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November 27, 2017

Kevin Brady, Chair, House Ways and Means Committee
Richard Neal, Ranking Member, House Ways and Means Committee
Orrin Hatch, Chair of the Senate Finance Committee
Ron Wyden, Ranking Member of the Senate Finance Committee

Re: Comments on How Legislation Similar to the Retirement Enhancement and Savings Act of 2016 Would Implement a Five-Year Limit on Post-Death Retirement Distributions

Dear Representatives and Senators:

The American College of Trust and Estate Counsel (“ACTEC”) is pleased to submit the enclosed comments on what was proposed to be Section 501 of the Retirement Enhancement and Savings Act of 2016 (the proposed legislation, “RESA”). Section 501 would have limited post-death deferral of IRA and defined contribution retirement plan distributions to no more than five years, with certain exceptions. ACTEC submits these comments at this time because, even if RESA is not re-introduced, the provisions of Section 501 may serve as a starting point in addressing these issues in future tax legislation.

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.

If you or your staff would like to discuss ACTEC’s comments please contact (i) Beth Kaufman, Chair of ACTEC’s Washington Affairs Committee, at (202) 862-5062 or by email at bkaufman@capdale.com, or (ii) Steve Gorin, who led the task force drafting these comments, at (314) 552-6151 or by email at sgorin@thompsoncoburn.com.

Respectfully submitted,

Susan T. House, President

November 27, 2017

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Enclosure: Comments on How a Five-Year Limit on Post-Death Retirement Distributions Would Be Implemented in Legislation Similar to the Retirement Enhancement and Savings Act of 2016

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COMMENTS OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL
("ACTEC")

HOW A FIVE-YEAR LIMIT ON POST-DEATH RETIREMENT DISTRIBUTIONS WOULD
BE IMPLEMENTED IN LEGISLATION SIMILAR TO THE RETIREMENT
ENHANCEMENT AND SAVINGS ACT OF 2016

Background on Current Law. Current law generally allows distributions from an IRA¹ or a defined contribution retirement plan ("Plan") after the death of the IRA owner or Plan participant ("Owner") to be made gradually over the remaining life expectancy of the designated beneficiary, even if the designated beneficiary dies prematurely. (Note that these rules do not come into play when a surviving spouse is treated as the Owner and takes distributions under the rules for living Owners – often called a "spousal rollover.")

Summary of Changes if Section 501 of RESA is Enacted. If it is re-introduced and enacted, or if it is otherwise used as the model for legislation, Section 501 of the "Retirement Enhancement and Savings Act of 2016" ("RESA")² would amend Internal Revenue Code ("Code") Section 401(a)(9) to limit an Owner's ability to arrange deferral of IRA and Plan distributions over the remaining life expectancy of young designated beneficiaries. Here is a summary of how these amendments to Code Section 401(a)(9) would work:

- At an Owner's death, that portion of the aggregate balance of all of the Owner's IRAs and Plans in excess of \$450,000 would have to be distributed within five years of death.³ We refer to the excess portion as the "Excess Portion," to the amount as the "\$450k Amount," and to the non-excess portion as the "\$450k Portion." (An exception for certain "Eligible Designated Beneficiaries" is discussed below).
- Post-death distributions from the \$450k Portion would remain eligible to be deferred under current law rules, but distributions of the Excess Portion would not be taken into account in determining whether minimum distribution requirements for the \$450k Portion have been satisfied.⁴
- The \$450k Amount would be allocated among all of an Owner's IRAs and Plans in the manner provided in regulations to be issued by the Secretary.⁵

¹ The term "IRA" is used in these Comments to refer broadly to all types of IRAs and Roth IRAs governed by I.R.C. Sections 408 and 408A.

² The Retirement Enhancement and Savings Act of 2016, S. 3471, as reported out of the Senate Finance Committee on November 16, 2016.

³ I.R.C. Section 401(a)(9)(H)(i) if amended.

⁴ I.R.C. Section 401(a)(9)(H)(iii) if amended.

⁵ I.R.C. Section 401(a)(9)(H)(ii) if amended.

- If an Owner has multiple beneficiaries, the part of the aggregate Excess Portion that is payable to each beneficiary would be proportional to each beneficiary’s portion of the overall aggregate value of all of such Owner’s IRAs and Plans.⁶
- The five-year limitation that generally applies to the Excess Portion would not apply to portions for “Eligible Designated Beneficiaries,”⁷ defined to include:
 - The Owner’s surviving spouse,⁸
 - The Owner’s children who have not reached age of majority,⁹
 - Disabled individuals,¹⁰
 - Chronically ill individuals,¹¹ and
 - Individuals no more than ten years younger than the Owner.¹²
- The determination of whether an individual is an Eligible Designated Beneficiary is made at the time of the Owner’s death.¹³
- In the case of a minor child of the Owner, deferral of post-death distributions from the Excess Portion is allowed under current law until the child attains majority or dies, whichever occurs first, and then the five-year rule applies.¹⁴
- For all other Eligible Designated Beneficiaries, deferral of post-death distributions from the Excess Portion is allowed under current law for so long as the Eligible Designated Beneficiary is living, and at death the five-year rule applies, even if the IRA or Plan passes to others who might satisfy the definition of an Eligible Designated Beneficiary.¹⁵
- There is no provision to index the \$450k Amount for inflation.

⁶ I.R.C. Section 401(a)(9)(H)(iv) if amended.

⁷ I.R.C. Section 401(a)(9)(H)(v) if amended.

⁸ I.R.C. Section 401(a)(9)(E)(ii)(I) if amended.

⁹ I.R.C. Section 401(a)(9)(E)(ii)(II) if amended. “Majority” is defined with respect to I.R.C. Section 401(a)(9)(F). Treas. Regs. Section 1.401(a)(9)-6 Q&A-15 provides that a child may be treated as not having attained the age of majority if either (i) the child has not completed a specified course of education and is under the age of 26, or (ii) the child was disabled within the meaning of I.R.C. Section 72(m)(7) at the time the child reached the age of majority, for so long as the child continues to be disabled.

¹⁰ I.R.C. Section 401(a)(9)(E)(ii)(III) if amended. “Disabled” is defined as in I.R.C. Section 72(m)(7), which provides: “For purposes of this section, an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require.”

¹¹ I.R.C. Section 401(a)(9)(E)(ii)(IV) if amended. “Chronically ill” is based on I.R.C. Section 7702B(c)(2) and also requires a certification that meets certain requirements.

¹² I.R.C. Section 401(a)(9)(E)(ii)(V) if amended.

¹³ I.R.C. Section 401(a)(9)(E)(iv) if amended.

¹⁴ I.R.C. Sections 401(a)(9)(H)(v) and 401(a)(9)(E)(iii) if amended.

¹⁵ I.R.C. Sections 401(a)(9)(H)(v) if amended.

- These amendments to Section 401(a)(9) would not change current law with respect to spousal rollovers.

Overview of ACTEC's Comments. ACTEC is concerned that the way Section 501 of RESA would have implemented these proposed changes would create unnecessary difficulties in planning and administering IRAs and retirement plans if RESA is re-introduced, or if Section 501 serves as a starting point for future tax legislation.

The comments contained herein explain ACTEC's concerns, offer possible alternatives, and point out possible opportunities to simplify the rules. Here is a list of ACTEC's concerns:

1. Allocating the \$450k Amount among all IRAs and Plans would place a burden on Beneficiaries and Account/Plan Administrators that would be impossible to manage in some cases and impractical in most other cases.
2. Dividing each beneficiary's interest in each IRA and Plan into a \$450k Portion and an Excess Portion would mean that portions of each IRA and Plan would be subject to different post-death distribution rules, which would dramatically increase the complexity and effort for both Administrators and taxpayers.
3. There are unanswered questions about how the switch to the five-year rule at an Eligible Designated Beneficiary's majority or death would work with certain "see-through trusts."
4. The rule requiring that the Excess Portion for multiple beneficiaries be a pro rata portion may produce unfair results among spouses, children, and charities.
5. A potential "marriage penalty" would arise if an Owner leaves IRA or Plan assets to his or her surviving spouse.
6. The definition of "Eligible Designated Beneficiary" may produce unfair results with a predeceased child.
7. If the rules of Section 501 are enacted, Congress may have an opportunity to streamline the see-through trust rules without compromising its policy or revenue objectives.
8. Congress might consider whether a simpler set of rules that applies a fixed time period in all cases would serve its policy and revenue objectives.

Comment #1: Allocating the \$450k Amount among all IRAs and Plans would place a burden on Beneficiaries and Account/Plan Administrators that would be impossible to manage in some cases and impractical in most other cases.

A Plan Administrator or IRA Trustee/Custodian (both referred to in these Comments as an "Administrator") is typically informed of an Owner's death by a surviving family member, another individual designated as beneficiary of the Owner's Account, or the Owner's financial

advisor. At that time, the Administrator determines the beneficiaries indicated to receive the Owner's Account by reviewing the beneficiary designation on file, or, in the absence of a beneficiary designation, the Plan document/IRA agreement (both referred to as the "Plan Document").

An Administrator is not legally required to contact the beneficiaries. However, if the initial contact was not made by a beneficiary, most Administrators consider it a good business practice to send a letter to each beneficiary explaining what needs to be done to initiate distributions. Administrators generally require submission of a distribution request form along with additional documents (e.g., certified copy of the Owner's death certificate) in order to initiate distributions, and these submissions, along with the governing plan instrument and death beneficiary designation, provide the information that the Administrator needs to carry out its responsibilities. If a beneficiary is a trust, regulations require the trustee to provide certain information to the Administrator that is intended to provide the Administrator with the additional information about the trust that it will need to carry out its responsibilities.¹⁶

Beyond that, it is up to each beneficiary to evaluate available distribution options and instruct the Administrator accordingly. Once the Administrator receives instructions from the beneficiary as to the option selected, the Administrator can proceed with making distributions in accordance with those instructions.

The foregoing comments illustrate that in our current law environment, the Administrator is able to rely on specific information contained in the underlying Plan document and beneficiary designation, supplemented by information provided by each beneficiary at the time of the Owner's death. If any distribution options apply, the Administrator can rely on each beneficiary's instructions to carry out the desired option. These responsibilities are manageable, and the current fees charged by most Administrators reflect this.

If Section 401(a)(9) is amended in the manner provided in Section 501, the \$450k Amount must be allocated in some fashion among all IRAs and Plans, as provided in regulations to be issued by Treasury. This would create a nightmare for the Administrator, because in order to do this the Administrator would need to somehow verify the existence of every IRA and Plan Account the Owner may have that is administered elsewhere, and then obtain comparable information about each of those Accounts including the date of death balances. How could an Administrator ever be certain it has identified *all* of an Owner's IRAs and Plans?

In fact, it would be unlawful for an Administrator of one account to disclose information about the account to an Administrator or beneficiary of another account. An Administrator has no state law right to information about other Plans belonging to the Owner and privacy laws and regulations governing the financial services industries would preclude disclosure of this information to another institution or to the beneficiary of another Plan.

In addition, the proposed rules would make beneficiary requests for a trustee-to-trustee transfer of a Plan or inherited IRA even more challenging for Administrators in that an array of information would need to accompany the transfer, including information about the

¹⁶ Treas. Reg. § 1.401(a)(9)-4, A 6(b).

beneficiary(ies) necessary to satisfy the new Administrator as to whether any beneficiaries qualify for exception as Eligible Designated Beneficiaries.

Mistakes would be more likely to occur under the proposed rules, leading to potential tax penalties, litigation, or letter ruling requests. Some specific difficulties that can be anticipated include the following:

- (a) Multiple portions of multiple IRAs or Plans could become subject to different post-death rules, making it difficult for both Administrators and taxpayers to keep track of these multiple portions and multiple IRAs or Plans;
- (b) If a beneficiary has requested full distribution of one account, no one (other than the beneficiary) may know about the account or be able to obtain information about it;
- (c) An Administrator may inadvertently provide a beneficiary with erroneous distribution payout information based on incomplete or invalid data;
- (d) An Administrator may fail to distribute the “Excess Portion” in a timely manner due to inaccurate or incomplete information provided to it, resulting in application of the 50% excess accumulation tax;
- (e) Taxpayers may need to file requests for private letter rulings seeking relief on the basis of financial institution error; and
- (f) Any imposition of the 50% excess accumulation tax that results from inaccurate or incomplete information may lead to disputes among the Administrators and beneficiaries of the various Plans and IRAs involved to determine who is ultimately responsible.

The foregoing comments illustrate that the rule requiring an allocation of the \$450k Amount among all IRAs and Plans would make it impossible in many cases for Administrators to comply with their obligations to make timely distributions to beneficiaries, and would make it impractical in most other cases. Administrators would need to significantly increase fees to cover these increased responsibilities, research time, operational expenses, and legal risks, which would make it harder for individuals to save and accumulate for retirement.

Administrators might even amend their underlying IRA and Plan documents to reduce distribution options as a way of reducing complexity, effort, and risk – the result being varied and inconsistent options from one Administrator to the next, which would add to the difficulties individuals face in saving for retirement. Another subtle result may also occur. If an Administrator amends its Plan documents, for example, to require a five-year post-death distribution period in all events, the IRA or Plan may still receive allocation of a portion of the Owner’s \$450k Amount, even though the amended document prohibits deferral beyond five years, essentially wasting that portion of the Owner’s \$450k Amount.

If these rules are ultimately enacted, we see an additional difficulty and offer a suggestion to address it. This difficulty would arise under what would be Code Section 401(a)(9)(H)(ii) of

the proposed rules, which would state that the \$450 Amount is to be allocated among all of an Owner's plans "...as provided in regulations prescribed by the Secretary...." This language provides no method of allocation on which Administrators can rely before regulations are issued. We suggest that the statute explicitly sanction an interim safe-harbor allocation approach to allocating the \$450k Amount on which Administrators could rely until Treasury regulations are issued. For example, this interim safe-harbor allocation approach might require a pro rata allocation of the \$450K Amount to each Plan or IRA based on its value at the death of the Owner.

Comment #2: Dividing each beneficiary's interest in each IRA and Plan into a \$450k Portion and an Excess Portion would mean that portions of each IRA and Plan would be subject to different post-death distribution rules, which would dramatically increase the complexity and effort for both Administrators and taxpayers.

Under current law, an IRA or Plan with one beneficiary would likely continue as one inherited account, with the same post-death distribution rules governing the entire account balance. If the IRA or Plan has multiple beneficiaries, it would likely be divided into one separate account for each beneficiary with the same post-death distribution rules governing the entire balance of each separate account. The method for determining post-death distribution for each inherited IRA will be known within a reasonable time after the Owner's death, and will not change thereafter.

If Section 401(a)(9) is amended in the manner provided in Section 501, things would get much more complicated whenever the aggregate balance of an Owner's IRAs and Plans exceeds the \$450k Amount. This can be illustrated by the following examples:

Example 2-A: Unmarried Owner designates his 2 IRAs and 2 Plans to his 3 nieces who are adults and are not disabled or chronically ill. Under current law, at Owner's death each IRA and Plan would likely be divided into 3 separate accounts (12 altogether).¹⁷ Each niece could choose whether to consolidate the separate accounts established for her, resulting in 1 separate inherited account per niece (3 altogether). Whether a niece consolidates or not, the same post-death distribution rules would apply to all of her separate accounts, even if she dies prematurely.

Under the proposed rules, each IRA and Plan would be administered as if there were 6 separate portions¹⁸ (24 altogether), and different post-death distribution rules would apply depending on whether a portion is funded from the \$450k Portion or the Excess Portion. Each niece could choose whether to consolidate these separate portions,

¹⁷ Each of the 3 separate accounts qualifies for post-death distributions with respect to the respective niece for whom the account is established. Treas. Regs. Section 1.401(a)(9)-8 A-2 and A-3 (known as the "separate account rule").

¹⁸ The word "portion" was intentionally chosen in lieu of the word "account," as the portions for a beneficiary that come from the 450k Portion and the Excess Portion are probably not recognized as separate accounts under Treas. Regs. Section 1.401(a)(9)-8 A-2 and A-3, which only recognize separate accounts when they are created for different beneficiaries. Some coordination and clarification as to how the proposed rules would work in conjunction with these regulations may be helpful.

but as a practical matter she should avoid commingling the \$450k Portion and the Excess Portion account balances – so the best she could do would be to consolidate into 2 inherited accounts each (6 altogether).

In addition to the challenges described in Comment #1, Administrators would need to help the nieces implement these concepts so as to avoid commingling in getting the inherited accounts set up properly. Administrators would need, for each inherited account, to keep track of whether it came from the “450k Portion” or the “Excess Portion,” and would need to see that the appropriate post-death distribution rules are applied for that portion. Administrators of Plans would need to rethink how they account and provide statement information to a niece who now has two different portions subject to different post-death distribution rules.

Administrators would also need to remember not to count distributions from the Excess Portion when determining whether minimum required distribution requirements for the \$450k Portion are satisfied. Administrators would also need to consider whether any adjustments would be needed in the manner that information is reported on Forms 1099 because distributions from two different portions would be subject to two different sets of rules.

Example 2-B: Same as Example 2-A, except the designated beneficiaries are Owner’s 3 minor children.

The consequences under current law would be the same as the consequences under current law in Example 2-A.

Under the proposed rules, the Administrator of each IRA and Plan would have to determine the \$450k Portion and then establish the \$450k Portion and the Excess Portion. Thus, the three designated beneficiaries would begin with six separate portions per IRA and Plan (18 altogether).

Next, the Administrator of each IRA and Plan would need to determine which designated beneficiaries qualify as Eligible Designated Beneficiaries and which do not, in order to apply the appropriate distribution rules to each designated beneficiary’s Excess Portion. Note that separating each IRA and Plan into a \$450k Portion and Excess Portion would always be necessary when there is a designated beneficiary, even if he or she is an Eligible Designated Beneficiary, since the rules for distributions from the Excess Portion would never be identical to the current law rules that would govern distributions from the \$450k Portion.¹⁹ In this Example 2-B, all of the portions for each designated beneficiary would be subject to the same post-death distribution rules at least until the designated beneficiary attains the age of majority or dies prior thereto, and perhaps longer if the designated beneficiary also qualifies as an Eligible Designated Beneficiary on the basis of disability or chronic illness.

¹⁹ For example, at the death of an Eligible Designated Beneficiary, the Excess Portion must be distributed over a five-year period, while the \$450k Portion may continue to be distributed over the designated beneficiary’s single life expectancy.

Example 2-B illustrates how each Administrator would be burdened with considerably more responsibility under the proposed rules. Each Administrator would need to determine whether each designated beneficiary is a child,²⁰ and whether each designated beneficiary is deemed to have not reached the age of majority under Code Section 401(a)(9)(F), which provides special rules for students up to age 26 and children who were disabled at the time they reached the age of majority (see footnote 9).

The Administrators would also need to determine whether a designated beneficiary also qualifies on the basis of other circumstances such as the beneficiary's being disabled or chronically ill,²¹ since different rules would govern distributions after the designated beneficiary is deemed to have reached the age of majority.

Even after setup of the portions and accounts is complete, the Administrators must continue to monitor each of the three designated beneficiaries year after year in order to identify whether an event has occurred that triggers distributions over a five-year period from each Excess Portion. Death would be such an event for any Eligible Designated Beneficiary. In addition, an event also occurs if a designated beneficiary who qualifies solely on the basis of being a minor child of the Owner when the designated beneficiary is deemed to have attained the age of majority (within the meaning of Code Section 401(a)(9)(F), which is discussed in footnote 9). Thus, the Administrator would need to monitor year after year to determine whether any of the designated beneficiaries (i) was disabled when reaching the age of majority and then subsequently ceased to be disabled, or (ii) ceased to qualify as a student or attained 26 years of age.

If at any point along the way a beneficiary wants to move accounts from one Administrator to another, the new Administrator would need to conduct substantial due diligence to ascertain the relevant facts to set up and administer the accounts correctly.

We anticipate that these Examples illustrate just a couple of the potential scenarios in which these proposed rules would have difficult consequences. These difficulties, compounded with those described in Comment #1, illustrate how difficult the proposed rules would be for Administrators and taxpayers. It follows that the effort needed from the Treasury to provide guidance and enforce the proposed rules would also increase significantly.

Comment #3: There are unanswered questions about how the switch to the five-year rule at an Eligible Designated Beneficiary's majority or death would work with certain "see-through trusts."

Under current law, the general rule is that when an estate or trust is designated as beneficiary of an IRA or Plan, it will not qualify to defer post-death distributions over an individual's life expectancy. However, if a trust that has been designated meets certain additional requirements, post-death distributions are determined by looking through the trust as if the trust's

²⁰ This may not be as straightforward as it seems. For example, it is not uncommon in blended family situations for an Owner to hold out an individual as his child, when in fact the individual is not a child and has not been adopted.

²¹ It is even possible a minor child could qualify as an individual no more than 10 years younger than an Owner in certain blended family situations, such as when a new spouse adopts a step-child.

beneficiaries had been designated. The shortest life expectancy of the various trust beneficiaries will govern post-death distributions from the IRA or Plan to the trust, and such a trust is often called a “see-through trust.”²²

If Section 401(a)(9) is amended in the manner provided in Section 501, and if an Owner’s IRA or Plan is designated all or in part to an Eligible Designated Beneficiary, that beneficiary’s Excess Portion would qualify for deferral over the beneficiary’s life similar to current law, but would switch to a five-year distribution period at the beneficiary’s death.

It is unclear how this would apply to a see-through trust with more than one current beneficiary or with a measuring life arising from someone other than the current trust beneficiary, as illustrated by the following examples:

Example 3-A: Owner dies, designating her \$1 million IRA to a discretionary pot trust that qualifies as a see-through trust. Her three children, who are minors, are the current beneficiaries of the trust. The oldest child is the oldest trust beneficiary.

Under current law, distributions after Owner’s death would be determined using the oldest child’s life expectancy.

If Section 401(a)(9) is amended in the manner provided in Section 501, the Administrator would need to determine the \$450k Amount and establish a \$450k Portion and Excess Portion. Distributions from the \$450k Portion would be made using the oldest child’s life expectancy under current law rules, and distributions from the Excess Portion would depend on whether that Portion is payable to a designated beneficiary who qualifies as an Eligible Designated Beneficiary.

The use of the term “designated beneficiary” in the proposed rules²³ implies that only the oldest child would be recognized, since all post-death distributions for the trust are determined using the oldest child’s life expectancy under current law. Under this view, the Excess Portion would be viewed as payable entirely to the oldest child, and not the other two. Post-death distributions from the Excess Amount would be determined using the oldest child’s life expectancy for as long as the oldest child qualifies for the minor child exception from the five-year rule.

What event or events would trigger a switch to the five-year rule for post-death distributions from the Excess Portion? The entire Excess Portion of the IRA would cease to qualify for exception from the five-year rule when the oldest child is deemed to have attained majority or dies prior thereto, regardless of whether the younger children are deemed to have attained majority or died prior thereto.

²² Reg. § 1.401(a)(9)-4, A 5.

²³ I.R.C. Section 401(a)(9)(H)(v) if amended. “Designated beneficiary” has a special meaning under the minimum distribution regulations, and is generally understood to refer to an individual beneficiary whose life expectancy is recognized under the regulations as the life expectancy to be used to determine post-death minimum distributions. This term appears in the RESA bill.

Example 3-B: Owner dies, designating his \$1 million IRA to a discretionary see-through trust for his only child, who is a minor. The trust provides that at the child's death, the trust remainder passes to the child's descendants or, if none, to Owner's brother, who is twelve years younger than Owner. Owner's brother is the oldest trust beneficiary.

Under current law, post-death distributions from the IRA to the trust are determined using the life expectancy of Owner's brother, even though the minor child is the current beneficiary. If the child subsequently dies and the trust continues for child's descendants, post-death distributions continue to be determined using the life expectancy of Owner's brother.

If Section 401(a)(9) is amended in the manner provided in Section 501, the Administrator would need to determine the \$450k Amount and divide the IRA into a \$450k Portion and an Excess Portion. The \$450k Portion would be distributed over the life expectancy of the Owner's brother under current law rules. The Excess Portion would be treated as payable to Owner's brother, who is not an Eligible Designated Beneficiary. Thus, the entire Excess Portion would be subject to the five-year rule, even though a minor child is the sole current beneficiary.

On the other hand, if Owner's brother is assumed to be no more than 10 years younger than Owner, Owner's brother would qualify as an Eligible Designated Beneficiary and the Excess Share would be distributed over his life expectancy for as long as he lives, and then switch to a five-year rule at his death. These Examples illustrate additional and perhaps unintended complications under the proposed rules that arise when trusts are used. Ironically, minor children, disabled, and chronically ill individuals may be most in need of the support and protections that a trustee can offer through the vehicle of a trust. If Congress did not intend for these additional complications to arise with see-through trusts, this could be addressed by providing that a see-through trust switches to the five-year rule only when it no longer has any minor children of the Owner or other living Eligible Designated Beneficiaries as current beneficiaries.

Comment #4: The rule requiring that the Excess Portion for multiple beneficiaries is a pro rata portion may produce unfair results among spouses, children, and charities.

If Section 401(a)(9) is amended in the manner provided in Section 501, and if an Owner has multiple beneficiaries, any Excess Portion arising in connection with the Owner's IRAs and Plans would be established for those beneficiaries in a pro rata manner based on each beneficiary's interest in the aggregate of all of the Owner's IRAs and Plans.

This rule would have the effect of spreading the benefit of the \$450k Amount pro rata among all beneficiaries, even though some may benefit more from it than others. For example, portions of a Plan that are designated for spouses or charities may consume a portion of the \$450k Amount, even though spouses and charities would normally not benefit from such an allocation. This would leave less for adult children or others who are not Eligible Designated Beneficiaries and who could better benefit from allocation of the \$450k Amount.

If this is not what Congress intends, this could be addressed by allowing non pro rata allocations of the Exempt Portion in favor of spouses and charities, or by allowing taxpayers to affirmatively designate which beneficiaries receive the benefit of the \$450k Amount.

Comment #5: A potential “marriage penalty” would arise if an Owner leaves IRA or Plan assets to his or her surviving spouse.

If Section 401(a)(9) is amended in the manner provided in Section 501, and if an Owner leaves all of her plans to her surviving spouse who elects to treat them as his own, only one \$450k Amount would be available for their children at the surviving spouse’s death. This could be viewed as a sort of “marriage penalty” because two unmarried individuals would each be able to use their respective \$450k Amounts. This marriage penalty could significantly complicate planning for certain married couples because they may be torn between leaving as much as possible to the surviving spouse and avoiding waste of the \$450k Amount that belongs to the first spouse to die. In blended families, there could be a “\$450k lottery” effect as the children of the surviving spouse would receive all of the benefit from the sole \$450k Amount. Couples in community property states may face even more complication, because federal tax rules may apply the \$450k Amount to the first spouse’s IRAs and Plans as if she owned them all, when in fact they may be owned 50/50 by the two spouses.

We anticipate that these examples illustrate just a few of the potential scenarios in which these proposed rules would create planning dilemmas for married couples.

If this is not what Congress intends, this could be addressed with rules similar to those allowing portability between spouses of the applicable exclusion for estate tax.²⁴

Comment #6: The definition of “Eligible Designated Beneficiary” may produce unfair results with a predeceased child.

If Section 401(a)(9) is amended in the manner provided in Section 501, and an Owner of IRAs or Plans dies predeceased by a child, the predeceased child’s minor children would not qualify as Eligible Designated Beneficiaries (unless they qualify in some other manner, such as disability or chronic illness).

If this is not what Congress intends, this could be addressed with rules similar to those allowing a generational “move-up” under the generation-skipping transfer tax rules.²⁵

Comment #7: If the rules of Section 501 are enacted, Congress may have an opportunity to streamline the see-through trust rules without compromising its policy or revenue objectives.

The current law minimum distribution rules that apply to see-through trusts are very complicated, and have resulted in a great deal of uncertainty. The greatest area of uncertainty has

²⁴ See I.R.C. Section 2010(c).

²⁵ See I.R.C. Section 2651(e).

arisen in connection with determining which future beneficiaries may be disregarded in determining the oldest beneficiary of the trust – or to be more specific, which future beneficiaries may be disregarded as “mere potential successors” under the Regulations.²⁶ These uncertainties have vexed taxpayers and Administrators alike, and have led to numerous private letter ruling requests.

These rules evolved at a time when Treasury was concerned that trusts would be used to maintain deferral for future beneficiaries that didn’t merit deferral from a policy standpoint. But if Section 401(a)(9) is amended in the manner provided in Section 501, it would no longer be possible to use trusts to provide deferral for future beneficiaries that don’t merit deferral from a policy standpoint, at least with respect to the Excess Portion, because the Excess Portion would be paid over five years unless a longer time period is permitted for one or more Eligible Designated Beneficiaries. Any such longer time period would switch to a five-year rule no later than the death of those Eligible Designated Beneficiaries (although there are some unanswered questions as to exactly when and how this would occur, as discussed in Comment #3).

If the rules described in Section 501 are to be enacted in their current form, Congress might want to consider whether there is an opportunity to streamline the rules that govern future beneficiaries of a see-through trust without compromising Congress’s policy and revenue objectives. This could be accomplished by (i) providing that only the current beneficiaries of a see-through trust are to be considered in determining the oldest beneficiary of the trust, and (ii) requiring that the \$450k Portion designated to a see-through trust must switch to the five-year rule at the same time the Excess Portion designated to the trust switches to the five-year rule.

Comment #8: Congress might consider whether a simpler set of rules that applies a fixed time period in all cases would serve its policy and revenue objectives.

If Congress determines that its policy or revenue objectives require restrictions on the deferral of payouts from IRAs and Plans, it may consider whether it could accomplish those objectives in a way that is simpler than Section 501 of RESA. One approach that has been suggested by ACTEC Fellow Natalie Choate, a leading commentator on planning and administration of IRAs and Plans, is to simply require annual distributions over a fixed time limit in all cases except spousal rollovers.²⁷

Ms. Choate explains why she thinks the fixed time limit offers several advantages. One advantage is that Administrators would not need to be involved in tracking down or divulging the information necessary to allocate the \$450k Amount or any similar monetary limit. Another advantage is that all portions of any given IRA or Plan would be subject to the same rules. Ms. Choate also explains that if the time limit is long enough (such as 21 years), there might not be a

²⁶ See Treas. Regs. Section 1.401(a)(9)-5 A-7(c).

²⁷ Ms. Choate’s proposal, “Is it Time to ‘Retire’ the Stretch IRA?,” can be found on her website at: <https://www.ataxplan.com/wp-content/uploads/2017/07/End-the-Stretch-website.pdf>.

need for exceptions for favored beneficiaries such as the Eligible Designated Beneficiary exception provided in Section 501.