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RE: Request for Guidance from Treasury Regarding Sections 107(c) and 327 of the SECURE 2.0 Act as part of Finalizing Proposed Regulations IRS REG-105954-20

Dear Ms. Levy and Ms. Weiser:

The American College of Trust and Estate Counsel (“ACTEC”) is pleased to submit comments regarding Sections 107(c) and 327 of the SECURE 2.0 Act¹, both of which impact required minimum distributions. Section 107(c) adds a new clause (v) at the end of section 401(a)(9)(C) of the Internal Revenue Code of 1986 (“Code”) adding the definition of “applicable age” for beginning required lifetime distributions. Section 327(a) amends Code section 401(a)(9)(B)(iv) to update special rules for the surviving spouse of the employee and to make those rules elective. Section 327(b) directs the Secretary to amend Q&A-5(a) of Treasury Regulation section 1.401(a)(9)-5 (or any successor regulation thereto) to direct use of the Uniform Lifetime Table when an electing spouse is the employee’s sole designated beneficiary. Section 327(c) provides that such amendments shall apply to calendar years beginning after December 31, 2023.

ACTEC understands that before the enactment of the SECURE 2.0 Act, Treasury was finalizing the proposed amendments to the Income Tax Regulations under Code section 401(a)(9) that were published in the Federal Register on February 24, 2022 (“Proposed Regulations”). ACTEC believes that the enactment of Sections 107(c) and 327 raise additional issues that may need to be considered as part of finalizing the Proposed Regulations. ACTEC also believes that clarification may be needed as to certain issues of interpretation and implementation of Section 327, and that it may be possible to provide this clarification as part of finalizing the Proposed Regulations. Such clarification will be helpful to taxpayers, plan administrators, IRA custodians and trustees.

¹ “SECURE 2.0 Act” or “SECURE 2.0” refers to Division T of The Consolidated Appropriations Act, 2023, P. L. 117-328, signed into law by President Joe Biden on December 29, 2022.

Executive Director
DEBORAH O. MCKINNON

ACTEC's goal in making this submission is to present these comments in time to be considered in the process of finalizing the Proposed Regulations.

ACTEC is a nonprofit association of lawyers and law professors. Its more than 2,400 members are called "Fellows" and practice throughout the United States, Canada and other foreign countries with extensive experience in the preparation of wills and trusts, estate planning, and administration of trusts and estates of decedents, minors and other individuals who lack capacity. 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 association activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of personal income tax, transfer tax, and retirement plan rules, and providing advice to IRA and retirement plan administrators on plan administration. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

ACTEC's comments and recommendations regarding Sections 107(c) and 327 are set forth in the attached memorandum. If you or your staff would like to discuss the contents of this memorandum with the ACTEC Fellows who created it, please contact Steven E. Trytten (626-365-6000 ext. 200, strytten@beaconlawllp.com) or Kathleen R. Sherby (314-259-2224, krsherby@bclplaw.com), who head up the task force of the ACTEC Employee Benefits in Estate Planning Committee, or Deborah McKinnon, ACTEC Executive Director, (202-684-8460, domckinnon@actec.org).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kurt A. Sommer". The signature is fluid and cursive, with a large initial "K" and "S".

Kurt A. Sommer
ACTEC President 2023-2024

Comments of the American College of Trust and Estate Counsel (“ACTEC”) on Sections 107(c) and 327 of the SECURE 2.0 Act

This memorandum sets forth ACTEC’s comments and recommendations for guidance with regard to Sections 107(c) and 327 of the SECURE 2.0 Act² (“Section 327”) for Treasury’s consideration as part of finalizing the proposed amendments to the Income Tax Regulations under section 401(a)(9) of the Internal Revenue Code of 1986 (“Code”) that were published in the Federal Register on February 24, 2022 (“Proposed Regulations”). Treasury’s guidance on the issues discussed herein will be helpful to taxpayers, plan administrators, IRA custodians and trustees.

ACTEC appreciates the opportunity to provide these comments and recommendations to Treasury. It is ACTEC’s hope that these comments and recommendations will yield helpful insight to Treasury on issues that taxpayers, plan administrators, IRA custodians and trustees may face when the amendments found in Sections 107(c) and 327 take effect and will be helpful to Treasury in finalizing the Proposed Regulations.

CITATIONS AND DEFINITIONS

For readability, these comments use certain citation conventions and define certain key terms that are frequently used. Defined terms are capitalized in these comments to indicate that the term as used has the meaning set out in these definitions.

Citation Conventions are as follows:

- (i) Final Treasury regulations are cited as “Reg. [section or §] 1.401(a)(9)-...”,
- (ii) Proposed Regulations are cited as “Prop. Reg. [section or §] 1.401(a)(9)-...”,
- (iii) Provisions of the Code are cited as “Code [section or §] ...”, and
- (iv) Sections of this memorandum are referred to as “Section ...”

Defined Terms are as follows:

1. **“Accumulation Trust”** means a See-Through Trust that is not a Conduit Trust, as provided in Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).
2. **“Applicable Multi-Beneficiary Trust” or “AMBT”** means a trust described in Code section 401(a)(9)(H)(v) as a trust that has more than one beneficiary, all of whom are treated as Designated Beneficiaries, and at least one of such beneficiaries is disabled or chronically ill.

² “SECURE 2.0 Act” or “SECURE 2.0” refers to Division T of The Consolidated Appropriations Act, 2023, P. L. 117-328, signed into law by President Joe Biden on December 29, 2022.

- a. **“Type I AMBT”** means an AMBT described in Code section 401(a)(9)(H)(iv)(I) that is to be divided immediately upon the death of the Employee into separate trusts for each beneficiary.
 - b. **“Type II AMBT”** means an AMBT described in Code section 401(a)(9)(H)(iv)(II) that does not provide any interest in Employee’s interest in the Plan to any beneficiary who is not a disabled or chronically ill EDB until the death of all beneficiaries who are disabled or chronically ill EDBs.
3. **“Beneficiary Determination Date”** means September 30 of the calendar year following the calendar year of the death of the Employee.
4. **“Conduit Trust”** means a See-Through Trust defined in Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A), the terms of which provide that with respect to the deceased Employee’s interest in the Plan, all distributions will, upon receipt by the trustee, be paid directly to or for the benefit of specified beneficiaries.
5. **“Countable Beneficiary(ies)”** means those beneficiaries of a See-Through Trust who are treated as beneficiaries of the Employee under Prop. Reg. § 1.401(a)(9)-4(f)(3)(i) and not disregarded under Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii) or under Prop. Reg. § 1.401(a)(9)-4(c)(2).
6. **“Designated Beneficiary” or “DB”** is as defined in Code section 401(a)(9)(E)(i) meaning any individual designated as a beneficiary by the Employee.
7. **“Election to Treat IRA as Spouse’s Own”** means the timely election by a deceased Employee’s surviving spouse to treat a deceased Employee’s IRA as the spouse’s own IRA pursuant to Reg. § 1.408-8, A-5(a), as modified under Prop. Reg. § 1.408-8(c) or successor regulations, provided that applicable requirements are satisfied (such as the time limit for making the election provided under Prop. Reg. § 1.408-8(c)(1)(ii)).
8. **“Eligible Designated Beneficiary” or “EDB”** means any Designated Beneficiary who falls within any of the five categories described in Code section 401(a)(9)(E)(ii) with respect to any Employee, specifically: (i) surviving spouse of Employee, (ii) child of Employee who has not reached majority, (iii) disabled individual, (iv) chronically ill individual, or (v) individual not more than ten years younger than Employee.
9. **“Eligible Surviving Spouse”** means a deceased Employee’s surviving spouse who meets the eligibility requirements in Code § 401(a)(9)(B) to make the Section 327(a) Election because:
 - (i) any portion of the Employee’s interest is payable to (or for the benefit of) the surviving spouse, and
 - (ii) Employee died before Employee’s Required Beginning Date.
10. **“Employee”** refers broadly to an Employee, participant, account holder, IRA owner, or Roth IRA owner of any retirement Plan or account subject to the rules of Code section 401(a)(9).
11. **“Plan”** refers broadly to any retirement Plan, retirement Plan account, IRA, Roth IRA and any other retirement Plan or account subject to the rules of Code section 401(a)(9) and the

regulations thereunder, as set forth in Reg. § 1.401(a)(9)-1, A-1 and to the Employee’s interest in such Plan, as the context indicates.

12. **“Primary Beneficiary”** means a trust beneficiary described in Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(A).

13. **“Required Beginning Date”** or **“RBD”** means the date specified in Code section 401(a)(9)(C) on which an Employee must start taking Required Minimum Distributions.

14. **“Required Minimum Distribution”** or **“RMD”** means the amount required to be distributed from a Plan in a given calendar year pursuant to the minimum distribution requirements of Code section 401(a)(9) and the regulations thereunder.

15. **“Secondary Beneficiary”** means a trust beneficiary described in Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(B).

16. **“Section [107 or 107(c)]”** means Section 107 (or Section 107(c) as the case may be) of the SECURE 2.0 Act contained in Division T of The Consolidated Appropriations Act, 2023, P.L. 117-328, signed into law by President Joe Biden on December 29, 2022.

17. **“Section [327, 327(a), 327(b), or 327(c)]”** means Section 327 (or Sections 327(a), 327(b), or 327(c) as the case may be) of the SECURE 2.0 Act contained in Division T of The Consolidated Appropriations Act, 2023, P. L. 117-328, signed into law by President Joe Biden on December 29, 2022.

18. **“Section 327(a) Election”** means the election arising under Code section 401(a)(9)(B)(iv) as amended pursuant to Section 327(a).

19. **“See-Through Trust”** means a trust described in Prop. Reg. § 1.401(a)(9)-4(f)(1)(i) that is designated as beneficiary of an Employee under a Plan and that meets the requirements of Prop. Reg. § 1.401(a)(9)-4(f)(2) such that certain beneficiaries of the trust who meet the description in Prop. Reg. § 1.401(a)(9)-4(f)(3) and are not disregarded are treated as having been designated beneficiaries.

20. **“Separate Account Rule”** means the rule provided under Reg. § 1.401(a)(9)-8, A-2(a)(2), as modified under Prop. Reg. § 1.401(a)(9)-8(a) or successor regulations, whereby after the death of the Employee, Code section 401(a)(9) is applied separately with respect to the separate interests of each of the Employee’s beneficiaries provided that applicable requirements (such as the separate accounting requirements of Prop. Reg. § 1.401(a)(9)-8(a)(2)) are satisfied, and subject to applicable limitations (such as the general prohibition for trust beneficiaries of Prop. Reg. § 1.401(a)(9)-8(a)(1)(iii)).

21. **“Spousal Rollover”** means a rollover of benefits from a deceased Employee’s Plan into an eligible account owned by the Employee’s surviving spouse pursuant to Section 402(c), either made directly or through a distribution to the surviving spouse beneficiary that the surviving spouse deposits within 60 days into such eligible account.

22. **“10-Year Election”** means the optional election described in Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii) that a plan administrator may decide to include or not include in the Plan document.

This election, if included, would permit the Employee (or perhaps the EDB) to elect to apply the 10-year rule in lieu of the life expectancy method that is otherwise available to the EDB if the Employee dies before the RBD.

COMMENTS AND RECOMMENDATIONS FOR GUIDANCE

1. Treasury Should Clarify the Application of the Applicable Age Clause Added by Section 107(c) for Those Born in 1959.

Section 107(c) of SECURE 2.0 adds the following new clause at the end of Code § 401(a)(9)(C):

“(v) APPLICABLE AGE –

“(I) In the case of an individual who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, the applicable age is 73.

“(II) In the case of an individual who attains age 74 after December 31, 2032, the applicable age is 75.”

For anyone born in 1958, it is clear that the applicable age is 73 because the requirements of subclause (I) are satisfied, and the requirements of subclause (II) are not satisfied.³ For anyone born in 1960 or later, it is clear that the applicable age is 75 because the requirements of subclause (II) are satisfied, and the requirements of subclause (I) are not satisfied.⁴

However, for anyone born in 1959, that individual meets the requirements of both subclauses (I) and (II). That is, the individual born in 1959 attains age 72 after December 31, 2022, and age 73 before January 1, 2033 ($1959+73=2032$), and also turns age 74 after December 31, 2032 ($1959+74=2033$).

ACTEC understands that Congress is aware of this issue and is planning to make a technical correction that will clarify that the applicable age will be 75 for those who attain age 73 after December 31, 2032, which includes those born in 1959.⁵

If this technical correction has not occurred by the time that Treasury finalizes its regulations on issues related to Required Minimum Distributions, ACTEC recommends that Treasury clarify that the applicable age under new Code § 401(a)(9)(C)(v) for those born in 1959 is 75.

³ Such an individual attains age 72 after December 31, 2022 ($1958+72=2030$), attains age 73 before January 1, 2033 ($1958+73=2031$), and does not attain age 74 after December 31, 2032 ($1958+74=2032$).

⁴ Such an individual attains age 74 after December 31, 2032 ($1960+74=2034$) and does not attain age 73 before January 1, 2033 ($1960+73=2033$).

⁵ May 23, 2023, letter from the Chairmen and Ranking Members of House Ways and Means Committee and Senate Finance Committee to the Secretary of the Treasury and the Commission of the Internal Revenue Service.

2. Treasury Should Clarify How Required Minimum Distributions Work Depending on Whether the Surviving Spouse Makes the Section 327(a) Election.

Prior to enactment of SECURE 2.0, if an Employee named the Employee's older spouse as the beneficiary of the Employee's IRA and died at age 68, when the Employee's surviving spouse was age 74, the Employee's surviving spouse could leave assets in the deceased Employee's Plan without taking any RMDs until the Employee would have turned 72 (now age 73). This special rule arose in what was then Code § 401(a)(9)(B)(iv)(I). And if the surviving spouse died before the date on which distributions to the surviving spouse would begin, another special rule under what was then Code § 401(a)(9)(B)(iv)(II) provided that post-death distributions be determined by applying the subparagraph in Code § 401(a)(9)(B) "as if the surviving spouse were the employee." These special rules applied automatically and were available to surviving spouses of any age.

Now, under Code § 401(a)(9)(B)(iv) as amended by Section 327(a) of SECURE 2.0, the special rules found in Code § 401(a)(9)(B)(iv) no longer apply automatically and a surviving spouse will need to make an irrevocable election, at the time and in the manner provided by Treasury, to have these two special rules apply. The surviving spouse's decision to make or not make the Section 327(a) Election may also have consequences under other rules, too, as discussed in this Section 2 and in Section 3.

The change from an automatic regime to an elective regime is significant, and ACTEC has observed confusion among taxpayers, plan administrators, IRA custodians and trustees as to the rules that will apply depending on whether the Section 327(a) Election is made. ACTEC recommends that Treasury clarify the various rules that will apply depending on whether the Section 327(a) Election is made or not made, including these two special rules under pre-SECURE 2.0 found in Code § 401(a)(9)(B)(iv) and the other rules discussed in this Section 2 and in Section 3.

(a) Is the Section 327(a) Election Available to Any Surviving Spouse Beneficiary or Only to a Surviving Spouse Who is the Sole Beneficiary?

Code § 401(a)(9)(B)(iii) and (iv) provide special rules for an Eligible Surviving Spouse if

- (i) any portion of the Employee's interest is payable to (or for the benefit of) the surviving spouse,⁶ and
- (ii) Employee died before Employee's Required Beginning Date.⁷

Under Section 327(a) of SECURE 2.0, a new election was added to the special rule for the surviving spouse found in Code § 401(a)(9)(B)(iv) when the Employee died before the Employee's Required Beginning Date. However, similar to the provisions of Code

⁶ Code § 401(a)(9)(B)(iv), if the surviving spouse is the designated beneficiary referred to in clause (B)(iii)(I).

⁷ A designated beneficiary will only be referred to in Code § 401(a)(9)(B)(iii)(I) when an Employee dies before beginning distributions. When an Employee dies on or after the date for beginning distributions, Employee's post-death distributions are governed by Code § 401(a)(9)(B)(i), and not by Code §§ 401(a)(9)(B)(ii), (iii), and (iv).

§ 401(a)(9)(B)(iv) before SECURE 2.0, Section 327(a) does not limit this special rule or the election to surviving spouses who are the sole beneficiary of the Employee's Plan.

Existing regulations (promulgated before SECURE 2.0) required the surviving spouse to have been the "sole beneficiary" of the deceased Employee in order to use the special rule for the surviving spouse found in Code § 401(a)(9)(B)(iv), even though this was not required in what was then Code § 401(a)(9)(B)(iv).⁸ These regulations also provided that this rule is not available to the surviving spouse of a surviving spouse who remarries.⁹

ACTEC notes that the provisions of Section 327(b) differ in this regard from the provisions of Section 327(a), in that Section 327(b) of SECURE 2.0 explicitly provides that the rule set out in Section 327(b) is limited to those surviving spouses who are "the employee's sole designated beneficiary."

In order to assist Employees in their planning and surviving spouses in making the decision on whether to make the Section 327(a) Election, ACTEC believes it is important for Treasury to provide guidance as to whether the Section 327(a) Election requires the surviving spouse to be the "sole beneficiary" of the deceased Employee's Plan. If so, taxpayers, plan administrators, IRA custodians and trustees would benefit from clarification of how the rules apply when an Eligible Surviving Spouse is not the sole beneficiary of the deceased Employee's Account. This is discussed in more detail in Section 4(a).

(b) What is the Result of the Section 327(a) Election on the Ability to Defer the Date on Which Distributions Must Begin?

If an Eligible Surviving Spouse makes the Section 327(a) Election, the special rule now found in Code § 401(a)(9)(B)(iv)(II) will apply. Under this rule, the date on which the distributions to the surviving spouse commence, "... shall not be earlier than the date on which the employee would have attained the applicable age."

Before SECURE 2.0, this rule was automatic and was found in Code § 401(a)(9)(B)(iv)(I). The regulations¹⁰ provided that this deferral of the date on which distributions commence for the surviving spouse under this special rule was until the end of the calendar year in which the deceased Employee would have attained the specified age, even though the date prescribed in what was then Code § 401(a)(9)(B)(iv)(I) was the date on which the deceased Employee would have attained such age.

It seems that SECURE 2.0 did not make any substantive change in this special rule previously found in Code § 401(a)(9)(B)(iv)(I) and now found in Code § 401(a)(9)(B)(iv)(II). The only change in Code § 401(a)(9)(B)(iv)(II) was to change the words "the date on which the employee would have attained age 72" to "the date on which the employee would have attained the applicable age." This change simply coordinates with Section 107 of SECURE 2.0 (which

⁸ Reg. § 1.401(a)(9)-3, A-3(b) and A-5; Prop. Reg. § 1.401(a)(9)-3(d) and 3(e)(1).

⁹ Reg. § 1.401(a)(9)-3, A-5; Prop. Reg. § 1.401(a)(9)-3(e)(2).

¹⁰ Reg. § 1.401(a)(9)-3, A-3(b)(2).

increases the age at which lifetime distributions are required to begin to age 73 starting in 2023, and to age 75 starting in 2033).

But now that this special rule is subject to an election, ACTEC believes it is important for Treasury to clarify whether the deferral under Code § 401(a)(9)(B)(iv)(II) is until the date on which the deceased Employee would have attained such age, or until the end of the calendar year in which the deceased Employee would have attained such age. In this regard, ACTEC observes that prescribing deferral until the end of the calendar year in which the deceased Employee would have attained such age seems most consistent with the approach taken on this and other issues in the existing and proposed regulations.

It appears to ACTEC that if an Eligible Surviving Spouse makes the Section 327(a) Election, then the special rule now found in Code § 401(a)(9)(B)(iv)(II) will apply and the date on which distributions commence for the surviving spouse would not be earlier than the date on which the deceased Employee would have attained the applicable age, or the end of the calendar year in which that occurs if Treasury so specifies.

It appears to ACTEC that if an Eligible Surviving Spouse decides not to make the Section 327(a) Election, then Code § 401(a)(9)(B)(iv)(II) will not apply and the date on which distributions commence for the surviving spouse will be the end of the calendar year following the calendar year of the Employee's death. ACTEC recommends that Treasury confirm whether an election and a non-election work in this manner.

(c) What is the Result of the Section 327(a) Election on the Required Minimum Distributions When the Spouse Dies Before Beginning Distributions?

If an Eligible Surviving Spouse makes the Section 327(a) Election, the special rule now found in Code § 401(a)(9)(B)(iv)(III) will also apply. Under this rule, if the surviving spouse dies before the date on which distributions to the surviving spouse begin, "... this subparagraph shall be applied as if the surviving spouse is the employee,"¹¹ and required minimum distributions after the spouse's death are determined using the rules that apply when an Employee dies before the Employee's required beginning date.¹²

Before SECURE 2.0, this rule was automatic and was found in Code § 401(a)(9)(B)(iv)(II). The enactment of Secure 2.0 made no substantive change in this special rule previously found in Code § 401(a)(9)(B)(iv)(II) and now found in Code § 401(a)(9)(B)(iv)(III). The only change in Code § 401(a)(9)(B)(iv)(III) was to change the words "as if the surviving spouse were the employee" to "as if the surviving spouse is the employee."

How this rule applies will be important for taxpayers, plan administrators, IRA custodians and trustees to understand. If a Section 327(a) Election is made and the surviving spouse is to be treated as if the surviving spouse is the Employee who had not yet reached the Required Beginning Date, then several different outcomes will result, depending on what beneficiary designation, if any, is in place at the surviving spouse's death. It seems that if the surviving

¹¹ Code § 401(a)(9)(B)(iv)(III).

¹² Reg. § 1.401(a)(9)-3, A-5; Prop. Reg. § 1.401(a)(9)-3(e)(1).

spouse has not named a Designated Beneficiary of the plan, the 5-year rule would apply, and no distributions would be required until the end of the year containing the fifth anniversary of the surviving spouse's death.¹³ However, if the surviving spouse has named a Designated Beneficiary, then it seems that the 10-year rule would apply, and no distributions would be required until the end of the year containing the tenth anniversary of the surviving spouse's death.¹⁴ If the surviving spouse has named an EDB, then it seems that the life expectancy rules applicable to an EDB would apply,¹⁵ subject to the requirement that the remaining balance of the Plan is to be distributed by the end of the year containing the tenth anniversary of the EDB's death (or the EDB's attainment of majority if the EDB is a minor child EDB).¹⁶

ACTEC believes clarification of the operation of this special rule will promote a greater understanding of Code § 401(a)(9)(B)(iv)(III) among taxpayers, plan administrators, IRA custodians and trustees. The following examples are offered as possible illustrations where guidance from Treasury is needed on how Code § 401(a)(9)(B)(iv)(III) would work in various situations. ACTEC proposes suggested interpretations for Treasury's consideration in the Examples below and suggests that including examples such as these in Treasury's guidance would be very helpful in promoting understanding of this rule among taxpayers, plan administrators, IRA custodians and trustees.

Example 2A: A surviving spouse is the designated beneficiary of the Employee's Plan after the death of the 68-year-old Employee in 2024. The surviving spouse has not completed a Spousal Rollover or made an Election to Treat IRA as Spouse's Own with respect to the Plan, and the surviving spouse has not made the Section 327(a) Election or the 10-Year Election with respect to the Plan. The surviving spouse dies during 2025 without having designated a beneficiary. The Plan documents direct that the Plan is now payable to the surviving spouse's estate. Clarification is needed on the RMD requirements that apply to the Plan. ACTEC's understanding of this rule suggests that Code § 401(a)(9)(B)(iv)(III) does not apply because no Section 327(a) Election was made. Thus, an RMD must be taken in 2025 because the surviving spouse, as an EDB, must start taking distributions over the spouse's life expectancy determined under the Single Life Table (redetermined each year) starting no later than the end of the year following the year in which the 68-year-old Employee died. For years following 2025, the surviving spouse's estate and its beneficiaries continue distributions over the life expectancy of the surviving spouse, determined using the age of the surviving spouse on spouse's birthday in 2025 subtracting one each year, subject to distribution of the remaining balance of the Plan at the end of the tenth calendar year following the year of spouse's death.

Example 2B: Same facts as Example 2A, except the surviving spouse makes a Section 327(a) Election and names a Designated Beneficiary before the surviving spouse's death in 2025. ACTEC's understanding of this rule found in Code § 401(a)(9)(B)(iv)(III)

¹³ Code § 401(a)(9)(B)(ii).

¹⁴ Code § 401(a)(9)(H)(i)(I).

¹⁵ Code § 401(a)(9)(H)(ii); § 401(a)(9)(B)(iii).

¹⁶ Code § 401(a)(9)(H)(iii); § 401(a)(9)(E)(iii).

suggests that there would be no RMD requirement for 2025,¹⁷ that there would be no RMD requirements for the years 2026 through 2034,¹⁸ and that the entire balance of the Plan must be distributed by the end of 2035.¹⁹

Example 2C: Same facts as Example 2A, except the surviving spouse makes a Section 327(a) Election and names a beneficiary who would qualify as an EDB before the spouse's death in 2025. ACTEC's understanding of this rule found in Code § 401(a)(9)(B)(iv)(III) suggests that clarification is needed as to the RMD requirements that apply to the Plan. ACTEC proposes the following interpretation for Treasury's consideration: there would be no RMD requirement for 2025,²⁰ that for years following 2025, the EDB would take RMDs in amounts determined using the EDB's life expectancy based on the Single Life Table beginning in the year following the year of the surviving spouse's death, reduced by one for each year thereafter, for as long as the EDB lives and through the year of the EDB's death, and the balance of the Plan must be distributed over the remaining life expectancy of the EDB that continues to be reduced by one each year with the remaining balance of the Plan distributed by the end of the calendar year that includes the tenth anniversary of the EDB's death (or attainment of majority in the case of a minor child EDB).²¹

Example 2D: Same facts as Example 2A, except the surviving spouse makes a Section 327(a) Election and designates as beneficiaries of the Plan 50% to minor child A and 50% to minor child B before the spouse's death in 2025. The 68-year-old Employee is the parent of minor child A, but not minor child B. The surviving spouse is the parent of minor child B, and not minor child A. Code Section 401(a)(9)(E)(ii)(II) defines a minor child EDB as, "... a **child of the employee** [*emphasis added*] who has not reached majority" As a result of spouse's Section 327 Election, Code § 401(a)(9)(B)(iv)(III) applies and directs, "**this subparagraph** [*emphasis added*] shall be applied as if the surviving spouse is the employee." Clarification is needed on whether, for purposes of determining if a child is a "child of the employee," Code § 401(a)(9)(E)(ii)(II) falls within "this subparagraph." That is, whether under these facts, child B, the child of the surviving spouse who makes the Section 327(a) Election, would be a minor child EDB or whether "child of the employee" refers only to a child of the deceased Employee. If the guidance that Treasury provides is that the child of the surviving spouse who makes the Section 327(a) Election would be a minor child EDB (child B in this Example), clarification is also needed as to whether a minor child of the deceased Employee who is not a minor child of the electing spouse is a minor child EDB at the surviving spouse's death (child A in this Example). Because there is no further evidence in the text to suggest an interpretation, ACTEC requests that Treasury clarify and provide examples on determining the "child of the employee" for purposes of determining the RMDs for a

¹⁷ Code § 401(a)(9)(B)(iv)(II).

¹⁸ The "at least as rapidly rule" of Code § 401(a)(9)(B)(i) does not apply because the surviving spouse, who is then treated as an Employee, died prior to beginning distributions.

¹⁹ Code § 401(a)(9)(H)(i) and Prop. Reg. § 1.401(a)(9)-3(c)(3).

²⁰ The "at least as rapidly rule" of § 401(a)(9)(B)(i) does not apply because the surviving spouse, who is then treated as an Employee, died before the Employee-spouse's required beginning date.

²¹ Code § 401(a)(9)(H)(iii).

minor child that commence after the surviving spouse's death where the surviving spouse has made the Section 327(a) Election.

Using these or similar examples to clarify the impact of making a Section 327(a) Election would provide needed guidance that would assist taxpayers, plan administrators, IRA custodians and trustees in correctly applying the effect of this election.

(d) Is the Special Rule for Surviving Spouses that Provides Annual Redetermination of Life Expectancy Subject to the Section 327(a) Election?

Before the enactment of SECURE 2.0, Reg. § 1.401(a)(9)-5, A-5(c)(2) and Prop. Reg. § 1.401(a)(9)-5(d)(3)(iv) each provided that the surviving spouse of a deceased Employee who was the Employee's sole beneficiary shall redetermine his or her remaining life expectancy for each distribution calendar year, at least up through the year of the surviving spouse's death (as discussed in more detail later in this section). This special regulatory provision permitting the surviving spouse/sole beneficiary of an Employee to redetermine life expectancy each distribution calendar year applied regardless of whether the Employee died before, or on or after, the Required Beginning Date.

ACTEC observes that there is some confusion among taxpayers, plan administrators, IRA custodians and trustees as to whether a surviving spouse's decision to make or not make the Section 327(a) Election has any impact on the availability of this regulatory provision for redetermining life expectancy of the sole beneficiary/surviving spouse each year. ACTEC observes that this special rule providing for redetermination of a sole beneficiary/surviving spouse's life expectancy arises under regulations that predate SECURE 2.0 and is not specific to the amendments to Code § 401(a)(9)(B)(iv) made by Section 327 of SECURE 2.0. ACTEC recommends that Treasury clarify whether this rule providing for the redetermination of the sole beneficiary/surviving spouse's life expectancy applies to the sole beneficiary/surviving spouse regardless of whether he or she makes the Section 327(a) Election.

ACTEC observes that Reg. § 1.401(a)(9)-5, A-5(c)(2) is explicit in providing that the remaining life expectancy in the first and subsequent years following the year of the sole beneficiary/surviving spouse's death is determined, "... using the age of the spouse as of the spouse's birthday in the calendar year of the spouse's death, reduced by one for each calendar year that has elapsed after the calendar year of the spouse's death." ACTEC also observes that Prop. Reg. § 1.401(a)(9)-5(d)(3)(iv) is not explicit and could be interpreted as allowing redetermination after the surviving spouse's death, stating only, "If the surviving spouse of the employee is the employee's sole beneficiary, then the surviving spouse's remaining life expectancy is redetermined each distribution calendar year using the surviving spouse's age as of the surviving spouse's birthday in that calendar year." ACTEC recommends that Treasury explicitly provide whether the remaining life expectancy of the sole beneficiary/surviving spouse is to be determined as explicitly provided in Reg. § 1.401(a)(9)-5, A-5(c)(2) or whether the spouse's remaining life expectancy may continue to be redetermined following the year of the surviving spouse's death.

Before the enactment of SECURE 2.0, any determination of the surviving spouse's life expectancy after the Employee's death was to be made using the Single Life Table. As discussed

in Section 3, there may be circumstances where such determination may be made from the Uniform Lifetime Table. ACTEC recommends that Treasury confirm that this rule allowing redetermination of the sole beneficiary/surviving spouse's life expectancy shall apply taking into account the Uniform Lifetime Table, when applicable, and is not limited to just the Single Life Table.

3. ACTEC Recommends that Treasury Provide Guidance as to the Meaning of New Code Section 401(a)(9)(B)(iv)(I) and Section 327(b).

ACTEC observes that new Code § 401(a)(9)(B)(iv)(I) and Section 327(b) may be susceptible to multiple interpretations. Guidance from Treasury harmonizing these two provisions will be important to taxpayers, plan administrators, IRA custodians and trustees.

Congressional intent in enacting Section 327 is expressed in the Senate Finance Committee report as a desire that the Employee's surviving spouse be treated as the Employee. This Committee report states:²²

“Section 327, Surviving spouse election to be treated as employee. Section 327 allows a surviving spouse to elect to be treated as the deceased employee for purposes of the required minimum distribution rules.”

In order to harmonize new Code § 401(a)(9)(B)(iv)(I) and Section 327(b), ACTEC believes it is helpful to look at these provisions together, rather than separately.

Section 327(b) directs Treasury to amend Reg. § 1.401(a)(9)-5, A-5(a) (or any successor regulation thereto) to provide, “... that if the surviving spouse is the employee's sole designated beneficiary and the spouse elects treatment under Code § 401(a)(9)(B)(iv), then the applicable distribution period for distribution calendar years after the calendar year including the employee's date of death is determined under the Uniform Lifetime Table.”

The amendments to Code section 401(a)(9)(B)(iv) under Section 327(a) include a new subclause § 401(a)(9)(B)(iv)(I) as a third special rule for the surviving spouse of the Employee that results from the Section 327(a) Election (in addition to the two special rules discussed in Sections 2(b) and 2(c)). This third rule provides that if a Section 327(a) Election is made, “the regulations referred to in Code section 401(a)(9)(B)(iii)(II) shall treat the surviving spouse as if the surviving spouse were the employee.”

The problem in interpreting these two provisions stems from the fact that Reg. § 1.401(a)(9)-5, A-5(a), referred to in Section 327(b), addresses post-death distributions when an Employee dies *on or after* the Required Beginning Date. This regulatory reference may limit the application of Section 327(b) to situations where the Employee dies *on or after* the Required Beginning Date. On the other hand, the election by the spouse under Code section 401(a)(9)(B)(iv) deals only with the special rules for a surviving spouse beneficiary when the Employee dies *before* the Required Beginning Date, as discussed in Section 2(a).

²² Senate Finance Committee Report on SECURE 2.0 Act of 2022, p. 14.

(a) Does the New Subclause 401(a)(9)(B)(iv)(I) allow the Surviving Spouse of an Employee Who Dies Before Employee’s Required Beginning Date to Determine Life Expectancies Using the Uniform Lifetime Table?

New Subclause (I) ends with the phrase “as if the surviving spouse were the employee.” This phrase appeared in old Code section 401(a)(9)(B)(iv)(II), which was revised to “as if the surviving spouse is the employee” in new Code section 401(a)(9)(B)(iv)(III). In the context of these subclauses (I) and (III), it appears that Congress’ intent in using this phrase is that the surviving spouse is to be viewed as the Employee, rather than as a Designated Beneficiary.

The impact of new Subclause (I) is unclear given that renumbered Subclause 401(a)(9)(B)(iv)(III) already views the surviving spouse as if the spouse is the Employee for purposes of determining distributions after the spouse dies if the death occurs before distributions to the spouse begin. Does this new Subclause I instead contemplate viewing the surviving spouse as if the spouse were the Employee for purposes of determining distributions to the spouse during the spouse’s lifetime? If so, this would mean that the spouse would use the Uniform Lifetime Table that would be used by an Employee, instead of the Single Life Table, if the Section 327(a) Election is made.

A reading of Code section 401(a)(9)(B)(iv)(I) and Section 327(b) consistent with the statement in the Senate Finance Committee report, may be that Section 327 of SECURE 2.0 is meant to allow certain surviving spouses to use the Uniform Lifetime Table whether the Employee dies *before* or *on or after* the Required Beginning Date.

The language in this new Subclause (I) refers to regulations promulgated by Treasury regarding the life expectancy method of distributions,²³ and may be referring to Prop. Reg. § 1.401(a)(9)-5(d)(2) and (3), dealing with determining life expectancy of a Designated Beneficiary when the Employee has died before the Employee’s Required Beginning Date. If the new Subclause (I) is interpreted to provide that the Uniform Lifetime Table is used to determine distributions during the lifetime of the surviving spouse who has made the Section 327(a) Election, concepts that currently appear in Prop. Reg. § 1.401(a)(9)-5(c) will now need to address the changes made by new Code § 401(a)(9)(B)(iv)(I) in final regulations to clarify that the surviving spouse is to determine life expectancy in the same manner as the Employee, using the Uniform Lifetime Table based on the surviving spouse’s age on the spouse’s birthday for each “relevant distribution calendar year” during the spouse’s lifetime.

ACTEC recommends that Treasury explicitly confirm the interpretations set forth above in this Section 3(a) or provide the correct interpretation of these provisions that is consistent with the provisions of this new Code § 401(a)(9)(B)(iv)(I) and Congressional intent.

ACTEC also recommends that Treasury clarify whether the benefit provided under new Subclause (I) discussed here is conditioned on the surviving spouse being the deceased Employee’s sole beneficiary. As discussed in more detail in section 4(a) of this memorandum,

²³ Reg § 1.401(a)(9)-5, Q&A-5(c).

Code § 401(a)(9)(B)(iv) does not condition the Section 327(a) Election on sole beneficiary status.

Clarification is needed on the impact of the Section 327(a) Election on life expectancy determination when the surviving spouse is older than the Employee, and the spouse's age at the time distributions begin exceeds the applicable age at which distributions would have otherwise been required to begin if the surviving spouse were the Employee. ACTEC proposes the following example for Treasury's consideration in which a 68-year-old deceased Employee has named the Employee's 74-year-old surviving spouse as beneficiary of the Employee's Plan, based on the examples in Section 2(c) above. If the surviving spouse makes the Section 327(a) Election, the 74-year-old surviving spouse can defer taking any distributions for 5 years, until the 68-year-old Employee would have attained the applicable age. Once the distributions are required to begin to the now 79-year-old surviving spouse, does the surviving spouse determine the applicable distribution period each year based on the Uniform Lifetime Table, by reference to the surviving spouse's age (age 79 in the year distributions begin), or by reference to the deemed age of the deceased 68-year-old Employee (who would have been age 73 in the year distributions begin)? ACTEC recommends that Treasury clarify whose age is to be used in determining the distribution period in this scenario.

ACTEC believes that there is uncertainty or confusion among taxpayers, plan administrators, or IRA custodians and trustees as to whether new subclause § 401(a)(9)(B)(iv)(I) subjects a surviving spouse who makes the Section 327(a) Election to the 10 percent additional tax on early distributions under Code § 72(t). It would seem that this is not the case, because new subclause § 401(a)(9)(B)(iv)(I) directs that the surviving spouse is treated as if he or she was the employee only for purposes of the regulations governing the life expectancy method of distributions. Thus, it would appear that the Section 327(a) Election will not implicate the additional tax under Code § 72(t). ACTEC requests that Treasury clarify whether the Section 327(a) Election has any impact on the application of the 10 percent additional tax on early distributions under Code § 72(t).

Finally, Treasury should also clarify what the result would be if the surviving spouse remarries and the new spouse is more than 10 years younger. If the surviving spouse names the new spouse as the sole beneficiary for an entire calendar year, then in treating the surviving spouse as if the spouse were the Employee, under Prop. Reg. § 1.401(a)(9)-5(c)(2), would the surviving spouse then use the Joint and Last Survivor Life Expectancy Table? ACTEC observes that existing regulations have generally provided that the benefits of rules arising under Code § 401(a)(9)(B)(iv) are not extended to the surviving spouse of a surviving spouse who remarries.²⁴

(b) ACTEC Suggests that Section 327(b) allows the Surviving Spouse of an Employee Who Dies On or After Employee's Required Beginning Date to Determine Life Expectancies Using the Uniform Lifetime Table.

Section 327(b) directs Treasury to amend Reg. § 1.401(a)(9)-5, A-5(a) (or any successor regulation thereto) to provide, "... that if the surviving spouse is the employee's sole designated

²⁴ Reg. § 1.401(a)(9)-3, A-5; Prop. Reg. § 1.401(a)(9)-3(e)(2).

beneficiary and the spouse elects treatment under Code section 401(a)(9)(B)(iv), then the applicable distribution period for distribution calendar years after the calendar year including the employee's date of death is determined under the Uniform Lifetime Table." However, this language contains two potentially contradictory references. Reg. § 1.401(a)(9)-5, A-5(a) addresses post-death distributions when an Employee dies *on or after* the Required Beginning Date. The election by the surviving spouse under Code section 401(a)(9)(B)(iv) appears to be available only when the Employee dies *before* the Required Beginning Date, as discussed in Section 2(a).

A possible interpretation that would harmonize these two potentially contradictory references in Section 327(b) is that Code § 401(a)(9)(B)(iv)(I) would apply the Uniform Lifetime Table to a surviving spouse who makes the Section 327(a) Election (as discussed in Section 3(a)), and Section 327(b) would apply the Uniform Lifetime Table to a surviving spouse who is the Employee's sole designated beneficiary, when the Employee dies on or after the Required Beginning Date. ACTEC provide taxpayers with another interpretation of Section 327(b) that would likewise harmonize these two seemingly contradictory provisions in Section 327(b).

If the benefit of using the Uniform Lifetime Table when the Employee dies on or after the Required Beginning Date is to be elective as stated in Section 327(b), some clarification is needed on the manner of the election. Treasury may consider guidance confirming that either the Section 327(a) Election can be made by a surviving spouse of an Employee who dies on or after Required Beginning Date or another election is intended to be made available in Treasury's guidance. If another election is intended, the guidance concerning such other election should include the time and manner in which such an election is made, whether a surviving spouse must be the Employee's sole beneficiary to be eligible to make such election, whether notice to the plan administrator is required, and whether the election is irrevocable.

(c) What is the Impact of the Title to Section 327(b)?

There has been much discourse over the provisions set forth in §1.401(a)(9)-5(d)(1)(i) that the 10-year rule enacted for DBs in the SECURE Act remains subject to Code § 401(a)(9)(B)(i), the "At Least As Rapidly" rule when the Employee dies on or after the Required Beginning Date. The title of Section 327(b) is "Extension of Election of At Least As Rapidly Rule."

There has been much discourse over the provisions set forth in Prop. Reg. § 1.401(a)(9)-5(d)(1)(i) that the 10-year rule enacted for DBs in the SECURE Act remains subject to the "At Least As Rapidly" rule of Code § 401(a)(9)(B)(i) when the Employee dies on or after the Required Beginning Date. The title of Section 327(b) is "Extension of Election of At Least As Rapidly Rule." Some have interpreted the words used in this title as a Congressional validation of Treasury's position in the proposed regulations that the At Least As Rapidly rule remains in effect when an Employee dies on or after the Required Beginning Date. Others have interpreted the words used in this title as an indication that the use of the Uniform Lifetime Table is limited to those surviving spouses of Employees who die on or after Required Beginning Date.

ACTEC is concerned that speculation over the meaning of this title may be causing confusion for taxpayers, plan administrators, IRA custodians and trustees. ACTEC suggests that the best interpretation of Section 327(b) as a whole is to read Section 327(b) together with new

§ 401(a)(9)(B)(iv)(I), as discussed in Section 3(a), and that these provisions read together do not seem to limit the use of the Uniform Lifetime Table only to those surviving spouse beneficiaries of Employees who die on or after the Required Beginning Date. ACTEC recommends that Treasury clarify the meaning of Section 327(b), and ACTEC suggests that Treasury provide in its clarification that the title to Section 327(b) does not limit the use of the Uniform Lifetime Table to surviving spouses of Employees who die on or after the Required Beginning Date.

(d) In Order to Accommodate the Use of the Uniform Lifetime Table for Surviving Spouses, a New Uniform Lifetime Table Will be Needed.

Currently the Uniform Lifetime Table commences with age 70, the previous age at which an Employee was required to begin taking distributions from a plan or IRA. However, once a surviving spouse can elect to use the Uniform Lifetime Table as of the beginning of 2024, the spouse may need to determine life expectancy under the Uniform Lifetime Table for ages younger than age 70. ACTEC is aware that these life expectancies could be found in the Joint and Last Survivor Life Expectancy Table but recommends that Treasury publish a revised Uniform Lifetime Table that includes younger ages to accommodate younger surviving spouses.

4. Treasury Should Consider Clarifying the Circumstances in Which the Section 327(a) Election and Related Rules are Available.

(a) If there is a “Sole Beneficiary” Requirement, How Does it Work When a Portion of the Employee’s Interest is Payable to More Than One Designated Beneficiary or to Multiple Beneficiaries?

If Treasury determines that surviving spouse must be the sole beneficiary of the Employee to be able to make certain elections under Code § 401(a)(9)(B)(iv) or Section 327(b), ACTEC is concerned that there may be uncertainty or confusion among taxpayers, plan administrators, or IRA custodians and trustees as to how this requirement works when the Employee has designated multiple beneficiaries, including the Employee’s surviving spouse, as beneficiaries of the Employee’s Plan – particularly if trusts are involved. Depending on the circumstances, this determination may require applying a number of different rules, including:

- (i) The Separate Account Rule,
- (ii) The rules for multiple designated beneficiaries under Prop. Reg. § 1.401(a)(9)-4(e)(2),
- (iii) The rules for disregarding certain beneficiaries after the occurrence of certain post-mortem events under Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A) or Prop. Reg. § 1.401(a)(9)-4(f)(5), and
- (iv) The rules for determining the Countable Beneficiaries of a See-Through Trust.

ACTEC has observed that some have assumed that the “sole beneficiary” requirement cannot be satisfied if there are multiple beneficiaries, which seems to ACTEC to be an erroneous assumption. ACTEC recommends that Treasury provide guidance to help taxpayers, plan

administrators, IRA custodians and trustees better understand the application of these new, elective rules under Section 327 when multiple beneficiaries have been designated.

If a surviving spouse is not the sole beneficiary, it follows that multiple beneficiaries must have been designated. ACTEC understands that the Separate Account Rule generally applies when multiple beneficiaries have been designated. Thus, if the surviving spouse is, for example, one of three individuals designated as beneficiaries, Code section 401(a)(9) is applied separately with respect to the separate interests of each of the Employee's beneficiaries, including the interest of the surviving spouse, and the surviving spouse is the sole beneficiary of his or her interest. Alternatively, the surviving spouse would not be the sole beneficiary in those situations where the deceased Employee has designated multiple beneficiaries and the Separate Account Rule does not apply (which could arise with the designation of an Accumulation Trust or a Conduit Trust with multiple current beneficiaries). ACTEC recommends that Treasury provide guidance on whether the Separate Account Rule works in this manner for purposes of determining whether a surviving spouse is the sole beneficiary of the Employee.

The following examples illustrate several possible scenarios where clarification and guidance will be helpful as to whether a surviving spouse is the sole beneficiary, and if applicable, the impact of the Section 327(a) Election and possible election under Section 327(b) in each scenario. ACTEC suggests that Treasury consider clarifying in its guidance how these rules work with the facts set out in the following examples.²⁵

Example 4A: Employee dies after 2023 having designated the beneficiaries of the Employee's Plan as 50% for her surviving spouse and 50% for her adult child. ACTEC's understanding is that Code § 401(a)(9) is applied separately to the 50% portion for the surviving spouse and to the 50% portion for the adult child. Thus, the surviving spouse would be the sole beneficiary of his or her 50% portion for purposes of the Section 327(a) Election and related rules.

Example 4B: Employee dies after 2023 having designated the beneficiaries of the Employee's Plan as 50% for her surviving spouse and 50% for a Conduit Trust for her adult child as the only current beneficiary. ACTEC's understanding is that Code § 401(a)(9) is applied separately to the 50% portion for the surviving spouse and to the 50% portion for the Conduit Trust for the adult child. The adult child, as the only current beneficiary, is the only Countable Beneficiary of the Conduit Trust and thus the sole beneficiary of that portion, and the surviving spouse would be the sole beneficiary of his or her 50% portion for purposes of the Section 327(a) Election and related rules.

Example 4C: Employee dies after 2023 having designated the beneficiaries of the Employee's Plan as 50% for the Employee's surviving spouse and 50% for the Employee's favorite charity. ACTEC understands that Code § 401(a)(9) is applied separately to the 50% portion for the surviving spouse and to the 50% portion for charity.

²⁵ All examples in Section 4(a) assume timely compliance with the separate accounting requirements that apply to the Separate Account Rule under Prop. Reg. § 1.401(a)(9)-8(a)(2), if applicable.

Thus, the surviving spouse would be the sole beneficiary of his or her 50% portion for purposes of the Section 327(a) Election and related rules.

Example 4D: Employee dies after 2023 having designated a Conduit Trust for the Employee's surviving spouse (as the sole current beneficiary of the Conduit Trust) as the beneficiary of the Employee's Plan. ACTEC understands that the surviving spouse, as the sole current beneficiary, is the only Countable Beneficiary of the Conduit Trust, and would be the sole beneficiary of 100% of Employee's Plan for purposes of the Section 327(a) Election and related rules.

Example 4E: Employee dies after 2023 having designated Trust A as the beneficiary of the Employee's Plan. Trust A is an Accumulation Trust. The surviving spouse is the sole Primary Beneficiary, Employee's adult child is the sole Secondary Beneficiary, and if the adult child is not living at the time of the surviving spouse's death, the Employee's favorite charity is the sole contingent beneficiary. ACTEC's understanding of the rules is that the surviving spouse and the adult child are both Countable Beneficiaries of Trust A. However, the surviving spouse may not be the sole beneficiary of any portion of Employee's Plan for purposes of the Section 327(a) Election and related rules.

Example 4F: Same as Example 4E, except that the Employee's surviving spouse is disabled, and Trust A is a Type II AMBT. The Employee's surviving spouse is the sole disabled EDB of Trust A, and Trust A provides that no trust beneficiary other than surviving spouse has any right to any interest in Employee's Plan until the death of the surviving spouse. Employee's adult child is the sole Secondary Beneficiary. It is ACTEC's understanding of the rules that, under these facts, the surviving spouse may be the sole beneficiary of the Employee's Plan for purposes of the Section 327(a) Election and related rules because the surviving spouse is the sole disabled or chronically ill EDB of Trust A, and the other beneficiaries are disregarded while the disabled or chronically ill EDB is living.²⁶

Example 4G: Same as Example 4F, except that Trust A is a Type I AMBT that will immediately divide upon the Employee's death, 50% into a Type II AMBT for the disabled surviving spouse, and 50% into a Conduit Trust for the Employee's adult child. The Employee's surviving spouse is the sole disabled EDB of Trust A and of the Type II AMBT, and Trust A and the Type II AMBT each provide that no trust beneficiary other than surviving spouse has right to any interest in Employee's Plan until the death of the surviving spouse. The Employee's adult child is the sole Secondary Beneficiary of the Type II AMBT. It is ACTEC's understanding of the rules that, under these facts, the surviving spouse is the sole disabled or chronically ill EDB of the Type II AMBT, and the other beneficiaries of the Type II AMBT are disregarded while the disabled or chronically ill EDB is living.²⁷ Code § 401(a)(9) may be applied separately to the 50% share of the Type I AMBT that is immediately divided for the surviving spouse's Type II AMBT.

²⁶ Code § 401(a)(9)(H)(iv); Prop. Reg. § 1.401(a)(9)-4(g)(3)(ii).

²⁷ Code § 401(a)(9)(H)(iv); Prop. Reg. § 1.401(a)(9)-4(g)(3)(ii).

The following two examples explore questions related to the Section 327(a) Election and related rules in other situations where the Employee wants to benefit the Employee's spouse. ACTEC observes two important trends in the evolution of the estate planning practice. First, taxpayers are generally utilizing revocable trusts in their estate plans. Second, Employees are finding that plan administrators and custodians are increasingly limiting the space available for designating beneficiaries on their beneficiary forms, making it difficult to enter a carefully drafted designation that creates separate interests in a way that supports separate application of Code § 401(a)(9) to each interest. Some administrators and custodians will accept attachments with longer designations, and others will not do so. ACTEC observes that more and more Employees are designating their revocable trust, the operative estate planning document, because the revocable trust can easily be identified or described on the beneficiary form, and the revocable trust will provide for the division of the Plan assets in a way that produces the same substantive outcome as if the shares had been specified directly in the beneficiary designation form. ACTEC also observes that Employees often do not seek tax advice when dealing with their Plan benefits as these are dealt with through their Human Resources department or through their IRA sponsor either when a new account is opened or an existing account is moved. As a result, some taxpayers may be unaware of the limitations to designating their revocable trust as beneficiary of their Plan.

With the enactment of Section 327, and if Treasury determines that the Section 327(a) Election and related rules require that the surviving spouse be the Employee's sole beneficiary, ACTEC is concerned that the use of a revocable trust as a beneficiary of the Employee's Plan may result in significant detriment to a surviving spouse given the new Section 327(a) Election and related rules. ACTEC suggests that Treasury consider adopting a rule that would apply Code § 401(a)(9) separately to divisions under an Employee's revocable trust that occur immediately at death, or at least to the interests thereunder that pass to or for the benefit of Employee's surviving spouse.

The following Examples illustrate circumstances where such a rule would avoid depriving a surviving spouse of the benefits of the Section 327(a) Election and related rules where there is little difference in the beneficial interest of the surviving spouse:

Example 4H: Employee dies after 2023 having designated Trust R as the beneficiary of the Employee's Plan. Trust R was revocable during the Employee's lifetime. Upon the Employee's death, Trust R becomes irrevocable and provides that all trust assets, including Plan assets, are to immediately pass outright and free of trust 50% to the Employee's surviving spouse and 50% to the Employee's adult child. The Trustee of Trust R completes the assignments of all assets promptly and before the Beneficiary Determination Date. Clarification is needed with respect to the application of Code § 401(a)(9) and the ability of the surviving spouse to make the Section 327(a) Election and related elections. ACTEC proposes the following for Treasury's consideration: Code § 401(a)(9) should apply to the surviving spouse's 50% interest under the revocable trust such that the surviving spouse is eligible to make the Section 327(a) Election. If Code § 401(a)(9) does not apply separately to the surviving spouse's 50% interest under the revocable trust, the surviving spouse is not deemed the Employee's sole beneficiary and may not be eligible to make the Section 327(a) Election.

Example 4I: Same as Example 4H, except that Trust R passes immediately 50% to a Conduit Trust for the Employee's surviving spouse (as the sole current beneficiary of the Conduit Trust) and 50% to the Employee's adult child. Clarification is needed with respect to the application of Code § 401(a)(9) and the ability of the surviving spouse to make the Section 327(a) Election and related elections. ACTEC proposes the following for Treasury's consideration: Code § 401(a)(9) should apply to the surviving spouse's 50% interest in the Conduit Trust under the revocable trust such that the surviving spouse is eligible to make the Section 327(a) Election.

(b) How Does the Section 327(a) Election Work When Spouse Has Previously Completed a Spousal Rollover or an Election to Treat IRA as Spouse's Own?

ACTEC observes that there may be confusion among taxpayers, plan administrators, or IRA custodians and trustees as to whether the Section 327(a) Election and any election allowed under Section 327(b) (as discussed in Section 3) remain available with respect to a Plan when the Employee's surviving spouse has previously completed a Spousal Rollover or an Election to Treat IRA as Spouse's Own.

If the deceased Employee's surviving spouse has previously completed a Spousal Rollover or an Election to Treat IRA as Spouse's Own, the surviving spouse is then viewed as the owner of that portion of such Plan and is no longer the Employee's designated beneficiary referred to in Code § 401(a)(9)(B)(iii)(I). Thus, the surviving spouse who has previously completed a Spousal Rollover or an Election to Treat IRA as Spouse's Own may no longer be eligible to make the Section 327(a) Election with respect to that portion of such Plan and would also no longer be eligible to make any election that might be available under Section 327(b). ACTEC recommends that Treasury provide guidance with respect to the effect of a spousal rollover or an Election to Treat IRA as Spouse's Own on the ability to make the Section 327(a) Election.

(c) Treasury Should Clarify Whether a Section 327(a) Election Precludes Spouse's Ability to Subsequently Complete a Spousal Rollover or Election to Treat IRA as Spouse's Own.

Some taxpayers may be confused as to how the Section 327(a) Election and any election allowed under Section 327(b) (as discussed in Section 3) effects the elections available to a surviving spouse who is the sole beneficiary of an account to subsequently complete a Spousal Rollover or an Election to Treat IRA as Spouse's Own. Section 327(a) provides that once the Section 327(a) Election is made, it is irrevocable and may not be revoked except with the consent of the Secretary. Clarification is needed with respect to (i) whether the Section 327(a) Election precludes the surviving spouse from later completing a Spousal Rollover or an Election to Treat IRA as Spouse's Own without the consent of the Secretary because such a rollover or election may be viewed as an impermissible revocation of the Section 327(a) Election, and (ii) whether the transition from the Section 327(a) Election to the Spousal Rollover/Spouse's Own election is effective immediately upon the Spousal Rollover/Election to Treat IRA as Spouse's Own or at some other time. ACTEC recommends that Treasury provide clarification with respect to these issues, and ACTEC suggests that Treasury provide as part of its guidance that a Spousal Rollover or an Election to Treat IRA as Spouse's Own is not viewed as an impermissible revocation of the Section 327(a) Election, and thus the surviving spouse who makes the Section 327(a) Election is

not precluded from completing a subsequent Spousal Rollover or an Election to Treat IRA as Spouse's Own. ACTEC also suggests that Treasury explicitly provide that the Section 327(a) Election no longer applies once such subsequent Rollover or Election to Treat IRA as Spouse's Own has been completed. Clarification may also be needed as to whether the transition from the Section 327(a) Election rules to the rules applicable to the Spouse being the owner of the Plan occurs as of the date of the Spousal Rollover or Election to Treat IRA as Spouse's Own, or at some other time.

5. Clarification is Needed on Certain Issues Relating to See-Through Trusts.

(a) How Do Elections under Section 327 Work With a Conduit Trust for the Surviving Spouse?

When an Employee dies before beginning distributions from the Plan, and the Plan is payable to the Employee's surviving spouse, Code § 401(a)(9)(B)(iv) as amended under Section 327(a) generally provides for special rules for the spouse if the spouse makes the Section 327(a) Election.²⁸ Section 327(b) may be interpreted as generally providing for use of the Uniform Lifetime Table by the Employee's surviving spouse if the Employee dies on or after beginning distributions and the spouse makes an election (as discussed in Section 3).²⁹

ACTEC suggests that Treasury clarify how the 327(a) Election and any election arising under Section 327(b) works when a deceased Employee's Plan is payable to a See-Through Trust that has the Employee's surviving spouse as the sole Countable Beneficiary.³⁰ The most common type of See-Through Trust that could have the surviving spouse as its sole Countable Beneficiary is a Conduit Trust for the spouse as the trust's sole current beneficiary (as discussed in Section 4(a) and Example 4D).

ACTEC has observed that it is common for an Employee's Plan to be one of the Employee's largest assets, and that the Plan often needs to be preserved after the Employee's death as a source of support for the remaining lifetime of the Employee's intended beneficiary, such as a surviving spouse. In some cases, the Employee may name the spouse to receive the Plan free of trust. But in other cases, the Employee may have concerns about the spouse's ability to manage the Plan, and special planning may be needed to carry out the Employer's intention to preserve the Plan.³¹ This special planning may be particularly important with smaller Plans, where there may be the greatest uncertainty as to whether the Plan will be sufficient to maintain support for the spouse late in life.

ACTEC has also observed that difficult planning issues can arise for the Employee in another common scenario, where the Employee is part of a blended family that includes a current spouse who is not a parent of the Employee's children. Special planning for this Employee is often

²⁸ Code § 401(a)(9)(B)(iv) states, "If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee and the surviving spouse elects the treatment in this clause— . . ."

²⁹ Section 327(b) includes the phrase, "... and the spouse elects treatment . . ."

³⁰ This comment assumes that the Section 327(a) Election will only be available when the surviving spouse is the "sole beneficiary," as discussed in Sections 2(a) and 4(a).

³¹ For example, the Employee's concerns may arise from physical or mental health issues, including the spouse's susceptibility to undue influence.

needed to preserve the Plan for the spouse's later years and thereafter for the Employee's children, especially if the Employee does not have many assets outside of the Plan.

ACTEC has observed that the most common approach employed when this special planning is needed is for the Employee to make the Plan payable to a Conduit Trust that names the surviving spouse as its sole current beneficiary. This allows RMDs after the Employee's death to be taken gradually over the spouse's lifetime, which preserves as much of the Plan as possible to be available for the spouse late in life. In scenarios such as these, ACTEC has observed that Employees often designate someone other than the spouse as the trustee of such a Conduit Trust.

Under the applicable law of most or all jurisdictions, the formation of an irrevocable trust (including a See-Through Trust) results in a legal relationship where legal title to the assets of the trust is vested in the trustee, and the trustee exercises any and all rights and powers associated with those assets. The trust's beneficiary(ies) is viewed as the equitable owner(s) of the assets of the trust, and the trustee is bound to act in accordance with the terms of the trust and for the benefit of the beneficiary(ies). The trustee is held to a strict fiduciary standard in doing so.³²

Further, under applicable state law as codified in the Uniform Trust Code adopted in at least 35 states, as well as in substantially all other states by common law, it is the trustee who determines the timing and manner of distributions from the trust to the beneficiary(ies), subject to the trustee's fiduciary duties to administer the trust in accordance with the terms of the trust for the benefit of the beneficiary(ies).³³

Thus, when a deceased Employee's Plan is payable to a Conduit Trust for an Employee's surviving spouse as the sole current beneficiary, applicable state law will generally provide that it is the trustee who (i) exercises the rights and powers associated with the assets of the trust, including the Plan, and (ii) determines the timing and manner of distributions in accordance with the terms of the trust, and (iii) requires the trustee to exercise these rights and powers for the benefit of the trust beneficiary(ies).

With a Conduit Trust, every Plan distribution must, upon receipt by the trustee, be paid directly to, or for the benefit of, the current beneficiary.³⁴ Thus, the power to decide the timing and amount of required Plan distributions to a Conduit Trust is tantamount to a power to direct distributions from the Conduit Trust to the spouse/beneficiary – a power that is normally held by the trustee, consistent with applicable state law principals.

At the Employee's death, elections under Section 327 may be available with respect to the Employee's Plan as discussed in Sections 2 and 3. Making such an election may allow post-death RMDs to be made over the longest possible period using the Uniform Lifetime Table, rather than the Single Life Table. In the case of the Section 327(a) Election, the action may also defer the start of RMD requirements depending on the circumstances. Thus, the decision *not to make* such an election is likely to accelerate Plan distributions to the Conduit Trust, which then accelerates distributions from the Conduit Trust to the spouse/beneficiary. Thus, the power to elect or not

³² Uniform Trust Code § 801.

³³ Uniform Trust Code § 802 and Restatement (Second) of Trusts § 170(1) (1959).

³⁴ Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

elect the Section 327(a) Election in these circumstances is also tantamount to a power to direct distributions from the Conduit Trust to the spouse/beneficiary.

ACTEC is concerned that conflicts with applicable state law will arise if the surviving spouse, rather than the trustee, holds the power to elect or not elect the special rules applicable to a spouse arising under Section 327 with respect to a Plan held in such a Conduit Trust, because (i) applicable state law provides that the trustee holds legal title to assets of the trust and all rights and powers associated with those assets, and (ii) applicable state law provides that the trustee is responsible for determining the time and manner of distributions in accordance with the terms of the trust.

ACTEC is also concerned that if the surviving spouse, rather than the trustee, holds the power to elect or not elect these special rules for the spouse arising under Section 327 with respect to a Plan held in such a Conduit Trust in scenarios such as those described above, the spouse's ability to *not elect* these special rules could significantly undermine an Employee's intention to provide for a spouse who needs measured distributions to provide support over the spouse's lifetime. This could prove harmful to the spouse if this power results in an early depletion of the Plan, leaving insufficient assets to support the spouse in the later years of the spouse's life.

In fact, this could cause such an Employee to rule out the Conduit Trust and use an Accumulation Trust for the surviving spouse, to ensure that it will be the trustee who manages the Plan and determines the time and nature of distributions to the surviving spouse. Unfortunately, this would likely produce a less than optimal situation for the spouse, because an Accumulation Trust is a less efficient vehicle for applying a Plan to provide support over the spouse's lifetime.³⁵

In other words, if the spouse of such a Conduit Trust holds the power to make or not make elections under Section 327, then an Employee who requires special planning to ensure that the Employee's Plan will provide support to a spouse for the spouse's lifetime may no longer be able to use the Conduit Trust which, until now, has been the most common and effective planning technique, and this will work to the detriment of the surviving spouse of the Employee.

ACTEC believes that it is important for taxpayers, plan administrators, or IRA custodians and trustees to receive clarification as to whether the surviving spouse or the trustee holds the power to make or not make any elections arising under Section 327 when the Employee's Plan is payable to a Conduit Trust that has the Employee's surviving spouse as the sole current beneficiary. ACTEC requests Treasury to provide this clarification. In that regard, ACTEC suggests that Treasury consider harmonizing the manner in which elections under Section 327 are made with state law, by providing guidance that it is the trustee, rather than the spouse, who holds the power to make or not make these elections when the Employee's Plan is payable to a Conduit Trust that has the Employee's surviving spouse as the sole current beneficiary.

³⁵ The reasons for this inefficiency include (i) non-availability of the life expectancy method for RMDs, (ii) non-availability of elections under Section 327, (iii) less tax-deferred compounding (or tax-free accumulation in the case of a Roth Plan, and (iv) higher income tax rate on Plan distributions that are accumulated, due to compressed trust income tax rates.

ACTEC suggests that there may be support for so imputing the spouse's power to make or not make these elections to the trustee in the regulations that govern See-Through Trusts, notwithstanding the language found in amended Code section 401(a)(9)(B)(iv) and in Section 327(b) that refers to the surviving spouse as making an election.

ACTEC observes that Treasury has harmonized the treatment of trusts under state law with the provisions of Code § 401(a)(9) in its prior regulations, and most recently, in Prop. Reg. § 1.401(a)(9)-4(f)(3)(i), which provides that when a Conduit Trust is designated as beneficiary of an Employee's Plan, the sole current beneficiary of a Conduit Trust is treated as the designated beneficiary of the Employee's Plan.³⁶

Thus, if a deceased Employee's Plan is payable to a Conduit Trust that has the Employee's surviving spouse as the sole current beneficiary, these regulations look through the trust and, even though the trustee is the actual beneficiary of the Employee's Plan and the legal owner of the Plan assets with the power under state law to administer those assets, treat the surviving spouse as the designated beneficiary. ACTEC suggests that these regulations that allow ownership of a Plan by such a Conduit Trust while allowing RMDs "as if" owned by the spouse provide support for a new regulation that allows the trustee of the Conduit Trust as the proper party to make the 327 Election, "as if" made by the spouse, individually.

By harmonizing the regulations with state law by providing that it is the trustee, rather than the spouse, who makes these elections, the Employee will still have flexibility under applicable state trust laws to include the spouse in these election decisions. For example, the Employee could name the spouse as trustee, or direct the trustee to make or not make the election based on the spouse's instruction. However, if Treasury's guidance provides that the surviving spouse/beneficiary of such a Conduit Trust makes these elections, the Employee will have no flexibility to involve the trustee in these elections.

ACTEC is concerned that if the surviving spouse holds the authority to make (or not make) these elections when a deceased Employee's Plan is payable to a Conduit Trust that has the Employee's surviving spouse as the sole current beneficiary, this will stand applicable state trust law on its head. ACTEC suggests that it is important for Treasury to harmonize the rules regarding these elections with applicable state trust law, and that doing so will ensure the effectiveness of the Conduit Trust for Employees who need to arrange for their Plan to provide for a surviving spouse's security for the spouse's lifetime, and will preserve flexibility for Employees within the state law trust framework in making these provisions in the manner that best fits the unique circumstances of the Employee and the surviving spouse.

(b) How Does the 10-Year Election Work With a Conduit Trust for the Surviving Spouse (or other EDB)?

The 10-Year Election was created under the 2022 Proposed Regulations, not by statute.³⁷ The 10-Year Election can arise with respect to an Employee's Plan when the plan document includes an optional provision that permits the election and when the Employee dies before the Required

³⁶ Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2 provides a similar rule.

³⁷ Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii).

Beginning Date with an EDB designated to receive the Plan.³⁸ The optional provision may permit “the employee (or eligible designated beneficiary)” to make the election.³⁹ If the 10-Year Election is made, the EDB takes distributions after the Employee’s death based on the 10-year rule rather than the life expectancy method.

In the scenario where the 10-Year Election is available and is made by the surviving spouse (or other EDB), and if the election is made with respect to a deceased Employee’s Plan that is payable to a Conduit Trust that has the Employee’s surviving spouse (or other EDB) as the sole current beneficiary, the election will accelerate post-death RMDs in most cases by substituting the 10-Year Rule for the life expectancy method that may otherwise apply to the surviving spouse (or other EDB) as sole current beneficiary.

If the plan document directs that the election is to be made by the surviving spouse (or other EDB), the 10-Year Election represents another election decision that is generally provided to the surviving spouse (or other EDB) in a way that, if the Plan is payable to a Conduit Trust for the spouse or EDB as the sole current beneficiary, could be tantamount to a distribution power over the Conduit Trust and likely conflicts with applicable state trust law.

ACTEC believes that it is important for taxpayers, plan administrators, or IRA custodians and trustees to receive clarification as to whether it is the surviving spouse (or other EDB), or the trustee, who holds the power to make or not make the 10-Year Election when the Employee’s Plan is payable to a Conduit Trust that has the Employee’s surviving spouse (or other EDB) as the sole current beneficiary and someone other than the spouse (or other EDB) as the trustee of such trust. ACTEC requests Treasury to provide this clarification.

For the reasons discussed in Section 5(a) with respect to elections under Section 327, ACTEC recommends that Treasury clarify this point by providing that the election is made (or not made) in these circumstances by the trustee and not the surviving spouse (or other EDB).

6. Clarification is Needed to Coordinate Between the Section 327(a) Election and Regulations that Provide Either a 10-Year Election or a 10-Year Rule.

ACTEC has identified certain circumstances that suggest the need for clarification on the appropriate operation of the Section 327(a) Election and either the 10-Year Election or the non-elective 10-year provision found in Prop. Reg. § 1.409(a)(9)-3(c)(5)(ii), as follows:

- Circumstance #1: If the Plan provides, an Employee makes the 10-Year Election before death, and the surviving spouse makes (or attempts to make) the 327(a) Election after the Employee’s death. Which election controls?
- Circumstance #2: A surviving spouse, either as a result of confusion as to application of the rules or erroneous advice, makes (or attempts to make) both the 10-Year Election and the 327(a) Election after the death of the Employee. Which election controls?

³⁸ Id.

³⁹ Id.

- Circumstance #3: Prop. Reg. § 1.409(a)(9)-3(c)(5)(ii) allows inclusion of a *non-elective* provision in the plan document that mandates that RMDs after the death of an Employee who dies before the Required Beginning Date with an EDB designed to receive the Plan are to be made using the 10-year rule instead of the life expectancy rule. An Employee’s Plan contains such a provision, Employee dies before the Required Beginning Date and names the Employee’s surviving spouse as the sole beneficiary of the Plan. The surviving spouse, who perhaps is unaware of the provision, makes (or attempts to make) the Section 327(a) Election. Does the spouse’s Section 327(a) election control?

ACTEC requests Treasury to clarify whether a Section 327(a) Election, which arises by statute, overrides the 10-Year Election and the non-elective 10-year provision, which arise by regulation, in each of these three circumstances, with the result that the life expectancy method and the other special rules discussed in Section 2 are available to the surviving spouse. ACTEC suggests that Treasury provide in its guidance that the Section 327(a) Election overrides the 10-Year Election and the non-elective 10-year provision, because the former election is provided by statute, and because the Section 327(a) Election reflects Congress’s intent that the surviving spouse is allowed “... to elect to be treated as the deceased Employee for purposes of the required minimum distribution rules.”⁴⁰

7. Time and Manner of the Section 327(a) Election.

Section 327(a) provides that “An election described in this clause shall be made at such time and in such manner as prescribed by the Secretary, shall include a timely notice to the plan administrator, and once made may not be revoked except with the consent of the Secretary.”

(a) Deadline for a “Timely” Section 327(a) Election; Conditions and Procedure for a “Late” Section 327(a) Election.

By providing that certain post-mortem events must have occurred by September 30 of the year following the death of the Employee (known as the, the “Beneficiary Determination Date”)⁴¹, Treasury has already recognized that, on the death of an Employee, there is a period of time needed for settling the affairs of the Employee with respect to the Employee’s Plan. The surviving spouse may also require a period of time to evaluate the various elections available to the surviving spouse with respect to the Employee’s Plan if the surviving spouse has been named as a beneficiary of the Employee’s Plan, either directly or indirectly through a trust.

In prescribing the deadline for making the Section 327(a) Election and any other election arising under Section 327, ACTEC recommends that Treasury provide that such election(s) will be “timely” if made by the Beneficiary Determination Date. The Beneficiary Determination Date is a familiar deadline that is already in place and understood by the taxpayers, plan administrators, custodians and trustees, and will allow the spouse sufficient time to evaluate the election, while also preserving enable adequate time before the end of the year following the year of the

⁴⁰ Senate Finance Committee Report on SECURE 2.0 Act of 2022, p. 14.

⁴¹ Reg. § 1.401(a)(9)-4, Q&A-4 and in Prop. Reg. § 1.401(a)(9)-4(c)(1).

Employee's death for the administrator, custodian, trustee if applicable, and spouse to determine and complete the appropriate RMD that must be taken by year-end.

Another advantage of setting the Beneficiary Determination Date as the deadline for making such election(s) is that if the named beneficiary of the Employee's Plan is a trust, this date will allow sufficient time to evaluate the need for any post-mortem modifications to the trust⁴² that may need to be coordinated with the decision to make or not make such election(s), and to carry out any such modifications.

ACTEC understands that the period after the Employee's death can be a chaotic period for the family, especially the surviving spouse. The surviving spouse may have her or his own health challenges and may need time to consult tax and other advisors before making or declining to make the Section 327(a) Election, as illustrated by this example:

Example 7A: Employee dies after 2023 leaving his IRA to the Employee's surviving spouse. Spouse suffers a stroke shortly after the Employee's death and before the deadline for making the Section 327(a) Election. Spouse is incapacitated and resides in a nursing home. Spouse subsequently recovers capacity and discovers that the deadline has been missed. Spouse wants to give late notice of a Section 327(a) Election to the IRA custodian and requests that the IRS grant an extension of the deadline on the basis of reasonable cause.

Clarification is needed as to whether a late Section 327(a) Election may be made, and if so, the conditions and procedure for making such a late election. Consequently, ACTEC requests that Treasury clarify under what conditions, if any, a late Section 327(a) Election may be made, and the procedure for making such a late election. Since the deadline for making a Section 327(a) Election is to be set by Treasury, ACTEC suggests for Treasury's consideration that Treasury adopt a procedure that would allow a late 327 Election for "reasonable cause," adopting the same standards used for waivers of penalties for reasonable cause under Code Section 4974. This would avoid the necessity for a spouse to request and pay for 9100 relief.

(b) Manner of Making the Election.

In order to document the Section 327(a) Election and any other elections under Section 327, ACTEC anticipates that there will need to be a document evidencing the election(s) that is signed by the person making the election(s), and that is sufficient to indicate the intent to make such election(s). Clarification will also be needed on other requirements for the manner of making such elections, including the effective date and notice and delivery requirements.

(i) *Election(s) Not Irrevocable Until Due Date.* ACTEC suggests that Treasury consider providing that the Section 327(a) Election and any other elections under Section 327 are

⁴² Certain post-mortem modifications are permitted under Prop. Reg. §1.401(a)(9)-4(f)(5)(iii).

revocable through the deadline for making such election(s) and only become irrevocable at the time of that deadline. This rule would enable correction of inadvertent elections before that time.

Example 7B: Employee dies after 2023, leaving her IRA to her surviving spouse. Spouse makes the Section 327(a) Election by giving written notice to the custodian for the IRA in January of the year after death. Spouse has second thoughts and sends a notice to the custodian the following month, before the deadline for making the election, rescinding her election. Clarification is needed with respect to the effective date of the Section 327(a) Election. The following is submitted for Treasury's consideration: If the surviving spouse rescinds the Section 327(a) Election before the deadline for making the election has elapsed, ACTEC suggests that Treasury provide that such rescission will be effective.

(ii) *Authority of Agent to Make Timely and Late Elections.* ACTEC suggests that there will need to be clarification as to whether the spouse's agent under a durable power of attorney or guardian of the spouse's estate would be able to make the Section 327(a) Election on behalf of the surviving spouse.

Example 7C: Same as Example 7A, except that Spouse does not subsequently recover her capacity. Spouse's agent or guardian, in taking over Spouse's affairs, wants to make a timely Section 327(a) Election on behalf of the Spouse.

Example 7D: Same as Example 7A, except that Spouse does not subsequently her capacity. Spouse's agent or guardian, in taking over Spouse's affairs, discovers that the deadline for making a Section 327 Election has been missed. Spouse's agent or guardian wants to make a late Section 327(a) Election on behalf of the Spouse.

As set out in Examples 7C and 7D, a surviving spouse may become incapacitated before making the election, may or may not recover capacity, and meanwhile an election under Section 327 may be essential in order to provide the greatest benefit to the surviving spouse. Moreover, a surviving spouse may die shortly after the Employee's death without having had a chance to make the election. ACTEC suggests that Treasury adopt a rule that would enable the spouse's agent under a durable power of attorney or a spouse's guardian to make such election, including a late election if Treasury's guidance allows late elections, on behalf of the spouse in the event of incapacity, and that would enable a spouse's executor to make such election, including a late election if Treasury's guidance allows late elections, on behalf of the spouse in the event of the spouse's death.

(iii) *Format of Election.* ACTEC suggests clarification on the format of the election, and specifically encourages Treasury to permit elections under Section 327 to be submitted in electronic form, and electronically submitted to the plan administrator.

(iv) *Trusts.* ACTEC requests that Treasury provide guidance on the manner in which elections under Section 327 are made when a See-Through Trust is involved if the spouse, and not the trustee, is to make such election (as discussed in Section 5(a)). If a See-Through-Trust for

the benefit of the surviving spouse is named as the Plan beneficiary, the trustee of such a trust will need to be aware of whether such election has been made in order to carry out the trustee's responsibilities under the trust. ACTEC suggests that Treasury provide a rule that clarifies that the surviving spouse must provide copies of pertinent documents related to the making of such election to the trustee by the Beneficiary Determination Date, so that the trustee can take such documents into account in providing the plan administrator with the documentation set out in Prop. Reg. § 1.401(a)(9)-4(h) by October 31 of the year following the year of the Employee's death, which is the date set out in Prop. Reg. § 1.401(a)(9)-4(f)((2)(iv) on which the trustee is required to deliver such documents. This rule would confirm involvement of all necessary parties at the appropriate time.

(v) *Do Not Require Strict Compliance.* ACTEC recommends that strict compliance, such as identifying precise account numbers (that are often changed after death) or using specific forms provided by plan administrators or custodians, should not be required. Strict compliance will only increase the possibility that mistakes are made. If there is more than one account with a particular plan administrator or custodian to which an election under Section may apply, ACTEC suggests that Treasury provide a rule that presumes any notice to the plan administrator or custodian applies to all such accounts unless specifically stated otherwise. Providing for a rule that allows substantial compliance (and not strict compliance) avoids imposing a potentially severe penalty on a well-intentioned beneficiary in circumstances where the intended election is reasonably clear, and takes into account the fact that his election may be one of many tasks that may need to be addressed during the chaotic period of estate administration.

(vi) *Election May Be Made for Some Plans and Not Other Plans.* Finally, ACTEC has observed confusion among taxpayers, plan administrators, IRA custodians, and trustees as to whether the Section 327(a) Election or any other election arising under Section 327 applies across the board to all of the Employee's Plans, or whether the surviving spouse may make such an election for some Plans and not for others. ACTEC suggests that Treasury clarify that the surviving spouse may make any such election for some but not all of the Employee's Plans of which the surviving spouse is the sole beneficiary so long as the surviving spouse does so explicitly.

(c) Is the Plan Administrator Required to Forward the Notice of an Election Under Section 327 to any Subsequent Plan Administrator?

It is common for retirement accounts to be transferred to new custodians or plan administrators both before and after the Employee's death. Plan administrators and IRA custodians are not currently set up to preserve the written documentation of elections made under Section 327, or to pass it on to a successor plan administrator or custodian. ACTEC recommends that Treasury provide that it is the taxpayer, rather than the plan administrator or IRA custodian, who is responsible for (i) preserving the documentation pertaining to each election made under Section 327 that was delivered to the then-serving plan administrator or IRA custodian, and (ii) providing copies of such documentation to successor plan administrators and IRA custodians. ACTEC recommends that Treasury should also explicitly state that the plan administrator or IRA

custodian has no duty to provide any such documentation to any successor plan administrator or custodian when the Plan is transferred to a plan administrator or IRA custodian.

8. Does the Plan Administrator have any Duty to Inform the Surviving Spouse of the Elections Available to the Surviving Spouse as Beneficiary of the Employee's Plan?

With the enactment of the SECURE Act and SECURE 2.0, at least four elections are now potentially available to a surviving spouse who is the beneficiary of the Employee's Plan: (1) the surviving spouse could complete a Spousal Rollover; (2) the surviving spouse could Elect to Treat the Employee's Plan as the Spouse's Own; (3) the surviving spouse could make the Section 327(a) Election if the Employee died prior to the Required Beginning Date (and possibly an election under Section 327(b) if the Employee died on or after the Required Beginning Date); and (4) the surviving spouse could make the 10-Year Election if the Employee died before the Required Beginning Date. Some of these options seem to be mutually exclusive, so that the surviving spouse who elects options 1 and 2, may not then elect options 3 or 4. Each of these options will have a significant impact on the period over which distributions are made from the Plan. Due to the complexity of these options and the need to evaluate these options carefully in the context of the circumstances of each surviving spouse, ACTEC understands that plan administrators and IRA custodians are concerned about the extent to which the plan administrator or IRA custodian has any duty to advise the surviving spouse who is a beneficiary of the Employee's Plan as to the existence and efficacy of any of these options. ACTEC suggests that Treasury provide guidance to plan administrators as to whether the plan administrator has any duty under the tax rules that govern retirement plans and IRAs to provide any such advice or information about these options.

9. Treasury Should Consider Clarifying How the Section 327(c) Effective Date is to Be Applied.

Section 327(c) provides that the amendments made by Section 327 shall apply to calendar years beginning after December 31, 2023.

ACTEC anticipates, as discussed in Section 6(a), that regulations will set a deadline for any Section 327(a) Election (or other election arising under Section 327(b)) that may be made in connection with an Employee's death, and that the regulations may provide that this election must be made by a date arising in the calendar year following the Employee's death.

ACTEC observes that there may be confusion among taxpayers, plan administrators, or IRA custodians and trustees as to how this effective date rule works in the scenario where an Employee dies in 2023 having designated the Employee's spouse as beneficiary, and the Section 327(a) Election becomes available after December 31, 2023.

ACTEC recommends that Treasury provide clarification whether the effective date makes the Section 327(a) Election available based on the date of the Employee's death or based on the deadline for making the Section 327(a) Election. That is, if the Employee dies during 2023 having named the Employee's surviving spouse as beneficiary of the Employee's Plan, may the Employee's surviving spouse make a timely Section 327(a) Election after December 31, 2023?

ACTEC observes that there may also be confusion among taxpayers, plan administrators, or IRA custodians and trustees as to how this effective date rule works in the scenario where an Employee dies in 2022 or 2023 having designated the Employee's spouse as beneficiary, a purported 327 Election is made in 2023 in a time and manner that would have been effective had the amendments made by Section 327(a) then been in effect. Some believe that this results in a valid Section 327(a) Election that is recognized as such beginning January 1, 2024. Others believe that this does not result in a valid Section 327(a) Election for 2024 or any other year. ACTEC recommends that Treasury provide clarification as to whether a Section 327(a) Election is possible in this fact pattern, and if such a Section 327(a) Election might be possible in this fact pattern, how such an election is to be made.

ACTEC observes that Section 327 is a significant change from prior law and may raise complexities that may not be immediately apparent to all taxpayers, plan administrators, or IRA custodians and trustees. Some surviving spouses may not receive appropriate advice in time to make a timely Section 327(a) Election and may proceed under the pre-amendment rules of Code section 401(a)(9)(B)(iv) by delaying distributions until the decedent would have reached the Required Beginning Date.

ACTEC recommends that Treasury consider providing a grace period for making a timely Section 327(a) Election in connection with Employees who die on or before December 31, 2024, having designated Employee's spouse as beneficiary. ACTEC suggests extending the deadline for making Section 327(a) Elections in these cases to the date that would otherwise apply to an Employee who dies on December 31, 2024.

ACTEC also recommends that Treasury consider providing a grace period to cure, without penalty, any failures to take 2024 RMDs by surviving spouses who may have erroneously followed the rules of pre-amendment Code section 401(a)(9)(B)(iv).