directed to be divided on death, the trust rarely divides immediately at the moment of death. A reasonable period of administration is usually necessary to accomplish numerous requirements, including for example taking possession of and inventorying the decedent's assets, identifying and resolving any valid claims of the decedent's creditors, and complying with income, gift, and estate tax requirements, just to name a few. When a trust is drafted to require a division or other action "upon the death of" a person, this is generally understood and interpreted to allow time for a reasonable period of administration prior to the division. ACTEC requests Treasury confirm that a trust provision that calls for division of

[78] Code § 401(a)(9)(H)(v).
[79] Modern trusts sometimes create an office of Trust Protector in addition to the office of Trustee. The Trust Protector generally does not hold powers that a Trustee would hold, and often holds powers that might be useful in responding to changed circumstances.
[80] Code § 401(a)(9)(H)(iv)(I)
[81] *Id.*

the trust upon the death of the Employee is sufficient, even if the provision does not contain the term "immediate" in describing the division, and even if the division may not actually occur until after a reasonable period of administration. If Treasury concludes otherwise, ACTEC requests Treasury to specifically so explain as part of its guidance on the Act, and to include in that explanation the terminology that must be used in order for the trust provisions to satisfy the "immediate division" requirement.

In many cases, the terms of a trust apply common disaster or survivorship provisions to avoid subjecting property to administration twice in rapid succession. Under such provisions, a beneficiary's interest will fail if the beneficiary does not survive the grantor by the requisite period of time. Common disaster and survivorship provisions have been recognized in another tax context having to do with the marital deduction from estate tax. Code § 2056(b)(1) provides the general rule that the marital deduction for estate tax is not allowed if any post-death event or contingency can cause the interest passing to a surviving spouse to fail. A common disaster or survivorship requirement that applies to the spouse would violate this rule and jeopardize the marital deduction were it not for the exception provided in Code § 2056(b)(3). This exception excludes the existence of (i) a survivorship requirement if the requisite period is no more than six months after decedent's death, and (ii) a common disaster provision that applies only if both the decedent and surviving spouse die as a result of a common disaster.[82] ACTEC requests Treasury confirm that the "immediate division" requirement is satisfied even if immediate division is not possible due to the existence of a common disaster or survivorship requirement under the trust. If Treasury does not so conclude, ACTEC requests that Treasury so explain as part of its guidance on the Act. In this regard, ACTEC suggests that Treasury consider limiting the requisite survivorship period to no more than six months after the Employee's death, the same time period as is allowed under Code § 2056(b)(3).

Most states' statutes likewise address common disaster or survivorship issues by providing a requisite period of time a beneficiary must survive in order to remain a beneficiary of a trust. Time periods can range from a few days to several months, but in all cases, state law complies with the six month survivorship period required for the estate tax marital deduction. ACTEC requests Treasury confirm that the terms of the trust are not required to negate applicable state law provisions relating to post-death survivorship in order to satisfy the "immediate division" requirement. If Treasury does not agree with this approach, ACTEC requests that Treasury explain how to deal with statutory post-death survivorship periods as part of its guidance on the Act.

Separate Trusts for Each Beneficiary. Code § 401(a)(9)(H)(iv)(I) requires the division of an AMBT must be into "separate trusts" for "each beneficiary."

As discussed under Subsection G.19, an AMBT must be a See Through Trust. When the beneficiary of a See Through Trust is another trust, Reg. § 1.401(a)(9)-4, A-5(d) requires the other trust also to satisfy the See Through Trust requirements of Reg. § 1.401(a)(9)-4, A-5(b). Therefore, each of the separate trusts for each beneficiary must satisfy these See Through Trust requirements. ACTEC requests Treasury to confirm that each of the separate trusts must satisfy these requirements and further to confirm that the documentation requirement[83] for each separate

[82] Code § 2056(b)(3); see also, Reg. § 20.2056(b)-3(d), Examples 2 and 3, and Rev. Rul. 76-166, 1976-1 CB 287.
[83] Reg. §§ 1.401(a)(9)-4, A-5(b)(4), A-6(b).

trust is satisfied if the terms of the separate trusts are set out in the AMBT and the documentation requirement has been satisfied with respect to the AMBT. If Treasury concludes differently, ACTEC requests Treasury to so explain as part of its guidance under the Act.

ACTEC suggests that the only workable way to interpret the phrase "each beneficiary" contained in Code § 401(a)(9)(H)(iv)(I) is to require a separate trust only for each Current Beneficiary. It is virtually impossible to split out the interest of a Contingent or Successor Beneficiary into a separate trust. ACTEC requests that Treasury confirm that the separate trusts required in Code § 401(a)(9)(H)(iv)(I) are only required for each Current Beneficiary. If Treasury concludes otherwise, ACTEC requests Treasury to so explain, as part of its guidance on the Act.

21. Are there any additional requirements that must be followed when the trustee executes the division of the AMBT in order to benefit from Code § 401(a)(9)(H)(iv)?

Assuming an AMBT qualifies under Code § 401(a)(9)(H)(iv)(I) to divide pursuant to AMBT Rule I, guidance is requested as to whether any further requirements apply when the division is carried out. Even without any further requirements, a trustee may not carry out a distribution in an unfair manner since the laws of every jurisdiction impose strict fiduciary duties on the trustee of a trust towards the beneficiaries.

Must a division extend to all of the assets held in an AMBT? ACTEC suggests that such a division must extend only to a division of the AMBT's interest in the deceased Employee's Plan, and that there is no need to regulate whether non-Plan assets are or are not included in the division. To the extent that less than all of the non-Plan assets of the AMBT are included in the division, it is possible that the initial single trust prior to the division may continue to hold the non-Plan assets that were not included in the division. ACTEC requests Treasury to confirm that only the AMBT's interest in the deceased Employee's Plan needs to be the subject of the division.

Must a division create equal shares for each beneficiary, and must the size of the shares be predetermined? ACTEC suggests that, in dividing the Employee's interest in the Plan, there is no reason to require the allocation to be equal or predetermined. Employees commonly designate Plan beneficiaries in unequal proportions and may wish to specify that the AMBT divide into unequal shares. In some cases, the disabled or chronically ill EDB is best protected by granting discretion to the trustee of the AMBT to determine the shares taking into account circumstances at the time of the Employee's death. ACTEC requests Treasury to confirm that the Employee's interest in the Plan need not be divided equally among the separate trusts, and that the proportions allocated among the separate trusts can be left to the discretion of the trustee and need not be predetermined.

Must the different trusts for the different beneficiaries have the same terms? ACTEC suggests that there is no reason to require the separate trusts after the division of an AMBT have the same terms. In fact, when planning for a disabled or chronically ill EDB, the Employee will often need to include provisions for such EDBs that would not be appropriate for beneficiaries who are not disabled or chronically ill, such as special needs trust provisions. ACTEC requests Treasury to confirm that the terms of the separate trusts need not be the same after the division.

Must the division and allocation of the assets being divided be made pro rata? ACTEC suggests that there is no reason to require assets to be divided on a pro rata basis. In fact, such a requirement could work against disabled and chronically ill beneficiaries by limiting the amount of the deceased Employee's Plan that can be allocated to their trusts. ACTEC requests Treasury to confirm that the division of the assets of an AMBT into separate trusts can be made on a non-pro rata basis.

Should the division be completed within a fixed period of time? ACTEC requests Treasury to clarify whether there is an absolute time limit for the trustee to complete the division into separate trusts called for on the death of the Employee under the terms of the trust. In practice, many trust administrations go smoothly and are completed within twelve months. But sometimes administration can be prolonged by reasonable circumstances, such as an estate tax audit, a contested creditor's claim, a contest of the underlying estate planning documents or other litigation among the trustee and beneficiaries. Although the delay arising from these events is reasonable, ACTEC recommends that Treasury set an outside time limit for completing the division to provide certainty and avoid undue complexity for plan administrators and IRA custodians. ACTEC suggests that the last day of the year following the calendar year of the Employee's death may be an appropriate time limit, as this date also serves as the time limit for establishing separate accounts under Reg. 1.401(a)(9)-8, A-2(a)(2).

In conclusion, ACTEC recommends that no additional requirements should apply when the division is carried out, except for a firm time limit to complete the division, which ACTEC recommends should be the last day of the year following the calendar year of the Employee's death. ACTEC requests Treasury provide guidance consistent with these recommendations or, if Treasury concludes differently, that Treasury explain any additional requirements in the execution of the division as part of its guidance on the Act. To the extent Treasury applies further requirements to be followed in a division, ACTEC also requests Treasury to clarify that such further requirements govern the *execution* of such division and do not need to be part of the provisions that must be specified in the terms of the trust, as discussed in Subsection G.20.

22. How are RMDs determined after an AMBT divides under AMBT Rule I?

If an AMBT qualifies to divide under Code § 401(a)(9)(H)(iv)(I), AMBT Rule I, and divides accordingly (and complies with any additional requirements that must be observed in executing the division), Code § 401(a)(9)(H)(iv) provides, "clause (ii) shall be applied separately with respect to the portion of the employee's interest that is payable to" any disabled or chronically ill EDB. ACTEC suggests the following interpretations in connection with this provision:

- The phrase "portion of the employee's interest that is payable to" any disabled or chronically ill EDB refers only to such interest in an Employee's Plan as is allocated to a separate trust that has a disabled or chronically ill EDB as the sole *Current Beneficiary*, consistent with the suggestion ACTEC makes in Subsection D.19 that the division of an AMBT into separate trusts for separate beneficiaries be interpreted as requiring a division into separate trusts for each *Current Beneficiary*. Without this clarification, some might interpret the phrase as applying to a separate trust where a disabled or chronically ill EDB is counted as a beneficiary but is not a Current Beneficiary.

- The phrase “shall be applied separately” requires the rules of Code § 401(a)(9) be applied separately to that portion of an Employee’s Plan interest so allocated to a separate trust for a disabled or chronically ill EDB in the manner provided in Reg. § 1.401(a)(9)-8, A-2(a)(2), notwithstanding the rule of Reg. § 1.401(a)(9)-4, A-5(c) that otherwise provides that these rules are not available to a trust with more than one beneficiary.

ACTEC requests guidance confirming each of the above interpretations, or if Treasury concludes differently, that Treasury provide its interpretation of these provisions as part of Treasury’s guidance on the Act.

ACTEC also requests guidance as to how RMDs are determined after a division is made pursuant to AMBT Rule I. RMDs are determined using the Life Expectancy Method for each portion of the Employee’s Plan interest payable to a separate trust for a disabled or chronically ill EDB that arises from such a division,[84] but guidance is needed either to (i) confirm that the disabled or chronically ill EDB’s life expectancy is always used, or (ii) explain those circumstances in which the disabled or chronically ill EDB’s life expectancy might not be used and whose life expectancy should be used in those circumstances. The following examples help frame this issue:

<u>Example A</u>: Employee Leslie dies after the Effective Date after naming an AMBT to receive her Plan. The AMBT provides for division qualifying under AMBT Rule I and divides accordingly, resulting in separate trusts for Leslie’s children, Matt, Ned and Opal. Matt is an adult disabled EDB. Ned and Opal are healthy adults. Matt’s trust provides for discretionary distributions to or for Matt’s benefit (and no one else) for his lifetime. At Matt’s death, the trust terminates and is distributed in equal portions to those then living of Ned and Opal. A portion of Leslie’s Plan is allocated to the trust for Matt as part of the division. At the time of Leslie’s death, Leslie is age 68, and is survived by Matt (age 36), Ned (age 39), and Opal (age 43).

<u>Example B</u>: Same as Example A, except Matt’s trust also provides a contingent interest for Ned, who is not disabled or chronically ill, that does not arise until Ned attains age 65 and only if he is living at that time, but this contingent interest could result in distributions to Ned during Matt’s lifetime.

<u>Example C</u>: Same as Example A, except Matt’s trust is a Conduit Trust with Matt as the sole Current Beneficiary.

Examples A, B, and C, describe variations on the type of trust that might arise for a disabled or chronically ill EDB from a division of an initial AMBT under AMBT Rule I. ACTEC points out that any trust for a disabled or chronically ill EDB that arises from such a division (and is not a Conduit Trust) must be an AMBT.[85] Further, such a trust should qualify under AMBT Rule II, which is the case in Example A. The only scenario in which such a trust does not qualify for AMBT Rule II is where the trust provides a contingent beneficial interest to another beneficiary who is *not* a disabled or chronically ill EDB *that might result in future distributions to that other*

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[84] Code § 401(a)(9)(H)(iv).

[85] Such a trust is certain to satisfy the requirements to be an AMBT, i.e. the trust has more than one beneficiary, all of whom are treated as DBs, and at least one of whom is a disabled or chronically ill EDB. IRC § 401(a)(9)(H)(v). On the other hand, a Conduit Trust does not satisfy the requirements to be an AMBT because it has only one Countable Beneficiary.

beneficiary while the disabled or chronically ill EDB is still alive. This is the scenario illustrated in Example B. In practice, however, trusts for disabled or chronically ill individuals rarely include such a provision.

The trust for Matt in Example A is clearly an AMBT that satisfies AMBT Rule II. ACTEC suggests that where a trust for a disabled or chronically ill EDB satisfies AMBT Rule II, the EDB's life expectancy is used to determine the RMDs for the portion of the Employee's Plan interest payable to Matt's trust during Matt's lifetime,[86] and a 10 year distribution period applies after Matt's death.

The separate trust for Matt in Example B is clearly an AMBT, but it does not satisfy AMBT Rule II because distributions could be made to Ned, a Contingent Beneficiary, during Matt's lifetime. If Code § 401(a)(9)(H)(iv) is interpreted as providing that the disabled or chronically ill EDB's life expectancy is always used, then Matt's life expectancy is still used to determine RMDs in the same manner as in Example A. This is the interpretation ACTEC recommends, because it is simple, reasonable, and consistent with Congress's apparent intent in creating these provisions. But if Code § 401(a)(9)(H)(iv) is not interpreted in this way, ACTEC requests guidance that explains the circumstances in which the disabled or chronically ill EDB's life might not be used, and whose life expectancy should be used in those circumstances.

If Treasury concludes that a different rule is needed, ACTEC suggests that such rule apply only when the trust arising from a division under AMBT Rule I *does not* satisfy AMBT Rule II. ACTEC further suggests that such a rule use the shortest life expectancy of those who might receive distributions during the lifetime of the disabled or chronically ill EDB. In Example B, this would result in using Ned's life expectancy instead of Matt's.

Example C illustrates a Conduit Trust for Matt. In practice, Conduit Trusts are rarely used for disabled and chronically ill individuals, but they are included in this discussion since they are a permissible separate trust that may arise in a division under AMBT Rule I. In Example C, ACTEC suggests that RMDs are determined for the portion of Leslie's Plan payable to the Conduit Trust using Matt's life expectancy under the Life Expectancy Method for as long as he lives, and that a 10 year distribution period applies after Matt's death.

To summarize for Examples A, B, and C, ACTEC requests Treasury to confirm that, after a division is made as provided in AMBT Rule I, RMDs are determined for each portion of the Employee's Plan interest payable to a separate trust for a disabled or chronically ill EDB that arises from such a division using the respective disabled or chronically ill EDB's life expectancy, regardless of whether the trust qualifies under AMBT Rule II. If Treasury concludes otherwise, ACTEC requests that Treasury explain the circumstances where the disabled or chronically ill EDB's life expectancy might not be used, and whose life expectancy should be used in those circumstances as part of its guidance on the Act.

Next, ACTEC requests guidance as to a division under AMBT Rule I that may not satisfy the "separate trusts for each beneficiary" requirement under Code § 401(a)(9)(H)(iv)(I), and may not

[86] This discussion in Subsection G. 21 assumes that Treasury agrees with ACTEC's suggestion in Subsection G.23, that the disabled or chronically ill EDB's life expectancy is used when the Life Expectancy Method is applied pursuant to AMBT Rule II.

qualify for the Life Expectancy Method under the portion of Code § 401(a)(9)(H)(iv) that applies to divisions under AMBT Rule I.

Example D: Same as Example A, except Matt's trust also allows discretionary distributions to Ned, who is not disabled or chronically ill, during Matt's lifetime, but only in case of a medical emergency. Ned receives his own separate trust as part of the division.

In Example D, Matt's trust is an AMBT, but there is a question whether this trust satisfies the requirements of Code § 401(a)(9)(H)(iv)(I), which requires that the division of an AMBT must be into "separate trusts" for "each beneficiary." ACTEC suggests in Subsection G.19 that the only workable way to interpret this requirement is to require a separate trust for each *Current Beneficiary* of the initial AMBT that divides. In Example D, every Current Beneficiary of the initial AMBT *does* receive his or her own separate trust, but Ned also receives a beneficial interest in Matt's trust that results in Ned being a Current Beneficiary of two different trusts.

ACTEC further suggests in the second paragraph of this Subsection G.22 that a disabled or chronically ill EDB be the *sole* Current Beneficiary of his or her separate trust in order for the Life Expectancy Method to apply under Code § 401(a)(9)(H)(iv). In Example D, Matt's trust has two Current Beneficiaries, Matt and Ned. Accordingly, ACTEC suggests that there is also a question whether Matt's trust qualifies to use the Life Expectancy Method under the portion of Code § 401(a)(9)(H)(iv) that applies to divisions under AMBT Rule I.

Further, although Matt's trust in Example D is an AMBT, it does not satisfy the requirements for AMBT Rule II, and thus does not qualify to use the Life Expectancy Method under the portion of Code § 401(a)(9)(H)(iv) that applies to certain AMBTs under AMBT Rule II. Thus, guidance is needed as to how RMDs are determined for the portion of Leslie's Plan interest payable to Matt's trust.

Example E: Same as Example D, except Ned makes a qualified disclaimer of his interest as a Current Beneficiary in Matt's trust that is effective prior to September 30 of the year following Leslie's death.

ACTEC suggests that Ned is no longer a Current Beneficiary of Matt's trust for purposes of determining RMDs by reason of Ned's qualified disclaimer made prior to September 30 or the calendar year following the calendar year of Leslie's death.[87] Accordingly, ACTEC suggests that the "separate trust for each beneficiary" requirement is satisfied, and that Matt's trust qualifies for the Life Expectancy Method, using Matt's life expectancy, under the portion of Code § 401(a)(9)(H)(iv) that applies to divisions under AMBT Rule I.

To summarize for Examples D, and E, ACTEC requests guidance as to whether a division described in Example D satisfies the "separate trusts for each beneficiary" requirement. ACTEC suggests that it does not, since Ned is a Current Beneficiary of two different trusts. If Treasury determines that the division described in Example D satisfies the "separate trusts for each beneficiary" requirement, ACTEC also requests guidance as to whether a trust such as Matt's trust in Example D qualifies for the Life Expectancy Method under the portion of Code § 401(a)(9)(H)(iv) that applies to divisions under AMBT Rule I. Further, if Treasury determines that a trust such as Matt's trust in Example D does not qualify for the Life Expectancy Method

[87] Reg. § 1.401(a)(9)-4, A-4(a).

either because it does not satisfy the "separate trusts for each beneficiary" requirement or because it does not qualify to use the Life Expectancy Method under the portion of Code § 401(a)(9)(H)(iv) that applies to divisions under AMBT Rule I, ACTEC requests that Treasury provide guidance as to how RMDs are determined for such a trust.[88]

ACTEC also requests guidance confirming that a post-mortem event, such as the disclaimer in Example E, that is completed before the September 30 of the calendar year following the year of the Employee's death, may be taken into account for purposes of determining the designated beneficiaries, including any who might be EDBs, and the method to be used for the RMDs of each portion of an Employee's Plan interest payable to a separate trust for a disabled or chronically ill EDB.

In conclusion, ACTEC requests guidance confirming each of the above interpretations in Examples A, B, C, D, and E, or if Treasury concludes differently, that Treasury provide its interpretation of these provisions as part of Treasury's guidance on the Act.

23. What requirements must be satisfied for an AMBT to qualify as a trust described in Code § 401(a)(9)(H)(iv)(II)?

An AMBT qualifies for AMBT Rule II if, under the terms of the trust, no individual (other than a disabled or chronically ill EDB) "has any right to the employee's interest in the plan until the death of all such EDBs with respect to the trust".[89] This requirement can be broken down into two elements: (i) the "rights" of the trust beneficiaries, and (ii) in the "the employee's interest in the plan" prior to the death of all such EDBs. ACTEC suggests that the phrase "has any right" be interpreted as referring to rights as a *Current Beneficiary* in the Employee's Plan, since it is used to describe interests that are prohibited prior to the death of all such EDBs.

ACTEC suggests that the phrase "the employee's interest in the plan" be interpreted as referring only to such portion of the Employee's Plan that is designated by the Employee as payable to the AMBT. This interpretation is necessary, because if this phrase is interpreted as referring to the Employee's entire Plan interest, it will be impossible for an AMBT to satisfy this requirement whenever the Employee designates other portions of the Employee's Plan for individuals who are not disabled or chronically ill, either outright or in trust.

ACTEC requests that Treasury confirm ACTEC's interpretations of these requirements or, if Treasury concludes differently, that Treasury provide its interpretations of these requirements as part of its guidance on the Act.

24. How are RMDs determined for an AMBT that satisfies the requirements of AMBT Rule II?

If an AMBT qualifies under Code § 401(a)(9)(H)(iv)(II), Code § 401(a)(9)(H)(iv) provides that the Life Expectancy Method of Code § 401(a)(9)(B)(iii) "shall apply to the distribution of the employee's interest and any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary upon the death of such eligible

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[88] In this regard, ACTEC suggests that the rules ACTEC has proposed in prior Subsections are appropriate.

[89] Code § 401(a)(9)(H)(iv)(II).

designated beneficiary."[90] ACTEC suggests the following interpretations in connection with this provision:

- The phrase "employee's interest" is interpreted as referring only to such portion of Employee's Plan designated as payable to the AMBT, for the reasons discussed in Subsection G.23.

- When Code § 401(a)(9)(B)(iii) is applied to the distribution of such interest in Employee's Plan and a disabled or chronically ill EDB is the sole Current Beneficiary of the AMBT, RMDs from such interest are determined using that EDB's Life Expectancy Method during that EDB's lifetime, switching to a 10 year distribution period after that EDB's death, as illustrated by the following example:

  Example A: Employee Pat dies after having named a trust to receive her entire interest in her Plan. Pat is survived by her four children, Quinn, Rita, Sara, and Tony. Quinn is an adult, disabled EDB. The other children are healthy adults. The trust provides discretionary distributions to Quinn (and no one else) during Quinn's lifetime. At Quinn's death, the trust terminates and is distributed equally to those then living of Rita, Sara and Tony. The trust satisfies the requirements to be an AMBT and to qualify for AMBT Rule II.

  ACTEC suggests that in this example, the RMDs from Pat's Plan are determined using Quinn's Life Expectancy Method, switching to a 10 Year Period after Quinn's death.

- That the phrase "any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary" be interpreted as providing that such other beneficiaries of the AMBT who are not disabled or chronically ill EDBs are not counted as a trust beneficiaries under the See Through Trust rules that might otherwise apply to the AMBT.

ACTEC requests that Treasury confirm the above interpretations of this provision of Code § 401(a)(9)(H)(iv), or if Treasury concludes otherwise, that Treasury provide its interpretation of this provision as part of its guidance on the Act.

Example B: Same as Example A, except both Quinn and Tony are adult, disabled EDBs, and the trust is a "pot" trust that provides discretionary distributions to either Quinn or Tony based on their respective needs for so long as either is living. After both Quinn and Tony have died, the trust terminates and is distributed equally to those then living of Rita and Sara. Quinn is older than Tony.

ACTEC suggests that the RMDs from Pat's Plan in Example B are determined using the Life Expectancy Method, and that the shorter of Quinn's life expectancy or Tony's life expectancy is used for this purpose. Quinn is older than Tony, so Quinn's life expectancy applies. ACTEC requests that Treasury consider allowing the Life Expectancy Method that is based on Quinn's life expectancy to continue for as long as either Quinn or Tony is living, switching to a 10 year

[90] Code § 401(a)(9)(H)(iv).

distribution period after both Quinn and Tony have died. This approach is consistent with the protection of disabled EDBs contemplated by §§ 401(a)(9)(H)(iv) and (v).

Example C: Same as Example B, but the trust is not a "pot" trust. The trust provides discretionary distributions to Quinn (and no one else) for as long as she is alive. At Quinn's death, the trust provides discretionary distributions to Tony (and no one else) for as long as he is alive. After both Quinn and Tony have died, the trust terminates and is distributed equally to those then living of Rita and Sara.

ACTEC suggests that the distributions of Pat's Plan in Example C are determined using the Life Expectancy Method, using Quinn's life expectancy. ACTEC requests that Treasury consider allowing the Life Expectancy Method that is based on Quinn's life expectancy to continue for as long as either Quinn or Tony is living, since Tony is also a disabled EDB, and converting to a 10 year distribution period after both Quinn and Tony have died. This approach is also consistent with the protection of disabled EDBs contemplated by §§ 401(a)(9)(H)(iv) and (v).

Example D: Same as Example C, except the trust provides discretionary distributions first to Tony, and then to Quinn after Tony's death.

The distributions of Pat's Plan in Example D are determined using the Life Expectancy Method, but guidance is needed as to whether the life expectancy to be used is that of Tony or Quinn. There is a good argument that Tony's life expectancy should be used, since the trust is clearly designed primarily for his protection. He is the only Current Beneficiary while he is alive. On the other hand, it could be argued that the shorter of Quinn's life expectancy or Tony's life expectancy should be used, because some portion of the trust may remain for Quinn, even though she is older than Tony. ACTEC suggests that the life expectancy be determined by looking only at the Current Beneficiary, as discussed above. This approach is especially appropriate for a trust that is primarily designed to protect its Current Beneficiary. Thus, ACTEC suggests that Tony's life expectancy would be used in this Example D.

In conclusion, ACTEC requests that Treasury either confirm that RMDs for AMBTs that qualify for the AMBT Rule II are determined in the manner illustrated in these four examples, or if Treasury concludes differently, that Treasury provide guidance on how RMDs are to be determined as part of its guidance under the Act.

H. NOT MORE THAN 10 YEARS YOUNGER

25. How is the age difference determined for purposes of determining whether an individual is not more than 10 years younger than the Employee?

An individual beneficiary who is not otherwise an EDB and who is not more than 10 years younger than the Employee is an EDB under Code § 401(a)(9)(E)(ii)(V). ACTEC requests guidance as to how the relative ages of the Employee and the beneficiary should be determined for this purpose. There are no issues in applying this rule where the beneficiary is the same age as, older than, or one-to-nine years younger than, the Employee. However, if the beneficiary was born about 10 years after the Employee, the question will arise as to whether the 10-year standard is applied based on their actual respective birthdates, or whether a less precise but easier to apply measurement may still carry out Congressional intent. For example, Treasury could provide in its guidance that the beneficiary is not more than 10 years younger than the Employee if the beneficiary's year of birth is not more than 10 years later than the Employee's birth year. So, for example, if the deceased Employee was born in 1945, the beneficiary is "not more than 10 years younger" if she was born in 1955 or earlier. Alternatively, Treasury could provide in its guidance that the comparable method used in Reg. § 1.401(a)(9)-5, A-4(b)(1), for determining relative ages of the Employee and the Employee's spouse to establish whether the spouse is more than 10 years younger than the Employee, should be used. Thus, Treasury could provide that the determination of whether an individual is not more than 10 years younger is made by using the actual attained ages of the Employee and the individual beneficiary, rather than their actual birthdates, as of the date of the Employee's death, or by using the actual attained ages of the Employee and the beneficiary on the birthday of each in the year of the Employee's death. Whatever standard is to be used, ACTEC requests that Treasury specifically state in its guidance what standard is to be used for determining whether the individual is not more than 10 years younger.