1401 H Street, NW, Washington, DC 20005-2148, USA
202-326-5800 www.ici.org

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

Re: Notice of Proposed Rulemaking – Required Minimum Distributions

To Whom It May Concern:

The Investment Company Institute (ICI)[1] appreciates the opportunity to provide our views to the Treasury Department ("Treasury") and Internal Revenue Service (IRS) on the proposed regulations relating to required minimum distributions (RMDs) from retirement plans and individual retirement accounts (IRAs).[2] The proposal would amend the regulations under section 401(a)(9) of the Internal Revenue Code ("Code"), and other related sections, to reflect changes to the RMD rules enacted under the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act") and other legislation over the years.

BACKGROUND

Our comments mainly relate to the following SECURE Act changes:

- Section 114 of the SECURE Act increased the age at which RMDs must begin, from age 70½ to age 72. The provision became effective for distributions required to be made after

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $31.3 trillion in the United States, serving more than 100 million investors, and an additional $10.0 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] *See* 87 Fed. Reg. 10504 (February 24, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-02-24/pdf/2022-02522.pdf.

December 31, 2019, with respect to individuals who attain age 70½ after December 31, 2019.

- Section 401 of the SECURE Act modified the RMD rules for post-death distributions to designated beneficiaries from defined contribution plans and IRAs. It generally requires the account to be fully distributed within 10 years following the year of the plan participant's or IRA owner's death, unless the distribution is made to an "eligible designated beneficiary" (i.e., a surviving spouse, a disabled or chronically ill individual, an individual who is not more than 10 years younger than the participant or IRA owner, or a child of the participant or IRA owner who has not reached the age of majority). Eligible designated beneficiaries can continue to "stretch" RMD payments over life expectancy. This section is generally effective for RMDs with respect to employees (or IRA owners) with a date of death after December 31, 2019, although there are special rules for certain situations and a delayed effective date for governmental and collectively bargained plans.

EXECUTIVE SUMMARY

Our comments and recommendations include the following:

- *Applicability Dates and Plan Amendment Deadlines*. Provide relief as soon as possible by delaying the applicability date of the amended regulations and the deadline for plan amendments. **(Section 1)**
- *10-Year Rule for Designated Beneficiaries - Continued Application of "At Least as Rapidly" Rule.* Reverse the proposed interpretation that would apply the "at least as rapidly rule" simultaneous with the new 10-year rule for designated beneficiaries when the employee dies after the required beginning date. **(Section 2.1)**
- *Application of New 10-Year Rule Upon Death of Oldest Beneficiary*. Reconsider the "death of oldest beneficiary" trigger for application of the 10-year rule, which is proposed to apply in certain situations involving multiple beneficiaries. **(Section 2.2)**
- *Eligible Designated Beneficiary Status - Documentation of Disability or Chronic Illness*. Modify the proposal to allow plans and IRA providers to rely on a beneficiary's representation that he or she satisfies the definition of disabled or chronically ill. **(Section 3.1)**
- *Eligible Designated Beneficiaries Who Are Older Than Account Owner*. Eliminate the proposed rule that would require full distribution to a beneficiary who is older than the account owner when the beneficiary's remaining life expectancy is less than or equal to one. **(Section 3.2)**
- *IRAs – Time Limit for Spousal Election and Recapture of Hypothetical RMDs*. Eliminate the proposed rule that would deny eligible rollover treatment for certain distributions that hypothetically would have been treated as RMDs, when the spouse elects to roll over amounts after missing the deadline for electing to treat the IRA as the spouse's own. **(Section 4)**

- *Request for Comments on 403(b) Plans*. Structural and administrative differences between 403(b) and tax-qualified 401(a) plans would make application of the tax-qualified plan RMD rules unworkable. **(Section 5)**

1. Applicability Dates and Plan Amendment Deadlines

The regulatory amendments are proposed to apply beginning January 1, 2022. For 2021, the proposal states that the existing regulations apply, along with a reasonable, good faith interpretation of the amendments made by sections 114 and 401 of the SECURE Act. Compliance with the proposed regulations will satisfy the reasonable, good faith interpretation requirement.

The proposal does not change the current statutory deadline for making plan amendments to reflect the SECURE Act changes (generally the end of 2022 for private-sector plans) and does not include any model amendment language.

We previously requested relief relating to the regulatory applicability dates and plan amendment deadlines in a March 25, 2022 letter signed by ICI and several other organizations.[3] The letter makes the following recommendations, which are hereby incorporated by reference:

- The amended regulations should be effective no earlier than the first calendar year beginning at least nine months after final regulations are issued, and should provide relief for reasonable, good faith interpretations until then.
- The deadline for amending plans and IRAs should be delayed at least one full plan year (calendar year for IRAs) from the later of (1) the effective date of final RMD regulations or (2) the date IRS publishes updated Listings of Required Modifications (LRMs).[4]

We strongly urge Treasury and IRS to act quickly to provide the aforementioned relief. Ideally, the effective date of the final regulations would provide even more time (e.g., 12 or 18 months) to make the necessary system updates. Many of the interpretations introduced by the proposal (as described later) were unexpected and will take time to incorporate into practice. Furthermore, the uncertainty associated with possible changes to the final RMD regulations make it even more difficult to comply with all aspects of the proposal in 2022, especially given that we are well into the year.

The time, resources, and cost associated with amending plan documents this year (which would likely need to reflect the proposed RMD regulations) and again the following year to reflect the

[3] March 25, 2022 Letter from American Benefits Council, American Council of Life Insurers, Committee of Annuity Insurers, Finseca, Insured Retirement Institute, Investment Company Institute, National Association of Insurance and Financial Advisors, National Association of Professional Employer Organizations, Retirement Industry Trust Association, Securities Industry and Financial Markets Association, Small Business Council of America, and The SPARK Institute, available at https://www.ici.org/system/files/2022-03/34088a.pdf.

[4] Amendments to individually designed plans generally do not need to be adopted until a change in the law is published on the IRS Required Amendments List, but for calendar year pre-approved plans—which includes most plans—amendments would be needed by the end of 2022.

final RMD regulations is significant. Even if final regulations are issued before the end of 2022, there may not be enough lead time to amend documents to reflect the final guidance (and to notify IRA owners of the amendments) before the end of the year. We urge you to provide plan amendment deadline relief as soon as possible, so that the timeline for IRA and plan amendment projects currently underway can be adjusted accordingly.

We note that H.R. 2954 (the "Securing a Strong Retirement Act of 2022" or "SECURE 2.0"), which recently passed the US House of Representatives, would push back the plan amendment deadline for SECURE Act changes generally to December 31, 2024.[5] This delay reflects Congress' understanding of the need for plan amendment deadline relief in this context. The prospects for enactment of SECURE 2.0 remain unclear, for reasons unrelated to the plan amendment deadline provision, and therefore Treasury and IRS should act as soon as possible.

2. 10-Year Rule for Designated Beneficiaries

The proposal provides that, under the new 10-year rule for designated beneficiaries, the employee's entire interest in a defined contribution plan (including an IRA) must be distributed by the end of the calendar year that includes the tenth anniversary of the employee's death. This 10-year rule applies regardless of the timing of the employee's death.

2.1 Continued Application of "At Least as Rapidly" Rule

With respect to employees who die after their required beginning date (RBD), the proposal provides that the "at least as rapidly" rule[6] continues to apply simultaneous with the 10-year rule. Under this interpretation, the designated beneficiary would continue to have annual RMDs (calculated using the beneficiary's life expectancy, as under the existing regulations) due for up to nine calendar years after the employee's death. In the tenth year following the calendar year of the employee's death, a full distribution of the employee's remaining interest would be required. (The same annual payout rule would apply to the designated beneficiary of an eligible designated beneficiary who dies before the entire interest is distributed.)

We urge Treasury and IRS to reconsider this interpretation, which is contrary to common expectations that beneficiaries subject to the new 10-year rule would not be required to take annual distributions during the 10-year period.[7]

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[5] On March 29, 2022, the US House of Representatives approved H.R. 2954 by a vote of 414 to 5. Section 501 of the bill would require adoption of plan amendments on or before the last day of the first plan year beginning on or after January 1, 2024 (2026 in the case of governmental plans), as long as the plan operates in accordance with such amendments as of the effective date of a bill requirement or amendment. The bill also would conform the plan amendment deadlines under the SECURE Act, the CARES Act, and the Taxpayer Certainty and Disaster Tax Relief Act of 2020 to the SECURE 2.0 deadlines.

[6] The "at least as rapidly" rule requires that, with respect to an employee or IRA owner who dies after the RBD, the remaining portion of the interest must be distributed at least as rapidly as under the method of distributions in use by the employee or IRA owner. *See* Code section 401(a)(9)(B)(i).

[7] It also appears to conflict with Publication 590-B (as revised April 25, 2022), which states on page 11: "The 10-year rule requires the IRA beneficiaries who are not taking life expectancy payments to withdraw the entire balance

As amended by the SECURE Act, Code section 401(a)(9) includes the following:

"(H) Special rules for certain defined contribution plans. In the case of a defined contribution plan, if an employee dies before the distribution of the employee's entire interest-

(i) In general. Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii) [the 5-year rule]--

(I) shall be applied by substituting "10 years" for "5 years", and

(II) shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (A)."

The plain meaning of this provision is that the pre-SECURE Act rule for death before RBD (i.e., the 5-year rule) shall apply to designated beneficiaries of defined contribution plan accounts, regardless of whether the employee dies before or after the RBD, except that "10 years" is substituted for "5 years." The 5-year rule in subparagraph (B)(ii) of section 401(a)(9) applies *in lieu of*, not *in addition to*, the "at least as rapidly" rule of subparagraph (B)(i). There is no indication that Congress intended to apply the "at least as rapidly" rule and the 10-year rule simultaneously to such designated beneficiaries.

The Ways and Means committee report on the SECURE Act provides the following explanation of section 401:

> "Under the provision, the five-year rule is expanded to become a 10-year period instead of five years ('10-year rule'), such that the 10-year rule is *the general rule* for distributions to designated beneficiaries after death (*regardless of whether the employee (or IRA owner) dies before, on, or after the required beginning date*) unless the designated beneficiary is an eligible beneficiary as defined in the provision. Thus, in the case of an ineligible beneficiary, distribution of the employee (or IRA owner's) entire benefit is required to be distributed by the end of the tenth calendar year following the year of the employee or IRA owner's death."[8] (Emphasis added.)

If Congress had intended the "at least as rapidly" rule to continue to be the *general* rule for RMDs when the employee or IRA owner dies on or after the RBD, with the new 10-year cap for

of the IRA by December 31 of the year containing the 10th anniversary of the owner's death. For example, if the owner died in 2021, the beneficiary would have to fully distribute the IRA by December 31, 2031. *The beneficiary is allowed, but not required, to take distributions prior to that date.* The 10-year rule applies if (1) the beneficiary is an eligible designated beneficiary who elects the 10-year rule, if the owner died before reaching his or her required beginning date; or (2) the beneficiary is a designated beneficiary who is not an eligible designated beneficiary, regardless of whether the owner died before reaching his or her required beginning date." (Emphasis added.) Publication 590-B is available here: https://www.irs.gov/pub/irs-pdf/p590b.pdf. Taxpayers may not rely on IRS publications as binding precedent.

[8] Report of the Committee on Ways and Means, House of Representatives, on H.R. 1994, Rept. 116–65, p. 108 available at https://www.congress.gov/116/crpt/hrpt65/CRPT-116hrpt65.pdf.

certain designated beneficiaries applying concurrently with that rule, the report could have specified that intent. Instead, the committee report clearly states that the 10-year rule is to be the *general* rule for designated beneficiaries, regardless of the timing of the employee's or IRA owner's death.

Not only does the proposed interpretation conflict with the plain meaning of the new special rules for defined contribution plans in Code section 401(a)(9)(H), but it also increases administrative complexity and will result (and already has resulted) in confusion for beneficiaries.

Beneficiaries of employees and IRA owners who died in 2020 did not know that an annual RMD would be needed for 2021 and most likely did not take distributions that would satisfy the "at least as rapidly" rule. If Treasury does not reconsider the interpretation to apply the "at least as rapidly rule" on top of the 10-year rule, at a minimum, it must provide guidance and relief for dealing with these "missed" RMD payments. That said, we believe the better course would be to reverse the proposed interpretation and allow the 10-year rule to stand on its own as intended.

2.2 Application of New 10-Year Rule Upon Death of Oldest Beneficiary

Section 1.401(a)(9)-1(b)(2)(iii)(B) of the proposal would require that for an employee who dies prior to the statutory effective date of the new special rules for defined contribution plans (January 1, 2020 for non-governmental, non-collectively bargained plans), if the employee has multiple designated beneficiaries, the new 10-year rule will apply upon the death of the oldest designated beneficiary if that designated beneficiary is alive on or after the effective date. Similarly, under proposed regulation section 1.401(a)(9)-5(f), for situations where the employee has more than one beneficiary and life expectancy distributions apply (e.g., all of the employee's beneficiaries are eligible designated beneficiaries), the 10-year rule would be triggered upon the death of the oldest designated beneficiary.

We recommend that Treasury and IRS reconsider the "death of oldest beneficiary" trigger for application of the 10-year rule in these situations. This rule would be difficult to administer in practice because the plan administrator or IRA beneficiaries may not know when the oldest beneficiary has died. IRA beneficiaries may not even know the identities or ages of the other beneficiaries. Though it is possible to avoid application of this rule by establishing separate accounting for each of the beneficiaries (in which case, the RMD rules would be applied separately to each beneficiary), the impracticality of the oldest beneficiary rule will lead to problems in cases where such separate accounting is not timely established.

3. Special Rules for Eligible Designated Beneficiaries

The SECURE Act provides special rules for eligible designated beneficiaries (EDBs) of defined contribution plans and IRAs, who are defined as including a spouse, minor child of the employee, chronically ill or disabled individual (or certain trusts for the same), and beneficiary not more than 10 years younger. Instead of applying the 10-year rule, EDBs can elect life

expectancy distributions beginning in the year after the year of death, except that a surviving spouse can delay until the owner's RMD age.

3.1 Eligible Designated Beneficiary Status - Documentation of Disability or Chronic Illness

With respect to a beneficiary who is disabled or chronically ill as of the date of the employee's death, the proposal would require documentation of the disability or chronic illness to be provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the employee's death. The proposal includes details around the required documentation.

We urge Treasury and IRS to modify the proposal to allow plans and IRA providers to rely on a beneficiary's representation that he or she satisfies the definition of disabled or chronically ill. Any required documentation from the beneficiary should be provided to IRS upon request, rather than to the plan administrator or IRA provider. The sensitive personal nature of a beneficiary's health status makes this proposed requirement awkward to administer. Furthermore, financial institutions acting in this capacity are not appropriately positioned to make determinations on health status or to maintain private health information.

3.2 EDBs Who Are Older Than Account Owner

Under the proposal, for an EDB who is older than the IRA owner/employee (and where the owner/employee dies after the RBD), the EDB may use the *owner's/employee's* remaining life expectancy to calculate annual distributions. However, the proposal provides that the entire remaining amount must be distributed by the calendar year when the *beneficiary's* remaining life expectancy is less than or equal to one.

We urge Treasury and IRS to eliminate this special rule requiring accelerated distribution when the beneficiary's remaining life expectancy is less than or equal to one, because it is administratively burdensome (requiring monitoring of two different life expectancies) and will be difficult to communicate to affected beneficiaries. Furthermore, applying this rule will likely involve only small differences in the dollar amounts being distributed, which would not justify the administrative burden.

4. IRAs – Time Limit for Spousal Election and Recapture of Hypothetical RMDs

Section 1.408-8(c) of the proposal would introduce a new deadline for a spousal beneficiary to treat an IRA as his or her own IRA. The deadline would be the later of (1) the calendar year in which the surviving spouse reaches age 72 and (2) the calendar year following the calendar year of the individual's death. If the spouse does not make such an election by the deadline, he or she still may elect to roll over distributions to his or her own IRA at a later time but would be subject to a special recapture rule for distributions that hypothetically would have been required after the spouse's RBD. Under proposed regulation section 1.402(c)-2(j)(3)(iii) (relating to eligible rollover distributions), the spouse would not be able to roll over these hypothetical RMDs to the IRA.

This treatment of spousal rollover elections is not required under existing law or regulations and there is no statutory change in the SECURE Act that would require it. The changes made by the SECURE Act were intended to preserve currently available options for spouses and other beneficiaries categorized as eligible designated beneficiaries.[9] The requirement to calculate hypothetical RMDs if a spouse later rolls over to his or her own IRA, adds unnecessary complexity to already complex rules.[10] We question whether this added complexity is justified, and urge IRS to eliminate the hypothetical RMD recapture requirement in the final regulations.

5. Request for Comments on 403(b) Plans

Section 403(b) plans must satisfy RMD rules similar to the requirements of Code section 401(a)(9) for tax-qualified plans (such as 401(k) plans). As noted in the proposal, however, the specific RMD requirements applicable to 403(b) plans in some instances track the RMD rules for IRAs, and in other instances track the rules for qualified plans. For example, like in the IRA context, an RMD owed from one 403(b) plan account may be satisfied through a distribution from another 403(b) account of the taxpayer. However, the RBD applicable to a 403(b) account is determined in the same manner as a qualified plan RBD, which takes into account the calendar year in which the employee retires from employment with the employer maintaining the plan (if that date is later than the year in which the employee reaches age 72).

In this regard, the proposal indicates that the "Treasury Department and the IRS are considering additional changes to the required minimum distribution rules for section 403(b) plans so that they more closely follow the required minimum distribution rules for qualified plans. For example, under this approach, 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). These changes would treat similar employer-sponsored plans consistently and may facilitate compliance with the required minimum distribution rules."[11]

Accordingly, the proposal requests "comments on these possible changes to the required minimum distribution rules for section 403(b) plans, including: (1) Any administrative concerns; (2) any differences between the structure or administration of section 403(b) plans and of qualified plans that should be taken into account in applying the required minimum distribution

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[9] The Committee Report states that "[t]he Committee believes that the tax subsidy for retirement savings should phase down after the lives of the individual and surviving spouse, except in the case of certain other beneficiaries." Report of the Committee on Ways and Means, House of Representatives, on H.R. 1994, Rept. 116–65, p. 108 available at https://www.congress.gov/116/crpt/hrpt65/CRPT-116hrpt65.pdf.

[10] Pursuant to proposed regulation section 1.402(c)-2(j)(3)(iii), the hypothetical RMDs would be calculated for each year before the rollover distribution, beginning with the year the spouse attained age 72 (or the employee would have reached age 72, if later), by determining the amount that would have been the RMD for that year had the life expectancy rule applied to the spouse, using an "adjusted account balance," which is the account balance reduced by the excess (if any) of the sum of the hypothetical RMDs for years leading up to each determination year over the distributions actually made to the spouse during those years.

[11] 87 Fed. Reg. 10520.

rules for qualified plans to section 403(b) plans; and (3) any transition rules that would ease the implementation of these possible changes."

We strongly recommend against conforming the RMD rules for 403(b) plans to the RMD rules applicable to tax-qualified plans. There are structural and administrative differences between the two types of plans that would make importation of the tax-qualified plan rules unworkable. For example:

- Many 403(b) plans are funded with individually owned annuity contracts and custodial accounts, which do not provide authority for the plan sponsor, custodian, or annuity provider to force distributions. Consequently, the individual beneficiary must retain the control over when and how to satisfy RMDs from 403(b) plans.
- 403(b) plans commonly are administered on the same recordkeeping platforms as those used for IRAs. These platforms are not set up to administer RMDs as a qualified plan would. There would be tremendous expense involved in making the necessary programming changes to comply with qualified plan-like rules.
- It is also common for 403(b) plan participants to have accounts with more than one vendor within the same plan. A rule that requires RMDs to be made on a plan-by-plan basis would be even more difficult to implement in a multi-vendor situation.

It is also worth noting that when Treasury and IRS updated the 403(b) regulations in 2007, generally requiring that all 403(b) contracts and custodial accounts be held pursuant to an employer's written plan document and imposing certain other qualified plan-style obligations on 403(b) plan administrators, the agencies provided significant relief with respect to 403(b) contracts and accounts issued to former employees and beneficiaries, contracts established pursuant to a transfer previously permitted under Revenue Ruling 90-24, and contracts held by discontinued vendors.[12] This relief recognized the existence of participant-controlled 403(b) accounts that, from a practical standpoint, could not be treated as part of the employer's ongoing 403(b) plan.

Here too, the IRS should recognize that the history of 403(b) plans cannot be undone. 403(b) plans simply are fundamentally different in structure and administration, and it is not realistic to achieve complete conformity with 401(a) tax-qualified plans.

[12] *See* 26 C.F.R. § 1.403(b)-11(g) and Rev. Proc. 2007-71.

CONCLUSION

ICI and its members appreciate the opportunity to comment on the proposed regulations. We are committed to working with Treasury and the IRS to implement the SECURE Act changes in an effective manner. If you have any questions, please contact me at 202-326-5821 or elena.chism@ici.org.

Sincerely,

/s/ Elena Barone Chism

Elena Barone Chism
Associate General Counsel
Retirement Policy