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July 14, 2020

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RE: Request for Guidance from Treasury on Section 401 of the SECURE Act, Part 1

Dear Ms. Weiser and Mr. Tackney:

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

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

ACTEC’s comments and recommendations are set forth in the attached memorandum, which is the first of two memoranda ACTEC is providing.

If you or your staff would like to discuss the contents of this attached 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@bcplaw.com), who head up the task force of the ACTEC Employee Benefits in Estate Planning Committee, or Deborah McKinnon, ACTEC Executive Director, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,



Stephen R. Akers
ACTEC President 2020-2021

Comments of the American College of Trust and Estate Counsel (“ACTEC”)
on Section 401 of the SECURE Act – Part 1 of 2

This memorandum includes an executive summary of the recommendations for guidance from Treasury that will assist taxpayers with issues raised by the changes to the required minimum distributions (“RMDs”) after the death of an Employee found in Section 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019, PUB. L. 116-94 (THE “SECURE Act” or the “Act”)¹ and detailed comments discussing the issue each recommendation addresses. We appreciate the opportunity to provide these comments to Treasury on issues of concern to ACTEC in planning for the changes made to the required minimum distribution rules following the death of an employee. It is our hope these comments provide helpful insight on the issues practitioners have been grappling with since the enactment of the Act, and ACTEC respectfully requests Treasury to take the following recommendations into consideration in preparing its guidance as to the meaning and operation of the Act.

EXECUTIVE SUMMARY OF RECOMMENDATIONS

A. Definitions (page 5-7)

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

B. 10 Year Rule (page 8-14)

1. Does the calendar year end due date for all distributions under the 5 Year Rule extend to the application of the 10 Year Rule? ACTEC requests Treasury state in its guidance that the new 10 Year Rule is satisfied by a complete distribution of the Employee’s interest in the Plan by the end of the calendar year that contains the tenth anniversary of the Employee’s death, and that no distributions are required to be taken before that date. ACTEC requests Treasury apply the same rule on the transition to the 10 Year Rule after the death of an EDB, after a minor child reaches majority and after the death of a DB dying after the Effective Date. That is, in each instance in which there is to be a transition from a Life Expectancy Method to a 10 year distribution period, the 10 Year Rule would be satisfied by complete distribution of the interest in the Plan by the end of the calendar year that contains the tenth anniversary of the event triggering the transition, and no distributions would be required to be taken in any of the nine calendar years before that date.

2. How are RMDs handled in the year of death under rules that call for use of the 10 Year Rule? ACTEC requests Treasury adopt the rule that the DB of an Employee who dies after the Effective Date and after her RBD would take the undistributed portion of the Employee’s RMD in the distribution calendar year of the Employee’s death, and the 10 Year Rule would

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

commence in the calendar year immediately following the calendar year of the Employee's death. These same rules applicable on the death of such Employee who had reached her RBD ought likewise to apply in each of the other three instances that the Code or Act requires transition from the Life Expectancy Method to the 10 Year Rule on the occurrence of death or reaching majority (i.e. the death of a DB after the Effective Date, the death of an EDB and attainment of majority by a minor child).

3. Does the "At Least As Rapidly Rule" still apply if the Employee dies with a DB after the Employee's RBD, and if so, can the DB elect to use the 10 Year Rule in lieu of the Deceased Employee's Remaining Life Expectancy? ACTEC requests Treasury revise the rule of Reg. § 1.401(a)(9)-5, A-5(a)(1) by substituting the new "10 Year Rule" for the "Life Expectancy Method" for DBs with respect to Employees dying after the Effective Date and on or after the Employee's RBD, thus leaving in place the At Least As Rapidly Rule. ACTEC requests Treasury provide an option for a DB to elect between either the Deceased Employee's Remaining Life Expectancy Method and the 10 Year Rule in the At Least As Rapidly Rule set out in Reg. § 1.401(a)(9)-5, A-5(a)(1).

C. **Effective Date** (page 14-23)

4. How does Act § 401(b)(5)(A) impact those succeeding to an Employee's Plan interest when the Employee dies on or before the Effective Date and the Employee's DB dies after the Effective Date? ACTEC requests Treasury confirm that Act § 401(b)(5)(A)(i) refers to all those succeeding to the balance of the Employee's interest at the DB's death, regardless of whether the successor beneficiary was named by the DB, as ACTEC believes was Congress's intent.

ACTEC requests Treasury clarify whether or not the cross-reference in Act § 401(b)(5)(A)(ii) correctly it refers to Code § 401(a)(9)(H)(ii) instead of Code § 401(a)(9)(H)(iii). The results of this cross-reference are described below and may lead to very different results. If Treasury concludes that the cross-reference should be corrected, ACTEC requests Treasury provide interim guidance explaining how Act § 401(b)(5)(A)(ii) should be interpreted until such time as Congress enacts a technical correction to fix the cross-reference.

Alternatively, if Treasury concludes that the cross reference in Act § 401(b)(5)(A)(ii) is correct, Treasury should so state and explain that, in order to carry out Congressional intent, this section is to be implemented by providing that for an Employee who died on or before the Effective Date and a DB of the Employee who dies after such date, the DB is treated as if the DB had been an EDB using the Life Expectancy Method exception provided for EDB's in Code § 401(a)(9)(H)(ii), and that on the death of such DB, such Life Expectancy Method ceases and the remainder of the Employee's interest in the Plan must be distributed under the 10 Year Rule of Code § 401(a)(9)(H)(iii).

5. How does Act § 401(b)(5)(A) impact those succeeding to an Employee's Plan interest when the Employee dies on or before the Effective Date and the Employee's DB dies after the Effective Date, and the DB had been receiving distributions over the Deceased Employee's Remaining Life Expectancy under the At Least As Rapidly Rule? On the death of an Employee on or before the Effective Date and the death of the Employee's DB after the

Effective Date when the now deceased DB's RMDs had been determined using the Deceased Employee's Remaining Life Expectancy under the At Least As Rapidly Rule, ACTEC requests Treasury state expressly whether the beneficiary succeeding to such DB's interest (1) would continue to use the Deceased Employee's Remaining Life Expectancy, (2) would be required to transition to the 10 Year Rule, (3) would be able to use the longer of the 10 Year Rule or the Deceased Employee's Remaining Life Expectancy under the At Least As Rapidly Rule as set out in Reg. § 1.401(a)(9)-5, A-5(a)(1), or (4) could elect between continuing the Deceased Employee's Remaining Life Expectancy or switching to the 10 Year Rule.

6. Does Act § 401(b)(5)(A) apply at the death of a successor beneficiary if both the Employee and the Employee's Designated Beneficiary died on or before the Effective Date, and if so, do deaths of further successor beneficiaries restart the 10 Year Period? ACTEC requests Treasury confirm that Act § 401(b)(5)(A) expressly applies the amendments made by Act § 401 on the death of the DB, and does not require application of the amendments made by Act § 401 on the death of any beneficiary who is not the DB after the Effective Date.

7. If the Employee dies on or before the Effective Date leaving the Employee's interest in the Plan to a Conduit Trust or Accumulation Trust, what event triggers application of the 10 Year Rule under Act § 401(b)(5)(A)? If a Conduit Trust or Accumulation Trust were named by the Employee as the beneficiary of her interest in the Plan, ACTEC requests Treasury clarify that the reference to "designated beneficiary" in Act § 401(b)(5)(A) is a reference to one or more of the beneficiaries of the Conduit Trust or Accumulation Trust and not to the trust itself.

ACTEC requests Treasury confirm that the death of the Current Beneficiary of the Conduit Trust, who served as the measuring life for purposes of determining the RMDs for the trust, is the event that triggers application of Act § 401(b)(5)(A) to cause the amendments made by Act § 401 to apply.

ACTEC requests Treasury clarify that (i) if the Employee designated an Accumulation Trust that continued for more than one Current Beneficiary, the death of the last to die of the Current Beneficiaries is the event that triggers application of Act § 401(b)(5)(A) with respect to the Accumulation Trust, and (ii) when the Employee designated an Accumulation Trust that divided at the Employee's death into separate subtrusts for separate individual Current Beneficiaries, the death of each subtrust's Current Beneficiary is the event that triggers application of Act § 401(b)(5)(A) with respect to that subtrust.

DETAILED COMMENTS:

A. DEFINITIONS

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

1. An “**Accumulation Trust**” is a trust named as beneficiary of a deceased Employee’s Plan that qualifies as a See Through Trust, all of the Countable Beneficiaries of which are individuals, but is not a Conduit Trust. That is, the trust does not require that all amounts distributed from the Plan be distributed from the trust upon receipt, leaving open the possibility that some amounts distributed from the Employee’s Plan may be accumulated in the trust for the ultimate benefit of different beneficiaries. Note that one example of such a trust is described in Reg. ²§ 1.401(a)(9)-5, A-7(c)(3), Example 1.
2. “**Applicable Distribution Period**” refers to the time period over which the Plan of an Employee or a deceased Employee must be distributed which, under pre-SECURE Act law, was based on the life expectancy tables prescribed in the regulations for different scenarios. Reg. § 1.401(a)(9)-5, A-4, A-5, and A-6.
3. An “**Applicable Multi-Beneficiary Trust**” and its abbreviation “**AMBT**” - refer to a trust meeting all of the requirements set out in Code³ § 401(a)(9)(H)(v), with respect to an Employee’s Plan.
4. The “**At Least As Rapidly Rule**” refers to a rule that arises in Code § 401(a)(9)(B)(i), and is further developed in Reg. § 1.401(a)(9)-5, A-5. Code § 401(a)(9)(B)(i) states the rule that if the Employee dies after distribution of the Employee’s interest has begun (generally on or after the Employee’s RBD), the remaining portion of the Employee’s interest is distributed “at least as rapidly” as under the method of distribution being used by the Employee as of the date of death. Reg. § 1.401(a)(9)-5, A-5 provides that if the Employee has a DB, in order to satisfy Code § 401(a)(9)(B)(i) the Applicable Distribution Period is the longer of (i) the remaining life expectancy of the Employee’s DB, and (ii) the remaining life expectancy of the Employee.
5. A “**Conduit Trust**” is a trust named as beneficiary of a deceased Employee’s Plan that qualifies as a See Through Trust, and provides that all amounts distributed from the deceased Employee’s Plan will, upon receipt by the trustee, be paid directly to a particular individual beneficiary for as long as that beneficiary is living, or otherwise falls within the rule of Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. This regulation provides that such individual beneficiary is the DB of the deceased Employee’s Plan, and all other beneficiaries of the trust are not counted for purposes of determining the Employee’s beneficiary with the shortest life expectancy and whether any beneficiary of the Employee is not an individual.
6. A “**Contingent Beneficiary**” is, with respect to a See Through Trust, a trust beneficiary who could become entitled or eligible to receive distributions from the trust that could be satisfied with an Employee’s interest in the Plan, other than a Current Beneficiary or a Successor Beneficiary. Note that a Contingent Beneficiary’s entitlement to an Employee’s benefit after the

² “Reg.” refers to Treasury Regulations.

³ “Code” refers to the Internal Revenue Code.

Employee's death is generally a contingent right. Note also that a Contingent Beneficiary of a See Through Trust other than a Conduit Trust is considered a beneficiary of the Employee for purposes of determining the Employee's beneficiary with the shortest life expectancy and whether any beneficiary of the Employee is not an individual. Reg. § 1.401(a)(9)-5, A-7(b).

7. **“Countable Beneficiaries”** refers to those trust beneficiaries of a See Through Trust who are either a Current Beneficiary or a Contingent Beneficiary and are thus considered a beneficiary of the Employee for purposes of determining the Employee's beneficiary with the shortest life expectancy and whether any beneficiary of the Employee is not an individual. Reg. § 1.401(a)(9)-4, A-5(a).

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

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

10. **“Designated Beneficiary”** and its abbreviation **“DB”** – refer to any individual designated as a beneficiary by the Employee. Code § 401(a)(9)(E)(i). An individual may be designated as a beneficiary under the Plan either by the terms of the Plan or, if the Plan so provides, by an affirmative election by the Employee (or the Employee's surviving spouse) specifying the beneficiary. Reg. § 1.401(a)(9)-4, A-1.

11. **“Effective Date”** – refers to the date after which the amendments contained in SECURE Act § 401(a) generally apply, which date is identified in SECURE Act § 401(b)(1) as December 31, 2019. For purposes of this memo, it can be assumed that any Plan discussed in this memo is subject to the general rule, and not the exceptions to the general rule provided in SECURE Act §§ 401(b)(2)-(4).

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

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

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

15. **“Life Expectancy Method for Spouse as Sole DB”** refers to the method for calculating RMDs after an Employee’s death using an Applicable Distribution Period consisting of the remaining life expectancy of the Employee’s surviving spouse who is sole DB, redetermined annually. See Reg. § 1.401(a)(9)-2, A-5(c)(2).
16. **“Plan”** – refers broadly to any retirement Plan, retirement Plan account, IRA, Roth IRA and any other retirement Plan or account subject to the rules of Code § 401(a)(9) and the regulations thereunder, as set forth in Reg. § 1.401(a)(9)-1, A-1 and to the Employee’s interest in such Plan, as the context indicates.
17. **“Required Beginning Date”** and its abbreviation **“RBD”** – refer to the date specified in Code § 401(a)(9)(C) for that Employee as the date the Employee must start taking Required Minimum Distributions.
18. **“Required Minimum Distribution”** and its abbreviation **“RMD”** – refer to the amount required to be distributed from a Plan in a given calendar year pursuant to the minimum distribution requirements of Code § 401(a)(9) and the regulations thereunder.
19. A **“See Through Trust”** is a trust named as the beneficiary of an Employee’s Plan meeting all of the requirements set out in Reg. § 1.401(a)(9)-4, A-5(b) so that the beneficiaries of the trust (and not the trust itself) are treated as having been designated as beneficiaries of the Employee under the Plan pursuant to Reg. § 1.401(a)(9)-4, A-5(a). Depending on the terms of the trust, a See Through Trust may be a Conduit Trust, an Accumulation Trust, or neither.
20. The terms **“Successor Beneficiary”** or **“Mere Potential Successor Beneficiary”** are synonymous – each refers to a beneficiary of a See Through Trust who, pursuant to Reg. § 1.401(a)(9)-5, A-7(c)(1), will not be considered a beneficiary of an Employee’s interest in the Plan (for purposes of determining who is the beneficiary with the shortest life expectancy or whether a person who is not an individual is a beneficiary) merely because the trust beneficiary could become the successor to the interest of one of the other trust beneficiaries after the death of that other beneficiary. For example, if the first beneficiary is entitled to receive all of the income of the trust, and the second beneficiary will receive the principal of the trust on the death of the first beneficiary, the second beneficiary is a Contingent Beneficiary and not a Successor Beneficiary.
21. **“5 Year Rule”** refers to the rule described in Code § 401(a)(9)(B)(ii) whereby the entire interest of a deceased Employee is to be distributed within 5 years after the death of such Employee. Reg. § 1.401(a)(9)-3, A-2 specifically provides that in order to satisfy this rule, the Employee’s entire interest must be distributed by the end of the calendar year that contains the fifth anniversary of the date of the Employee’s death.
22. **“10 Year Rule”** refers to the rule described in Code § 401(a)(9)(H)(i) whereby Code § 401(a)(9)(B)(ii) shall be applied by substituting “10 years” for “5 years.”

B. 10 YEAR RULE

1. Does the calendar year-end due date for all distributions under the 5 Year Rule extend to the operation of the 10 Year Rule or the other 10 year distribution periods?

Code § 401(a)(9)(B)(ii) provides that if an Employee dies before her RBD without a DB, the Employee's entire interest in the Plan must be distributed within 5 years after the Employee's death. This 5 Year Rule applies both before and after enactment of the Act. If an Employee dies after the Effective Date with a DB who is not an EDB, Code § 401(a)(9)(H)(i) provides that Code § 401(a)(9)(B)(ii) shall be applied by substituting "10 years" for "5 years," thus creating a new 10 Year Rule that applies to a DB who is not an EDB regardless of whether the Employee's post-Effective Date death is before or after her RBD.

Although Code § 401(a)(9)(B)(ii) requires distribution of the Employee's entire interest within 5 years after the Employee's death, Reg. § 1.401(a)(9)-3, A-2 provides that such complete distribution "within 5 years after the Employee's death" is satisfied if the entire interest is distributed no later than the end of the calendar year that contains the fifth anniversary of the Employee's death. Further, this regulation does not require any distributions to be taken before the end of such calendar year. Given the manner in which the new 10 Year Rule was created by substituting 10 years for 5 years in Code § 401(a)(9)(B)(ii), Congress appears to have intended that rules such as those in Reg. § 1.401(a)(9)-3, A-2 for the 5 Year Rule extend to the 10 Year Rule. However, guidance is needed to confirm that the 10 Year Rule operates the same as the 5 Year Rule in this regard.

ACTEC recommends that Treasury provide in its guidance that the new 10 Year Rule is satisfied by a complete distribution of the deceased Employee's entire interest in the Plan by the end of the calendar year that contains the tenth anniversary of the Employee's death, and that no distributions are required to be taken before the end of such calendar year. Thus, for example, if the 10 Year Rule applies to the DB of an Employee who dies on October 12, 2022, the 10 Year Rule is satisfied under Code § 401(a)(9)(B)(ii) even if the DB waits to receive any distributions until 2032 and then receives complete distribution of the Employee's entire interest in the Plan by December 31, 2032. There is indirect support for this position in The Report of the House Ways and Means Committee on H.R. 1994 (the precursor of Act § 401). Page 111 of this report states:

10-year rule after the death of a beneficiary

In the case of an Employee (or IRA owner) who dies before the effective date (as described below) for the plan (or IRA), if the designated beneficiary of the Employee (or IRA owner) dies on or after the effective date, the provision applies to any beneficiary of the designated beneficiary as though the designated beneficiary were an eligible beneficiary. Thus, the entire interest must be distributed by the end of the tenth calendar year after the death of the designated beneficiary.

The Act contains several additional provisions that require the distribution period to change from the Life Expectancy Method to a 10 year distribution period. Code § 401(a)(9)(H)(iii) provides that on the death of an EDB, the Life Expectancy Method applicable to the EDB does not apply to the EDB's succeeding beneficiary and the remainder of the interest in the Plan "shall be distributed within 10 years after the death of such eligible designated beneficiary." Code § 401(a)(9)(E)(iii) provides that when a minor child ceases to be an EDB upon reaching majority, the now adult child's interest in the Plan must be "distributed within 10 years after such date [the date the child reaches majority]." Finally, Act § 401(b)(5), the Effective Date provision, seems to require transition from the Life Expectancy Method used by the DB prior to death to 10 year distribution period when a DB of an Employee who died on or before the Effective Date dies after the Effective Date.⁴ Although the Act in that instance does not use the language "distributed within 10 years after" the death of such DB, this transition from the Life Expectancy Method to the 10 year distribution period is achieved by reference to the transition from the Life Expectancy Method to a "distribution within 10 years" applicable on the death of an EDB. Each of these additional provisions in the Act uses, directly or indirectly, the exact same language to describe the period intended by the new 10 year distribution period. That is, the interest in the Plan must be "distributed within 10 years after" the event that triggers the transition from the Life Expectancy Method to the new 10 year distribution period. What is required to satisfy "distribution within 10 years after" any such event should be the same in each of these instances.

Accordingly, ACTEC recommends that Treasury provide in its guidance that the 10 year distribution period after the death of an EDB, the 10 year distribution period after a minor child reaches majority and the 10 year distribution period on the death of a DB dying after the Effective Date may be satisfied so long as the entire interest in the Plan is distributed by 12/31 of the year containing the 10th anniversary of the triggering event, and that no distributions are required to be taken in any of the nine calendar years prior to that date.

2. How are RMDs handled in the year of the triggering event under rules that call for use of the 10 Year Rule or other 10 year distribution periods?

If the Employee has reached her RBD at the time of death, the Employee will have an RMD for the distribution calendar year containing her death determined based on the account balance as of the last valuation date in the calendar year immediately preceding the calendar distribution year in which the Employee dies⁵. Under pre-Act rules as set out in Reg. § 1.401(a)(9)-5, A-4(a), the portion of the Employee's RMD that the Employee had not taken prior to death must still be distributed to the beneficiary(ies) entitled to the Plan interest, and the beneficiary(ies) RMDs commence in the calendar year immediately following the distribution calendar year containing the date of the Employee's death. Under Act § 401, when an Employee dies after the Effective Date, the Employee's DB must generally use the 10 Year Rule to calculate RMDs.⁶

Guidance is needed to clarify the RMD requirements that arise in the calendar year of the Employee's death when the 10 Year Rule applies for the DB who is not an EDB. Is the DB still

⁴ Whether this is the correct interpretation of the Effective Date provision contained in Act § 401(b)(5) is discussed in more detail in item #3 below.

⁵ Reg. § 1.401(a)(9)-5, A-3(a) and A-5(a)

⁶ Code § 401(a)(9)(H)(i).

required to take any portion of the Employee's RMD not yet taken by the Employee as of the date of death, with the 10 Year Rule commencing in the calendar year immediately following the calendar year of the Employee's death? Or does the 10 Year Rule commence in the calendar year of the Employee's death so that no distribution is required even if the Employee who dies after his RBD had not yet taken his RMD? There is no corollary here to the 5 Year Rule, as the 5 Year Rule is only applicable if the Employee dies prior to reaching his RBD. Nevertheless, there does not appear to be any policy reason for changing the rules found in Reg.

§§ 1.401(a)(9)-5, A-4(a) and A-5(a), that the DB would take the undistributed portion of the Employee's RMD in the distribution calendar year of the Employee's death, and that the 10 Year Rule would commence in the calendar year immediately following the calendar year of the Employee's death. This rule is simple and consistent with prior practice. ACTEC recommends that Treasury's guidance adopt this rule.

A DB who is an EDB may use the Life Expectancy Method while living.⁷ Confirmation is needed that: (i) the rules found in Reg. §§ 1.401(a)(9)-5, A-4(a) and A-5(a) continue to apply to an EDB, (ii) the EDB would take the undistributed portion of the Employee's RMD in the distribution year of the Employee's death, and (iii) the EDB's RMDs using the Life Expectancy Method would commence in the calendar year immediately following the distribution calendar year containing the date of the Employee's death.

Code § 401(a)(9)(H)(iii) provides that if the EDB dies before the Employee's interest in the Plan is fully distributed, the exception for EDBs "shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary." First, ACTEC recommends that Treasury clarify the meaning of "any beneficiary of such eligible designated beneficiary." As used in this section, "any beneficiary" could apply to all those succeeding to the balance of the Employee's interest in the Plan at the EDB's death whether or not specifically named by the EDB. ACTEC recommends that Treasury confirm that this section refers to anyone who receives the balance of the Employee's interest in the Plan at the EDB's death regardless of whether the successor beneficiary is named by the EDB.

In addition to the transition from the EDB's life expectancy to a 10 year distribution period, Code § 401(a)(9)(E)(iii) provides a special rule for children, providing that a child of the Employee who is a minor at the Employee's death "shall cease to be an eligible designated beneficiary as of the date the individual reaches majority and any remainder of the portion of the individual's interest . . . shall be distributed within 10 years after such date." Finally, while not clear in Act § 401(b)(5), the Effective Date provision seems to direct that the Life Expectancy Method used by a DB of an Employee who died before the Effective Date convert to the 10 year distribution period when the DB dies after the Effective Date.

Guidance is needed to clarify the RMD requirements that arise by reason of (i) the death of such DB dying after the Effective Date, (ii) the death of an EDB, or (iii) attainment of the age of majority by a minor child EDB, as illustrated by the following three examples:

⁷ Code § 401(a)(9)(H)(ii).

Example A: DB dying Post Effective Date. Alice is an Employee who died on February 26, 2017, with Betsy, an adult, as her sole DB. Betsy takes RMDs each calendar year beginning in 2018 determined under the Life Expectancy Method. When Betsy dies on January 25, 2025, she has taken only a very small portion of her RMD for 2025. Are the successors to Betsy's interest required to take the remaining portion of Betsy's RMD under the Life Expectancy Method used by Betsy in 2025, the calendar year of her death?

Example B: Disabled EDB. Clare is an Employee who dies on March 1, 2022, with Dave, an adult, as her sole DB. Dave is an EDB because he was disabled at the time of Clare death. Dave takes RMDs determined under the Life Expectancy Method each calendar year from 2023 through 2026. Dave dies on October 15, 2027, without having taken any 2027 distributions. Are the successors to Dave's interest required to take an RMD under the Life Expectancy Method used by Dave in 2027 (i.e. the calendar year of Dave's death)?

Example C: Minor Child EDB. Emily is an Employee who designates her minor child, Francine, as her sole DB. Emily dies on March 1, 2022, while Francine is still a minor. Francine is an EDB at the time of Emily's death. RMDs are distributed for Francine under the Life Expectancy Method each calendar year from 2023 through 2028. Francine reaches majority on February 1, 2029, without yet having taken any 2029 distributions. Is Francine required to take an RMD under the Life Expectancy Method in 2029 (i.e. the year she reaches majority)?

None of Act § 401(b)(5), Code § 401(a)(9)(H)(iii), or Code § 401(a)(9)(E)(iii) provides guidance as to whether an RMD is required under the DB's Life Expectancy Method in the year the DB dies after the Effective Date, under the EDB's Life Expectancy Method in the year the EDB dies, or under the minor child's Life Expectancy Method in the year the child reaches majority, as the case may be. ACTEC recommends that Treasury clarify whether or not an RMD is required in the year the event occurs that requires transition from the Life Expectancy Method to a 10 year distribution period under the Act effective date provision or these two Code sections.

ACTEC also recommends that Treasury clarify that the 10 year distribution period starts the year following the year in which the event occurs triggering the transition to the 10 Year Rule and that a RMD needs to be taken in the year of such event determined under the Life Expectancy Method then used for such distribution calendar year. Conversely, if Treasury clarifies that the 10 year distribution period that arises under these two Code Sections and the Act's Effective Date provision ends on the tenth anniversary of such death or attainment of majority, ACTEC recommends that Treasury also clarify that this means the 10 year distribution period starts immediately on such date, and that there would be no requirement to take a RMD determined under the Life Expectancy Method used in the calendar year prior to such event.

If Treasury determines that a deceased EDB's or DB's remaining RMD in the year of death must still be taken by the successor beneficiaries, ACTEC recommends that Treasury permit the successor beneficiaries a reasonable period after the date of death for notification, administration, and transition of ownership, since it may be difficult or impossible for a successor beneficiary to comply with a year-end deadline if the death has occurred late in the year. For example, Treasury could permit the successor beneficiary to an EDB to take any RMD not taken by the EDB in the year of death by the later of (i) December 31 of the year of death or (ii) 6 months after the EDB's death.

In conclusion, each of these three examples under which the Life Expectancy Method transitions to a 10 year distribution period presents the same issue faced by the DB of the Employee who dies after the Effective Date after reaching her RBD. ACTEC recommends that the rules applicable on the death of such Employee who had reached her RBD should likewise apply in each of these three cases. Accordingly, ACTEC requests that Treasury clarify that the remaining portion of the RMD in the year of such death or reaching majority must be taken during that calendar year, and the transition to the 10 year distribution period commences the calendar year following the calendar year of the event that triggered application of the 10 Year Rule.

3. Does the “At Least As Rapidly Rule” still apply if the Employee dies with a DB after the Employee’s RBD, and if so, can the DB elect to use the 10 Year Rule in lieu of the Deceased Employee’s Remaining Life Expectancy?

Code § 401(a)(9)(H)(i) added by Act § 401(a)(1) creates the 10 Year Rule for distributions to a DB after the post-Effective Date death of the Employee whether or not the Employee reached her Required Beginning Date. However, the Act did not modify the distribution rules contained in Code § 401(a)(9)(B)(i), which as developed by Reg. § 1.401(a)(9)-5, A-5(a)(1), is known as the At Least As Rapidly Rule. There appears to be a conflict between these two Code sections. ACTEC recommends that Treasury clarify whether the At Least As Rapidly Rule arising in Code § 401(a)(9)(B)(i) still applies if an Employee dies after the Effective Date on or after her RBD, with a DB who is not an EDB.

Under the At Least As Rapidly Rule set out in Reg. § 1.401(a)(9)-5, A-5(a)(1) if an Employee dies on or after her RBD with a beneficiary who is a DB, the DB is entitled to receive distributions from the Plan using the longer of (i) the Life Expectancy Method and (ii) the Deceased Employee’s Remaining Life Expectancy Method. In contrast, Reg. § 1.401(a)(9)-5, A-5(a)(2) provides that if such Employee has a beneficiary who is not a DB, the non-DB must use the Deceased Employee’s Remaining Life Expectancy Method. Thus, under these pre-Act rules, a DB would have had at least as long as a non-DB, and perhaps longer, to take full distribution of the Plan interest.

Code § 401(a)(9)(H)(i) expressly states that the 10 Year Rule does not apply to a beneficiary who is not a DB, so a non-DB must use the Deceased Employee’s Remaining Life Expectancy Method regardless of whether the Employee who has reached her RBD dies on, before, or after the Effective Date. However, if the At Least As Rapidly Rule no longer applies to the DB of an Employee who dies after the Effective Date and on or after her RBD even though the Act made no change in Code § 401(a)(9)(B)(i), the DB would be required to use the 10 Year Rule under Code § 401(a)(9)(H)(i) and would not be allowed to use the Deceased Employee’s Remaining Life Expectancy Method if it is longer, as previously provided in Reg. § 1.401(a)(9)-5, A-5(a)(1). As a result, the DB may in some instances be allowed less time to take full distribution of the Employee’s interest in the Plan than the non-DB.

For example, Georgina dies on July 1, 2022, at age 75, with her 50 year old daughter, Hanna, who is neither disabled nor chronically ill, as her DB. If the At Least As Rapidly Rule is no longer viable, Hanna is subject to the 10 Year Rule and may not use the Deceased Employee’s

Remaining Life Expectancy Method that would otherwise permit distribution over 12.4 years⁸. On the other hand, if Georgina instead named a non-DB as her beneficiary (such as her estate or a trust that is not an Accumulation Trust or a Conduit Trust), the Deceased Employee's Remaining Life Expectancy applies and the non-DB has 12.4 years instead of 10 years to take full distribution of Georgina's interest in her Plan.

One way to harmonize these two seemingly inconsistent sections of the Code would be to revise the rule of Reg. § 1.401(a)(9)-5, A-5(a)(1) as it applies to a DB who is not an EDB by substituting the new 10 Year Rule for the DB's Life Expectancy Method with respect to Employees dying after the Effective Date and on or after the Employee's RBD. This would create an updated version of the At Least As Rapidly Rule for DBs who are not EDBs. The existing At Least as Rapidly Rule should remain for EDBs. This revision is consistent with Code § 401(a)(9)(H), which also replaces the Life Expectancy Method for a DB who is not an EDB with the 10 Year Rule. Under this alternative, the longer of the 10 Year Rule or the Deceased Employee's Remaining Life Expectancy would apply to a DB of the Employee who dies after the Effective Date and on or after her RBD, and the longer of the EDB's life expectancy or the Deceased Employee's Remaining Life Expectancy would apply to an EDB of an Employee who dies after the Effective Date and on or after her RBD. This revision eliminates the anomaly that arises if the 10 Year Rule applies to the DB and not to the non-DB, leaving the DB with a shorter distribution period than the non-DB, and continues the existing At Least As Rapidly Rule for EDBs.

If Treasury determines that the best way to harmonize Code § 401(a)(9)(B)(i) with Code § 401(a)(9)(H)(i) is to make the revision described in the previous paragraph, an additional point requires consideration. The time period allowed using the Deceased Employee's Remaining Life Expectancy Method cannot exceed 14.5 years and could be less than 10 years, depending on the Employee's age in the year of the Employee's death.⁹ There may be some circumstances in which a DB would prefer to use the 10 Year Rule since the DB would retain more flexibility as to the exact amount of distributions in any given year of the distribution period.

ACTEC recommends that Treasury consider whether to allow a DB of such an Employee to elect between either the Deceased Employee's Remaining Life Expectancy Method and the 10 Year Rule. For example, if Georgina's daughter Hanna, for non-tax reasons, determines that it would be in her best interest not to take any distributions for several years, and if she is allowed to elect to use the 10 Year Rule rather than Georgina's Deceased Employee's Remaining Life Expectancy of 12.4 years, she could defer taking any distributions from Georgina's Plan until 2032, the year containing the 10th anniversary of Georgina's death (assuming that the calendar year end operation of the 5 Year Rule extends to the 10 Year Rule).

⁸ The single life expectancy for a 75 year old is 13.4 years (from the Single Life Expectancy Table in Reg. § 1.401(a)(9)-9, A-1, and then is reduced by 1 for the 1 year that elapses between the year of death and the first post-death distribution year, per Reg. § 1.401(a)(9)-5, A-5(c)(3).

⁹ The single life expectancy for a 72 year old is 15.5 years (from the Single Life Expectancy Table in Reg. § 1.401(a)(9)-9, A-1, reduced by 1 for the 1 year that elapses between the year of death and the first post-death distribution year, per Reg. § 1.401(a)(9)-5, A-5(c)(3).

There is precedent for this type of election in another context. Reg. § 1.401(a)(9)-3, A-4(c) provides that if an Employee dies before her RBD, and the Employee has named a DB to receive the balance of the account, the DB may elect to receive the RMDs over the 5 year period or over the DB's remaining life expectancy.

In conclusion, ACTEC recommends that Treasury harmonize Code § 401(a)(9)(B)(i) with Code § 401(a)(9)(H)(i) in the case of an Employee dying with a DB after the Effective Date and on or after her RBD by revising the rule of Reg. § 1.401(a)(9)-5, A-5(a)(1) to substitute the 10 Year Rule for the DB's Life Expectancy Method, permitting the DB to use the longer of the 10 Year Rule or the Deceased Employee's Remaining Life Expectancy Method, while preserving the existing At Least As Rapidly Rule for EDBs. ACTEC recommends that Treasury also clarify whether or not the DB may elect between either of these methods, and if so, the manner and deadline for making such an election.

C. EFFECTIVE DATE PROVISIONS

4. How does Act § 401(b)(5)(A) impact those succeeding to an Employee's Plan interest when the Employee dies on or before the Effective Date and the Employee's DB dies after the Effective Date?

Act § 401 amended Code § 401(a)(9) to change the way RMDs are determined for an Employee's DB when the Employee dies after the Effective Date. Under Act § 401(b)(5), these amendments also change the way RMDs are determined for those who succeed to a DB's interest when the Employee died on or before the Effective Date and the Employee's DB dies after the Effective Date. Act § 401(b)(5) provides that, if an Employee dies on or before the Effective Date and the Employee's DB dies after such date, then

- (i) the Act § 401 amendments apply to "any beneficiary of such designated beneficiary"¹⁰, and
- (ii) "the designated beneficiary shall be treated as an eligible designated beneficiary for purposes of applying [Code] section 401(a)(9)(H)(ii) . . ."¹¹

First, ACTEC recommends that Treasury clarify the meaning of the phrase "such amendments shall apply to any beneficiary of such designated beneficiary" contained in Act § 401(b)(5)(A)(i). Do such amendments apply only to those beneficiaries specifically named by the DB to take the balance of the Employee's interest at the DB's death? Or do such amendments apply to all those succeeding to the balance of the Employee's interest at the DB's death, whether or not specifically named by the DB? ACTEC recommends that Treasury confirm that Act § 401(b)(5)(A)(i) refers to anyone who received the balance of the Employee's interest in the Plan at the DB's death, regardless of whether the successor beneficiary was named by the DB.

¹⁰ Act § 401(b)(5)(A)(i).

¹¹ Act § 401(b)(5)(A)(ii).

Second, ACTEC recommends that Treasury clarify the meaning of Act § 401(b)(5)(A)(ii), which provides that upon the DB's death, the DB "shall be treated as an eligible designated beneficiary for purposes of applying [Code] section 401(a)(9)(H)(ii)...." The reference to Code § 401(a)(9)(H)(ii) is confusing, and could lead to more than one interpretation. This particular Code section provides an exception to the general rule that applies the 10 Year Rule to the DB of an Employee who dies after the Effective Date. Under this exception, a DB who is an EDB would use the Life Expectancy Method described in Code § 401(a)(9)(B)(iii). It is Code § 401(a)(9)(H)(iii), however, that provides for transition from the Life Expectancy Method being used by the EDB when the EDB dies to the 10 year distribution period; per Code § 401(a)(9)(B)(iii) this life expectancy distribution exception is no longer available.

For example, Ian is an Employee who died on or before the Effective Date. His healthy, adult son Jeremy is his sole beneficiary and Jeremy dies in 2022, after the Effective Date. Does the reference to Code § 401(a)(9)(H)(ii) in Act § 401(b)(5)(A)(ii) mean that the beneficiary who succeeds to the balance of Ian's interest in the Plan on Jeremy's death is treated as an EDB and is allowed to use the Life Expectancy Method under the EDB exception provided in Code § 401(a)(9)(H)(ii)? This would lead to an inconsistent result, given the different result under Code § 401(a)(9)(H)(iii) if Ian dies after the Effective Date and Jeremy had actually been an EDB. Or does the reference mean that Jeremy is treated as if he had been an EDB under the Act, and that upon his death the balance of Ian's interest in the Plan must be distributed within 10 years of Jeremy's death under Code § 401(a)(9)(H)(iii)? If that is what Congress intended, Congress could have referred to Code § 401(a)(9)(H)(iii) instead of Code § 401(a)(9)(H)(ii) in Act § 401(b)(5)(A)(ii).

The Report of the House Ways and Means Committee on H.R. 1994 (the precursor of Act § 401) is instructive. This Report was issued before the finalization and enactment of this legislation, but Act § 401(b)(5)(A) as it existed in H.R. 1994 in May 2019 remained intact as part of the legislation that was ultimately enacted. Page 111 of this report states:

10-year rule after the death of a beneficiary

In the case of an Employee (or IRA owner) who dies before the effective date (as described below) for the plan (or IRA), if the designated beneficiary of the Employee (or IRA owner) dies on or after the effective date, the provision applies to any beneficiary of the designated beneficiary as though the designated beneficiary were an eligible beneficiary. Thus, the entire interest must be distributed by the end of the tenth calendar year after the death of the designated beneficiary. For this purpose, the effective date is the date of death of the Employee (or IRA owner) used to determine when the provision applies to the plan (or IRA), for example, before January 1, 2020, under the general effective date.

Given this clear expression of Congressional intent, ACTEC recommends that Treasury clarify whether the noted cross-reference to Code § 401(a)(9)(H)(ii) in Act § 401(b)(5)(A)(ii) should instead be a cross-reference to Code § 401(a)(9)(H)(iii). If Treasury concludes that the cross-reference should refer to Code § 401(a)(9)(H)(iii), ACTEC recommends that Treasury provide interim guidance explaining how Act § 401(b)(5)(A)(ii) should be interpreted until such time as

Congress enacts a technical correction to refer to the correct Code section. Consistent with the Report of the House Ways and Means Committee on H.R. 1994, ACTEC recommends that this interim guidance provide that Congress intended to provide that when an Employee died on or before the Effective Date, on the death of such Employee's DB who dies after such date, the Life Expectancy Method ceases and the remainder of the Employee's interest must be distributed by the end of the tenth calendar year after the DB's death under the rule of Code § 401(a)(9)(H)(iii).

Alternatively, if Treasury concludes that the existing language of Act § 401(b)(5)(A)(ii) is a correct cross reference, it should so state and explain how this section of the Act is to be implemented to carry out Congressional intent. Given the language from the Report of the House Ways and Means Committee quoted above, ACTEC recommends that Treasury provide that this section be implemented by providing that if an Employee died on or before the Effective Date and a DB of the Employee dies after such date, the DB is treated as if the DB had been an EDB using the Life Expectancy Method exception provided for EDB's in Code § 401(a)(9)(H)(ii), and that on the death of the DB deemed to be an EDB, such Life Expectancy Method ceases and the remainder of the Employee's interest must be distributed by the end of the tenth calendar year after the DB's death under the rule of Code § 401(a)(9)(H)(iii).

Either way, as recommended under Issue #1 discussed above with respect to the 10 Year Rule, ACTEC also recommends that Treasury provide in its guidance that the deadline for completing the distribution of the remainder of Employee's interest is the end of the calendar year containing the tenth anniversary of the DB's death. This is consistent with ACTEC's recommendation under Issue #1 above with respect to the 10 Year Rule.

5. How does Act § 401(b)(5)(A) impact those succeeding to an Employee's Plan interest when the Employee dies on or before the Effective Date and the Employee's DB dies after the Effective Date, and the DB had been receiving distributions over the Deceased Employee's Remaining Life Expectancy under the At Least As Rapidly Rule?

Continuing with the Effective Date rule in Act § 401(b)(5)(A), ACTEC also recommends that Treasury provide guidance on how this rule works when an Employee died on or before the Effective Date with an older DB subject to the At Least As Rapidly Rule found in Code § 401(a)(9)(B)(i). Reg. §1.401(a)(9)-5, A-5(a)(1) provides that the DB's Applicable Distribution Period is "the longer of" the DB's life expectancy or the Employee's life expectancy, which satisfies the At Least As Rapidly Rule found in Code § 401(a)(9)(B)(i). Thus, if the DB had a shorter remaining life expectancy than the Employee at the time of the Employee's death, Reg. §1.401(a)(9)-5, A-5(a)(1) would have the DB use the Deceased Employee's Remaining Life Expectancy because it was longer than the DB's life expectancy. The Deceased Employee's Remaining Life Expectancy happens to be the same method for determining RMDs that would apply for a non-DB under otherwise similar circumstances.

ACTEC recommends Treasury clarify how Act § 401(b)(5)(A) applies when a DB using the Deceased Employee's Remaining Life Expectancy dies after the Effective Date. Act § 401(b)(5)(A) could be read to apply because its application is conditioned on the death of an Employee on or before the Effective Date and the death of Employee's DB after the Effective Date. If the Employee was older at the time of death, a switch to a 10 year period may provide a longer deferral period and greater flexibility than continuing with the Deceased Employee's

Remaining Life Expectancy. Alternatively, for some DBs, a switch to a 10 year period may shorten the deferral period for the successor beneficiary, and it seems unfair for the successors of a DB to receive a less favorable outcome than would be available in otherwise identical circumstances for the successors of a non-DB.

ACTEC recommends that Treasury clarify the application of Act § 401(b)(5)(A) on the death of an Employee on or before the Effective Date and the death of the Employee's DB after the Effective Date when the now deceased DB's RMDs had been determined using the Deceased Employee's Remaining Life Expectancy under the At Least As Rapidly Rule. Treasury could state expressly whether the beneficiary succeeding to the interest of the DB in that instance (i) would continue to use the Deceased Employee's Remaining Life Expectancy, (ii) would be required to transition to the 10 Year Rule, (iii) would be able to use the longer of the 10 Year Rule or the Deceased Employee's Remaining Life Expectancy under the At Least As Rapidly Rule as set out in Reg. § 1.401(a)(9)-5, A-5(a)(1), or (iv) could elect between continuing the Deceased Employee's Remaining Life Expectancy or switching to the 10 Year Rule.

As recommended under Issue #1 discussed above with respect to the 10 Year Rule, ACTEC also recommends that Treasury provide in its guidance that the deadline for completing the distribution of the remainder of the Employee's interest is the end of the calendar year containing the tenth anniversary of the DB's death.

6. Does Act § 401(b)(5)(A) apply at the death of a succeeding beneficiary if both the Employee and the Employee's Designated Beneficiary die on or before the Effective Date, and if so, do deaths of further succeeding beneficiaries restart the 10 Year Period?

In providing guidance on the application of the Effective Date, ACTEC recommends that Treasury provide guidance as to whether Act § 401(b)(5)(A) applies when the Employee and then the Employee's DB both died on or before the Effective Date and a beneficiary who succeeded to the Employee's interest dies after the Effective Date. Under the rules applicable before the Effective Date, once the DB determined the Applicable Distribution Period using the Life Expectancy Method at the time of the death of the Employee, that distribution period will continue until the Employee's interest in the Plan is entirely distributed. Thus, the beneficiary, who received the interest in the Employee's plan on the death of the DB prior to the Effective Date, would still be using the DB's life expectancy subtracting one each succeeding year for determining RMDs when such succeeding beneficiary dies after the Effective Date.

Such a situation could occur, for example, if Ken, the Employee, died in 2017 and his daughter Lola (age 66), Ken's DB, began taking distributions over her life expectancy of 20.2 years¹² in 2018. Lola then died in 2019 when her remaining life expectancy was 19.2 years. Lola's Successor Beneficiary, her older brother Mark, continued taking distributions over Lola's life expectancy, but Mark dies in 2021 when Lola's remaining life expectancy is 17.2 years, leaving the inherited IRA to his son Noah. Mark was simply a Successor Beneficiary and not a DB. Does Noah continue to receive distributions over Lola's remaining life expectancy, or does a 10

¹² Taken from the Single Life Expectancy Table in Reg. § 1.401(a)(9)-9, A-1, using Francine's attained age in the calendar year following the year of Eric's death.

year period apply under Act § 401(b)(5)(A)? And if the 10 Year Rule applies under Act § 401(b)(5)(A), what happens when Noah dies suddenly in 2022 - would there be a restart of a new 10 year period?

ACTEC believes that Act § 401(b)(5)(A) expressly applies the amendments made by Act § 401 on the death of the DB, and does not appear to require application of the amendments made by Act § 401 on the death after the Effective Date of any beneficiary who is not the DB. However, if Treasury concludes that Act § 401(b)(5)(A) applies the amendments made in Act § 401 to all beneficiaries and not just DBs who die after the Effective Date, Treasury should then provide guidance on whether or not, once there is an initial transition to a 10 year period, the later death of a Successor Beneficiary restarts the 10 year period.

7. If the Employee dies on or before the Effective Date leaving the Employee’s interest in the Plan to a Conduit Trust or Accumulation Trust, what event triggers application of the 10 Year Rule under Act § 401(b)(5)(A)?

As discussed above, Act § 401(b)(5)(A) provides that if an Employee died on or before the Effective Date, then the amendments made by Act § 401 apply on the death of the Employee’s DB who dies after the Effective Date. If the Employee had named a Conduit Trust or Accumulation Trust as the beneficiary of her interest in the Plan, what post-Effective Date event with respect to such trust will trigger Act § 401(b)(5)(A) and cause the amendments made by Act § 401 to apply?

Only individuals and not estates or trusts may be DBs.¹³ If an Employee names a trust as beneficiary of her interest in the Plan that qualifies as a See Through Trust, “the beneficiaries of the trust who are beneficiaries with respect to the trust’s interest in the employee’s plan (and not the trust itself) are treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9).”¹⁴

According to Act § 401(b)(5)(A), the Act § 401 amendments apply “. . . to such employee’s designated beneficiary who dies after [the Effective Date] . . .” If a Conduit Trust or Accumulation Trust was named by the Employee as the beneficiary of her interest in the Plan, is the reference to “designated beneficiary” in Act § 401(b)(5)(A) to the Conduit Trust or Accumulation Trust, or to the Countable Beneficiaries who are treated as the Employee’s DBs? ACTEC requests that Treasury provide guidance as to whether the rule set out in Reg. § 1.401(a)(9)-4, A-5(a) also applies for purposes of applying Act § 401(b)(5)(A) if the Employee dies on or before the Effective Date after naming a See Through Trust that is a Conduit Trust or Accumulation Trust as the beneficiary of the Employee’s interest in the Plan. Reg. § 1.401(a)(9)-4, A-5(a) does not state that the beneficiaries of the trust *are* designated beneficiaries. It simply states that the beneficiaries of the trust “will be treated as having been designated as beneficiaries of the Employee for purposes of determining the distribution period under section 401(a)(9).” Nevertheless, ACTEC recommends that the conclusion in Reg. § 401(a)(9)-4, A-5(a) should be equally applicable in applying Act § 401(b)(5)(A). For this reason, ACTEC recommends that Treasury clarify that the reference to “designated beneficiary”

¹³ Reg. §§ 1.401(a)(9)-4, A-2 and A-3.

¹⁴ Reg. § 1.401(a)(9)-4, A-5(a).

in Act § 401(b)(5)(A) refers to the one or more DBs who are beneficiaries of the Conduit Trust or Accumulation Trust and not to the trust itself.

If the See Through Trust is a Conduit Trust, the Current Beneficiary is treated as the Employee's sole DB, and his or her life expectancy is used as the Applicable Distribution Period.¹⁵ (If the sole DB is the deceased Employee's spouse, his or her life expectancy may be recalculated each year through the year of the spouse DB's death.¹⁶) ACTEC recommends that Treasury confirm that it is the death of the Current Beneficiary of the Conduit Trust, who served as the measuring life for purposes of determining the RMDs for the trust, that would be the triggering event under Act §401(b)(5)(A) to cause the amendments made by Act § 401 to apply.

If the See Through Trust is an Accumulation Trust, the Successor Beneficiaries are not counted, but all of the Current Beneficiaries and Contingent Beneficiaries are counted and treated as the Employee's DBs.¹⁷ Since the Accumulation Trust is treated as having more than one DB, the DB with the shortest life expectancy is the DB whose life expectancy is used for purposes of determining the Applicable Distribution Period.¹⁸ If the Accumulation Trust divides at the Employee's death into separate subtrusts for each of the Current Beneficiaries, the Countable Beneficiaries of each separate subtrust is treated as the Employee's DBs,¹⁹ and the DB with the shortest life expectancy is the measuring life for purposes of determining the Applicable Distribution Period for all of the subtrusts' interests in the Employee's Plan.²⁰

There is much to consider in developing guidance when an Accumulation Trust has been named beneficiary by an Employee who died prior to the Effective Date. The beneficiaries, duration, and other terms of Accumulation Trusts can vary widely. Because all Countable Beneficiaries of an Accumulation Trust are treated as the Employee's DBs, and the Employee's DB with the shortest life expectancy is the DB for purposes of determining the Applicable Distribution Period, it is possible that a Contingent Beneficiary with a nominal interest in the Employee's Plan has the shortest life expectancy so as to be identified as the DB whose measuring life is used for purposes of determining the Applicable Distribution Period even though there are other, younger beneficiaries with more significant interests.

Although Treasury could provide several different rules to fit multiple types of Accumulation Trusts, ACTEC suggests that a simple rule for all Accumulation Trusts that is reasonable and easy to interpret is the best approach. Treasury need not be concerned that creative practitioners might try to draft trusts to exploit such a universal rule – the trusts that will become subject to Act § 401(b)(5)(A) have already been drafted, were irrevocable on the Employee's death, and are already in effect for Employees who have died prior to the Effective Date.

Here are some possible options for a universal rule that describes the event that involves the post-Effective Date death of a particular trust beneficiary and would trigger Act § 401(b)(5)(A)

¹⁵ Reg. § 1.401(a)(9)-4, A-5(a); Reg. § 1.401(a)(9)-4, A-5(c)(1) and A-7(c)(3), Example 2.

¹⁶ Reg. § 401(a)(9)-5, A-5(c)(2) and A-7(3), Example 2.

¹⁷ Reg. § 1.401(a)(9)-4, A-5(c); Reg. § 1.401(a)(9)-5, A-7(c)(1) and (3), Example 1.

¹⁸ Reg. § 1.401(a)(9)-5, A-7(a)(1).

¹⁹ Reg. § 1.401(a)(9)-4, A-5(d).

²⁰ Reg. § 1.401(a)(9)-5, A-7(a)(1). The separate account rule set out in Reg. § 1.401(a)(9)-8, A-2(a)(2) does not apply to a division of the Accumulation Trust into separate subtrusts.

when an Accumulation Trust has been named:

1. Death of the oldest Countable Beneficiary (whose life expectancy is used as the Applicable Distribution Period).
2. Death of the first Countable Beneficiary to die.
3. Death of the last Countable Beneficiary to die.
4. Death of the Current Beneficiary, or if there is more than one Current Beneficiary:
 - a. Death of the oldest Current Beneficiary.
 - b. Death of the first Current Beneficiary to die.
 - c. Death of the last Current Beneficiary to die.
 - d. In the case of multiple subtrusts, the death of each subtrust's Current Beneficiary.

The following examples illustrate how these options for a universal rule might work in different fact patterns, and how certain rules may produce an unfair outcome in certain scenarios.

Example A: The Employee, Oscar, dies in 2018 naming an Accumulation Trust as the beneficiary of the interest in his Plan. The trust provides for distributions of income and principal in the discretion of the trustee for Oscar's son Paul, who is age 26 at Oscar's death. When Paul attains age 40, the trust will terminate and all assets, including the balance of Ian's interest in his Plan, will be assigned or distributed to Paul. If Paul dies prior to attaining age 40, the trust terminates and passes in equal shares to his uncle Quentin and aunt Rose. At Oscar's death, Quentin is age 55 and Rose is age 48. Paul, Quentin, and Rose are the Countable Beneficiaries. Since Quentin has the shortest life expectancy, he is the DB for purposes of determining the Applicable Distribution Period, which is 28.7 years.²¹

ACTEC's comments on how these options work in Example A are as follows:

1. Death of the oldest Countable Beneficiary, i.e. Quentin . If Quentin dies prematurely, this cuts Paul's distribution period short regardless of whether or not Paul has reached age 40 and the trust has terminated. Quentin needs to live at least 19 more years after Oscar's death to avoid a shortening of Paul's distribution period, since a 10 year period arises at Quentin's death under Act § 401(b)(5)(A).
2. Death of the first Countable Beneficiary to die. This increases the likelihood of shortening Paul's distribution period, since the death of any of three beneficiaries would trigger a 10 year period under Act § 401(b)(5)(A).

²¹ Taken from the Single Life Expectancy Table in Reg. § 1.401(a)(9)-9, A-1, using Quentin's attained age in the calendar year following the year of Oscar's death.

3. The death of the last Countable Beneficiary to die. This produces the lowest likelihood of shortening Paul's distribution period since the death of all three beneficiaries is necessary to trigger a 10 year period under Act § 401(b)(5)(A).

4. Death of the Current Beneficiary, i.e. Paul. Paul would not see a shortening of the distribution period during his lifetime. Even if Paul dies prematurely, the primary purpose of the trust has been carried out.

ACTEC is not aware of any specific indication from Congress as to how Act § 401(b)(5)(A) is to be applied to Accumulation Trusts. Based on the general language contained in The Report of the House Ways and Means Committee on H.R. 1994, ACTEC believes that Congress' purpose in enacting Act § 401(b)(5)(A) was to limit the pre-Act Life Expectancy Method so that it continues only for those primary beneficiaries already receiving distributions under that rule, and not for the successors of those primary beneficiaries. Of the different options discussed above, the Death of the Current Beneficiary option seems to most closely reflect such a purpose. The other options tend to make the likelihood of triggering Act § 401(b)(5)(A) too high or too low, and could cause the trigger at the wrong time. Thus, ACTEC considers the Death of the Current Beneficiary to be the most appropriate option in Example A.

Example B: Consider the situation in which the Employee, Susan, died in 2017 naming an Accumulation Trust as the beneficiary of her interest in her Plan. The trust is a "pot" trust that authorizes discretionary, sprinkling distributions to or for the benefit of her three children, Tom age 7, Una age 5, and Victor age 3. When the youngest living child attains 30 years of age, or such earlier time as only one of Susan's descendants is living, the trust will terminate. On termination all assets, including the balance of Susan's interest in the Plan, will be assigned to Susan's descendants by right of representation. Tom, Una, and Victor are the Countable Beneficiaries, and each is also a Current Beneficiary. Since Tom has the shortest life expectancy, he is the DB for purposes of determining the Applicable Distribution Period, which is 74.8 years.²²

ACTEC's comments on how these options work in Example B are as follows. In Example B, there are no Countable Beneficiaries other than the Current Beneficiaries. Of the different rules that could be based on Current Beneficiaries:

a. Death of the oldest Current Beneficiary. This rule may produce harsh consequences if the oldest Current Beneficiary dies an untimely death. For example, if Tom dies in 2022, when the remaining distribution period is 69.8 years, the switch to the 10 year period would deprive the other two young children of 59.8 years of that distribution period.

b. Death of the first Current Beneficiary to die. This rule also produces harsh consequences similar to those described in the preceding paragraph, but the likelihood of this happening is much higher since it would result from the untimely death of any of the three children.

²² Taken from the Single Life Expectancy Table using age 8, Tom's attained age in calendar year following the year of Susan's death.

- c. Death of the last Current Beneficiary to die. If one or more of Susan's children live to a normal life expectancy, this rule produces the fairest result.

As explained above in the discussion of Example A, ACTEC believes that Congress' purpose in enacting Act § 401(b)(5)(A) was to limit the pre-Act Life Expectancy Method so that it continues only for those primary beneficiaries already receiving distributions under that rule, and not for the successors of those primary beneficiaries. Of the different options discussed above, the Death of the last Current Beneficiary to die option seems to most closely reflect such a purpose. The second option would make the likelihood of triggering Act § 401(b)(5)(A) too high, and both the first and second options could cause the trigger at the wrong time. Thus, ACTEC recommends the Death of the last Current Beneficiary to die as the most appropriate option in Example B.

Example C: Consider the case in which the Employee, Walt, who died in 2017, named his revocable trust as the beneficiary of his IRA. The revocable trust was an Accumulation Trust and it provided that, on Walt's death, the trust divided into 3 separate subtrusts, one for each of his three children, Xavier age 45, Yolanda age 39, and Zelda age 35. None of Xavier, Yolanda or Zelda has any descendants. Promptly after Walt's death, the trustee divided the trust into the 3 subtrusts, and set up 3 separate inherited IRAs corresponding to each of the 3 subtrusts (FBO Xavier, FBO Yolanda, and FBO Zelda). Since Xavier was the oldest beneficiary of the revocable trust, he would have had the shortest life expectancy, and would have been the DB for purposes of setting the Applicable Distribution Period of 39.7 years,²³ which was used to determine the distribution period for all three of the separate inherited IRAs. Each subtrust provided that it will terminate on the death of the Current Beneficiary of that subtrust and be added to the remaining subtrusts. However, at the time when Walt has only one remaining descendant living, each subtrust's portion of Walt's interest in his Plan will be distributed to the last of Walt's living descendants.

ACTEC's comments on how these options work in Example C are as follows. In Example C, there are no Countable Beneficiaries other than the Current Beneficiaries of the separate subtrusts. Of the different rules that could be based on Current Beneficiaries:

- a. Death of the oldest Current Beneficiary. This rule may produce harsh consequences if the oldest Current Beneficiary dies an untimely death. For example, if Xavier dies in 2022, when the remaining distribution period is 35.7 years, the switch to the 10 year period would deprive the other children of 25.7 years of that distribution period for each of their separate subtrusts.
- b. Death of the first Current Beneficiary to die. This rule also produces harsh consequences similar to those described in the preceding paragraph, but the likelihood of this happening is much higher since it would result from the untimely death of any of the three children.

²³ Taken from the Single Life Expectancy Table using age 46, Xavier's attained age in calendar year following the year of Walt's death.

c. Death of the last Current Beneficiary to die. This produces the lowest likelihood of shortening the distribution period for any of the children since the death of all three children is necessary to trigger a 10 year period under Act § 401(b)(5)(A), but could lengthen the distribution period for those Current Beneficiaries who die first.

d. Death of each subtrust's Current Beneficiary. If the death of each Current Beneficiary of each separate subtrust was to trigger application of the 10 Year Rule under Act § 401(b)(5)(A) for that Current Beneficiary's separate subtrust, the distribution period for any one of them would not be cut short on the untimely death of any of the other Current Beneficiaries. On the other hand, if a subtrust's Current Beneficiary has died, the subtrust's primary purpose is accomplished and there is no hardship if any remaining distributions from the subtrust become subject to a 10 year period.

As explained above in the discussion of Example A, ACTEC believes that Congress' purpose in enacting Act § 401(b)(5)(A) was to limit the pre-Act Life Expectancy Method so that it continues only for those primary beneficiaries already receiving distributions under that rule, and not for the successors of those primary beneficiaries. Of the different options discussed above, the death of each subtrust's Current Beneficiary option seems most closely to reflect such a purpose. The second option would make the likelihood of triggering Act § 401(b)(5)(A) too high, and both the first and second options could cause the trigger at the wrong time. The third option may result in distributions extending longer than needed to provide for the primary beneficiaries. Thus, ACTEC considers the death of each subtrust's Current Beneficiary to be the most appropriate option in Example C.

ACTEC believes these three Examples are representative of the many different scenarios that are possible with Accumulation Trusts. Accordingly, ACTEC recommends that Treasury clarify that (i) when the Employee designated an Accumulation Trust that continued for more than one Current Beneficiary, the death of the last to die of the Current Beneficiaries is the event that triggers Act § 401(b)(5)(A) with respect to the Accumulation Trust, and (ii) when the Employee designated an Accumulation Trust that either was to be held for the benefit of a single Current Beneficiary, or was divided at the Employee's death into separate subtrusts for each several Current Beneficiaries, the death of each trust's or subtrust's Current Beneficiary is the event that triggers Act § 401(b)(5)(A) with respect to that subtrust. This will provide a simple, clear rule that is manageable, easy to administer, and will produce a reasonably fair result across a wide variety of Accumulation Trusts.