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March 31, 2020

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**RE: 2020 Guidance from Treasury Regarding Selected Provisions of the
SECURE Act**

Dear Ms. Weiser and Ms. Judson:

The American College of Trust and Estate Counsel (“ACTEC”) is pleased to submit this request for interim guidance from Treasury that ACTEC believes will be needed by taxpayers in 2020 to adequately address the changes the SECURE Act made in the law relating to distributions from inherited plan accounts and IRAs after the death of the plan participant or IRA owner.

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.

Although the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, H.R. 748) enacted March 27, 2020, has reduced the need for guidance in 2020 on SECURE Act changes, ACTEC has identified one issue that could require interim guidance in 2020. This issue has to do with how status as “disabled” or “chronically ill” is certified and documented for an individual beneficiary of a decedent’s plan account or IRA to enable that beneficiary to qualify as an eligible designated beneficiary entitled to take required minimum distributions over his/her life expectancy.

ACTEC recommends that any interim guidance and the long-term guidance on this issue provide that no such certification will be required before a reasonable amount of time has passed after issuance of long-term guidance on this issue so that no

disabled or chronically ill beneficiary is negatively impacted for failing to have the necessary certification or documentation in place before the issuance of long-term guidance, as explained below. This is especially important during the COVID-19 pandemic, when routine certifications might not be available.

For the reasons described below, ACTEC also recommends that either interim or long-term guidance provide that no certification will be required until a reasonable and specified amount of time has passed after the date of death of the employee who has designated the beneficiary, provided of course that the certification confirms that the beneficiary was in fact disabled or chronically ill as of the death of the employee.

How to Certify and Document Beneficiary's Status as "Disabled" or "Chronically Ill"

The determination of whether a designated beneficiary is an eligible designated beneficiary ("EDB") is to be made as of the date of death of the employee. Code § 401(a)(9)(E)(ii).¹ Thus, the determination of status as "disabled" or "chronically ill" is to be made as of the date of death of the employee.

First, it is clear that guidance is needed as to whether, when, and how a beneficiary's status as "disabled" or "chronically ill" is to be certified and documented:

- (1) Disability. An individual who is disabled as of the employee's death within the meaning of Code § 72(m)(7) qualifies as an EDB. Code § 401(a)(9)(E)(ii)(III). Neither this subsection nor Code § 72(m)(7) specifies whether, when, or how disabled status is to be documented or certified.
- (2) Chronically Ill. An individual who as of the employee's death is (i) chronically ill within the meaning of Code § 7702B(c)(2) and (ii) whose period of inability is certified to be an indefinite one that is reasonably expected to be lengthy in nature also qualifies as an EDB. Code § 401(a)(9)(E)(ii)(IV). Code § 7702B(c)(2) imposes its own certification requirement for purposes of Code § 7702B(c)(2) by requiring that, within the preceding 12-month period, a licensed health care practitioner has certified that such individual meets the requirements of Code § 7702B(c)(2). However, this certification rule was included in Code § 7702B(c)(2) for purposes that are entirely different from the use to which the rule might now serve under the Act. Further, any certification under Code § 7702B(c)(2) does not address the additional requirement under the Act that the individual's period of inability be certified to be an indefinite one that is reasonably expected to be lengthy in nature.

Second, the certification should not be required to be in place until a reasonable and specified amount of time has passed after the date of death. Even if the criteria for certification are self-evident, it will not be practical in many cases to have it in place prior to the death of the employee. It is unlikely that a disabled or chronically ill beneficiary would have available documentation of the disability or chronic illness on the date of death of the employee for a variety of reasons, including:

- (1) The beneficiary may not have existing certification of disability or chronic illness as of the date of death because the beneficiary does not qualify for government benefits, perhaps because the disabled beneficiary does not have a work record, or because the chronically ill beneficiary, like most chronically ill individuals, does not have long-term care insurance requiring certification under Code § 7702B(c)(2), or because more than 12 months have passed since such a certification was made.

¹ "Code" refers to the Internal Revenue Code of 1986, as amended.

- (2) Also, even if certification of the beneficiary's disability or chronic illness does exist, it may not be possible for the employee to obtain a copy of or information about the necessary certifications because the Health Insurance Portability and Accountability Act (HIPAA) may preclude the release of the information during the employee's lifetime.
- (3) Moreover, the certification may not have been pursued or obtained because the beneficiary did not know he/she was the beneficiary of the retirement account until after the death of the employee. Some employees prefer that the beneficiary being named not be told that they are being designated, perhaps because the beneficiary designation may be changed from time to time prior to death.

In fact, even if the necessary certifications are in place before the employee's death, they would not reflect any changes in status between that time and the date of death of the employee, and thus may not be reliable support that the condition was in effect as of employee's death.

Third, and most importantly, these questions as to whether, when, and how documentation and certifications to support disabled or chronically ill status are to be made will understandably be of serious concern to employees and their advisors in 2020. It is important that employees be able to rely on planning to dedicate plan or IRA death benefits for an intended disabled or chronically ill beneficiary to last over that individual's lifetime, because this best corresponds to the likely period of need for such beneficiary. This will only be possible if employees understand (i) whether, when, and how documentation and certification is to be required and (ii) pending long-term guidance on these questions, what parameters apply in the interim.

For the reasons stated above, ACTEC recommends that Treasury address these questions of whether, when, and how certification or guidance is to be put in place as part of its long-term guidance project, and not the interim guidance project, to allow appropriate time to evaluate these questions. In the meantime, ACTEC recommends that Treasury announce as part of the interim guidance project that certification will not be required to be in place until a reasonable amount of time has passed after long-term guidance on these questions has been issued, provided of course that any certification that is ultimately required will need to confirm that the beneficiary was in fact disabled or chronically ill as of the death of the employee.

ACTEC plans to provide more detailed comments on these questions as part of a separate submission to Treasury regarding the changes the SECURE Act made in the law relating to distributions from inherited plan accounts and IRAs after the death of the plan participant or IRA owner that require long-term guidance. ACTEC will explain in more detail in this upcoming submission why ACTEC recommends that the long-term guidance that is ultimately provided set forth a reasonable and specified time after death to obtain the necessary certification or documentation to support a beneficiary's status as disabled or chronically ill, provided of course that any certification that is ultimately required will need to confirm that the beneficiary was in fact disabled or chronically ill as of the death of the employee. This will be especially important in light of the COVID-19 pandemic.

If you or your staffs would like to discuss the contents of this letter with the ACTEC Fellows who drafted it, please contact Steven E. Trytten, at (626) 365-6000 or strytten@hcesq.com, or Kathleen R. Sherby, at (314) 259-2224 or krsherby@bclplaw.com, who head up the task force

of the ACTEC Employee Benefits in Estate Planning Committee, or Deborah McKinnon, ACTEC Executive Director, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,

A handwritten signature in cursive script that reads "Steve R. Akers".

Steve R. Akers, President