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Please Address Reply to:

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Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

**RE: Comments of the American College of Trust and Estate Counsel ("ACTEC")
on Proposed Regulations under Code Section 401(a)(9) as amended by Section
327 of SECURE 2.0 Act**

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit its comments regarding the proposed amendments to the Income Tax Regulations under section 401(a)(9) of the Internal Revenue Code of 1986, as amended ("Code") published in the Federal Register at 89 Fed. Reg. 58644 on July 19, 2024 ("Proposed Regulations"). The Proposed Regulations address, among other issues, the required minimum distribution requirements for plans qualified under Code section 401(a) and are intended to update the special rules for the surviving spouse of the employee regarding the special spousal election created by Section 327 of the SECURE 2.0 Act¹, which was reserved in the final regulations that were issued the same date.

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 incompetents. 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 the Proposed Regulations 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

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.

Edwin P. Morrow III, Chair of ACTEC's Employee Benefits Committee (847-713-1378, emorrow@kelleherholland.com) or Kathleen R. Sherby, the ACTEC Fellow who heads the task force of the ACTEC Employee Benefits Committee for these comments (314-259-2224, krsherby@bclplaw.com), or Kevin Matz, Vice-Chair of ACTEC's Washington Affairs Committee (212-745-9576, kevin.matz@afslaw.com), or Deborah McKinnon, ACTEC Executive Director (202-684-8460, domckinnon@actec.org).

Respectfully submitted,

A handwritten signature in black ink that reads "Susan D. Snyder". The signature is written in a cursive, flowing style with a large initial "S".

Susan D. Snyder, President of ACTEC

ACTEC President 2024-2025

**Comments of the American College of Trust and Estate Counsel (“ACTEC”)
On Proposed Regulations under Code Section 401(a)(9)
as amended by Section 327 of the SECURE 2.0 Act**

This memorandum presents ACTEC’s comments and recommendations regarding the proposed amendments to the Income Tax Regulations published in the Federal Register at 89 Fed. Reg. 58644 on July 19, 2024 (“Proposed Regulations”),¹ which propose amendments to the Income Tax Regulations under section 401(a)(9) of the Internal Revenue Code of 1986, as amended (“Code”). These Proposed Regulation would update the regulations to reflect the amendments made to Code section 401(a)(9) by section 327 of the SECURE 2.0 Act (“Section 327”) enacted on December 29, 2022, as Division T of the Consolidated Appropriations Act of 2023, Public Law 117-328 (2022).

ACTEC commends Treasury and the IRS for propounding the Proposed Regulations and appreciates the opportunity to submit its comments and recommendations concerning them. ACTEC hopes that the comments and recommendations that are contained within this memorandum will provide helpful insight on issues that taxpayers, plan administrators, IRA custodians and trustees may face with respect to Section 327, and will facilitate their further clarification in final regulations.

A. CITATIONS AND DEFINITIONS

These comments use certain citation conventions and define certain key terms that are frequently used. Defined terms are then 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 (including those published in the Federal Register on July 19, 2024) are cited as “Reg. § 1.401(a)(9)-...”
- (ii) Proposed Regulations are cited as “Prop. Reg. § 1.401(a)(9)-...”
- (iii) Provisions of the Code are cited as “Code section ...”, 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 Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).
2. **“Beneficiary Determination Date”** means September 30 of the calendar year following the calendar year of the death of the Employee.
3. **“Conduit Trust”** means a see-through trust defined in 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.

¹ The Proposed Regulations can be found at the following link: [2024-14543.pdf \(federalregister.gov\)](https://www.federalregister.gov/documents/2024/07/19/2024-14543).

4. **“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.
5. **“Eligible Surviving Spouse”** means a deceased Employee’s surviving spouse who is the sole Designated Beneficiary of a separate portion of the Employee’s Plan as of the Beneficiary Determination Date.
6. **“Employee”** refers broadly to an Employee, participant, account holder, IRA owner, or Roth IRA owner of any retirement account subject to the rules of Code section 401(a)(9).
7. **“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.
8. **“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.
9. **“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.
10. **“Section [327, 327(a), or 327(b)]”** means Section 327 (or Sections 327(a) or (b) 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.
11. **“Single Life Table”** refers to the life expectancy table set out in Reg § 1.401(a)(9)-9(b).
12. **“Spousal Election”** means the surviving spouse election provided under Code section 401(a)(9)(B)(iv) and further described in Reg. § 1.401(a)(9)-5(g)(3)(i).
13. **“Uniform Lifetime Table”** refers to the life expectancy table set out in Proposed Reg. § 1.401(a)(9)-9(c), Table 2.

B. COMMENTS AND RECOMMENDATIONS

1. **Treasury Should Clarify Whether an Eligible Surviving Spouse of an Employee Who Dies Before the Employee’s RBD Can Elect Out of the Automatic Application of the Spousal Election.**

In Section 327(a), Congress made the provisions of Code section 401(a)(9)(B)(iv) elective, providing that an Eligible Surviving Spouse could elect the treatment provided for in Code section 401(a)(9)(B)(iv). Congress further provided at the end of Section 327(a) that this election “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.”

Congressional intent in enacting Section 327 is expressed in the Senate Finance Committee’s SECURE 2.0 Act of 2022 Section by Section Summary issued 12-19-22 at page 13 as a

desire that the Employee's surviving spouse be treated as the Employee. This Committee Summary stated:

“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.”²

The Joint Committee on Taxation explanation of Section 327 also reflected the desire for the surviving spouse to have an election to be treated as the Employee, explaining at page 456-457 as follows:

“In the case of an employee who dies before the distribution of required minimum distributions has begun under the plan, and who has designated a spouse as sole beneficiary, the provision permits the spouse to elect to be treated as the employee for purposes of determining the distribution period. . . . The provision also permits the spouse to elect whether to apply the present-law rule that treats the spouse as the employee for purposes of determining the distribution period in cases where the spouse dies before distributions have begun. The provision provides for the elections to be made in such time and manner as prescribed by the Secretary. The election must include a timely notice to the plan administrator, and once made it may not be revoked except with the consent of the Secretary.”³

Before SECURE 2.0, the provisions of Code section 401(a)(9)(B)(iv) applied automatically. The only change enacted by Section 327(a) (other than a minor word change in (III)) was to make this provision subject to the election of an Eligible Surviving Spouse of an Employee who died prior to the RBD. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii) proposes that when the Employee dies before the RBD and an Eligible Surviving Spouse is a beneficiary of the Employee's Plan, “the spouse is treated as having made that election.”

ACTEC is uncertain whether this rule makes the Spousal Election the default in this situation such that the Eligible Surviving Spouse may in some prescribed manner elect out of this automatic application of the Spousal Election or whether this automatic application of the Spousal Election is intended by Treasury to be an irrevocable application of the Spousal Election. ACTEC suggests that making the automatic application of the Spousal Election irrevocable when the Employee has died before the RBD would seem to erase the elective nature of the Spousal Election provided in Section 327(a).

ACTEC recommends that Treasury clarify the provisions of Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii) to state whether this automatic application of the Spousal Election when the Employee dies before the RBD having named an Eligible Surviving Spouse as beneficiary is mandatory or whether this Proposed Regulation is simply a default rule and the Eligible Surviving Spouse may elect out of

² Senate Finance Committee Secure 2.0 Section by Section Summary dated 12-19-2022 can be found at finance.senate.gov/imo/media/doc/Secure%202.0Section%20by%20Section%20Dummsty%2012-19-22%20FINAL.pdf.

³ Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 117th Congress, JCS-1-23 can be found at jct.gov/getattachment/90655114-4645-4790-9d20-4874ce634234.JCS-1-23.pdf.2.0.

this automatic application of the Spousal Election.

2. Treasury Should Clarify Whether an Eligible Surviving Spouse of an Employee Who Dies On or After the Employee's RBD Can Make a Spousal Election When the Election Does Not Otherwise Automatically Apply.

Section 327(b) provides that “if the surviving spouse is the employee’s sole designated beneficiary and the spouse elects treatment under section 401(a)(9)(B)(iv), then the applicable distribution period for distribution calendar years after the distribution calendar year including the employee’s date of death is determined under the uniform lifetime table.” However, Code section 401(a)(9)(B)(iv) applies when the Employee dies before the RBD and Section 327(b) applies when the Employee dies on or after the RBD. In order to harmonize new Code section 401(a)(9)(B)(iv)(I) and Section 327(b), ACTEC believes it is helpful to look at these provisions together, rather than separately.

The amendments to Code section 401(a)(9)(B)(iv) under Section 327(a) include a new subclause section 401(a)(9)(B)(iv)(I) as a third special rule for the surviving spouse of the Employee that results from the Spousal Election. This third rule provides that if a Spousal Election is made, the regulations “shall treat the surviving spouse as if the surviving spouse were the employee.”

Section 327(b) directs Treasury to provide, “... that if the surviving spouse is the employee’s sole designated 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.” Prior to SECURE 2.0, this Uniform Lifetime Table was used for determining the applicable distribution period for the Employee, but the surviving spouse was directed to use the Single Life Table for determining the surviving spouse’s applicable distribution period. Consequently, Section 327(b) seems to be permitting the Eligible Surviving Spouse to make an election under Code section 401(a)(9)(B)(iv), and such an election would then permit the Eligible Surviving Spouse to use the Uniform Lifetime Table, the table used by the Employee, for determining the applicable distribution period for the Eligible Surviving Spouse.

However, this language contains a potentially contradictory provision. The election by the surviving spouse under Code section 401(a)(9)(B)(iv) appears to apply only when the Employee dies *before* the RBD. A possible interpretation that would harmonize this potentially contradictory provision in Section 327(b) is that Code section 401(a)(9)(B)(iv)(I) would apply the Uniform Lifetime Table to an Eligible Surviving Spouse who makes the Spousal Election, and that the Spousal Election may be made by the Eligible Surviving Spouse not only when the Employee dies before the RBD but also when the Employee dies on or after the RBD.

ACTEC believes that Treasury may have taken that position when Treasury provided in Prop. Reg. § 1.401(a)(9)-5(g)(ii)(B) that the Eligible Surviving Spouse “is not *automatically* treated as having made” the Spousal Election. Both Section 327(b) and this Proposed Regulation seem to indicate that an Eligible Surviving Spouse can make the Spousal Election described in Code section 401(a)(9)(B)(iv) and Prop. Reg. § 1.401(a)(9)-5(g)(3)(i).

However, the Prop. Reg. § 1.401(a)(9)-5(g)(ii)(B) leaves open whether such an Eligible Surviving Spouse can affirmatively make the Spousal Election if it is not otherwise provided as a default under the terms of the Plan. ACTEC recommends that Treasury clarify whether an Eligible Surviving Spouse may affirmatively make the Spousal Election if it is not automatic and it is not otherwise the default under the terms of the Plan.

3. If the Employee Dies On or After the RBD, How Is the Eligible Surviving Spouse's Applicable Denominator for a Distribution Calendar Year Determined?

As noted above in Section 2, new Code section 401(a)(9)(B)(iv)(I) and Section 327(b) may be susceptible to multiple interpretations and has recommended that guidance from Treasury harmonizing these two provisions is important to taxpayers, plan administrators, IRA custodians and trustees. ACTEC suggests that the guidance provided in Prop. Reg. § 1.401(a)(9)-5(g)(ii)(B) and (C) may continue to cause confusion for taxpayers, plan administrators, IRA custodians and trustees as to what Treasury intends regarding (1) whether it is necessary for Eligible Surviving Spouse of an Employee who dies on or after the RBD affirmatively to have made a Spousal Election in order to use the Uniform Lifetime Table in determining the Eligible Surviving Spouse's applicable denominator for purposes of the RMD, and (2) whether the Uniform Lifetime Table or the Single Life Table is to be used for determining the Employee's remaining life expectancy.

(a) Must the Eligible Surviving Spouse of an Employee Who Dies On or After the RBD Affirmatively Make the Spousal Election in Order to Use the Uniform Lifetime Table in Computing the RMDs?

ACTEC suggests that, in order to harmonize new Code section 401(a)(9)(B)(iv)(I) and Section 327(b), there may be another interpretation in addition to that discussed in Section 2. That alternate interpretation may be found in Prop. Reg. § 1.401(a)(9)-5(g)(ii)(C). After Prop. Reg. § 1.401(a)(9)-5(g)(ii)(C) sets out how the Eligible Surviving Spouse is to determine the applicable denominator for each distribution calendar *if the Eligible Surviving Spouse has made the Spousal Election*, Prop. Reg. § 1.401(a)(9)-5(g)(ii)(C) continues with the statement in the next sentence that "if the employee died on or after the required beginning date, the applicable denominator for a distribution calendar year is the greater of the applicable denominator determined under the preceding sentence and the employee's remaining life expectancy." This sentence of Prop. Reg. § 1.401(a)(9)-5(g)(ii)(C) does not refer to the Eligible Surviving Spouse having made the Spousal Election as is required in the previous sentence in order to use the Uniform Lifetime Table, but seems to make the Uniform Table available to an Eligible Surviving Spouse of an Employee who dies on or after the RBD even if the Eligible Surviving Spouse had not affirmatively made the Spousal Election. Under this interpretation, the applicable denominator for the Eligible Surviving Spouse will be the longer of the distribution period determined for the Eligible Surviving Spouse under the Uniform Lifetime Table and the employee's remaining life expectancy, regardless of whether the Eligible Surviving Spouse has affirmatively made the Spousal Election.

ACTEC requests that Treasury clarify whether the Uniform Lifetime Table is available when the Employee dies on or after the RBD only if the Eligible Surviving Spouse has affirmatively made the Spousal Election or is available in determining the Eligible Surviving Spouse's applicable denominator even if the Eligible Surviving Spouse has not affirmatively made the Spousal

Election. This clarification will be important for taxpayers, plan administrators, IRA custodians and trustees.

(b) In Determining the Applicable Denominator for a distribution calendar year for the Eligible Surviving Spouse, Is the Employee's Remaining Life Expectancy Determined Using the Uniform Lifetime Table or the Single Life Table?

Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C) sets forth the manner in which the applicable denominator is determined for the Eligible Surviving Spouse. The last sentence of this Proposed Regulation provides that “if the employee died on or after the required beginning date, then the applicable denominator for the distribution calendar year is the greater of the applicable denominator determined under the preceding sentence and the employee’s remaining life expectancy.”

The applicable denominator determined under the preceding sentence directs that the Eligible Surviving Spouse use the Uniform Lifetime Table for the surviving spouse’s age as of the surviving spouse’s birthday in each distribution calendar year. ACTEC is concerned that there may be some confusion regarding how to determine “the employee’s remaining life expectancy” if the Eligible Surviving Spouse is to use the Uniform Lifetime Table in determining the spouse’s applicable denominator. Specifically, there may be confusion as to whether the Employee’s remaining life expectancy is also to be determined using the Uniform Lifetime Table for each distribution calendar year, or is to be determined for the Employee’s age as of the year of death using the Single Life Table and subtracting one each year as provided in Reg. § 1.401(a)(9)-5(d)(3)(i) and (ii), or is to be determined using some other method.

Reg. § 1.401(a)(9)-5(d)(3)(i) states that the method set out in that section is “for purposes of this paragraph (d)”, which seems to imply that this method would not necessarily apply to determine the “employee’s remaining life expectancy” under Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), particularly because the Uniform Lifetime Table would be used to determine the Eligible Surviving Spouse’s life expectancy and such life expectancy of the Eligible Surviving Spouse would be redetermined for each distribution calendar year.

ACTEC believes there may be four different ways to determine the Employee’s remaining life expectancy for purposes of Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C): (1) the Employee’s remaining life expectancy could be determined as provided under Reg. § 1.401(a)(9)-5(d)(3)(i) and (ii) using the Employee’s age on his or her birthday in the year of death using the Single Life Table subtracting one each year (that is, not recalculating that life expectancy); (2) the Employee’s remaining life expectancy could be determined using the Single Life Table for the age the Employee would have been on his or her birthday in each distribution calendar year (that is, recalculating that life expectancy); (3) the Employee’s remaining life expectancy could be determined in the same fashion as the Eligible Surviving Spouse’s life expectancy using the Uniform Lifetime Table for the age the Employee would have been on his or her birthday in each distribution calendar year; or (4) the Employee’s remaining life expectancy could be determined using the Uniform Lifetime Table for the age the Employee would have been on his or her birthday in the year of death subtracting one each year (that is, not recalculating life expectancy).

ACTEC recommends that Treasury clarify this point by providing specifically whether, for purposes of Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), the Employee’s remaining life expectancy is

determined using the Single Life Table or Uniform Lifetime Table and whether the applicable distribution period is or is not recalculated each distribution year.

4. If an Election is Available to an Eligible Surviving Spouse to Elect Out of the Automatic Application of the Spousal Election When an Employee Dies Before the RBD and to Affirmatively Make the Spousal Election When an Employee Dies On or After the RBD, Treasury Should Provide Guidance As to How Such Elections Work.

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 age 73. This special rule arose in what was then Code section 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 section 401(a)(9)(B)(iv)(II) provided that post-death distributions be determined by applying the subparagraph in Code section 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.

Then under Code section 401(a)(9)(B)(iv) as amended by Section 327(a), the special rules found in Code section 401(a)(9)(B)(iv) no longer applied automatically when an Employee dies before the RBD and a surviving spouse would need to make an irrevocable Spousal Election, at the time and in the manner provided by Treasury. And under Section 327(b) a surviving spouse of an Employee who dies on or after the RBD would seem also to have a similar Spousal Election.

Now under Prop. Reg. § 1.401(a)(9)-5(g)(ii)(A), the Spousal Election automatically applies to an Eligible Surviving Spouse when the Employee dies before the RBD, and under Prop. Reg. § 1.401(a)(9)-5(g)(ii)(B), the Spousal Election does not automatically apply when the Employee dies on or after the RBD. The change from an automatic regime to an elective regime back to an automatic regime in some cases and not in others depending on when the Employee dies is significant. ACTEC has observed confusion among taxpayers, plan administrators, IRA custodians and trustees as to how the Spousal Election works. If the Eligible Surviving Spouse is to continue to have an irrevocable election, at the time and in the manner provided by Treasury, whether or not the Spousal Election automatically applies as discussed above in Sections 1 and 2, ACTEC recommends that Treasury provide guidance regarding who makes the Spousal Election when the Eligible Surviving Spouse is the sole beneficiary of a Conduit Trust, and regarding the time and manner for making the Spousal Election.

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

Code section 401(a)(9)(B)(iv) as amended under Section 327(a) generally provides for special rules for an Eligible Surviving Spouse who makes the Spousal Election.⁴ Section 327(b) may be interpreted as generally providing for use of the Uniform Lifetime Table by the Eligible Surviving Spouse when the Employee dies on or after the RBD if the Eligible Surviving Spouse affirmatively makes a Spousal Election (as discussed in Section 3).⁵

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 qualifies as a Conduit Trust for the sole current benefit of the Employee's surviving spouse.

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 ACTEC has 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 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 Conduit Trust or Accumulation Trust) results in a legal relationship where legal title to the assets of the trust is vested in the trustee and the trustee exercises 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 without the power to exercise rights associated with trust assets, but 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.⁶

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

⁴ Code section 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—"

⁵ Section 327(b) includes the phrase, "... and the spouse elects treatment"

⁶ Uniform Trust Code § 801.

fiduciary duties to administer the trust in accordance with the terms of the trust for the benefit of the beneficiary(ies).⁷

Thus, when a deceased Employee's Plan is payable to a Conduit Trust for an Employee's Eligible Surviving Spouse, applicable state law generally (i) provides that it is the trustee who exercises the rights and powers associated with the trust assets (including the Plan), and determines the timing and manner of distributions from the Plan and then to the Eligible Surviving Spouse in accordance with the terms of the Conduit Trust, and (ii) requires the trustee to exercise these rights and powers for the benefit of all of the trust beneficiary(ies).

Since a Conduit Trust must provide that every Plan distribution must, upon receipt by the trustee, be paid directly to, or for the benefit of, the current beneficiary,⁸ this power to make the Spousal Election is tantamount to a power to decide the timing and amount of required Plan distributions to a Conduit Trust from the Plan to the Eligible Surviving Spouse – a power that is normally held by the trustee, consistent with applicable state law principles.

At the Employee's death, elections under Section 327 may be available with respect to the Employee's Plan as discussed in Sections 1 and 2. Such an election may cause post-death RMDs to be accelerated due to the use of the Single Life Table and lack of deferral or may allow post-death RMDs to be made over the longest possible period using the Uniform Lifetime Table. Thus, the decision to elect out of the automatic application of the Spousal Election or the decision affirmatively to make the Spousal Election will have an impact on the timing of Plan distributions to the Conduit Trust, and it then has an impact on distributions from the Conduit Trust to the Eligible Surviving Spouse.

ACTEC is concerned that conflicts with applicable state law will arise if the Eligible Surviving Spouse, rather than the trustee, holds the power to elect out of the automatic application of the Spousal Election or to affirmatively make the Spousal Election 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 the trust assets 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 Eligible Surviving Spouse, rather than the trustee, holds the power to elect out of the automatic application of the Spousal Election or affirmatively to make the Spousal Election under Section 327 with respect to a Plan held in such a Conduit Trust in scenarios such as those described above, the Eligible Surviving Spouse's ability to elect out of or affirmatively make the Spousal Election could significantly undermine an Employee's intention to provide for a spouse who needs measured distributions for his or her 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

⁷ Uniform Trust Code § 802 and Restatement (Second) of Trusts § 170(1) (1959).

⁸ Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

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.⁹

In other words, if the spouse of such a Conduit Trust holds the power to elect out of or affirmatively elect into the Spousal 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. This will work to the detriment of a spouse of the Employee.

However, ACTEC believes that Treasury may have already concluded, for the reasons stated above, that it is the trustee who would make elections available with respect to a Plan when a Conduit Trust is the beneficiary of the Employee's Plan. In the *Analysis* found in Examples 2, 3, and 5 in Reg. § 1.401(a)(9)-4(f)(6) it is the trustee who would make the election between the 10-year rule and annual life expectancy distributions.

ACTEC recommends that Treasury provide similar guidance as to whether, for these same reasons, the trustee and not the Eligible Surviving Spouse would be the one to elect out of or affirmatively elect into the Spousal Election under Section 327. ACTEC believes that such guidance will be important for taxpayers, plan administrators, or IRA custodians and trustees. 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.

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 elect out of or elect into the Spousal 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.

(b) Treasury Should Provide Guidance on the Timing and Manner of Electing Out Of or Affirmatively Electing Into the Spousal Election.

If an election is available to an Eligible Surviving Spouse to elect out of the automatic application of the Spousal Election when an Employee dies before the RBD and affirmatively to make the Spousal Election when an Employee dies on or after the RBD, Treasury should provide guidance on the timing and manner of making these elections. This guidance will need to include the due date of such election, such as the Beneficiary Determination Date; whether a late election can be made for reasonable cause; what documentation will need to be used to evidence an election;

⁹ 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 IRA), and (iv) higher income tax rate on Plan distributions that are accumulated, due to compressed trust income tax rates.

whether the election can be made electronically; to whom the election documentation will need to be given by the due date; whether strict compliance will be required for the information submitted on the required documentation; and whether an election can be made for some Plans and not others.

ACTEC believes that such guidance will not only be highly useful but will also be necessary to taxpayers, plan administrators, IRA custodians and trustees. ACTEC observes that without such guidance, it will not be possible for the Eligible Surviving Spouse to elect out of automatic application of the Spousal Election when the Employee dies before the RBD or affirmatively to make the Spousal Election when the Employee dies on or after the RBD. ACTEC recommends that Treasury provide such detailed guidance in its final regulations if it concluded that the Eligible Surviving Spouse (or the trustee of a Conduit Trust) may elect out of the automatic application of the Spousal Election and may affirmatively make the Spousal Election as discussed in Sections 1 and 2.