The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

May 25, 2022

Filed electronically at www.regulations.gov

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

RE: REG-105954-20, RIN 1545-BP82, Required Minimum Distributions

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing in response to the Internal Revenue Service's ("the Service's") proposed regulations relating to required minimum distributions (and certain other issues) published on February 24, 2022 (the "Proposal").[1] Our letter provides substantive and technical comments on the proposal.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 100 million employer-sponsored plan participants.

SPARK members process many thousands of distributions, including required minimum distributions ("RMDs"), each year. They are the entities primarily responsible for programming the systems that calculate RMDs, determine the amount of a distribution that is eligible for a direct rollover, and determine the proper withholding on a distribution that is not directly rolled over. In addition, SPARK members assist plan sponsors and plan administrators provide information and guidance to participants and beneficiaries to ensure that the RMD rules are met. Many SPARK members also offer IRA accounts or IRA annuities, or provide services to IRA custodians and issuers. In short, SPARK members have a strong interest in ensuring that the final RMD regulations are workable, as simple as possible for participants and beneficiaries to understand, and that adequate time is provided for implementation.

[1] 87 Fed. Reg. 10504 (Feb. 24, 2022).

Summary of Comments

- The final regulations should not be effective until, at the earliest, calendar years beginning at least 9 months after the final regulations are released.
- The relief for reasonable, good faith interpretations of the SECURE Act should be expanded.
- The Service should provide guidance as soon as possible on the deadline for plan amendments for the SECURE Act.
- The Service should not modify the rules for 403(b) plans, or if it does, only through a separate regulatory proposal.
- The final regulations should modify the Service's interpretation of the 10-year rule, or if not, provide relief for prior years.
- The Service should reconsider whether the Proposal's rules for withholding on distributions to non-spouse beneficiaries correctly reflect the Code.
- The final regulations should simplify the documentation requirements for eligible designated beneficiaries ("EDBs") and trusts.
- The Proposal's rule regarding a "hypothetical" RMD should be removed.
- The final regulations should retain age 21 as the age of majority.
- The final regulations should confirm that distributions for health insurance premiums for public safety officers under Code section 401(l) may be treated as RMDs.
- The Service should confirm that nothing in the 401(a)(9) regulations would prevent a plan from offering different after-death distribution options for different beneficiaries.

Our letter ends with a number of additional requests for clarifications and technical issues.

We will be separately submitting a request to testify at the June hearing on this proposed regulation.

I. Need For Significantly Delayed Effective Date

The Proposal states that the Service proposes to apply the final regulations for purposes of determining RMDs for calendar years beginning on or after January 1, 2022. Similarly, the Proposal's changes to the regulations governing eligible rollover distributions (which also impact withholding) are proposed to apply for distributions on or after January 1, 2022. This must be significantly delayed.

The Proposal was not published until well into 2022. The comment period does not end until May 25, 2022, and there will be a hearing on June 15, 2022. Thus, the Service cannot even begin to process all the stakeholder input until mid-way into 2022. Given that it took the Service *more than two years* from the enactment of the Setting Every Community Up for Retirement Enhancement ("SECURE") Act to issue the proposed regulations, it is unrealistic to believe the Service could issue final regulations by the end of 2022. In fact, we think it is likely that the final regulations will not be issued until late into 2023 at the earliest.

For recordkeepers, it very important for the Service to keep in mind that adequate time is needed to implement the final regulations *before the beginning of the year in which the regulations are effective.* This is because the RMD rules are not solely relevant to determining the amount that must be distributed by the end of a calendar year. The RMD rules also determine the amount of a distribution at any time during a calendar year that must be treated as an RMD for purposes of the eligible rollover distribution and withholding rules.

For example, assume that the Service wishes to make the regulations apply for calendar year 2024. The Service cannot issue the final regulations late in 2023 and expect recordkeepers to be able to correctly program systems so that they are ready for distributions on January 1, 2024. Recordkeepers need sufficient time *before* the calendar year begins. For example, when the Service issued the last major rewrite of the regulations, it did so on April 17, 2002, to be effective for the 2003 calendar year.

We urge the Service to make the final regulations effective for a calendar year that begins no earlier than 9 months after the final regulations are published. Thus, for example, unless the Service is able to complete the final regulations by March 31, 2023, they should not be effective for the 2024 calendar year. We also urge the drafters to be realistic about the time it will take to move the final regulations through the clearance process. According to public statements from IRS officials, the proposed regulations were largely completed in mid-2021, but did not actually see public release until February 2022. When the key authors of the Proposal first put pen to paper, it might have seemed reasonable that the Proposal could be released in time to make them effective for 2022, but, of course, now this is simply unworkable.

A delay in the effective date of this kind will not harm participants, beneficiaries, or the Service. Many of the changes reflected in the Proposal are based on changes in the law that plans and individuals have long since implemented. Even with respect to the SECURE Act's changes to the after-death distribution rules, plans, IRA providers, and beneficiaries have been following a good faith reasonable interpretation of the SECURE Act for more than two years.

II. Expanded Good Faith Reliance

The Proposal provides that, for the 2021 distribution calendar year, taxpayers must apply the existing regulations, but taking into account a reasonable, good faith interpretation of the amendments made by sections 114 and 401 of the SECURE Act. This reliance is somewhat helpful, but will need to be expanded.

First, we assume that the Service did not reference 2020 because the first RMDs directly affected by the new after-death rules would not be due until 2021 and the Coronavirus Aid, Relief, and Economic Security ("CARES") Act waived RMDs for 2020. Nonetheless we think that there were some actions that may have been taken by plans based on the SECURE Act which may not precisely reflect the positions taken by the Service in the Proposal. In short, we believe there are reasons to provide relief for 2020.

Second, as noted earlier, once the Service publishes final regulations, plans and service providers will need time to review and understand them, adopt necessary programming changes, and communicate those changes to participants and beneficiaries. Until that time, all parties should be able to adopt a reasonable, good faith interpretation of the SECURE Act and other statutory changes.

Finally, it is worth pointing out that these regulations, while focused primarily on the amendments made by the SECURE Act to the RMD rules, incorporate a number of other statutory changes for the first time. By way of example, as noted later, the Proposal addresses the eligible rollover distribution and withholding rules in a few surprising ways, and parties should be able to rely on a reasonable, good faith interpretation of the changes made by Congress to other, non-SECURE Act rules until these regulations are finalized.

In short, we recommend that the Service confirm that reliance on a reasonable, good faith interpretation of all of the statutory changes addressed by the Proposal (and, of course, taking into account any prior final regulations and guidance) is available for all prior plan and taxable years, until the effective date of the final regulations.

III. Plan Amendments

The SECURE Act provides that a plan will not be treated as failing to be operated in accordance with the terms of the plan with respect to plan amendments made pursuant to the SECURE Act, so long as the plan is amended on or before the last day of the first plan year beginning on or after January 1, 2022 (2024 in case of governmental and certain collectively bargained plans), or such later date as the Secretary of the Treasury may prescribe. In addition to the SECURE Act, amendments for the CARES Act must also generally be made at the same time.

It is not entirely clear when amendments to reflect the SECURE Act and the CARES Act[2] must be adopted. For example, it is generally believed that even though the Service has not specifically extended the deadline for SECURE Act and CARES Act changes, individually designed plans need not adopt an amendment until the end of the second calendar year that begins after the issuance of a Required Amendments List on which the change in law appears.[3] But with respect to pre-approved 401(a) and 403(b) plans, the general rule is that an interim amendment is required by the end of the second calendar year following the calendar year in which the change in the qualification requirements is effective with respect to the plan.[4] For many SECURE Act requirements, including the RMD changes, this would require a good faith interim amendment by the end of the 2022 calendar year, except as otherwise extended by the SECURE and CARES Act's special amendment deadlines. There are, as the Service knows, hundreds of thousands of pre-approved plans, and the process of drafting, distributing,

[2] References to the amendment deadlines in the SECURE Act and CARES Act shall also reference other statutory changes for which Congress has provided a similar amendment deadline, including Division M of the Further Consolidated Appropriations Act, 2020, known as the Bipartisan American Miners Act of 2019.

[3] Rev. Proc. 2016-37 and Rev. Proc. 2019-39.

[4] Rev. Prov. 2021-37 and Rev. Proc. 2021-38.

explaining, and following up with plan sponsors of pre-approved plans (who often do not have expertise in these issues), is a monumental process.

Particularly with respect to pre-approved plans, the very late issuance of the Proposal has put service providers that offer pre-approved plan documents in a very difficult position. Lacking any clear extension, document providers of pre-approved plans have been forced to draft a 2022 interim amendment, which covers a variety of SECURE Act and CARES Act changes. The process of distributing these interim amendments through various recordkeepers and third-party administrators has already begun for some document providers.

The majority of SPARK members believe that the Service should announce an extension of the deadline to amend 401(a) and 403(b) plans to reflect the SECURE Act and the CARES Act, and do so as quickly as possible to avoid unnecessary work in 2022.[5] These members point out that future amendments will be needed anyway, since the Service will not finalize this Proposal quickly enough and the Service has provided little guidance on other key SECURE Act provisions, such as the changes to the safe-harbor requirements and the new long-term part-time rules.

A few SPARK members, on the other hand, point out that the process to create and distribute interim amendments for pre-approved plans has already begun, with a number of large document providers already having released their interim amendments. Thus, an extension – especially if not carefully crafted – could create confusion for plan sponsors who use pre-approved plans. One SPARK member stated that if the Service is to grant an extension, it should apply only to the SECURE Act, and not to the CARES Act, because all of the CARES Act guidance that we expect has already been issued.

At a minimum, we recommend that the Service make known its plans with regard to any amendment deadline extensions as quickly as possible. This has a huge impact on SPARK members planning for their remaining communications and actions in 2022 for adopters of pre-approved plans.

IV. Rules for Section 403(b) Plans

Under current regulations, the RMD rules applicable to 403(b) annuity contracts and custodial accounts are, in general, applied using rules similar to those for IRAs.[6] This has two primary implications. The first is that an RMD owed with respect to one section 403(b) contract or account of an individual is permitted to be distributed from another section 403(b) contract or

[5] We would also note that the Securing a Strong Retirement Act of 2022, which passed the House of Representatives nearly unanimously, would provide such an extension. While it is generally expected that this bill will become law, this will likely not occur until late 2022 at the earliest. It would be much less disruptive for the Service to provide for an extension more quickly.

[6] One exception is the required beginning date. Participants in 403(b) plans may generally delay RMDs until they retire.

account of the same individual. The second is that a 403(b) plan is not required to automatically distribute an RMD for a participant or beneficiary.

In the preamble to the Proposal, the Service states that it is considering additional changes to the RMD rules for section 403(b) plans so that they more closely follow the RMD rules for qualified plans. The Service did not propose any actual changes, but instead referred at a high level to an approach under which "each section 403(b) plan (like each qualified plan) would be required to make required minimum distributions calculated with respect to that plan (rather than rely on the employee to request distributions from another plan in an amount that satisfies the requirement)."

Our first comment is that the Service ***cannot and should not apply a new rule of this nature in the final regulation***. Before applying a very significant change in the rules for 403(b) plans, the Service would need to issue a separate proposal which includes draft regulatory language and which provides a full analysis as required by the Administrative Procedures Act, the Regulatory Flexibility Act, and section 7805(f) of the Code. We simply do not have enough detail from one sentence in the preamble to provide a fulsome set of comments.

To the extent we are able to surmise what this rule might look like, we oppose these changes. While there are some similarities between the administration of 401(a) and 403(b) plans, there continue to be a number of differences between the two plan types that justify the different treatment. The Service states in the preamble that the prior RMD regulations were developed before 2007 when the section 403(b) regulations were issued. While those 403(b) regulations did impose some new requirements on 403(b) plans that also apply to qualified plans (such as the requirement to have a plan document), it is not correct that 403(b) plans are now administered the same as qualified plans.

First, many 403(b) plans continue to be multi-vendor, meaning that a participant can have contracts and accounts with multiple companies. In fact, in some states, the plan sponsor is required by law to allow an employee to have contributions made to more than one company.

Second, many 403(b) annuities and custodial accounts are owned by the participant, not by the plan sponsor. The plan sponsor (or a coordinating TPA) does not have the legal right to control when distributions occur, and thus could not legally "force" distributions from a 403(b) contract or account held under the plan.

The Service points out in the preamble that, unlike for IRA trustees and issuers, there is no current requirement on 403(b) plans, or custodians or issuers, to report to the Service regarding RMDs. If the Service decides to change this, to reiterate, it should be done only through a new proposal which provides a meaningful opportunity for comment. For example, we would want to provide input on:

- To whom the reporting requirement applies (employer, plan administrator, vendor, etc.).
- How to apply such a reporting requirement for group annuity contracts and group custodial accounts. In many cases, the provider of the group annuity contract or group

custodial account may not have the necessary information; only the employer, TPA, or plan administrator would have participant specific information.

- Ensuring that the reporting entity is not required to incorporate information it does not have (such as any amounts held at a different vendor).

V. The 10-Year Rule and Need For Relief For Prior Years

Clauses (i) and (iii) of Code section 401(a)(9)(H), as enacted by the SECURE Act, contain the new 10-year rule. Clause (i) provides that in the case of a designated beneficiary, subparagraph (B)(ii) shall be applied by substituting "10 years" for "5 years" and shall apply whether or not distributions of the employee's interests have begun. Clause (iii) provides that if "an eligible designated beneficiary dies before the portion of the employee's interest to which this subparagraph applies is entirely distributed, the exception under clause (ii) shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary." The new 10-year rule also is described in Code section 401(a)(9)(E)(iii), which provides that when a child reaches the age of majority "any remainder of the portion of the individual's interest to which subparagraph (H)(ii) applies shall be distributed within 10 years after such date."

In the Proposal, the Service has taken a surprising interpretation of the 10-year rule in the SECURE Act. First, under the Proposal, if an employee dies on or after the required beginning date with a designated beneficiary other than an EDB, *both* the 10-year rule and the "at least as rapidly rule" apply. Thus, distributions must continue annually during the 10-year period, which is a different application of how the 5-year rule applied pre-SECURE Act. In contrast, if an employee happens to die before the required beginning date, all designated beneficiaries are allowed to take no distributions for 10 years. This results in a very different consequence, with little justification in tax policy.

Similarly, under the Proposal, if an employee dies on or after the required beginning date with an EDB, the 10-year rule does not apply. This is a very surprising result given that the changes made by the SECURE Act state that the new 10-year rule "shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (a)" – i.e., whether or not distributions have begun on or after the employee's required beginning date.[7]

In addition, it appears – although the text of the proposed regulation is not clear – that if distributions begin to an EDB under a life expectancy payout option, and the EDB dies, payments must continue to the EDB's beneficiary each year during the applicable 10-year period. That is not the natural reading of clause (iii), which simply states that the life expectancy payout exception for EDBs ceases to apply and the "remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary."

We believe that the Service has misinterpreted the statutory language in Code section 401(a)(9)(H) as it relates to the 10-year rule. The natural reading of the statute is that Congress

[7] Code section 401(a)(9)(H)(i)(II).

intended to apply the pre-existing 5-year rule to individual designated beneficiaries, but have it last 10 years and apply in all cases (other than a beneficiary that is not an individual). And the pre-existing 5-year rule requires no distributions until the fifth year, at which point the benefit must be fully distributed. It is somewhat difficult to discern the Service's reasoning, because this Service does not provide an explanation for its thinking in the preamble.

We urge the Service to reconsider this position. While we appreciate that the Service may be concerned about a 10-year delay in the payment of taxes, we would point out that this is clearly the result in the case of deaths before the required beginning date, and there does not seem to be any good policy reason for a different result solely because a beneficiary happens to inherit from a participant or IRA owner who has reached his or her required beginning date.

If the Service decides not to change its position with respect to the 10-year rule, then it is critical that the Service understand that it has taken a position that most have found surprising. Nowhere in the legislative history of the SECURE Act is there a description which takes this position. Even the IRS Publication 590-B had to be revised after being released in draft form because of the uncertainty regarding this issue. Thus, the Service must provide meaningful relief for prior years:

- First, the Service should confirm that for purposes of years prior to the effective date of the final regulations, it is a reasonable, good faith interpretation of the SECURE Act to conclude that, when the 10-year rule applies to a beneficiary under Code Section 401(a)(9)(H)(i) or (iii), or (E)(iii), no distributions are required during the 10-year period, regardless of whether the participant or IRA owner died before, on, or after the required beginning date. In a similar regard, the Service should confirm that it is a reasonable, good faith interpretation to conclude that the 10-year rule applies to EBDs inheriting accounts from employees who died on or after their required beginning date.
- Second, the Service should clarify that a beneficiary who is subject to both the 10-year rule and the "at least as rapidly" rule, or another life expectancy payout rule, and who interpreted the 10-year differently, is not required to make up distributions for any distribution calendar year before the effective date of the final regulations. Put another way, the Service should make clear that, in the first year for which the final regulations are effective, the only distribution required of a beneficiary caught in this situation is the distribution based on the account balance as of the last day of the prior year and the applicable denominator that applies to that beneficiary under the final regulations. This relief should be clearly available to an EDB of an employee who died on or after their required beginning date and concluded that the 10-year rule applied to them.
- Finally, the Service should confirm that this relief for years prior to the effective date of the final regulations also applies for purposes of the excise tax in Code section 4974, and beneficiaries are not required to specifically request relief on Form 5329.

In addition, if the Service decides not to change its position, there are a number of clarifications needed. First, the Service should clarify that in the case of death before the required beginning date with a beneficiary who is a minor child, and who elects the life expectancy rule, RMDs should start in the year after death. Further, in this situation when the minor reaches age 21, the

Service should clarify that RMDs should continue uninterrupted until a final lump sum payout in the 10th year.

VI. Withholding For Non-Spouse Beneficiaries

Consistent with changes made to Code section 402(c), the Proposal provides that a non-spouse beneficiary is not permitted to roll over a distribution, but is allowed to make a direct trustee-to-trustee transfer (subject to certain exceptions) of a distribution into an inherited IRA. If the non-spouse beneficiary makes such a transfer, the transfer is treated as an eligible rollover distribution.

However, the Proposal carries over a rule from prior regulations which appears to be an error: The Proposal states that a distribution to a non-spouse beneficiary is not subject to the 20-percent mandatory withholding under Code section 3405(c). This is not how most recordkeepers had interpreted the Code.

Code section 402(c)(11), which is the non-spouse trustee-to-trustee transfer rule, was added by Section 829 of the Pension Protection Act ("PPA"). Under the PPA provision, Code section 402(c)(11) provided that the transfer is treated as an eligible rollover distribution "for purposes of this subsection" i.e. for purposes of section 402(c). Subsequently, the Service issued Notice 2007-7, which had two relevant Q&As. Q&A-14 stated that a plan is not required to offer a direct rollover to a non-spouse beneficiary. Q&A-15 stated that "a direct rollover of a distribution by a nonspouse beneficiary is a rollover of an eligible rollover distribution only for purposes of § 402(c). Accordingly, the distribution is not subject to the direct rollover requirements of § 401(a)(31), the notice requirements of § 402(f), or the mandatory withholding requirements of § 3405(c). If an amount distributed from a plan is received by a nonspouse beneficiary, the distribution is not eligible for rollover."

After Notice 2007-7 was issued, Congress passed The Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"). Section 108(f)(2)(B) of WRERA struck the phrase "for purposes of this subsection." WRERA also added a new sentence to Code section 402(f)(2)(A) which states that the term eligible rollover distribution includes a distribution which would be an eligible rollover distribution by reason of subsection (c)(11). The clear intent of these changes was to overrule Q&A-14 and -15 of Notice 2007-7. The Joint Committee on Taxation's explanation of the provision states that the purpose of the technical change is to make clear that "rollovers by nonspouse beneficiaries are generally subject to the same rules as other eligible rollovers."[8]

In Notice 2009-68, the Service confirmed that, because of the change in WRERA, the notice requirements of Code section 402(f) now apply to distributions to a non-spouse beneficiary. And

[8] Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 110th Congress (JCS-1-09), March 2009, p. 553.

in the Listing of Required Modifications, the Service confirmed that a plan is required to offer a direct rollover to a non-spouse beneficiary, i.e., Code section 401(a)(31) applies.[9]

Code section 3405(c) defines eligible rollover distributions by cross-reference to section 402(f)(2)(A). Thus, because 402(f)(2)(A) treats a distribution as an eligible rollover distribution if it would be treated as an eligible rollover distribution if were rolled over, the same rule should apply for purpose of Code section 3405(c). The instructions to Form 1099-R, while not crystal clear on this point, are also consistent with the idea that 20% withholding applies.[10]

Because of the foregoing analysis, most recordkeepers apply 20% mandatory withholding to distributions to non-spouse beneficiaries and have done so since the passage of WRERA (except, of course, if the distribution is not otherwise an eligible rollover distribution, for example to the extent that it represents an RMD). We understand that this view may not be universal, but we believe that it is how most recordkeepers handle withholding for non-spouse beneficiaries. Regardless of how the Service resolves this issue, it is important that (a) the Service clearly explain in the final regulations whatever position the final regulations take, and how that is consistent with the statutory provisions; (b) allow sufficient time for recordkeepers to make changes to their systems to accommodate the final regulation, and (c) provide relief for reasonable good faith positions taken by plan administrators and their service providers with respect to withholding on distributions to non-spouse beneficiaries prior to the effective date of the final regulations.

VII. Documentation Issues

This section of our comment letter addresses certain documentation issues raised by the Proposal.

Chronically Ill and Disabled Beneficiaries. Under the Proposal, with respect to a beneficiary who is disabled or chronically ill as of the date of the employee's death, documentation of the disability or chronic illness must be provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the employee's death. In the case of chronic illness, the Proposal lays out detailed requirements for what this documentation must contain. We recommend that the Service eliminate this documentation requirement and instead allow the plan administrator to rely on the written certification of the designated beneficiary (or his/her personal representative), as long as the plan administrator does not have actual knowledge to the contrary.

We see no justification to impose this documentation requirement on one type of EDB, when the plan administrator will not need to obtain documentation for any other type of EDB. For

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[9] See LRM #51 in Defined Contribution Listing of Required Modifications and Information Package (LRM) (Oct. 2017), available at https://www.irs.gov/retirement-plans/listing-of-required-modifications-lrms.

[10] See Instructions to Form 1099-R (2022), p. 4 (suggesting that a distribution to a non-spouse beneficiary is an eligible rollover distribution), p 12 (describing the 20% withholding rule but making no distinction regarding distributions to non-spouse beneficiaries).

example, plans do not generally insist on a marriage certificate for a spousal beneficiary or a birth certificate for an EDB who is not more than 10 years younger than the participant, or to prove that a child has not reached the age of majority. These pieces of information are provided by the participant, or the beneficiary after the death of a participant, and generally plan administrators will simply accept a paper or electronic signature certifying the information is correct and true. There are, of course, circumstances when the plan administrator may have knowledge to the contrary or suspect fraud, and may request additional information or documentation, but these circumstances are quite rare.

We appreciate that a beneficiary should not simply be able to assert EDB status. We believe, however, it should be sufficient for a plan administrator to receive a certification, which includes a commitment by the beneficiary to produce documentation if so requested by the plan administrator or the IRS, similar to the administration of coronavirus-related distributions and hardship distributions.[11] This would address any risk of abuse, which is fairly remote.

See-Through Trusts and Applicable Multi-Beneficiary Trusts. The Proposal has made many changes to the rules for "see-through" trusts and has created a complex set of rules for type I and type II applicable multi-beneficiary trusts. With respect to the documentation requirements for a plan administrator to ensure that a trust beneficiary is, in fact, a see-through trust, the Proposal generally retains the rules in the current regulations.

Thus, the Proposal provides that in lieu of receiving and reviewing the trust document, a plan administrator may instead accept from the trustee the following:

- a final list of all beneficiaries of the trust as of September 30 of the calendar year following the calendar year of the death (including contingent beneficiaries) with a description of the conditions on their entitlement sufficient to establish who are the beneficiaries;
- a certification that, to the best of the trustee's knowledge, this list is correct and complete and that the requirements of the see-through trust rules are satisfied; and
- an agreement to provide a copy of the trust instrument to the plan administrator upon request.

We request that the Service confirm that this documentation and certification process is applicable for all of the requirements that might apply to a trust. For example, the Proposal explains a number of provisions that may be contained in a trust document but will not disqualify it from being a see-through trust, and creates complex rules for applicable multi-beneficiary trusts. In addition, we ask the Service to confirm that the plan administrator may rely on the trustee's certification regarding the EDB status of each of the trust beneficiaries.

Any other rule is simply too difficult to administer. Plan administrators are not experts in trusts and estate law, and should not be put in the position of having to review complex trust

[11] See https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-hardship-distributions.

documents, which will become more complex under the Proposal because of the new options given by the Service to those that draft trust agreements.

VIII. Hypothetical RMD

The Proposal includes a complicated new rule, not mandated in any way by the SECURE Act, which requires a plan administrator to calculate a special "hypothetical RMD" in the case of certain distributions made to spousal beneficiaries. Among other conditions, this rule would apply only if the distribution is made in or after the calendar year the surviving spouse attains age 72 and the surviving spouse rolls over some or all of the distribution to a plan or IRA for which the surviving spouse is not treated as the beneficiary.

The rule requires a complex calculation, which will be difficult to explain to spouses, and the only impact on plan administrators will be to require that a portion of a distribution to a spouse would be treated "as if" it is an RMD for purposes of the eligible rollover distribution and withholding rules. We understand that the purpose of this rule is to prevent spousal beneficiaries who have attained their required beginning date from getting the "best of both worlds" under different sets of RMD rules – i.e., a 10-year deferral period under the after-death RMD rules that apply to beneficiaries and, following a rollover, the commencement of the lifetime RMD rules that apply to plan participants and IRA owners. We recommend that the Service remove this requirement.

First, this issue exists under current law; while we appreciate that the 5-year rule is now a 10-year rule, the issue is not new. Moreover, we note that once a surviving spouse does roll over an amount to an account for which the spouse is not treated as a beneficiary, the spouse will need to immediately begin taking distributions using the surviving spouse's life expectancy and the higher account balance.

Second, if we understand the rule correctly, it would appear to require that the plan administrator know whether a spouse is rolling over the account to a spousal IRA or inherited IRA. That is the not the kind of information that a plan administrator would be able to know or verify.

Finally, to the extent that the approach that would be limited by the hypothetical RMD represents an advantageous tax planning tool, then it is a natural consequence of the rules Congress has set forth. Congress could have imposed some rule to prevent this, but chose to keep the special rules for spouses in place in Code section 401(a)(9). These rules clearly allow the use of the 10-year rule, clearly allow direct rollovers, and clearly allow those rollovers to be made to a plan or IRA for which the surviving spouse is not treated as a beneficiary.

IX. Support Age 21 as Age of Majority

The Proposal states that, for purposes of the EDB rule that treats a child of the participant as an EDB until the child reaches the age of majority, age 21 will be considered the age of majority. We support this approach. We agree on the importance of a uniform rule that applies for all plans, regardless of the state that the plan, the participant, or the beneficiary is located.

We also agree it not necessary to provide an extension in the case of a child who continues to be a full-time student after age 21 (subject to the special grandfather rule in the regulations for certain plans). It would not be feasible for recordkeepers to continually collect confirmation on whether a beneficiary continues to be enrolled as a full-time student.

X. Confirm 402(l) Distributions to Public Safety Officers May Satisfy RMDs

The Proposal adds new distribution amounts that are disregarded for purposes of determining whether the RMDs from a defined contribution plan have been satisfied. One of those additions is distributions of premiums for accident or health insurance under Treas. Reg. § 1.402(a)-1(e)(1)(i). That regulation describes "a payment made from a qualified trust that is a premium for accident or health insurance (including a qualified long-term care insurance contract under section 7702B)." Thus, if a plan makes such a payment, the resulting distribution would not be eligible to be counted as an RMD.

We have two concerns about this exception. The more important concern relates to distributions described in Code section 402(l) that are made to an "eligible retired public safety officer" for "qualified health insurance premiums." Under Code section 402(l), the amount of such distributions up to $3,000 per year is excluded from the retired public safety officer's gross income. This treatment is available only if the distribution would have otherwise been included in gross income. Importantly, for the special exemption to apply, Code section 402(l)(5)(A) provides that the plan must distribute the amount *directly* to pay the health insurance premiums.

We are concerned that the above-referenced change in the Proposal could be interpreted to mean that such distributions to retired public safety officers would not count towards the RMD that the retired public safety officer might otherwise be required to take for a calendar year. This result would put a retired public safety officer in the position of having to choose between giving up the tax benefit Congress intended or having to take an *additional* distribution to satisfy the RMD requirements. We recommend that the final regulations clarify that distributions with respect to an eligible public safety officer to which Code section 402(l) applies may satisfy the RMD requirements.

A second issue is somewhat technical. Although most distributions from plans are either paid directly to the participant or in a rollover, some plans will offer participants the ability to have distribution checks cut to particular parties for convenience. Thus, the participant might direct the plan administrator to pay a plan distribution directly to the participant's mortgage servicer. As relevant here, the participant might instead direct the plan administrator to pay a distribution directly to a health insurance company or for Medicare premiums. This distribution would be reported on Form 1099-R as if it was paid directly to the participant; the direct payment to the health insurer or Medicare is irrelevant for tax purposes. We do not think that the Service intends to prevent such distributions from being treated as eligible rollover distributions (if they otherwise qualify) or counting towards any RMD for the year. We suggest that the final regulations confirm this.

XI. Distribution Differences Among Beneficiary Types

Because of the significant complication created by the SECURE Act's after-death RMD rules, we expect that some defined contribution plans may wish to limit or modify their distribution options for beneficiaries. For example, we can imagine that some plan sponsors may choose to remove the ability of beneficiaries to receive payments over the beneficiary's life expectancy. The plan sponsor may, on the other hand, wish to allow certain types of distributions for certain types of beneficiaries – for example allowing life expectancy payments only for spouses and children of the participant, but not for other EDBs.

We ask the Service to confirm that nothing in the 401(a)(9) regulations would prevent the plan from offering different after-death distribution options for different beneficiaries, so long as the plan does not otherwise violate another provision of the Code (or any other law). Further, we ask the Service to confirm that nothing would prohibit a plan from always applying the 10-year rule to a trust.

XII. Other Clarifications and Technical Comments

This section includes additional requests for clarifications and other technical comments.

Application of 10-Year Rule to Non-Governmental 457(b) Plans. There has been some confusion as to whether or not the SECURE Act's 10-year rule applies to section 457(b) plans of non-governmental entities. The reason for this confusion is that Code section 401(a)(9)(H)(vi) states: "For purposes of applying the provisions of this subparagraph in determining amounts required to be distributed pursuant to this paragraph, all eligible retirement plans (as defined in section 402(c)(8)(B), other than a defined benefit plan described in clause (iv) or (v) thereof or a qualified trust which is a part of a defined benefit plan) shall be treated as a defined contribution plan." The cross reference to Code section 402(c)(8)(B) suggests that, perhaps, section 457(b) plans of non-governmental entities would *not* be treated as a defined contribution plan, and thus may not be subject to the 10-year rule.

We believe most have read the quoted language above as *not exclusive*, that is, it confirms that IRAs are treated as defined contribution plans, but does not serve to exclude non-governmental 457(b) plans. Such plans are subject to the 401(a)(9) rules, and most 457(b) plans are defined contribution plans, as that term is usually understood.[12]

The Proposal does not address this question directly, except to confirm that all 457(b) plans are subject to the RMD rules under Code section 457(d), and laying out a set of rules that apply to "defined contribution plans" in the -5 portion of the regulations. In Footnote 1 of the preamble, the Service references Code section 402(c)(8)(B)(iv) and (v), but does not provide further guidance on non-governmental 457(b) plans.

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[12] A section 457(b) plan can be designed to provide defined benefit-type benefits, although this is not common.

In any event, we recommend that the Service confirm in the final regulation that all section 457(b) plans, except those that are defined benefit plans, are treated as defined contribution plans for purposes of the SECURE Act changes described in Code section 401(a)(9)(H), which includes the 10-year rule.

Confirm RMD Excise Tax Waiver Available. Code section 4974 imposes a 50 percent excise tax on RMD failures for a taxable year under any qualified retirement plan, eligible deferred compensation plan, or IRA, subject to the ability of the Service to waive the excise tax where the taxpayer can demonstrate that the failure is due to reasonable error and reasonable steps are being taken to remedy the RMD shortfall. The proposed regulations would replace the existing regulations under this section and make certain modifications, generally to conform to the changes to section 401(a)(9) by the SECURE Act. In addition, the proposed regulations would add a new rule providing an automatic waiver of the excise tax on an individual's RMD failure for a calendar year in which the individual dies if the beneficiary satisfies the RMD by the tax return filing deadline (including extensions) for the calendar year.

We appreciate and support the new automatic waiver in the Proposal. In addition, we would ask that the Service specifically confirm that the existing rules for requesting a waiver on Form 5329 (for reasonable errors) continue to be available. We believe this to be the case, but because this waiver is so important, our members would find it helpful to have confirmation.

Tracking Two Life Expectancy Rules for Older Beneficiaries. Under the Proposal, in the case of an EDB who is older than a deceased participant dying on or after the required beginning date, generally the participant's life expectancy is used, but in addition, the entire interest must be distributed by the end of the year in which the EDB's life expectancy would be equal to or less than 1 if their life expectancy (instead of the participant's) had been used to determine the distribution period. Thus, to administer this new limitation properly, plans must track *two* life expectancies—one for distributions and one to determine the year in which the account must be fully distributed.

We recommend this rule be eliminated. It is not mandated in any way by the SECURE Act. It would, in fact, appear to be inconsistent with the rule that distributions are made "at least as rapidly" as if the participant had lived. Finally, it creates opportunities for unnecessary errors for plans and beneficiaries because of the additional burden of tracking two life expectancies.

Pre-Effective Date Deaths and Separate Accounting. The Proposal includes a variety of rules to deal with participants who died before the effective date of the SECURE Act. One of those rules states that, if an employee who died before the effective date has multiple beneficiaries, whether prior law or the new 10-year rule applies depends on when the ***oldest*** of those beneficiaries dies. We have two comments on this rule. The first is that the Service should confirm that, for this purpose, the separate accounting rule applies. Thus, this rule would come into play only if separate accounts were not set up for the beneficiaries, and the effective date rule would be applied separately to each beneficiary for whom a separate account was previously established.

The second point is that there may be circumstances when a plan administrator will not know when the oldest beneficiary dies. This effective date rule only works if whoever needs to pay RMDs with respect to a beneficiary has information on all beneficiaries, which is not always the case. For example, many participants designate multiple beneficiaries, some of whom keep their account balance in the plan and some who do not. (This issue should be significantly mitigated if the Service confirms the separate accounting issue in the prior paragraph.)

QDRO Issues. SPARK members are also requesting clarification on two issues related to the application of the RMD rules when benefits are due to an alternate payee under a qualified domestic relations order ("QDRO"). Both of these issues are presented by the current RMD regulations, but this is an opportune time to address them.

First, the current regulations and the Proposal discuss the need to segregate a participant's account in connection with a QDRO, but the regulations appear to assume that this segregation will always occur prior to the required beginning date. The regulations do not address a situation in which an alternate payee's separate account is created in a year in which an RMD is due. For example: Assume a participant is age 75 in 2025 and has an account balance as of the end of 2024 of $100,000. Assume that the participant divorces in 2025 and the plan receives a QDRO directing the plan to split the account as of a date in 2025, with the alternate payee receiving 66% of the account. In determining the RMD that the alternate payee must pay in 2025, there is no prior year-end account balance for the alternate payee. It would seem unfair to require the participant to pay the entire RMD. It is possible the QDRO will address this, but even if it does, that would not necessarily determine the tax requirements. We do not believe the current regulations directly address this situation.

Second, it will occasionally happen that an alternate payee will keep his or her account in the plan, but the participant will not. In that case, the plan administrator may not receive any notification, and will have little way to know, when the former participant dies. And whether or not the alternate payee dies before or after the employee will impact how the RMD rules apply. We recommend the Service consider a rule of administrative convenience in this circumstance, such as allowing the plan administrator to presume that the alternate payee dies after the former participant unless the plan administrator has actual knowledge to the contrary.

Clarification of Anti-Cutback Relief. The SECURE Act contains a provision related to Code section 411(d)(6) and ERISA section 204(g) (generally known as the "anti-cutback" rule). This rule provides relief for any plan amendment made pursuant to the SECURE Act on or before the last day of the first plan year beginning on or after January 1, 2022 (later for governmental or certain collectively bargained plans), or such later date as the Secretary of the Treasury may prescribe.

We believe it would be helpful for the Service to provide guidance on the application of this relief. For example, we expect that, once the final regulations are released, plan sponsors will wish to consider whether to revise the plan's distribution options, particularly for beneficiaries. We do not believe that a plan's protected optional forms of benefits include optional forms payable upon the death of the employee, and thus we believe a plan could amend those options at any time.

We have also heard some concern that the anti-cutback relief in the SECURE Act may not be available beyond the end of the 2022 plan year, notwithstanding that many plans will not need to adopt amendments under the Service's various remedial amendment rules until a later date. We believe it would be helpful for the Service to confirm that the anti-cutback relief in the SECURE Act is available until the date that a plan must be amended.

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The SPARK Institute appreciates the opportunity to provide these comments to the Service. If the Service has any questions or would like more information regarding our comments, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director