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RE: 2020 Guidance from Treasury Regarding Section 2203 of the CARES Act

Dear Ms. Weiser and Ms. Judson:

The American College of Trust and Estate Counsel (“ACTEC”) is pleased to submit this request for guidance from Treasury to address issues raised by the waiver of required minimum distributions (“RMDs”) for 2020 found in Section 2203 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, H.R. 748) enacted March 27, 2020 (the “CARES Act”).

ACTEC is a professional organization of approximately 2,500 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of personal income tax, transfer tax, and retirement plan rules, and providing advice to IRA and retirement plan administrators on plan administration. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

Section 2203(a) of the CARES Act adds a new subsection I to Section 401(a)(9) of the Internal Revenue Code (the “Code”). Code § 401(a)(9)(I)(i) provides that RMDs will not apply during 2020. This rule is similar to the waiver of 2009 RMDs provided in Section 201 of the Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”), P.L. 110-458, enacted December 23, 2008. ACTEC believes that Congress acted then and now with the intention of helping employees by waiving RMDs shortly after a dramatic drop in the value of most investments typically found in employee plans. (This letter uses the term “plan” broadly to refer to all retirement arrangements subject to the minimum distribution rules and the term “employee” to refer to the employees, account owners, or IRA owners associated with them.)

Treasury released Notice 2009-82 on September 24, 2009, to provide guidance and relief in connection with a number of questions resulting from the WRERA waiver of 2009 RMDs. ACTEC recommends that Treasury provide guidance and

Executive Director
DEBORAH O. MCKINNON

relief on similar questions that now arise in connection with the CARES Act waiver of 2020 RMDs. In addition, ACTEC recommends that the guidance and relief account for issues unique to the CARES Act, namely that the Congress provided for the waiver of RMDs nearly three months after the start of the year and after many RMDs may have been made.

ACTEC makes more specific recommendations on some of these questions, as follows.

Relief for Employees Who Received 2020 Distributions.

Code § 402(c)(1) authorizes the employee to transfer any eligible rollover distribution to any eligible retirement plan. Code § 402(c)(4) defines an eligible rollover distribution as any distribution from a retirement plan, but RMD is not an eligible rollover distribution. Code § 402(c)(3)(A) requires the eligible rollover distribution to be transferred to an eligible retirement plan no more than 60 days following the day on which the distributee received the eligible rollover distribution. This is commonly known as the “60-day rollover period.”

The CARES Act waives the 2020 RMD requirement. As a result, any distribution received in 2020, even if the distribution would have been the employee’s RMD in 2020, would now be an eligible rollover distribution. Such a rule change after the start of the year would affect transactions already completed or underway and may be limited by the 60-day rollover period described above. Many employees may have received a distribution before March 27, 2020 (the date of enactment) that they believed was necessary to satisfy the 2020 RMD requirement. Many plan documents require the plan administrator to make distributions from the plan to employees who have retired or have reached a certain age, and the plan administrators may have made and may continue to make such distributions to those employees despite the CARES Act waiver of all 2020 RMDs. Many employees who received a distribution early in the year may not have been able to complete the rollover of the *now* eligible rollover distribution within the 60-day period. And employees who continue to receive RMDs due to the requirements contained in the plan documents may yet be unable to complete the rollover in the 60-day rollover period. The unique circumstances of the COVID-19 pandemic may cause further delays and issues for taxpayers. Efforts at social distancing and the resulting business closures create delays, or even health risks, for employees who need to consult their tax and investment advisors in making decisions about RMDs or taking steps to rollover distributions that would now be eligible rollover distributions. ACTEC believes these employees should not receive a less favorable outcome than employees who may not have received a distribution before the date of enactment and that all of employees who receive a distribution during this time should be allowed to return the distribution to any eligible retirement plan if they so choose.

ACTEC recommends that Treasury provide guidance to all employees who receive a distribution in 2020 and wish to restore the distribution to any eligible retirement plan, and provide relief from the 60-day rollover period limit that might otherwise prevent some employees from restoring these distributions to any eligible retirement plan. Accordingly, ACTEC recommends that Treasury extend relief similar to the relief extended in Section IV of Notice 2009-82, whereby (1) plan administrators could cease making what would have been RMDs to employees during 2020 notwithstanding contrary requirements contained in the plan document; (2) payments from a plan to the employee in 2020 will not be treated as ineligible for rollover on account of Code § 402(c)(4)(A) to the extent the payments equal the 2020 RMDs or are one or more payments in a series of substantially equal distributions (that include the 2020 RMDs) made at least annually and expected to last for the life (or life expectancy) of the employee, the joint lives (or joint life expectancy) of the employee and the employee’s

designated beneficiary, or a period of at least 10 years; and (3) the 60-day rollover period is extended so that it ends no earlier than November 30, 2020 for those 2020 RMDs and for any additional payments that are part of a series described earlier in this sentence.

Unfortunately, the possibility that the employee may not live long enough to benefit from this guidance is a more tangible reality in the current COVID-19 pandemic. ACTEC recommends that the Secretary augment the relief described above to provide six additional months for the executor or personal representative of such a deceased employee who dies before November 30, 2020 to complete a rollover of these 2020 payments.

Notice 2020-23 provides broad relief related to time-sensitive actions, but it is insufficient because the broad relief is limited to actions to be performed between April 1, 2020 and July 15, 2020 and it does not specifically address rollover transfers. ACTEC recommends that Treasury provide the guidance recommended above in a specific manner, just as it did with Notice 2009-82, to ensure that all employees have sufficient time to safely consult with advisors and, when appropriate, to return distributions to their plans (or up to six additional months if the employee dies prior to November 30, 2020). ACTEC also recommends that Treasury clarify whether specific relief so provided supersedes relief that might otherwise be available under Notice 2020-23.

Guidance Regarding 5-Year Rule for 2020 Decedents.

New Code § 401(a)(9)(I)(iii)(II) provides that if clause 401(a)(9)(B)(ii) applies, the 5-year period described in that clause shall be determined without regard to calendar year 2020.

Where the 5-year rule applies to accounts of employees who died during between 2015 and 2019, the language is clear: the 5-year period will be extended one year. However, where the 5-year rule would apply to the account of an employee who dies in 2020, the language is not clear. One interpretation suggests that disregarding the year 2020 requires that the year 2021 be viewed as the year of death, with the result that the 5-year period would run from January 1, 2022, through December 31, 2026. Another interpretation suggests that disregarding the year 2020 is not disregarding any of the 5 years that comprise the 5-year period, with the result that the 5-year period would still run from January 1, 2021, through December 31, 2025.

ACTEC believes that Congress intended to provide relief to all impacted employees who were alive as of January 1, 2020. In fact, given that the COVID-19 pandemic is likely to claim a number of employees' lives in 2020, and given that the CARES Act by its very title is targeted at providing relief in response to the COVID-19 pandemic, it would be contrary to what ACTEC believes was Congress's intent if employees who died during the last five years receive relief and employees who die in 2020 do not. Accordingly, ACTEC recommends that guidance be provided that clarifies that new Code § 401(a)(9)(I)(iii)(II) extends the 5-year period for accounts subject to the 5-year rule for the employee who dies in 2020.

Guidance Regarding the 10-Year Rule for 2020 Decedents.

New Code § 401(a)(9)(I)(iii)(II) of the CARES Act provides, "if clause (ii) of subparagraph B applies, the 5-year period described in such clause shall be determined without regard to calendar year 2020." Because this new section only contains a specific reference to the 5-year rule, and does not contain a similar specific reference to the new 10-year distribution period added by new Code § 401(a)(9)(H)(i) of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), Pub.L. 116-94, there will be some confusion as to whether this new Code § 401(a)(9)(I)(iii)(II) applies to the new 10-year distribution period.

This confusion stems from the unique way that the SECURE Act folds the 10-year rule into Code § 401(a)(9), making 401(a)(9)(B)(ii) the gateway for both the 5-year rule and the 10-year rule. If the employee dies with a designated beneficiary who is not an eligible designated beneficiary, the SECURE Act uses Code § 401(a)(9)(B)(ii) to create a new 10-year distribution period. Since clause (ii) of subparagraph B applies to the 10-year rule, the condition that clause (ii) of subparagraph B applies, found in in new Code § 401(a)(9)(I)(iii)(II), is satisfied by the 10-year rule to the same degree that it is satisfied by the 5-year rule. When new Code § 401(a)(9)(I)(iii)(II) directs that the 5-year period described in that clause is to be determined without regard to calendar year 2020, this new Code § 401(a)(9)(I)(iii)(II) should apply in the same way to the 10-year period. Under the interpretation ACTEC recommends, when “10 years” is substituted for “5 years” pursuant to Code § 401(a)(9)(H)(i), the 10-year period is also determined without regard to calendar year 2020.

Of course, this new 10-year period only applies to employees who die in 2020. However, ACTEC believes that if the new Code § 401(a)(9)(I)(iii)(II) applies to employees who die in 2020 with respect to the 5-year rule, this new Code § 401(a)(9)(I)(iii)(II) should also apply in the same fashion to employees who die in 2020 where their designated beneficiary is subject to the new 10-year distribution period created in the SECURE Act.

Accordingly, ACTEC recommends that guidance provided by Treasury as to the application of new Code § 401(a)(9)(I)(iii)(II) to the 5-year period also include guidance as to the application of new Code § 401(a)(9)(I)(iii)(II) to the 10-year distribution period for employees dying in 2020 with a designated beneficiary who is not an eligible designated beneficiary.

Other Relief.

ACTEC recommends that Treasury consider including in its guidance clarification for employees facing other questions regarding rollover distributions and eligibility, specifically the “one-rollover-per-12 month rule” and the rule limiting the ability of nonspouse beneficiaries to rollover funds withdrawn from an inherited IRA back to an inherited IRA. Even if the statutory nature of these rules limits Treasury’s ability to provide relief, Treasury should address the intersection of these rules with the CARES Act, providing as much relief to the employee as is possible under the guidelines set out in Code §§ 7508 and 7508A. In addition, ACTEC recommends that Treasury consider any other issues dealt with in Notice 2009-82 in respect of the waiver of 2009 RMDs that are important to address now with the waiver of 2020 RMDs to provide taxpayers with greater clarity in dealing with their RMDs and rollovers.

In view of the federally declared disaster resulting from the COVID-19 pandemic, the guidance requested above is fully within the scope of the statutory authority granted to the Secretary in Code § 7508A(b) “to specify a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted to be completed.” This authority includes without limitation the employee’s actions set out in Reg. § 301.7508A-1(c)(1)(iii).

If you or your staff would like to discuss the contents of this letter with the ACTEC Fellows who created it, please contact Steven E. Trytten (626-365-6000 ext. 200, strytten@hcesq.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, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,

A handwritten signature in cursive script that reads "Steve R. Akers".

Steve R. Akers
ACTEC President 2020-2021