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Please Address Reply to:

Executive Director
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May 24, 2022
Submitted Electronically at www.regulations.gov

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

RE: Comments on Proposed Regulations IRS REG-105954-20

Dear Internal Revenue Service:

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit its comments regarding the proposed amendments to the Income Tax Regulations under section 401(a)(9) of the Internal Revenue Code of 1986 ("Code") published in the Federal Register on February 24, 2022 ("Proposed Regulations"). The Proposed Regulations address the required minimum distribution requirements for plans qualified under Code section 401(a) and are intended to update the regulations to reflect the amendments made to Code section 401(a)(9) by sections 114 and 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act of 2019, Public Law 116-94, 133 Stat. 2534 (2019). The Proposed Regulations also update several existing regulations under Code sections 401(a)(9), 402(c), 403(b), 408, 457, and 4974 to reflect statutory amendments that have been made since those regulations were last issued.

ACTEC is a nonprofit association of lawyers and law professors. Its more than 2,400 members are called "Fellows" and practice throughout the United States, Canada and other foreign countries with extensive experience in the preparation of wills and trusts, estate planning, and administration of trusts and estates of decedents, minors and incompetents. 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 association 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 regarding the Proposed Regulations are set forth in the attached memorandum. 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, (202-684-8460, domckinnon@actec.org).

Respectfully submitted,

Robert W. Goldman
ACTEC President 2022-2023

American College of Trust and Estate Counsel ("ACTEC")
Comments and Recommendations
Regarding Proposed Regulations Published in IRS REG-105954-20

This memorandum presents ACTEC's comments and recommendations regarding the proposed amendments to the Income Tax Regulations published in the Federal Register on February 24, 2022 ("Proposed Regulations"), which (i) propose amendments to the Income Tax Regulations under section 401(a)(9) of the Internal Revenue Code of 1986 ("Code") to update the regulations to reflect the amendments made to Code section 401(a)(9) by sections 114 and 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act of 2019, Public Law 116-94, 133 Stat. 2534 (2019), and (ii) propose amendments to the Income Tax Regulations under Code sections 401(a)(9), 402(c), 403(b), 408, 457, and 4974 to reflect statutory amendments that have been made since those regulations were last issued.

ACTEC commends Treasury for these thoughtful and comprehensive Proposed Regulations. Many questions have been answered, but some questions remain. ACTEC hopes that the following comments and recommendations will help Treasury achieve even further clarity in these rules.

This memorandum begins with a Table of Contents that is intended to be in lieu of an Executive Summary. The memorandum then includes definitions and follows with detailed comments and recommendations. ACTEC appreciates the opportunity to provide these comments and recommendations to Treasury.

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A. CITATIONS AND DEFINITIONS

For readability, these comments use certain citation conventions and define certain key terms that are frequently used. Defined terms are capitalized in these comments to indicate that the term as used has the meaning set out in these definitions.

Citation Conventions are as follows:

(i) Existing Treasury regulations are cited as "Reg. § 1.401(a)(9)-…" and
(ii) Proposed Regulations are cited as "[Section or §] 1.401(a)(9)-…"

Defined Terms are as follows:

1. **"Accumulation Trust"** means a see-through trust that is not a Conduit Trust, as provided in § 1.401(a)(9)-4(f)(1)(ii)(B).

2. **"Age 31 Trust"** means a see-through trust for an individual as described in § 1.401(a)(9)-4(f)(3)(B), the terms of which provided for full distribution of amounts in the trust representing the Employee's interest in the Plan to the individual by the later of the end of the calendar year following the calendar year of the Employee's death and the end of the calendar year in which the individual attains age 31.

3. **"Applicable Multi-Beneficiary Trust" or "AMBT"** means a trust described in Code section 401(a)(9)(H)(v) as a trust that has more than one beneficiary, all of whom are treated as Designated Beneficiaries, and at least one of such beneficiaries is disabled or chronically ill.

   a. **"Type I AMBT"** means an AMBT described in Code section 401(a)(9)(H)(iv)(I) that is to be divided immediately upon the death of the Employee into separate trusts for each beneficiary.

   b. **"Type II AMBT"** means an AMBT described in Code section 401(a)(9)(H)(iv)(II) that does not provide any interest in Employee's interest in the Plan to any beneficiary who is not a disabled or chronically ill EDB until the death of all beneficiaries who are disabled or chronically ill EDBs.

4. **"Conduit Trust"** means a see-through trust defined in § 1.401(a)(9)-4(f)(1)(ii)(A), the terms of which provide that with respect to the deceased Employee's interest in the Plan, all distributions will, upon receipt by the trustee, be paid directly to or for the benefit of specified beneficiaries.

5. **"Designated Beneficiary" or "DB"** is as defined in Code section 401(a)(9)(E)(i) meaning any individual designated as a beneficiary by the Employee.

6. "**Effective Date"** means January 1, 2020, which is the date on which the amendments contained in SECURE Act § 401(a) generally apply, as it is the date immediately following the date identified in SECURE Act § 401(b)(1) as December 31, 2019 after which the SECURE Act applies. For purposes of these comments, it can be assumed that any Employee or Plan

discussed in this memorandum is subject to the general rule, and not the exceptions to the general rule for government plans and collectively-bargained plans provided in SECURE Act § 401(b)(2)-(4).

7. **"Eligible Designated Beneficiary"** or **"EDB"** means any Designated Beneficiary who falls within any of the five categories described in Code section 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.

8. **"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 section 401(a)(9).

9. **"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 section 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.

10. **"Primary Beneficiary"** means a trust beneficiary described in § 1.401(a)(9)-4(f)(3)(i)(A).

11. **"Required Beginning Date"** or **"RBD"** means the date specified in Code section 401(a)(9)(C) on which an Employee must start taking Required Minimum Distributions.

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

13. **"Secondary Beneficiary"** means a trust beneficiary described in § 1.401(a)(9)-4(f)(3)(i)(B).

B. COMMENTS AND RECOMMENDATIONS

1. Treasury Should Consider Confirming that the Separate Account Rule Applies to the Effective Date Rule that Treats Designated Beneficiaries of an Employee Who Dies Before the Effective Date as EDBs.

Section 1.401(a)(9)-1(b)(2)(iii) explains how the special rule of Code section 401(a)(9)(H)(iii) applies when, with respect to an Employee who died before the Effective Date, such Employee's DB dies on or after the Effective Date. Upon the death of such a DB, Code section 401(a)(9)(H)(iii) treats such DB as an EDB, with the result that full distribution of the employee's interest is required within 10 years after the death of such DB.

In the scenario where the Employee who died before the relevant Effective Date has multiple DBs, § 1.401(a)(9)-1(b)(2)(iii)(B) provides that Code section 401(a)(9)(H)(iii) is applied based on the death of the oldest of those DBs if that DB is alive as of the Effective Date.

ACTEC believes that this rule for "multiple beneficiaries" under § 1.401(a)(9)-1(b)(2)(iii)(B) does not apply in those situations where Code section 401(a)(9) is to be applied separately to each such beneficiary under the "separate account rule" (either under Reg. § 1.402(a)(9)-8, A-2 in effect as of the employee's death or under § 1.401(a)(9)-8(a)). However, this is not explicitly stated in § 1.401(a)(9)-1(b)(2)(iii)(B).

ACTEC observes that other sections of the Proposed Regulations include explicit cross-references to § 1.401(a)(9)-8(a), which ACTEC believes is helpful for clarity. See, for example, §§ 1.401(a)(9)-4(b), -4(e)(2)(i), -5(b), -5(f)(1)(i), and -5(f)(2)(i).

ACTEC recommends that § 1.401(a)(9)-1(b)(2)(iii) be revised to add an explicit cross-reference to the "separate account rule" (either under Reg. § 1.401(a)(9)-8, A-2 in effect as of the employee's death or under § 1.401(a)(9)-8(a) as Treasury determines appropriate). ACTEC believes this will minimize the risk of confusion and ease the burdens of compliance and enforcement.

2. Treasury Should Clarify How the Regulatory Effective Date in § 1.401(A)(9)-1(d) Works Regarding RMDs Taken Before January 1, 2022.

Section 1.401(a)(9)-1(d) provides that for calendar years before January 1, 2022, the existing regulations for Code Section 409(a)(9) apply. However, those regulations do not deal with the 10-year rule imposed under new Code Section 401(a)(9)(H)(i) that was added by the SECURE Act.

Code section 401(a)(9)(H)(i) simply adds to Code section 401(a)(9)(B)(ii) (the 5-year rule provision), the new 10-year rule for all designated beneficiaries by substituting "10 years" for "5 years" for all Designated Beneficiaries regardless of whether the Employee had begun taking distributions from the Employee's Plan. Reg. § 1.401(a)(9)-3, Q&A-2 provides that the 5-year rule is satisfied if the Employee's entire interest in the Plan is distributed by the end of the calendar year containing the fifth anniversary of the date of the Employee's death. Reg. § 1.401(a)(9)-3, Q&A-3 and Reg. § 1.401(a)(9)-5, Q&A-5, both of which set out the requirement for taking annual distributions the year following the year of death, only apply under the life expectancy rule. Importantly, there is no 5-year rule applicable when the Employee dies on or after the Required Beginning Date. Accordingly, there is no guidance in the existing regulations as to how the new 10-year rule is to work for a Designated Beneficiary when the Employee dies on or after the Employee's RBD.

ACTEC requests Treasury to provide an example in § 1.401(a)(9)-1(d) as to how the 10-year rule is to work under the existing regulations before the regulatory effective date of January 1, 2022. ACTEC suggests Treasury use one of the following two examples for this purpose.

> *Example 2, Option A*: Employee A was the owner of IRA B, and died in 2020 at the age of 74. A designated A's 40-year-old non-disabled, non-chronically ill son, S, as the sole beneficiary of A's interest in IRA B. S did not take any distributions in 2021, concluding that no minimum distribution was required for 2021 under the 10-year rule.
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> *Analysis of Example 2, Option A:* Pursuant to Reg. § 1.401(a)(9)-3, Q&A-2, since the SECURE Act substituted "10 years" for "5 years" when enacting Code section § 401(a)(9)(H)(i), the 10-year rule would work the same as the 5-year rule under the

existing regulations so as not to require any distributions until the end of 2030. Thus, S was not required to take a minimum distribution in 2021.

Example 2, Option B: The facts are the same as in Example 2, Option A.

Analysis of Example 2, Option B: Pursuant to Reg. § 1.401(a)(9)-5, Q&A-5, which applies when the Employee dies on or after the Employee's RBD, the Designated Beneficiary must begin taking distributions over the longer of the Designated Beneficiary's remaining life expectancy or the Employee's remaining life expectancy no later than the year following the year of the Employee's death. S failed to take the RMD in 2021, and must take this RMD as soon as practicable in 2022. Unless there is an automatic waiver of the 50% penalty for failure to take a Required Minimum Distribution, S must file a Form 5329 to request a waiver of the penalty for 2021.

3. **Treasury Should Clarify How the RMD is Determined in the Year of the Spouse's Death When an Employee Dies Prior to the RBD and the Spouse Subsequently Dies Before the Employee's RBD.**

Section 1.401(a)(9)-4(d) provides guidance when the Employee dies before the RBD and the sole beneficiary is the Employee's surviving spouse, who also dies before the Employee's RBD. ACTEC suggests that including the following example using specific dates of death for the Employee and the Employee's spouse to clarify when RMDs would be needed:

Example 3: Employee A died on February 1, 2021 at age 70, naming her 70 year old spouse, B, as the sole beneficiary of her Plan account. On September 30, 2022, B remains the sole beneficiary of A's Plan. On November 1, 2022, before taking any distributions and before A would have reached Employee A's RBD, B dies. Under § 1.401(a)(9)-(4)(d), the determination of the beneficiary of the account is now determined by who the beneficiary is on September 30, 2023 (the year following B's death). The Plan provides that upon the surviving spouse's death, the children of the A are the successor beneficiaries in equal shares. A has 2 surviving children on September 30, 2023, C who is aged 50 and D who is age 52. Neither C nor D is disabled or chronically ill.

Analysis: For 2021, B is not required to take any RMD because A had not yet reached her RBD. For 2022, C and D are not required to take any RMD because the B was not required to take an RMD until A would have reached her RBD. After 2022, the 10-year rule applies as to each of C and D, requiring that all assets be withdrawn from the Plan no later than December 31, 2032.

4. **Treasury Should Require Distribution No Earlier than the Tenth Year Following the Date On Which the Youngest Minor Beneficiary Attains Age 21.**

In the proposed regulations, two sections, namely § 1.401(a)(9)-4(e)(2)(ii) and § 1.401(a)(9)-5(f)(2)(ii), taken together appear to result in a peculiar difference in treatment for the same minor beneficiary depending on the age of the minor's oldest minor sibling on the date of the Employee's death. Consider the following scenarios:

In one scenario, Employee A, who was born on January 1, 1965, died on March 1, 2027, having named a Conduit Trust for the benefit of his children, B (aged 25), C (aged 23), D (aged 11) and E (aged 9) as the beneficiary of his Plan. The Conduit Trust requires the payment of the RMD equally to the four children as the RMD is withdrawn so only those four children are countable beneficiaries. Under § 1.401(a)(9)-4(e)(2)(ii), although B and C are not EDBs, A is treated as having named an EDB because D and E are minors. Pursuant to § 1.401(a)(9)-5(f)(1)(i), RMDs are calculated based upon the life expectancy of B, who is the oldest DB. However, pursuant to § 1.401(a)(9)-5(f)(1)(i) all assets must be distributed no later than the end of the tenth calendar year after D, as the oldest minor EDB, attains age 21.

Another scenario involves the same facts except that Employee A died in 2022, when his children were ages 20, 18, 6 and 4. Under § 1.401(a)(9)-5(f)(2)(ii), the RMDs would still be computed using B's life expectancy, but all assets in the Plan would have to be distributed no later than the end of the tenth calendar year after B (and not D) attains age 21. This would result in forcing all of the assets out of the Plan when D is age 17 and E is age 15, rather than when D is age 31 and E is age 29. If the trust is a Conduit Trust, the trustee of the trust would have to distribute D's full share and E's full share of their respective Plan balances to D at age 17 and to E at age 15, an undesirable result that may require the intervention of a court to appoint a guardian to receive and manage the funds for the minors. Such a result would not have been necessary if the rule in § 1.401(a)(9)-5(f)(2)(ii) required complete distribution only by the end of the calendar year that is ten years after the youngest minor EDB reaches age 21.

A fifteen year age gap among children in a family is not unusual, particularly with multiple marriages, and it is often desirable for a single trust to benefit all the children until the youngest reaches adulthood, to make sure that there are sufficient assets to support the youngest. It seems arbitrary that the treatment would be different for the youngest minor depending on the age of the older sibling when the participant dies.

ACTEC requests that the IRS revise § 1.401(a)(9)-5(f)(2)(ii) to require the Employee's interest in the Plan to be distributed no later than the tenth year following the date on which the youngest minor attains age 21.

5. Treasury Should Provide an Alternative Method For Determining and Documenting Disability For Adults in § 1.401(a)(9)-4(e)(4)(ii).

Section 1.401(a)(9)-(4)(e)(4)(ii) appears to rely solely on the Social Security Administration's findings regarding disability for adults (those over age 18) and provides no alternative path for determining disability. This narrow approach could prevent many individuals, genuinely disabled at the time of the Employee's death, from qualifying as EDBs. For the reasons stated below, ACTEC recommends that Treasury broaden this section to allow for reasonable alternatives for determining and documenting disability.

A surprising number of disabled adults are ineligible to apply for or receive a formal determination of disability by the Commissioner of Social Security because they lack a sufficient work record or are not indigent at the time of application. SSDI DIB benefits (the most common type of disability benefits) are based on premiums paid through quarters of work.[1] Homemakers and stay at home parents may be seriously disabled but fail to meet the required work record tests. The next most common type of disability benefits, Supplemental Security Income ("SSI"), are an alternative for individuals who are disabled but do not meet the work tests sufficient to qualify for SSDI DIB. SSI is a means tested program and a condition for SSI eligibility is that the individual must have subsistence level income and assets.[2] Further, family income is "deemed" to belong to the applicant, so again, many homemakers and stay at home parents are not eligible. They still may be disabled, however, under the SECURE Act and Proposed Regulations definition.

Treasury has recognized the need for alternative means of determining disability in its final regulations under Code section 529A, relating to ABLE accounts. Recognizing that the Social Security Administration is limited in assessing disability in some circumstances, Code section 529A(e)(2) and Reg. § 1.529A-2(d) recognize the need for an alternate method to certify disability. Those sections allow a procedure whereby a 'disability certification' is signed by a licensed health care provider described in (e)(1) of those regulations. For purposes of determining eligibility status, the filing of a disability certification will be deemed to have been made once the qualified ABLE program has received the disability certification. This procedure parallels the SECURE Act certification of chronically ill status, which is certified by a licensed health care provider. This procedure is referred to in these comments as the "ABLE Safe Harbor Method."

Further, to safeguard the privacy of personal medical information that financial institutions are not qualified to properly protect, please note that the ABLE regulations require only that a certification of disability be filed with the account provider. The burden to produce the underlying documentation of disability to Treasury lies with the disabled individual and his or her medical providers. Because financial institutions are not medical facilities, they do not have the means to protect personally identifiable health information. This could place them at risk of inadvertent health act or HIPAA violations, and places an undue burden on them. The ABLE Act regulations have taken that into account, and appear to present an appropriate solution.

Other programs under state and federal benefits law recognize the need for alternative methods for determining and substantiating disability due to the limitations of the Social Security Administration's determinations explained above. Accordingly, most states provide for alternate documentation of disability through a separate state agency or state contractor based on the identical definition of disability as in the federal statutes, including the SECURE Act.

ACTEC suggests that a determination of disability by a "disability certification" similar to the ABLE Safe Harbor Method, or by a state agency or contractor would be reasonable alternatives for Treasury to include in § 1.401(a)(9)-(4)(e)(4)(ii). ACTEC further recommends that only the certification of disability be required to be provided to the account provider to protect the

[1] In order to qualify for SSDI DIB benefits, an individual must meet both the duration of work test (i.e., sufficient quarters worked to be insured) and the recent work test (a certain number of quarters worked in the most recent years, e.g., 5 out of the past 10 years).
[2] The current asset limit for SSI is $2000 in countable assets. The current income limit is $841 per month.

medical information of the disabled beneficiary. ACTEC recommends inclusion of examples of alternatives for determining disability of an adult such as the following:

> *Example* 5A: Employee P died leaving his Plan benefits to his sister Q, who is legally blind and whom P has supported. Q has never worked. Q applies for and receives a determination of disability existing on or before the date of P's death from the state agency or contractor in her state that makes disability determinations and submits this determination to the Plan administrator by October 31 of the calendar year following the calendar year of Employee P's death. Q would qualify as an EDB with respect to the distributions from P's interest in the Plan based on her disability as of Employee P's death.

> *Example* 5B: The facts are the same as in Example 5A, but Q obtains a certificate of disability existing on or before the date of P's death using the criteria under Code section 72(m)(7) from a qualified licensed medical provider and submits this certificate to the Plan administrator by October 31 of the calendar year following the calendar year of Employee P's death. Q would qualify as an EDB with respect to the distributions from P's interest in the Plan based on her disability as of Employee P's death.

6. Treasury Should Clarify the Methods Available For Determining and Substantiating Disability For Minors in § 1.401(a)(9)-(4)(e)(4)(iii).

As is recognized in § 1.401(a)(9)-(4)(e)(4)(iii), minors do not typically engage in "substantial gainful activity" so determining disability status through the Social Security Administration remains problematic or impossible for the majority of them. Because the Social Security Administration provides SSI benefits only for those severely disabled minors whose families are also indigent and fall under the SSI income and asset limits, most disabled minors do not qualify for a disability determination if their family is above poverty level.[3] Accordingly, ACTEC requests consideration of the ABLE Safe Harbor Method described in comment 5 for determining and documenting disability for minors as disabled EDBs. ACTEC recommends inclusion of examples of alternatives for determining disability of a minor such as the following:

> *Example* 6A: Employee S dies, leaving his Plan benefits to his one minor child T who is 17 years of age. Child T was diagnosed at age 3 with cerebral palsy, a serious and incurable medical condition which results in marked and severe functional limitations for life. T must wait until he attains age 18 before he can be considered eligible for SSI purposes without regard to T's parents' income. Once Child T attains age 18, he promptly applies for a disability determination from the Social Security Administration. Child T is able to obtain such disability determination and submits such determination, including documentation that his cerebral palsy condition existed on or before S's death to the Plan administrator by October 31 of the calendar year following the calendar year of Employee S's death. Child T would qualify as an EDB with respect to the

[3] The Social Security Administration "deems" the income and assets of the family with whom the minor resides to belong to the minor in determining eligibility for SSI. Accordingly, SSA will not undertake a finding of disability for the majority of minors, regardless of the severity of the disability. Typically, the family waits until the minor reaches the age of 18 and disability is determined by SSA at that time when deeming is limited to in-kind maintenance and support.

distributions from S’s interest in the Plan based on his disability as of Employee S’s death.

Example 6B: The facts are the same as in Example 6A except that the determination of disability for SSI eligibility by the Social Security Administration comes on November 15 of the calendar year following the calendar year of Employee S’s death. Child T has also filed a certification of disability existing on or before the date of S’s death from a licensed medical provider with the Plan administrator by October 31 of the same year. Child T would qualify as an EDB with respect to the distributions from S’s interest in the Plan based on his disability as of Employee S’s death.

Example 6C: the same facts as in Example 6A except that Child T is age 12 as of the date of Employee S’s death. Child T is unable to be considered for SSI eligibility because his parents’ income is “deemed” to belong to him by the Social Security Administration. Child T obtains a certificate of disability based on his diagnosis of cerebral palsy from a licensed medical provider utilizing the criteria of Code section 72(m)(7) and files this disability certificate with the Plan administrator by October 31 of the calendar year following the calendar year of Employee S’s death. Child T would qualify as an EDB with respect to the distributions from S’s interest in the Plan based on his disability as of Employee S’s death.

7. **Treasury Should Give Consideration to Permitting an Extended Date, Such as an Alternate Age of 21, for Providing Proof of the Existence of a Minor’s Disability as of the Employee’s Death.**

Under § 1.401(a)(9)-(4)(e)(4)(iii), the disability of a person who has not yet reached age 18 must be established as of the date of the Employee’s death, and under § 1.401(a)(9)-(4)(e)(7), evidence of disability must be submitted by October 31 of the calendar year following the calendar year of the Employee’s death. As described above, this may be impractical or impossible for many families with disabled minor children, either because of limitations of the Social Security Administration, or because many disabilities a minor may suffer from as of the Employee’s death do not fully manifest until several years later, so that proof of disability may be impossible to provide by that early date. To achieve equivalent treatment for those minors who have the misfortune of both being disabled and losing their parent at a very young age, ACTEC recommends that Treasury consider extending the date for providing proof that a minor was disabled as of the Employee’s death to the later of (i) the date the minor attains age 21, and October 31 of the calendar year following the calendar year of the Employee’s death.

Because most determinations of disability for young people by the Social Security Administration are in fact made between the ages of 18 and 21, even when the disability relates back to birth, such determinations take some time to evaluate and process. Such a young person could nevertheless qualify to receive distributions of Plan benefits based on the life expectancy method until the time that a determination of disability is made if the young person is a minor child of the Employee or is the primary beneficiary of an Age 31 Trust. Consequently, in many cases a delayed date for proof of disability as of the Employee’s date of death would not impose a substantial hardship on the young person or the Plan administrator. Accordingly, ACTEC requests that Treasury provide a longer window for a determination of disability and for obtaining and submitting to the Plan administrator proof of a minor's disability relating back to the date of the Employee's death. This would avoid disparate treatment of individuals who are otherwise similarly situated: Those minors disabled as of the date of the Employee's death who can readily prove such disability because it is diagnosable and those minors disabled as of the date of the Employee's death who have less apparent but equally devastating disabilities that cannot be diagnosed until a later date. The following Example illustrates a "real life" situation in which an extended time period to determine disability at the Employee's death could make a meaningful difference for the disabled minor beneficiary.

> *Example* 7A: Employee W dies leaving his Child X, age 3 months old, as beneficiary of Employee W's Plan benefits. The Plan administrator of Employer V begins distributions of Employee W's Plan benefits to Child X the calendar year following the calendar year of Employee W's death, based on Child X's life expectancy. Child X's congenital disability of cerebral palsy will last for Child X's lifetime, and existed as of the date of Employee W's death, but the disability is not formally diagnosed until Child X is age 3. It was therefore impossible for Child X, or Child X's legal guardian, to submit a certification of Child's X's disability that existed as of Employee W's death until 3 years after Employee W's death at the earliest. Furthermore, the earliest date for a determination by the Social Security Administration that Child X is disabled would be when Child X reaches age 18, more than 18 years after Employee W's death. Child X should be able to provide proof to the Plan administrator no later than age 21 when Child X will have obtained a determination that Child X was suffering from the congenital disability of cerebral palsy when Employee W died, in order to qualify as a disabled EDB for purposes of continuing life expectancy distributions to Child X of Employee W's interest in the Plan beyond age 31.

There are disabilities that are congenital that cannot be diagnosed until a later date. In Example 7A, cerebral palsy may have been the likely diagnosis at birth, but because its symptoms may actually be another disease, the diagnosis cannot be confirmed until age 3. Likewise, some extreme mental health issues are present at birth but do not present until the late teens. In many cases, the child may not be able to work because of the nature of the illness. There are many such illnesses that cause disability in children that cannot even be diagnosed, much less documented sufficiently to provide proof of such disability until years later when the child is a teenager. Accordingly, ACTEC recommends that Treasury provide a longer window, until the later of (i) the date the minor reaches age 21, or (ii) October 31 of the calendar year following the calendar year of the Employee's death, to provide documentation that the minor was disabled as of the Employee's death.

8. Treasury Should Clarify that a Beneficiary's Unilateral Withdrawal Right is Equivalent to a Mandatory Distribution from a Conduit Trust.

ACTEC observes that some individuals choose to structure trusts that, in lieu of mandating distributions, provide the beneficiary with an unlimited withdrawal right over the intended portion of the trust. This leaves it up to the beneficiary to choose between taking current distribution from the trust and leaving assets in the trust.

This flexibility enhances the beneficiary's interest in the trust by allowing the beneficiary to leave in the trust some or all of the amounts that might otherwise be distributed, where these amounts will continue to benefit from other valuable non-tax estate planning objectives, including continued management of the assets by the trustee, continued creditor protection in some jurisdictions, protection from divorce in some jurisdictions, and protection from spousal elective share rules in some jurisdictions. Depending on the non-tax estate planning objectives that are intended, a trust may provide either (i) that the withdrawal right does not expire until the beneficiary's death, or (ii) that the withdrawal right for a given year may expire if the beneficiary has not exercised the withdrawal right after some reasonable period of time. One time period that is commonly provided in this regard is the time period ending at the later of thirty days from when the withdrawal right arises or thirty days after the beneficiary attains age 21.

ACTEC observes that there is interest among employees when naming Conduit Trusts as beneficiaries of Plan benefits to provide the flexibility of such a withdrawal right in lieu of mandatory conduit trust distributions, and that clarification of this point will ease the burdens of compliance and enforcement, and will reduce the need for private letter ruling requests.

Accordingly, ACTEC requests that Treasury add examples such as the following to these regulations in order to clarify whether a see-through trust is a Conduit Trust if the trust provides (i) that whenever the trustee receives a distribution from the deceased employee's interest in the Plan, one or more specified beneficiaries shall have the unilateral right to withdraw all of such Plan distribution, (ii) in one case, that the withdrawal right does not expire until the beneficiary's death, and in another case, that the withdrawal right expires after the later of thirty days from when the withdrawal right arises or thirty days from when the beneficiary attains age 21, and (iii) that for so long as any amounts of such Plan distribution remain in the trust, such amounts are to be held for the exclusive benefit of such one or more specified beneficiaries for so long as any one or more of them are living.

> *Example 8A*. Employee E dies at age 65, naming Trust X for the benefit of her nephew Y, who is age 40 but not disabled or chronically ill, as beneficiary of her Plan. Trust X provides that, whenever the trustee receives a distribution from E's Plan benefit, Y shall have the right to withdraw any part or all of such Plan distribution. Trust X provides that each such withdrawal right does not expire until Y's death, and that for so long as any amounts of such Plan distribution remain in the trust, they are to be held for the exclusive benefit of Y for so long as Y shall live.

> *Example 8B*. Same facts as Example 8A, except that Trust X provides that each such withdrawal right expires after thirty days from when the withdrawal right arises.

ACTEC's Analysis of Examples 8A and 8B: ACTEC believes that both versions of Trust X described in Examples 8A and 8B satisfy the requirements under § 1.401(a)(9)-4(f)(1)(ii)(A) to be a Conduit Trust because (i) Y's unfettered right to withdraw any part or all of each distribution from the Employee's interest in the Plan is equivalent to being entitled to such Plan distributions, and (ii) to the extent Y elects to take distribution of less than all of a given distribution, such distribution remains in the trust where it continues to be held for Y's exclusive benefit for so long as Y shall live, and no one else.

Multiple tax authorities support treating a trust beneficiary as owning the trust assets that the beneficiary has a right to withdraw. In the income tax area, the beneficiary of a trust is treated as the owner of the trust assets under Code section 678 if the beneficiary holds a withdrawal right. See Treas. Reg. § 1.678(a)-1(a) and Rev. Rul. 74-43, 1974-1 C.B. 285. See also Code section 661(a)(2), which treats the beneficiary of a trust essentially as the owner of income that a trustee has credited to the beneficiary, effectively creating a withdrawal right for that beneficiary.

In the estate tax area, one of the requirements for a trust to qualify for the marital deduction for estate tax in a decedent's estate under either Code section 2056(b)(5) or 2056(b)(7) is that the decedent's spouse must be entitled to all trust income for life. Treas. Reg. § 20.2056(b)-5(f)(8) explains that that this requirement is satisfied if the trust either mandates distributions of the trust income or provides the spouse with a withdrawal right over the trust income, stating "… under the terms of the trust the income referred to must be currently … distributable to the spouse or … she must have such command over the income that it is virtually hers." This regulation specifically approves such a withdrawal right that expires if unexercised, causing the income not withdrawn to be added to corpus. Treas. Reg. § 20.2056(b)-5(f)(8) also applies to marital trusts described in Code section 2056(b)(7). Treas. Reg. § 20.2056(b)-7(d)(2).

A spouse's withdrawal right over the undistributed income in an IRA was specifically recognized and approved as satisfying the "entitled to all income" requirement of Code section 2056(b)(7) in the context of an IRA designated at death to a qualified terminable interest property ("QTIP") marital trust in both Rev. Rul. 2006-26, 2006-1 Cum. Bul. 939, May 4, 2006, and its predecessor Rev. Rul. 2002-2, 2000-1 Cum. Bul. 305, January 5, 2000 (modified and suspended by Rev. Rul. 2006-6).

For purposes of Code section 401(a)(9), the QTIP marital trusts described in Rev. Rul. 2006-26 resemble the trust described in Reg. § 1.401(a)(9)-5, A-7(c)(3) Example 1. These trusts provide the spouse the right to compel the trustee to withdraw undistributed income from the employee's Plan interest and to distribute it to the spouse. Because such trusts do not require that all amounts distributed from Employee's Plan interest are to be paid directly to the spouse, when these trusts are analyzed under § 1.401(a)(9)-4(f)(1)(ii), they would be classified as Accumulation Trusts and not Conduit Trusts. Rev. Rul. 2006-26 contains the following statement regarding the determination of designated beneficiaries, which reflects the appropriate treatment for a trust that is not a Conduit Trust:

> Taxpayers should be aware, however, that in situations such as those described in this revenue ruling in which a portion of any distribution from the IRA to Trust may be held in Trust for future distribution rather than being distributed to [the spouse] currently, [the spouse] is not the sole designated beneficiary of [the Employee's] IRA. As a result, both [the spouse] and the remainder beneficiaries must be taken into account as designated beneficiaries in order to determine the shortest life expectancy and whether only individuals are designated beneficiaries. See A-7(c) of § 1.401(a)(9)-5.

However, to the extent that the spouse's withdrawal right results in distribution directly to the spouse, these statements show how a spouse's withdrawal right is recognized as equivalent to ownership for purposes of determining those trust beneficiaries who are treated as the employee's designated beneficiaries for an Accumulation Trust.

It is reasonable to conclude that withdrawal rights should also be recognized as equivalent to ownership for purposes of determining whether a see-through trust is a Conduit Trust, which supports ACTEC's conclusion that each trust described in Examples 8A and 8B satisfies the requirements under § 1.401(a)(9)-4(f)(1)(ii)(A) to be a Conduit Trust. Note that any taxable income associated with an amount that is to be distributed to a beneficiary or that is subject to a withdrawal right in the hands of that beneficiary will be taxed to the beneficiary in either case. ACTEC recommends that Treasury include the Examples 8A and 8B in defining Conduit Trusts in § 1.401(a)(9)-4(f)(1)(ii)(A).

9. Treasury Should Clarify that a Beneficiary's Unilateral Withdrawal Right is Equivalent to a Mandatory Distribution from an Age 31 Trust.

Pursuant to § 1.401(a)(9)-4(f)(3)(ii)(B) when the Primary Beneficiary of a see-through trust is a young individual and the trust is by its terms an Age 31 Trust, then any other beneficiary of the trust who is not a Primary Beneficiary and who could receive amounts in the trust representing the Employee's interest in the Plan if such individual dies prior to receiving full distribution is not treated as having been designated as a beneficiary of the employee under the Plan.

As mentioned in Comment 8, ACTEC observes that some individuals choose to structure trusts that, in lieu of mandating distributions, provide the beneficiary with an unlimited withdrawal right over the intended portion of the trust.

ACTEC also observes that there is interest among Employees in naming an Age 31 Trust as beneficiary of the Employee's Plan benefits in providing the flexibility of such a withdrawal right in lieu of a mandatory Age 31 Trust distribution. ACTEC believes that clarification of this point will ease the burdens of compliance and enforcement, and will reduce the need for private letter ruling requests.

Accordingly, ACTEC requests that Treasury add examples such as the following to these regulations in order to clarify whether a see-through trust that has only one Primary Beneficiary is an Age 31 Trust if the trust provides (i) that at the later of the end of the calendar year following the calendar year of the Employee's death and the end of the tenth calendar year following the calendar year in which such Primary Beneficiary attains age 21, such Primary Beneficiary shall have the unilateral right to withdraw all amounts in the trust representing the Employee's interest in the Plan, (ii) in one case, that the withdrawal right does not expire until the beneficiary's death, and in another case, that the withdrawal right expires thirty days after the withdrawal right arises, and (iii) that for so long as any amounts of the Employee's interest in the Plan remain in the trust, such amounts are to be held for the exclusive benefit of the sole Primary Beneficiary for so long as such Primary Beneficiary shall live.

> *Example 9A*. Employee E dies at age 65, naming Trust Y for the benefit of her niece F, who is age 23 and not disabled or chronically ill, as the beneficiary of her Plan. F is the only beneficiary of Trust Y. Trust Y provides that at the later of the end of the calendar year following the calendar year of E's death and the end of the tenth calendar year

> following the calendar year in which F attains age 21, F shall have the right to withdraw all amounts in Trust Y representing Employee E's interest in the Plan. Trust Y provides that such withdrawal right does not expire until F's death, and that for so long as any amounts of Employee E's interest in the Plan remain in Trust Y, such amounts are to be held for the exclusive benefit of F for so long as F shall live.
>
> *Example 9B*. Same facts as Example 9A, except that Trust Y provides that such withdrawal right expires thirty days after the withdrawal right arises.

ACTEC's Analysis of Examples 9A and 9B: ACTEC believes that each of the trusts described in Examples 2A and 2B satisfies the requirements under § 1.401(a)(9)-4(f)(3)(ii)(B) to be an Age 31 Trust because (i) F is the sole Primary Beneficiary, (ii) F has the unfettered right to exercise F's withdrawal right unilaterally and take full distribution from the trust of any part or all of the amounts in the trust representing Employee E's interest in the Plan from Trust Y, and (ii) to the extent F elects to take a distribution of less than all of the amounts representing the Employee E's interest in the Plan, such distribution remains in Trust Y where it continues to be held for F's exclusive benefit for so long as F shall live.

This interpretation is consistent with other tax authorities that treat a trust beneficiary as owning assets the beneficiary has a right to withdraw, as discussed in Comment 8.

In particular, the discussion in Comment 8 describes how Rev. Rul. 2006-26 recognizes a spouse's withdrawal right as equivalent to ownership for purposes of determining those trust beneficiaries who are treated as the Employee's designated beneficiaries. It is reasonable to provide that such withdrawal rights should also be recognized as equivalent to ownership for purposes of determining whether a see-through trust is an Age 31 Trust, which supports ACTEC's conclusion that each trust described in Examples 9A and 9B satisfies the requirements under § 1.401(a)(9)-4(f)(3)(ii)(B) to be an Age 31 Trust. ACTEC recommends that Treasury include the Examples 9A and 9B in defining the characteristics of the Age 31 Trust provided for in § 1.401(a)(9)-4(f)(3)(ii)(B).

10. Treasury Should Clarify Whether Certain Contingent Beneficiaries of an Accumulation Trust Are Disregarded if the Trust Continues for Secondary Beneficiaries.

Section 1.401(a)(9)-4(f)(3)(ii)(A) explains when contingent trust beneficiaries of an Accumulation Trust who are entitled to receive distributions solely because of the death of another beneficiary may be disregarded in determining an Employee's designated beneficiaries. This issue has historically generated much debate and uncertainty.

There is one question, in particular, that needs to be answered, which relates to a trust structure that is common and in certain cases, essential. Under this trust structure, the trust continues for the benefit of the Secondary Beneficiary(ies) rather than terminating and distributing to them outright. This trust structure is not addressed in Example 2 of § 1.401(a)(9)-4(f)(6)(ii), which illustrates how the rule of Section 1.401(a)(9)-4(f)(3)(ii)(A) is applied when a trust terminates and distributes outright to Secondary Beneficiaries.[4] ACTEC urges Treasury to include another example, such as that proposed below, which explains how the rule of § 1.401(a)(9)-4(f)(3)(ii)(A) is applied when a trust continues for the Secondary Beneficiary(ies).

There are many situations where an employee will need to design a trust to continue for Secondary Beneficiaries for important reasons that have little or nothing to do with tax planning and required minimum distributions. A common example is a trust for a child that will continue for young grandchildren. Another example is a trust for a spouse that will continue for a disabled sibling of the Employee. Trusts are often designed and named as beneficiaries at a time that the age and health of the Secondary Beneficiaries is uncertain.

The inclusion of such an example will be an important and valuable step toward clarity that will substantially ease the burden on taxpayers and on Treasury in administering these rules and will substantially reduce the need for private letter ruling requests in this area.

Accordingly, ACTEC requests Treasury to include the following proposed Examples in the final regulations in order to clarify when certain contingent trust beneficiaries of a see-through, Accumulation Trust may be disregarded when the trust continues for its Secondary Beneficiary(ies), rather than terminating and distributing outright to the Secondary Beneficiary(ies).

> *Example 10A.* Employee V died in 2022 at the age of 65. Employee V was survived by a nephew, A, who was then age 53 and was not then disabled or chronically ill. A has a child, B, who was then age 32 and was not then disabled or chronically ill. Employee V named Trust W as the beneficiary of all amounts payable from V's account in Plan U after V's death. Trust W satisfied the see-through trust requirements of § 1.401(a)(9)-4(f)(2).
>
> Under the terms of Trust W, the trustee is to distribute to A those amounts of income and principal necessary for A's health, education, and support for the remainder of A's lifetime. Upon A's death, the trust is to continue for B if she survives or if B does not survive A, the trust terminates and is distributed outright to Charity D (an organization exempt from tax under Code section 501(c)(3)). If B survives A, the trustee of the continuing trust is to distribute to B those amounts of income and principal necessary for B's health, education, and support for the remainder of B's lifetime, and upon B's death the trust terminates and is distributed outright to Charity D.
>
> *Example 10B*. Same facts as Example 10A, except that Trust W provides that if B survives A, the trustee of the continuing trust is to distribute to B those amounts of income and principal necessary for B's health, education, and support until B attains 60 years of age, at which time the trust terminates and the entire trust is distributed outright to B. If B dies prior to attaining 60 years of age, the trust terminates and is distributed outright to Charity D.

[4] ACTEC noticed that Example 2 contains a citation in the "Analysis" of Example 2 that may be erroneous. ACTEC believes the citation may have been intended to cite § 1.401(a)(9) 4(f)(3)(ii)(A). (The actual citation is to § 1.401(a)(9)-4(f)(2)(iii)(A), which does not exist.)

ACTEC's Analysis of Examples 10A and 10B. ACTEC believes, with respect to each of the Accumulation Trusts described in Examples 10A and 10B, that A and B are taken into account in determining the Employee V's designated beneficiaries, and that Charity D is disregarded in determining Employee V's designated beneficiaries because, as provided in § 1.401(a)(9)-4(f)(3)(ii)(A), Charity D can receive amounts in the trust representing the Employee's interest in the Plan solely contingent upon or delayed until the death of another trust beneficiary who is not described in § 1.401(a)(9)-4(f)(3)(i)(B), and Charity D is not a beneficiary described in § 1.401(a)(9)-4(f)(3)(i)(A).

The Preamble explains, "a beneficiary of a see-through trust is treated as a beneficiary of the employee if the beneficiary could receive amounts in the trust representing the employee's interest in the Plan *that are neither contingent upon nor delayed until the death of another trust beneficiary*."(Emphasis added.)

ACTEC reaches its conclusion based on the provisions of § 1.401(a)(9)-4(f)(3)(ii) and the Preamble's explanation of this section. ACTEC requests that Treasury either confirm this analysis or clarify how these rules are applied in determining whether Charity D is disregarded in determining Employee V's designated beneficiary with respect to Trust W described in Examples 10A and 10B.

11. Treasury Should Allow Contingent Beneficiaries of Certain Accumulation Trusts to be Disregarded Even Though the Secondary Beneficiaries May Receive Current "Sprinkling Distributions" Under Limited Conditions.

Section 1.401(a)(9)-4(f)(3)(ii)(A) explains when certain contingent trust beneficiaries of an Accumulation Trust may be disregarded in determining an Employee's designated beneficiaries. This section provides that a beneficiary of an Accumulation Trust who could receive amounts from the trust that represent the Employee's interest in the Plan is not treated as having been designated as a beneficiary of the Employee under the Plan if such beneficiary could receive amounts from the trust that represent the Employee's interest in the Plan only because of the death of another beneficiary who is described in § 1.401(a)(9)-4(f)(3)(i)(B) (the Secondary Beneficiary). However, § 1.401(a)(9)-4(f)(3)(ii)(A)(2) further provides that this rule does not apply if

(i) such other Secondary Beneficiary predeceased the Employee, § 1.401(a)(9)-4(f)(3)(ii)(A)(1), or

(ii) such other Secondary Beneficiary is also a Primary Beneficiary described in § 1.401(a)(9)-4(f)(3)(i)(A).

A commonly used form of Accumulation Trust provides for a certain Primary Beneficiary until his or her death and also allows discretionary "sprinkling distributions" to some or all of the Secondary Beneficiaries while that certain Primary Beneficiary is still living if such distributions can be made without jeopardizing the trustee's ability to provide for that certain Primary Beneficiary from the trust assets.

There are many nontax reasons why an Employee might name this form of an Accumulation Trust as the beneficiary of Plan benefits. For example, an Employee may want to designate such a trust as the beneficiary of Plan benefits to provide for her spouse and also allow the trustee to make discretionary sprinkling distributions to her children during her spouse's lifetime if such distributions can be made without jeopardizing the trustee's ability to provide for her spouse from the trust assets during her spouse's lifetime. As another example, an Employee may want to name as beneficiary of her Plan three such trusts to provide for her three children, and allow the trustee to make discretionary sprinkling distributions from each child's trust to that child's children if such distributions can be made without jeopardizing the trustee's ability to provide for the child from the trust assets during the child's lifetime.

ACTEC recognizes that the Primary Beneficiary(ies) of an Accumulation Trust may receive less than all of the Employee's interest in the Plan and that it is generally necessary to treat some, but not all, of the other trust beneficiaries along with the Primary Beneficiary(ies) as DBs of the Plan benefits. However, with respect to an Accumulation Trust that allows sprinkling distributions to Secondary Beneficiaries while the Primary Beneficiary is living, ACTEC is concerned that the provisions of § 1.401(a)(9)-4(f)(3)(i)(A)(2) could be interpreted as treating such Secondary Beneficiaries as Primary Beneficiaries. Under such an interpretation, other contingent beneficiaries who would normally be disregarded as trust beneficiaries might not be disregarded. The interest of a beneficiary that is contingent on the death of all members of a class of Primary Beneficiaries and Secondary Beneficiaries should be disregarded regardless of whether the trust allows this type of sprinkling distributions.

ACTEC requests Treasury to clarify that, under the rule stated in § 1.401(a)(9)-4(f)(3)(ii)(A)(2), any Secondary Beneficiary of a trust who may receive current distributions from a trust solely at the discretion of the trustee should not be treated as a Primary Beneficiary for purposes of § 1.401(a)(9)-4(f)(3)(ii)(A)(2), particularly where that discretion is subordinated to the interest of another beneficiary who is a Primary Beneficiary. ACTEC submits that any discretionary distributions made to a Secondary Beneficiary whose interest is subordinate to that of a Primary Beneficiary are best viewed as "advancements" to that beneficiary of his or her Secondary Beneficiary interest. Without this clarification, if an Employee designates an Accumulation Trust that allows sprinkling distributions to Secondary Beneficiaries to receive Plan benefits, an additional tier of contingent trust beneficiaries who are quite unlikely to receive any interest in the Employee's Plan benefits may be treated as having been designated as beneficiaries by the Employee because the Secondary Beneficiaries are treated as Primary Beneficiaries on the basis of potential discretionary distributions that they may or may not ever receive. The degree of remoteness of the interest of the contingent beneficiary of an Accumulation Trust that allows sprinkling distributions to Secondary Beneficiaries is no less, and may even be more remote, as compared to an Accumulation Trust that does not allow such sprinkling distributions. There is no apparent policy reason to require a trust to have Secondary Beneficiaries who are not eligible to benefit during the lifetime of the Primary Beneficiaries in order to be able to disregard the interest of a contingent beneficiary who takes solely by reason of the death of those Secondary Beneficiaries.

ACTEC suggests that Treasury could best clarify § 1.401(a)(9)-4(f)(3)(ii)(A)(2) by including an Example such as the following:

> *Example 11:* Employee E died in 2025 at age 75, survived by his spouse, S, who was then age 74, and his only child, F, who was then age 40. Neither S nor F was then

disabled or chronically ill. Employee E named Trust T as the beneficiary of his Plan benefits. Trust T satisfies the see-through trust requirements of § 1.401(a((9)-4(f)(2).

Under the terms of Trust T, the trustee is to distribute to S those amounts of income and principal necessary for S's health, education, and support for the remainder of A's lifetime. Upon S's death, the trust terminates and is to be distributed to F, or if F is not then living, to Charity G (an organization exempt from tax under Code section 501(c)(3)). Trust T also authorizes, but does not require, the trustee, in the trustee's sole discretion, to make distributions to F during S's lifetime, provided such discretionary distributions can be made without jeopardizing the trust's ability to provide for S.

ACTEC's Analysis of Example 11. S is the Primary Beneficiary of Trust T. F is a Secondary Beneficiary of Trust T. F could also be treated as a Primary Beneficiary of Trust T under the verbiage of § 1.401(a)(9)-4(f)(3)(ii)(A)(2), but ACTEC suggests Treasury clarify that, under these circumstances, F is not to be treated as a Primary Beneficiary for purposes of § 1.401(a)(9)-4(f)(3)(ii)(A)(2) and is only to be treated as a Secondary Beneficiary of Trust T because F's right to distributions are contingent on the trustee's sole discretion and are subordinated to S's rights. F has no entitlement to any distributions, and no assurance that any distributions will be made to him at all. Only if F is only treated as a Secondary Beneficiary will Charity G be disregarded as a DB under § 1.401(a)(9)-4(f)(3)(ii)(A). Because the only way Charity G will ever receive any Plan benefits is solely because of the death of S and F, only S and F, and not G, should be treated as a beneficiary of E's Plan benefits.

12. Treasury Should Clarify the Application of the Provisions in §§ 1.401(a)(9)-4(f)(5)(ii) and (iv) regarding Powers of Appointment.

ACTEC observes that many individuals include "powers of appointment" in their trusts to provide flexibility in future planning for changes in circumstances. A power of appointment allows the powerholder to appoint the trust to one or more members of a stated class of potential beneficiaries in a certain manner as provided in the trust instrument. It is customary for the creator of the trust instrument to also name "takers in default" who will receive the trust interest if such power of appointment is not exercised.

Treasury has clarified in § 1.401(a)(9)-4(f)(5)(ii) that a see-through trust does not fail to satisfy the requirement that beneficiaries be identifiable merely because the trust includes a power of appointment, and has also clarified when certain actions taken with respect to a power of appointment impact the determination of the trust's beneficiaries as of the September 30 of the calendar year following the year of the Employee's death.

Treasury has also required in § 1.401(a)(9)-5(f)(iv) that if certain actions are taken after the September 30 determination date, including an exercise of a power of appointment, that result in additional beneficiaries being counted as beneficiaries of the trust, then the rules of § 1.401(a)(9)-5(f)(1) will be re-applied to take such additional beneficiary(ies) into account, effective the following calendar year. This redetermination requirement could be problematical for certain trustees, beneficiaries, and Plan administrators, as it is foreseeable that a power of appointment might be exercised after the September 30 determination date in a way that adds a new beneficiary, and those involved in the exercise of the power fail to recognize the need to redetermine RMDs. As a result, less than all of the RMDs for subsequent years may be timely distributed and the Plan administrator may be completely unaware that such a power has even been exercised.

ACTEC recognizes why the clarifications that are so helpful in the design and initial determination of trust beneficiaries must be accompanied by the requirement of a redetermination when a post-September 30 determination date exercise of a power of appointment or other actions result in new beneficiaries. On balance, ACTEC commends the approach Treasury has taken, because ACTEC anticipates that:

(i) The clarifications provided in § 1.401(a)(9)-4(f)(5)(ii) will be helpful in the vast number of situations where see-through trusts contain powers of appointment. These clarifications will help the Employee determine which terms to include in the see-through trust that will be designated as the beneficiary of the Employee's Plan, and will help in the determination of the designated beneficiaries of such a trust as of the September 30 determination date after an Employee's death; and

(ii) There will be relatively few situations in which an exercise of a power of appointment will occur before the Employee's Plan interest is fully distributed that adds one or more beneficiaries in a way that would increase RMDs, but a redetermination of RMDs is inadvertently not made.

ACTEC recommends that Treasury consider adding clarification in the Proposed Regulations that any such failure to redetermine RMDs does not result in exposure to the Plan administrator, and does not disqualify the Plan. ACTEC also recommends adding clarification in the Proposed Regulations that any such failure constitutes "reasonable error" for purposes of § 54.4974-1(g)(1).

Finally, ACTEC also requests that Treasury add examples such as the following to these Regulations to clarify further the application of these proposed rules.

> *Example* 12A. Employee A named her Trust Z as sole beneficiary of Employee A's plan interest upon A's death. Trust Z provides that, after A's death, B is entitled to receive all of the income for B's life. Trust Z grants B a power of appointment, exercisable by B's Last Will and Testament or other written instrument, to appoint the trust assets remaining at B's death to any one or more recipients consisting of B's descendants or Code section 501(c)(3) organizations. Trust Z provides that, if B does not exercise the power of appointment, then B's three children C, D and E will receive the trust assets. B survives A and is still living on September 30 of the year following the year of A's death. Additionally, on or before September 30 of the calendar year following the calendar year of A's death, B executes a new Will that exercises B's power of appointment in favor of B's child C only. On or before October 31 of the calendar year following the calendar year of A's death, B provides a copy of Trust Z and a copy of B's new Will to the Plan administrator together with a written statement to the effect that if B revises B's Will at any future date, B will promptly provide a copy of the revised Will to the Plan administrator.

Analysis. Pursuant to § 1.401(a)(9)-4(f)(5)(ii)(A), only B and C are treated as beneficiaries designated under the Plan.

Example 12B. The same facts as Example 12A, except there is no exercise of the power of appointment by B on or before September 30 of the calendar year following the calendar year of A's death. However, on or before the September 30 date, B signs a document that irrevocably restricts the power of appointment so that it can be exercised at a later time but only in favor of B's children C and E. On or before October 31 of the calendar year following the calendar year of A's death, B provides a copy of the irrevocable restriction of the power of appointment to the Plan administrator.

Analysis. Pursuant to § 1.401(a)(9)-4(f)(5)(ii)(A), only B, C and E are treated as beneficiaries designated under the Plan.

Example 12C. The same facts as Example 12A, except there is no exercise of the power of appointment by B on or before September 30 of the calendar year following the calendar year of A's death. On January 10 of the second year following the year of A's death, B executes a new Will revoking all prior Wills. The Will executed on January 10 exercises B's power of appointment in favor of X charitable organization and the children of child C (B's grandchildren). On or before the end of the second calendar year following the year of A's death, B provides a copy of the new Will to the Plan administrator together with a statement to the effect that if B revises B's Will at any future date, B will promptly provide a copy of the revised Will to the Plan administrator.

Analysis. Pursuant to § 1.401(a)(9)-4(f)(5)(ii)(B), only B and the takers in default, C, D, and E are initially treated as beneficiaries designated under the Plan. However, B's execution of a new Will on January 10 requires a prospective redetermination of the trust's required minimum distributions pursuant to the rules of § 1.401(a)(9)-4(f)(5)(iv).

These Examples illustrate how the rules set forth in § 1.401(a)(9)-4(f)(5)(ii) apply to (i) an exercise of a power of appointment on or before September 30 of the calendar year following the calendar year of the Employee's death, (ii) a restriction of a power of appointment on or before such September 30 date, and (iii) an exercise of a power of appointment after such September 30 date. In addition, the Examples set forth reasonable examples of the documentation that should be provided to the Plan administrator regarding the exercise or restriction of powers of appointment as set forth in § 1.401(a)(9)-4(f)(5)(ii).

13. Treasury Should Clarify How the Division of a Type I AMBT Is to Work.

Code section 401(a)(9)(H)(iv)(I) and § 1.401(a)(9)-4(g)(2) provide that a trust will qualify as a Type I AMBT if the terms of the trust provide that it is to be divided immediately upon the death of the Employee into separate trusts for each beneficiary. ACTEC requests the addition of the following examples to clarify how the division of a Type I AMBT will work in practice:

Example 13A: Employee E dies on or after his RBD having named Trust Q, a revocable living trust, as the beneficiary of his Plan benefits. E has three adult children, F, G, and H. G is disabled at the time of E's death. The terms of Trust Q provide that upon E's death, Trust Q will be divided into three separate see-through trusts, one for each of E's children. Because Trust Q requires division at E's death into separate see-through trusts and G is disabled, Trust Q is a Type I AMBT. Each child is the sole Primary Beneficiary of that child's trust. F is the oldest child and H is the youngest child. The separate see-through trusts for F and H are Accumulation Trusts. The separate see-through trust for G is a Type II AMBT. No other beneficiary of G's trust is entitled to E's Plan benefits during G's lifetime. In addition, prior to October 31 of the calendar year following the calendar year of G's death, the trustee submitted the documentation required by § 1.401(a)(9)-4(e)(7) as evidence of G's disability on the date of G's death. The trustee has allocated all post-death distributions, as well as post-death gains and losses to each of the separate trusts in proportion to their shares of the Plan benefits in their respective trusts in accordance with the separate accounting requirements of § 1.401(a)(9)-8(a)(2).

Analysis: Because G is disabled and no trust beneficiary other than G is entitled to Plan benefits during G's lifetime, and all other requirements of a Type II AMBT are met, G's trust qualifies as a Type II AMBT pursuant to § 1.401(a)(9)-4(g)(3)(i). As provided in § 1.401(a)(9)-4(g)(3)(ii), G's life expectancy will be used to determine the RMDs payable to G's Type II AMBT over G's lifetime even though the other trust beneficiaries are not EDBs. In addition, since Trust Q is a Type I AMBT, the special rule under § 1.401(a)(9)-8(a)(1)(iii)(B) allows Code section 401(a)(9) to be applied separately with respect to the separate interests of the beneficiaries reflected in the separate trusts of each beneficiary of Trust Q. Because E died on or after the RBD, the trustee of F's and H's separate see-through trusts, as DBs, will be required to begin taking RMDs in the calendar year following the calendar year of E's death, subject to the 10 year limit. Therefore, the trustee will use F's life expectancy to determine the RMDs payable to F's trust, and H's life expectancy to determine the RMDs payable to H's trust, for the first nine years after E's death. By December 31 of the year that includes the tenth anniversary of E's death, the balance in the Plan accounts payable to F's trust will be distributed to F's trust and the balance in the Plan accounts payable to H's trust will be distributed to H's trust. In accordance with § 1.401(a)(9)-5(e)(3), governing the complete distribution of the Plan benefits after the death of an EDB, after G's death, the remainder beneficiaries of G's trust must liquidate the Plan benefits payable to G's trust by December 31 of the year that includes the tenth anniversary of G's death.

Example 13B: Same facts as Example 13A except that E dies before his RBD and F, G and H are minors at E's death. F and H are the Primary Beneficiaries of their respective trusts, which are Accumulation Trusts. In accordance with §1.401(a)(9)-4(f)(3)(2)(B), the trust for F and the trust for H state that upon each beneficiary attaining age 31, the remaining Plan benefits, and any trust accumulations derived from the Plan benefits, will be distributed to the Primary Beneficiary of the trust.

Analysis: Because Trust Q is a Type I AMBT, the separate account rule will apply to Trust Q as in Example 13A. The trustee will determine the RMD for F's trust using F's life expectancy until the year when F attains age 31, when, by December 31 of that year, all of the remaining Plan benefits will be distributed from the Plan to F, along with any accumulated income derived from the Plan benefits. Similarly, the trustee will determine the RMD for H’s trust using H’s life expectancy for RMDs payable to H’s trust until the year when H attains age 31, when, by December 31 of the year that H attains age 31, all of the remaining Plan benefits will be distributed from the Plan to H, along with any accumulated income derived from the Plan benefits. The Type II AMBT for G will use G’s life expectancy to determine the RMDs payable to G’s trust throughout G’s lifetime.

Example 13C: Same as Example 13A except that at E’s death, F is age 28, G is age 20 and H is age 14. F is the Primary Beneficiary of his trust, which is an Accumulation Trust that will continue for F’s lifetime. The trustee of F’s trust has complete discretion to distribute to F or accumulate RMDs and other withdrawals from E’s Plan benefits payable to F’s trust. G is the Primary Beneficiary of a Type II AMBT. H is the Primary Beneficiary of an Age 31 Trust and, in accordance with §1.401(a)(9)-4(f)(3)(2)(B), upon H attaining age 31, the remaining Plan benefits and any trust accumulations derived from the Plan benefits will be distributed to H.

Analysis: Because Trust Q is a Type I AMBT, the special rule of § 1.401(a)(9)-8(a)(1)(iii)(B) that allows Code section 401(a)(9) to be applied separately with respect to the separate interests of the beneficiaries applies to Trust Q as in Example 13A. F is an adult at the time of E’s death, and is treated as a DB. Accordingly, by December 31 of the year that includes the tenth anniversary of E’s death, the trustee of F’s trust must take a distribution of the entire balance of that portion of E’s Plan benefits payable to F’s trust as provided in § 1.401(a)(9)-3(c)(3). H is a minor EDB. Therefore, the trustee will determine the RMD for H’s trust using H’s life expectancy until the year when H attains age 31. By December 31 of the year that H attains age 31, all of the remaining Plan benefits payable to H’s trust must be distributed from the Plan to H, including any accumulated income derived from the Plan benefits. The Type II AMBT for G will use G’s life expectancy to determine the RMDs payable to G’s trust throughout G’s lifetime.

14. Treasury Should Clarify the Meaning of “Entitled to Benefits” in § 1.401(a)(9)-4(g)(3)(i)(A).

The definition of a Type II AMBT states that the trust terms must identify one or more disabled or chronically ill beneficiary or beneficiaries who are “entitled to benefits” during their lifetime. The use of the term “benefits” here may confuse some taxpayers and their advisors who counsel families with disabled or chronically ill family members who might otherwise think “benefits” refers not to the plan assets but to government programs such as Medicaid or SSI.

To clarify the use of this term, ACTEC suggests the following example:

Example 14: Employee R dies having designated a trust as the beneficiary of her Plan benefits. The sole Primary Beneficiaries of the trust are her disabled sons, S and T, who were disabled at the time of her death. S and T are not receiving any government benefits. The remainder beneficiaries of the trust are her other two children, U and V, who are not disabled. The trust is a see-through trust and qualifies as a Type II AMBT. The trust terms provide that only S and T are entitled to any of the Plan benefits during their lifetimes. Since S and T are the only beneficiaries of the trust entitled to benefits, the trust qualifies as a Type II AMBT.

Analysis: The reference that the disabled or chronically ill individuals are "entitled to benefits" appears to mean that the trustee must use the Plan benefits payable to the trust for the benefit of all of the disabled or chronically ill beneficiaries named in the Type II AMBT. However, attorneys and others who regularly counsel families with disabled or chronically ill beneficiaries might conclude that the reference, "entitled to benefits" in § 1.401(a)(9)-4(g)(3)(i)(A) refers to government benefits such as SSI or Medicaid or benefits under a long-term care contract. Code Section 401(a)(9)(E)(ii)(III) does not require a beneficiary to be receiving government benefits to qualify as a disabled eligible designated beneficiary. Likewise, Code section 401(a)(9)(E)(ii)(IV) does not require a chronically ill beneficiary to be receiving benefits under a long-term care contract to qualify as a chronically ill eligible designated beneficiary. The above example would clarify that § 1.401(a)(9)-4(g)(3)(i)(A) does not refer to the disabled or chronically ill beneficiary receiving government benefits of any type.

15. Treasury Should Clarify the Provisions of Sections 1.401(a)(9)-3(d), 1.401(a)(9)-5(d)(3)(iv), and 1.401(a)(9)-5(f)(1)(ii) When the Spouse is Sole Beneficiary of a Type II AMBT.

If a spouse is the Primary Beneficiary of a Conduit Trust, the spouse is treated as the sole beneficiary of the trust and the remainder beneficiaries of the trust are disregarded for purposes of determining the RMDs. In that case, the spouse, as the deemed sole beneficiary of the trust, may wait until the deceased Employee would have reached the RBD for the trustee to begin taking RMDs from the Plan. In addition, once distributions to the trust begin, the spouse's life expectancy is redetermined each year to determine the applicable denominator for that year's RMD.

ACTEC requests clarification on the following two points when the Employee's spouse is the sole disabled or chronically ill beneficiary of a Type II AMBT:

Under Proposed § 1.401(a)(9)-5(f)(1)(ii), only the life expectancies of the disabled or chronically ill beneficiaries of a Type II AMBT are taken into account in determining the oldest beneficiary of the trust. Because all non-EDB beneficiaries of the Type II AMBT are disregarded during the life of the disabled or chronically ill EDB, the Employee's disabled or chronically ill spouse would be the sole Primary Beneficiary of the Type II AMBT. Accordingly, the trustee should be able to delay the start of RMDs to the end of the calendar year in which the Employee would have reached age 72 as provided in § 1.401(a)(9)-3(d). ACTEC requests Treasury to confirm that this is the case with respect to a Type II AMBT for the disabled or chronically ill spouse who is the sole Primary Beneficiary of such trust. ACTEC suggests that Treasury include the following example to clarify this point.

Example 15: L dies in 2022 at age 65. L's spouse, M, age 63, was chronically ill at the time of L's death. L established a Type II AMBT that is the beneficiary of his Plan benefits. M is the sole current beneficiary of the Type II AMBT.

Analysis: Because M is the only beneficiary taken into account in determining the trust's RMDs, the trustee of the Type II AMBT may wait until December 31, 2029 to begin taking RMDs. *2029* would have been L's first distribution calendar year. In addition, because M is the *sole* beneficiary of the Type II AMBT, the trustee may redetermined M's life expectancy each year in accordance with § 1.401(a)(9)-5(d)(3)(iv).

If a Type II AMBT is drafted in such a way that it also functions as a third-party special needs trust, the trust will not be considered an available asset for the spouse in determining the availability of governmental benefits. For that reason, a Type II AMBT may be necessary in many states that would require the surviving spouse, absent a Type II AMBT, to "spend down" the Plan benefits in order to be eligible for Medicaid long-term care benefits.

16. Treasury Should Clarify Whether Certain Trust Distributions For the Benefit of a Disabled or Chronically Ill EDB Cause the Trust to Fail to be a Type II AMBT.

Code section 401(a)(9)(H)(iv)(II) and § 1.401(a)(9)-4(g)(3)(i)(B) require that a Type II AMBT provide that the trust terms must provide that no individual, other than a chronically ill or disabled EDB, has any right to the interests in the Plan until the death of all the chronically ill and disabled trust beneficiaries. ACTEC requests that examples be incorporated to clarify that a trust satisfies this condition even if it authorizes distributions for the benefit of the disabled or chronically ill beneficiary payable to a third party who is not a disabled or chronically ill EDB. ACTEC recommends inclusion of examples such as the following in the final regulations:

> *Example* 16A: A died in 2022 at age 75, survived by her son B who was then age 40 and disabled. A named Trust S as the beneficiary of her Plan benefits. Trust S is a special needs trust. B is the sole Primary Beneficiary of Trust S for his lifetime. At B's death, A's daughters, D and E, receive the balance of Trust S in equal shares. The trustees of Trust S are given discretion to pay for B's travel expenses and that of a companion, including a sibling, a close friend, or a direct support professional, none of whom is disabled or chronically ill, if doing so makes it possible for B to travel, attend family gatherings, or go on a family vacation. In addition, Trust S gives the trustee discretion to pay a reasonable fee to such companion to take B to necessary appointments. These payments are for B's benefit, because without a companion B would be unable to attend family gatherings, go on vacations, or keep necessary appointments.
>
> *Analysis:* The payments from Trust S to a companion for such travel expenses and services for B's benefit to enable B to get to travel, attend family gatherings, go on family vacations, or keep necessary appointments are distributions for the benefit of B, and are not distributions to the companion as a trust beneficiary. Trust S satisfies the requirements of Code section 401(a)(9)(H)(iv)(II) and § 1.401(a)(9)-4(g)(3)(i)(B) and qualifies as a Type II AMBT.
>
> *Example* 16B: Same facts as Example 16A, except B was chronically ill at the time of A's death, as B is no longer able to perform two activities of daily living without the substantial assistance of another person. The trustees of Trust S are given discretion to pay a reasonable fee to a companion to assist B in performing the activities of daily living.

Analysis: The payments to a companion to assist B in performing the activities of daily living are distributions for the benefit of B, and are not distributions to the companion as a trust beneficiary. Trust S satisfies the requirements of Code section 401(a)(9)(H)(iv)(II) and § 1.401(a)(9)-4(g)(3)(i)(B), and qualifies as a Type II AMBT.

Example 16C: The same facts as Example 16A, except that B is unable to live alone and lives with his sister D in D's home. D is a Secondary Beneficiary of Trust S along with E. The trustee is authorized to pay D directly for B's share of expenses while living in D's home. D is not disabled or chronically ill.

Analysis: These direct payments to D from Trust S are for the benefit of B, and are not distributions to D's companion as a trust beneficiary. Trust S satisfies the requirements of Code section 401(a)(9)(H)(iv)(II) and § 1.401(a)(9)-4(g)(3)(i)(B), and qualifies as a Type II AMBT.

Many special needs trusts for disabled or chronically ill beneficiaries explicitly give the trustee discretion to use trust funds to provide benefits to the beneficiary that result in payments to relatives or close friends of the beneficiary who are not disabled or chronically ill. These relatives or close friends may, in some cases, also be the remainder beneficiaries of the special needs trust. These payments, made in the discretion of the trustee and as part of the administration of the trust, are for the primary benefit of the beneficiary who is the disabled or chronically ill EDB and do not make the companion receiving such payments a beneficiary of the trust.

For fiduciary income tax purposes, these payments, while not made directly to the disabled or chronically ill beneficiaries, are treated as distributions for the benefit of the disabled or chronically ill beneficiary. The distributions will carry out income to the disabled or chronically ill beneficiary under Code sections 643 and 661.

This approach is also taken in the public benefits area. The Social Security Administration Programs Operations Manual Section (POMS) SI 01120.201F.3 addresses collateral/derivative benefits to third parties directly in discussing the "sole benefit rule."[5] The Social Security Administration's (POMS) SI 01120.201F.3 makes it clear that derivative benefits to others do not violate the sole benefit rule. A special needs trust that provides derivative benefits to others likewise should not violate the sole beneficiary rule of § 1.401(a)(9)-4(g)(3)(i)(B).

ACTEC requests that Treasury add examples such as those above to clarify this point in the final regulations.

[5] *Available at* https://secure.ssa.gov/poms.nsf/lnx/0501120201; The POMS in its directive states in its explanation of the sole benefit rule that "the key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent a collateral benefit to anyone else…."

17. Treasury Should Expressly Provide in §1.401(a)(9)-4(g)(3) That an Inherited IRA may be Transferred by a Disabled or Chronically Ill EDB to such Beneficiary's First Party Special Needs Trust as was authorized in Private Letter Ruling 200620025 (February 21, 2006).

PLR 200620025 addressed a fact pattern in which the Employee's disabled son was a beneficiary of his deceased father's IRA. The son was at risk of losing his Medicaid and other public benefits as a result of being named as an outright beneficiary of his father's IRA. The son's mother was his guardian. She established a first party special needs trust under 42 U.S.C. § 1396p(d)(4)(A) of the Social Security Act (a "(d)(4)(A) trust") and she was the trustee of the trust. The (d)(4)(A) trust was a grantor trust under Code §§ 677(a)(1) and (2) because the son was entitled to trust income in the discretion of the trustee and the trustee could also accumulate the trust income for her son's benefit. His mother was a nonadverse party, having disclaimed her right to any portion of the trust as a potential remainder beneficiary. The ruling allowed the son's inherited IRA share to be transferred by trustee-to-trustee transfer into an inherited IRA in the name of the grantor trust. After such transfer, RMDs were taken based on the son's life expectancy. The Service ruled (i) that the son's transfer of the IRA to the trust was not a taxable sale or exchange and was not a transfer for purposes of Code section 691(a)(2), and (ii) that based on these facts, particularly the necessity of forming a special needs trust, it was appropriate for RMDs from the IRA to be calculated using the life expectancy method allowed under the law at that time.

ACTEC recommends that the result of PLR 200620025 be incorporated into the final Section 401(a)(9) regulations that pertain to Type II AMBTs, using the following example:

> *Example 17*: J died before his RBD in 2022. He has named his four adult sons as the beneficiaries of his IRA. His youngest son, N, was disabled as of J's death and was receiving Medicaid. N was at risk of losing his medical assistance as a result of being named the beneficiary of his father's IRA. N possessed the capacity to establish a first party special needs in accordance with 42 U.S.C. § 1396p(d)(4)(A) of the Social Security Act (a "(d)(4)(A) trust"). Prior to September 30, 2023, the (d)(4)(A) trust was established by a petition to the probate court. N is the sole beneficiary of the (d)(4)(A) trust. No one other than N has an entitlement to the IRA benefits during N's lifetime. N's mother is the trustee. N's mother made a qualified disclaimer of any contingent interest she might have in the trust and is a nonadverse party because she is not a trust beneficiary. The (d)(4)(A) trust is a grantor trust under Code §§ 677(a)(1) and (2) since N is entitled to trust income in the discretion of the trustee and the trustee may also accumulate the trust income for N's benefit. At N's death, as a statutory condition of establishing a (d)(4)(A) trust, the state Medicaid agency where N resides is the primary creditor of the trust. After payment of any claim made by the state Medicaid agency, the remaining trust property, including the undistributed balance of the inherited IRA payable to N's trust will be distributed to the Secondary Beneficiaries, who are N's brothers. The court ordered the establishment of the (d)(4)(A) trust and a trustee-to-trustee transfer of the IRA benefits from J's IRA to the inherited IRA established by the trustee for N's (d)(4)(A) trust.

> *Analysis*: N is a disabled EDB. The trust is a Type II AMBT and is allowed to determine RMDs using the life expectancy method based on N's life expectancy. N's brothers are Secondary Beneficiaries and are disregarded in accordance with § 1.401(a)(9)-4(g)(3)(ii).

A (d)(4)(A) trust requires that, upon N's death, the State or States that provide Medicaid services be named as the first creditor to recover medical assistance paid during N's lifetime. Deferring payment to the State until N's death allows the trustee to preserve resources within the (d)(4)(A) trust during N's lifetime and to be repaid after N's death, unlike other creditors that would require payment as services are rendered to N.

There should no tax effect as a result of the transfer to N's (d)(4)(A) trust. Firstly, as stated in § 1.408-8(d)(4), the transfer from the father's IRA to an inherited IRA held in N's (d)(4)(A) trust is a trustee-to-trustee transfer and as such is not a taxable distribution. Moreover, allowing N's (d)(4)(A) trust to be considered a Type II AMBT is tax neutral. N will pay the same amount of taxes on the RMDs and other withdrawals from the inherited IRA payable to N's (d)(4)(A) trust as he would have if N were still the outright beneficiary of the inherited IRA because of the (d)(4)(A) trust's status as a grantor trust.

PLR 200620025 has been a very important private letter ruling for the special needs community. Many families do not understand that an IRA payable to a special needs beneficiary must be held in a specially drafted trust to avoid losing the medical benefits that the special needs beneficiary relies upon. It is notable that the benefits that may be forfeited may include not only cash payments but special services that can only be obtained if the beneficiary is covered by Medicaid. It is common for a class gift by a well-meaning relative who is not familiar with these issues could trigger the need for a (d)(4)(A) trust. A (d)(4)(A) trust is not the trust of choice for special needs planners. A third-party special needs trust that is structured as a Type II AMBT is the standard planning tool, but the Employee may not realize that their preferred beneficiary has a need for such a special needs trust until it is too late.

18. Treasury Should Clarify in § 1.401(a)(9)-5(d) the Requirement to Take the Employee's Remaining RMD in the Year of Death.

ACTEC notes that § 1.401(a)(9)-5(d) specifically states that in the year of a beneficiary's death, the deceased beneficiary's remaining RMD must be distributed to the beneficiary of the deceased beneficiary. However, § 1.401(a)(9)-5(d) does not also expressly state that the remaining RMD of a deceased Employee must be taken by the Employee's beneficiary. ACTEC suggests adding the following language to § 1.401(a)(9)-5(d)(1)(i) to deal with the event of an Employee not having taken the RMD in the year of death as indicated in bold as follows:

> (d) *Applicable denominator after employee's death* – (1) *Death on or after the employee's required beginning date—(i) In general.* If an employee dies after distribution has begun as determined under § 1.410(a)(9)-2(a)(3) (generally, on or after the employee's required beginning date), distributions must satisfy section 401(a)(9)(B)(i). In order to satisfy this requirement, the applicable denominator after the employee's death is determined under the rules of this paragraph (d)(1). **In the calendar year of the employee's death, a required minimum distribution must be taken by the employee's beneficiary, to the extent not already distributed to the employee.**

> **Furthermore,** the requirement to take an annual distribution in accordance with the preceding **sentences continues to apply** for distribution calendar years up to and including the calendar year that includes the beneficiary's death.

ACTEC believes making this change to include the RMD of the deceased Employee would clarify Treasury's intention that this requirement applies to the RMD in the year of death of both the deceased beneficiary and also the deceased Employee, and will also clarify that it is the beneficiaries of such decedents, and not such decedents' estates, who are required to take this remaining RMD.

19. Treasury Should Reconsider Section 1.401(a)(9)-5(e)(5), as this Section Appears to be Contrary to Congressional Intent.

ACTEC believes that the provisions of § 1.401(a)(9)-5(e)(5) are contrary to Congressional intent to benefit EDBs by authorizing distribution over life expectancy and not limiting the distribution to the 10-year period applicable to DBs. In the event the Employee dies on or after the RBD, § 1.401(a)(9)-5(d)(1)(ii) provides the distribution period for all designated beneficiaries, including an EDB, as the longer of the designated beneficiary's remaining life expectancy and the Employee's remaining life expectancy. However, § 1.401(a)(9)-5(e)(5), without explanation, adds a restricting limitation on an EDB's life expectancy distribution not found in the statute or prior Regulations. It would apply to beneficiaries older than the Employee who are disabled, chronically ill, or not more than 10 years younger than the Employee.[6] Such beneficiaries are those that Congress included in the class of beneficiaries of Plan benefits-expressly excluded from the 10-year limit created in the SECURE Act. Reg. § 1.401(a)(9)-5, Q&A-5, on which Congress based the life expectancy distribution carve out for EDBs, provides that life expectancy distribution for a DB when the Employee dies on or after the RBD is

> …the longer of (i) The remaining life expectancy of the of the employee's designated beneficiary determined in accordance with paragraph (c)(1) or (2) of this A-5; and (ii) The remaining life expectancy of the employee determined in accordance with paragraph (c)(3) of this A-5.

Nowhere in this existing Regulation or the SECURE Act is there any indication that this "longer of" life expectancy distribution period should be limited for an EDB.

Congress expressly created the class of EDBs excluding from the application of the 10-year limit those DBs who are disabled, chronically ill and those not more than 10 years younger than the Employee. DBs are subject to the 10 year limit, but EDBs are not. However, § 1.401(a)(9)-5(e)(5) would accelerate the distribution period for these EDBs when the Employee is younger than age 81 and the EDB is older than age 82, but a similarly situated regular DB would end up with a longer distribution period limited only by the 10-year rule. Certainly Congress did not intend that an older EDB was to be treated *less* favorably than a regular DB.

[6] The "not more than 10 years younger than the Employee" includes beneficiaries who are not only younger but also includes any beneficiary who is the same age or older than the Employee.

For example, if the Employee died in 2022 at age 75, and the disabled EDB is age 90 in the year of the Employee's death, the applicable denominator under the single life table for the first distribution year would be 13.8 (the Employee's life expectancy of 14.8 reduced by 1); but § 1.401(a)(9)-5(e)(5) would require complete distribution by the end of 2027, the 5th year following the Employee's death, upon reaching the end of the EDB's life expectancy. But if this beneficiary was *not* an EDB, and instead was simply a DB, distributions would continue until the end of 2032, the 10th year following the Employee's death. ACTEC suggests that Congress intended that such EDBs would have a longer distribution period than a regular DB, or at the very least would not have a shorter distribution period. The sudden switch from the Employee's life expectancy to the EDB's life expectancy cuts against this principle and is not supported by the existing Regulations, the Code or Congressional expression in enacting the SECURE Act.

In addition, ACTEC is concerned that, because Plan administrators of inherited IRAs are not required to notify the beneficiaries of their annual RMDs, older EDB beneficiaries of inherited IRAs will miss the transition to the older EDBs life expectancy required by § 1.401(a)(9)-5(e). This will result in such older EDBs, or their estate after their deaths, having to file Forms 56 for all of the years such RMDs were missed.

Accordingly, ACTEC requests that Treasury reconsider the inclusion of this provision in § 1.401(a)(9)-5(e).

20. In the Event Treasury Determines to Retain § 1.401(a)(9)-5(e)(5) in the Final Regulations, Treasury Should Clarify the Meaning of § 1.401(a)(9)-5(e)(5).

In the event Treasury decides to retain § 1.401(a)(9)-5(e)(5) in the final regulations, ACTEC believes that § 1.401(a)(9)-5(e)(5) is confusing, and that examples would be helpful in clarifying the meaning of § 1.401(a)(9)-5(e)(5). Accordingly, ACTEC requests that Treasury include the following examples in § 1.401(a)(9)-5(e)(5) if it is part of the final regulations to clarify its intended meaning.

> *Example* 20A. Employee A died in 2022 at age 74 after the required beginning date. A named B, a non-spouse eligible designated beneficiary who was age 85 at A's death, as the sole beneficiary of A's IRA. Pursuant to § 1.401(a)(9)-5(d)(1)(ii), B began taking distributions from A's IRA in 2023, the year following A's death using the applicable denominator of 14.6 (A's life expectancy under the Single Life Table in 2022, subtracting one for 2023). Based on B's life expectancy of 7.6 years in the year following A's death, B must withdraw the entire interest in A's IRA in 2030, the year in which B's applicable denominator is less than one, even though the applicable denominator in 2030 using Employee A's remaining life expectancy is 7.6, and even though B, then age 93, is still alive.

ACTEC believes this is what § 1.401(a)(9)-5(e)(5) would require as currently set out. However, it is also unclear what the result would be if the Employee's older EDB were to die before reaching the year in which the applicable denominator is less than one. ACTEC suggests that, in such case, § 1.401(a)(9)-5(e)(3) would extend such distribution to the tenth calendar year following the calendar year of the EDB's death despite the provisions of § 1.401(a)(9)-5(e)(5).

> *Example* 20B. Same facts as Example 20A except that B dies in 2024 at age 87. Under the "at least as rapidly" rule set out in § 1.401(a)(9)-5(d), following B's death, B's beneficiary would continue to take distributions over A's then remaining 13.6 years, but would be required to withdraw the balance of the IRA by the end of 2034, within the 10-year limit set out in § 1.401(a)(9)-5(e)(3).

Accordingly, ACTEC requests that Treasury add the above example to § 1.401(a)(9)-5(e)(5) to coordinate the application of § 1.401(a)(9)-5(e)(5) with the application of § 1.401(a)(9)-5(e)(3).

21. Treasury Should Clarify How the Separate Interests of the Beneficiaries of a See-Through Trust Work Under § 1.401(a)(9)-8(a)(1)(iii).

Section 1.401(a)(9)-8 generally retains the separate account rules in the existing Regulations, and continues the statement that, except as otherwise stated in § 1.401(a)(9)-8(a)(1)(iii)(B), the separate account rule does not apply separately to the separate interests of each of the beneficiaries of a see-through trust. However, a special rule provided in § 1.401(a)(9)-8(a)(1)(iii)(B) for Type I AMBTs states:

> Section 401(a)(9) may be applied separately with respect to the separate interests of the beneficiaries reflected in the separate trusts of each beneficiary of a type I applicable multi-beneficiary trust described in § 1.401(a)(9)-4(g)(2), provided that the separate accounting rules of paragraph (a)(2) of this section are satisfied.

These separate accounting rules require the trustee to allocate (1) post-death distributions with respect to each beneficiary's interest to the separate account of the beneficiary receiving that distribution, and (2) all post-death investment gains and losses, contributions and forfeitures on a pro rata basis.

Sections 1.401(a)(9)-8(a)(1)(iii)(A) and (B) are unclear as to exactly how the Plan is to be administered for separate interests of the trust beneficiaries of a Type I AMBT, when there are other trust beneficiaries who are neither disabled nor chronically ill. ACTEC suggests that Treasury clarify how the rules in these two subparagraphs work in certain situations by including examples of how the Plan is to be administered when the Employee names Type I AMBT as the Plan beneficiary, such as the following:

> *Example* 21A: Employee A dies in 2022 before her RBD, having designated Trust Q as beneficiary of 100% of her Plan. Pursuant to the terms of Trust Q, on the death of the Employee, Trust Q is to divide immediately into three equal separate trusts (Trust Q1, Trust Q2 and Trust Q3). The Primary Beneficiary of Trust Q1 is Child 1, who is a regular DB. The Primary Beneficiary of Trust Q2 is Child 2, who is a minor EDB. The Primary Beneficiary of Trust Q3 is Child 3, who is a disabled EDB. Trust Q3 qualifies as a Type II AMBT because Child 3 is the sole beneficiary during Child 3's lifetime and no other beneficiary has any rights in Trust Q3 until Child 3's death.
>
> Because the terms of Trust Q provide that it is to divide immediately into separate trusts upon the Employee's death, Trust Q is a Type I AMBT. The trustee of Trust Q promptly divides the assets of Trust Q into the three separate trusts, allocating all post death investment gains and losses, contributions and forfeitures among the three accounts on a

pro rata basis; no distributions have occurred prior to such division, and the division is not a taxable distribution. Because Trust Q3 is a Type II AMBT, distributions may be made over the life expectancy of Child 3. Pursuant to § 1.401(a)(9)-8(a)(1)(iii)(B), Code section 401(a)(9) is applied separately to each of Trust Q1 and Trust Q2 notwithstanding the provisions of § 1.401(a)(9)-8(a)(1)(iii)(A) because Trust Q is a Type I AMBT. Therefore, as provided in as provided in § 1.401(a)(9)-4(e)(2)(ii), since Child 2 is Employee A's minor child, Child 2 is treated as an EDB, even though there are other beneficiaries of Trust Q who are not eligible designated beneficiaries. Accordingly, Trust Q2 may use the life expectancy of Child 2 until the age of majority, after which time the 10 year limit would apply. Finally, due to the provisions of § 1.401(a)(9)-8(a)(1)(iii)(B), the separate account rule would also apply to Trust Q1, which would use the 10 year rule.

Example 21B: Employee B dies in 2022 before her RBD, having designated Trust Q as beneficiary of 100% of her Plan. Pursuant to the terms of Trust Q, on the death of the Employee, Trust Q divides into three equal separate trusts: Trust Q1, a Conduit Trust for Child 1 (age 20); Trust Q2 a Conduit Trust for Child 2 (age 16); and Trust Q3 a Conduit Trust for Child 3 (age 3). The division of the Plan by the Trustee of Trust Q into separate trusts as required by Trust Q is not a taxable distribution.

Trust Q is not an AMBT because no beneficiary is disabled or chronically ill. Consequently, pursuant to § 1.401(a)(9)-8(a)(1)(iii)(A) the separate account rule does not apply. Because the separate account rule is not available to the Trust Q, and because minor EDBs are the beneficiaries of all three trusts, all three trusts will use the life expectancy rule for determining RMD, but must use the life expectancy of the oldest trust beneficiary, Child 1, for determining the RMDs. If Trust Q had provided for a single Conduit Trust for all three children, then, as provided in § 1.401(a)(9)-5(f)(2)(ii), all of the assets in Trust Q would have to be distributed no later than the end of the tenth calendar year after Child 1 attains age 21. Here, since Trust Q divides into separate Conduit Trusts for minor EDBs, and even though the separate account rule does not apply, ACTEC suggests that all of the assets of Trust Q1 must be distributed no later than the end of the tenth calendar year after Child 1 attains age 21, all of the assets of Trust Q2 must be distributed no later than the end of the tenth calendar year after Child 2 attains age 21, and all of the assets of Trust Q3 must be distributed no later than the end of the tenth calendar year after Child 3 attains age 21.

Example 21C: The facts are the same as in Example 21B except that Trust Q1, Trust Q2 and Trust Q3 are Accumulation Trusts with each child as Primary Beneficiary of his/her own trust and the other two children as the Secondary Beneficiaries to receive funds outright if the Child who is the Primary Beneficiary dies prior to complete distribution of the Plan to the other respective trusts. All three children are minor EDBs of each trust. The result would be the same as in Example 21B for RMDs for each trust, but the amounts may be accumulated in Trust Q1 for Child 1, in Trust Q2 for Child 2, and in Trust Q3 for Child 3.

Example 21D: The facts are the same as in Example 21B except that Employee B designates in the Plan beneficiary designation form Trust Q1, Trust Q2 and Trust Q3 as equal direct beneficiaries of Employee B's Plan benefits. Because trusts were separately designated in the beneficiary designation form as beneficiaries of the Plan, the separate account rule applies, and each trust may use the separate life expectancy of the minor child EDB until that Child reaches age 21, after which time the 10 year rule will apply.

22. Treasury Should Extend the Timeframe for the Automatic Waiver of Penalty Contained in § 54.4974-1(g)(3).

Section 54.4974-1(g)(3) provides an automatic waiver of the 50% penalty that would have been imposed for failure to take the remaining RMD of the deceased Employee in the year of death. This automatic waiver only applies, however, if the Employee's beneficiary takes such distribution no later than the tax filing deadline (including extensions) for the taxable year of that beneficiary that begins with or within that calendar year. Since the calendar year is almost always used by the Employee and beneficiaries, such deadline for taking the remaining RMD would expire at the latest on October 15 of the year following the year of the Employee's death. However, pursuant to the beneficiary determination provisions of § 1.401(a)(9)-4(c)(1) the Employee's beneficiary is not finally determined until September 30 of the year following the year of death. The Employee's beneficiary should have a reasonable time after the beneficiary determination date to arrange to take the Employee's remaining RMD without the imposition of the 50% penalty and without having to request a waiver of such penalty for reasonable cause.

Accordingly, ACTEC suggests that the automatic waiver of the 50% penalty for failure to take the Employee's remaining RMD for the year of Employee's death needs to be expanded to provide that the penalty is automatically waived so long as the Employee's RMD is taken by the end of the calendar year following the calendar year of the Employee's death.

23. Treasury Should Provide an Automatic Waiver of Penalty in § 54.4974-1(g) for Certain 2021 RMDs Arising Due to Application of the At Least as Rapidly Rule for a Designated Beneficiary to Whom the 10-Year Limit Also Applies.

Prior to the issuance of the Proposed Regulations, most if not all taxpayers and their advisors understood that the requirements of the 10-year rule would be identical to the 5-year rule in that no distributions would be required until the end of the tenth year following the year of the Employee's death regardless of whether the Employee died before or on or after the Employee's RBD. This understanding was reasonably based on the provisions of Code section 401(a)(9)(H)(i) added by the SECURE Act, in which Congress stated in subparagraph (H)(i) that it was amending (B)(ii) of Code section 401(a)(9) simply by "substituting '10 years' for '5 years', and shall apply *whether or not* distributions of the employee's interests have begun." Thus, if the 10-year rule applied due to the addition of Code section 401(a)(9)(H)(i) by the SECURE Act, this provision seemed only to require distribution of the account in full no later than the end of the calendar year in which the tenth anniversary of the Employee's death occurred, based on its comparison to the 5-year rule applicable to accounts with no designated beneficiary.

Notwithstanding the provisions of Code section 401(a)(9)(H)(i), however, § 1.401(a)(9)-5(d)(1)(ii) would require the designated beneficiary to begin taking distributions in the year following the year of the Employee's death over the longer of the DB's remaining life expectancy and the Employee's life expectancy if the Employee died on or after the RBD. Because Code section 401(a)(9)(H)(i) applies to Employees who died after the Effective Date, the first distribution year for any designated beneficiary required to take distributions over life expectancy under the provisions of § 1.401(a)(9)-5(d)(1)(ii) would have been 2021. But because of the widely accepted interpretation of Code section 401(a)(9)(H)(i) that Code section 401(a)(9)(H)(i) had superseded for DBs the previously applicable At Least As Rapidly (ALAR) rule, most or all DBs simply did not take any RMDs for 2021 where the Employee died on or after the RBD. ACTEC refrains from taking a position in this memorandum on Treasury's interpretation of the viability of the ALAR rule after the enactment of Code section 401(a)(9)(H)(i), as other commenters have addressed the issue in sufficient detail. However, given the surprise of that interpretation, ACTEC suggests that it was reasonable for taxpayers to assume that distributions could be deferred for the 10 year period set out in new Code section 401(a)(9)(H)(i), and the application of penalties should be waived.

For these reasons, and in light of the fact that the proposed regulations were not published before it became too late for such designated beneficiaries to take a timely RMD for 2021, ACTEC recommends that § 54.4974-1(g) provide an automatic waiver of the 50% penalty for failure to take a required distribution in 2021 to avoid the need for the many thousands of affected DBs to file Form 5329 requesting waivers of such penalties. Such an automatic waiver could be conditioned on the designated beneficiary taking the 2021 RMD no later than December 31 of the calendar year in which the proposed regulations become final.