May 23, 2022

VIA ELECTRONIC SUBMISSION

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

Re: Required Minimum Distributions (REG -105954-20, RIN 1545-BP82)

To Whom it May Concern:

On February 24, 2022, the Internal Revenue Service (IRS) published a notice of proposed rulemaking to amend the income tax regulations[1] on required minimum distributions (RMDs) from qualified retirement plans.[2] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rules.

The proposal would modify the RMD requirements for plans qualified under section 401(a) of the Internal Revenue Code of 1986 (Code)[3] to reflect the amendments made by sections 114 and 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).[4] Among other changes, the proposed regulations intend to clarify the SECURE Act's requirement that a designated beneficiary of a defined contribution plan or individual retirement account (IRA) must distribute the entire inherited balance by the end of the 10th year after the death of the plan participant or account owner (10-year rule).[5]

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[1] 26 C.F.R. part 1.
[2] 87 Fed. Reg. 10504, February 24, 2022.
[3] Internal Revenue Code (I.R.C.), Title 26 U.S.C., as amended. Unless otherwise specified, section references in this letter refer to the Internal Revenue Code.
[4] The SECURE Act was signed into law as part of the Further Consolidated Appropriations Act, 2020, Public Law 116-94, 133 Stat. 2534 (2019).
[5] Section 401(b)(1) of the SECURE Act provides that, generally, the amendments made to section 401(a)(9)(E) and (H) of the Code apply to distributions with respect to employees who die after December 31, 2019. *See* 87 FR 10505. The law created exceptions for "eligible designated beneficiaries", including surviving spouses and surviving minor children of the deceased plan participant or account owner, disabled and chronically ill beneficiaries, and beneficiaries

Advocacy has received feedback from small business representatives in the tax and employee benefits industries regarding the proposed changes to the RMD rules. This feedback has generally been positive and is reflective of the IRS's efforts to craft clear regulations. However, small businesses have expressed concerns about the proposal's interpretation of the 10-year rule. Because the proposed regulations deviate significantly from many practitioners' good-faith interpretations of the 10-year rule, stakeholders are concerned about the effective date and compliance deadlines outlined in the regulations. Advocacy recommends that the IRS revise its proposal to simplify the application of the 10-year rule as described herein. As an alternative, Advocacy recommends that the final regulations delay the regulatory effective date until 12 months following the date of publication in the *Federal Register* and specify that there will be no penalties for good-faith interpretations of the SECURE Act until that date.

Additionally, the IRS certified that the proposed rules will not have a significant economic impact on a substantial number of small entities but did not provide a factual basis for that statement. Advocacy recommends that the IRS publish for public comment either a supplemental Regulatory Flexibility Act (RFA)[6] assessment with a valid factual basis for certification or an Initial Regulatory Flexibility Analysis (IRFA). Advocacy further encourages the IRS to extend the comment period for the proposed regulations by 60 days.

I. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[7] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[8] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[9]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation,

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who are not more than 10 years younger than the deceased plan participant or account owner. *See* I.R.C. §§ 401(a)(9)(E)(ii) and 401(a)(9)(H)(ii).

[6] 5 U.S.C. § 601 et seq.

[7] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

[8] Small Business Jobs Act of 2010 (PL. 111-240) §1601.

[9] *Id*.

federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[10]

II. Background on the SECURE Act and the Proposed RMD Rules

A. The SECURE Act's 10-Year Rule

On December 20, 2019, the SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020.[11] In addition to other rules, the SECURE Act established new distribution rules for the designated beneficiaries (who are not eligible designated beneficiaries) of defined contribution plans and IRAs whose owners die after December 31, 2019.[12] The new rules require that balances inherited by those beneficiaries be distributed by the end of the 10th year after the original account owner or plan participant dies, regardless of whether the deceased retirement saver had begun required distributions.[13] In many cases, this 10-year rule shortened the required distribution period from the lifetime of the designated beneficiary to 10 years.

B. The Proposed RMD Rules

On February 24, 2022, the IRS published a notice of proposed rulemaking on *Required Minimum Distributions* in the *Federal Register*.[14] The rulemaking proposes to modify the existing RMD regulations in accordance with the SECURE Act.[15] The proposed regulations would apply for purposes of determining RMDs for calendar years beginning on or after January 1, 2022.[16]

Regarding the application of the 10-year rule, the proposed regulations state that while the rule generally applies for distributions to designated beneficiaries if a retirement saver dies *before* the required beginning date for distributions, the same is not the case if the death occurs *after* the required beginning date.[17] Instead, where the death occurs after the distribution of benefits has commenced, "distributions to the employee's beneficiary for calendar years after the calendar year in which the employee died must satisfy section 401(a)(9)(B)(i) as well as section 401(a)(9)(B)(ii)."[18] The regulations go on to explain that this situation would require both calculation of the annual RMD to be distributed at least as rapidly as over the life of the employee or the life of the employee and the employee's designated beneficiary, and an additional requirement that a full distribution of the interest in the plan be made by the end of the 10th calendar year following the calendar year in which the employee died.[19]

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[10] *Id.*
[11] Pub. L. 116-94, 133 Stat. 2534 (2019).
[12] *See* secs. 401(a)(1) and (b)(1) of the SECURE Act.
[13] I.R.C. § 401(a)(9)(H)(i)(I)-(II).
[14] 87 FR 10504.
[15] *Id*.
[16] 87 FR 10521.
[17] 87 FR 10513-14. The "required beginning date" is the date by which a retirement plan participant must begin taking RMDs. *See* 87 FR 10504.
[18] 87 FR 10514.
[19] *Id*.

In short, in the case where an employee dies after RMDs have begun, a designated beneficiary is required not only to distribute the remaining balance of the inherited account within 10 years, but also to take RMDs in calendar years 1 through 9.[20] The regulations would apply in the same manner for IRAs.[21]

III. Advocacy's Comments and Recommendations

A. The IRS Should Revise its Proposal in Accordance with the Plain Meaning of the SECURE Act's 10-Year Rule

Small businesses have expressed concern that the proposed regulations are contrary to the plain language of the SECURE Act and that they will add unnecessary complexity to the administration of retirement accounts after the death of a plan participant or account owner. Advocacy agrees with these stakeholders that the proposal's interpretation of the 10-year rule differs from the plain meaning of section 401(a)(9)(H)(i).

Section 401(a)(9)(B) provides rules for distributions that are made after the death of an employee who contributed to a defined contribution plan. The rules are applicable to individual retirement plans pursuant to section 408(a)(6) and 408(b)(3). Under the rules, if the employee dies *after* distributions have begun, section 401(a)(9)(B)(i) provides that the employee's interest must be distributed at least as rapidly as under the method used by the employee. Section 401(a)(9)(B)(ii) and (iii) provide that, if the employee dies *before* distributions have begun, the employee's interest must either be distributed within 5 years after the death of the employee or be distributed (in accordance with regulations) over the life or life expectancy of the designated beneficiary with the distributions beginning no later than 1 year after the date of the employee's death, respectively. Subparagraph (B)(ii) does not require annual RMDs – it only requires that the inherited balance be distributed by the end of year five after the death of the employee. Furthermore, subparagraphs (B)(i) and (B)(ii) are mutually exclusive. The first applies where an employee died after beginning distributions and the second applies when the employee dies before beginning distributions.

Following enactment of the SECURE Act, section 401(a)(9)(H) provides that:

> (H) SPECIAL RULES FOR CERTAIN DEFINED CONTRIBUTION PLANS.-In the case of a defined contribution plan, if an employee dies before the distribution of the employee's entire interest-
>
> (i) In general.-Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii)-
>
> (I) shall be applied by substituting "10 years" for "5 years", and
> (II) shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (A).

[20] *Id.*
[21] Under I.R.C. §§ 408(a)(6) and 408(b)(3), individual retirement plans are subject to the RMD rules.

A plain language reading of section 401(a)(9)(H)(i) would lead a taxpayer to believe that, for designated beneficiaries, subparagraph (B)(ii) applies regardless of whether the deceased retirement saver had previously begun distributions and that the taxpayer has 10 years to distribute the balance of an inherited defined contribution plan (or IRA). The SECURE Act does not appear to require RMDs for years 1 through 9.

As outlined above, the plain meaning of the Code as amended by the SECURE Act appears to conflict with the interpretation in the proposed regulations. Therefore, Advocacy recommends that the IRS revise the proposed regulations to provide that inherited account balances must be distributed by designated beneficiaries within 10 years of the death of the employee or IRA owner, without annual RMDs.

B. Alternatively, IRS Should Consider Extending Compliance Deadlines

Small business stakeholders have also contacted Advocacy with concerns regarding the effective date and compliance deadlines found in the proposed regulations. Practitioners are concerned that the changes in the proposal are significant enough that they will need to spend a substantial amount of time to read, understand, and implement them for their clients. These efforts may have significant costs, as further described in section III.C., below.

As the proposed rules were published more than two years after the enactment of the SECURE Act, practitioners are also concerned that designated beneficiaries of inherited accounts may be subject to penalties because of a good-faith interpretation of the RMD rules. Specifically, designated beneficiaries who would have been required to take distributions in 2021 may not have done so and may not be planning to take a distribution in 2022.

To reduce the burden of the proposed rules on small entities, Advocacy recommends that the IRS implement a regulatory effective date that is 12 months following the publication date of the final rulemaking in the *Federal Register*. Advocacy further recommends that the IRS specify that there will be no penalties for good-faith interpretations of the SECURE Act until the regulatory effective date.

C. The Proposed Rules Do Not Provide a Valid Factual Basis for Certification under the RFA

The IRS has certified that the proposed regulations will not have a significant economic impact on a substantial number of small entities.[22] Under section 605(b) of the RFA, an agency must provide a factual basis in support of the certification. At a minimum, the factual basis should include:

1) Identification of the regulated small entities by industry based on the North American Industry Classification System (NAICS).
2) The estimated number of regulated small entities.
3) A description of the economic impact of the rule on small entities.

[22] 87 FR 10521-10522.

4) An explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA.[23]

In the proposed regulations, the IRS does not identify or estimate the number of regulated small entities. As part of the factual basis for certification, the IRS should include the NAICS code for all industries with affected small entities and the number of potentially affected small entities. Based on practitioners' feedback on the rule, Advocacy is concerned that the IRS may not have fully described affected small entities or impacts, including those for NAICS 523930 (Investment Advice), NAICS 523920 (Portfolio Management), and NAICS 541213 (Tax Preparation Services).

Moreover, based on input from small businesses, Advocacy is concerned that the IRS explanation regarding the proposed rule's burden is inaccurate. Practitioners' fiduciary responsibility to clients obligates them to understand the rules and know how to apply them to individual client situations. There will be costs to assisting clients in retooling distribution plans already in place as well as future costs for complying with more complex requirements beyond the plain meaning of the Code. Costs to learn the rule, revise existing distribution plans, and advise on more complex requirements are not optional for practitioners, and the RFA does not provide evidence that practitioners will be able to pass these costs on to clients. To support a factual basis for certification, IRS should provide estimates of all costs to small entities, including costs to revise distribution plans and any reporting and recordkeeping requirements.

If the IRS cannot properly certify the proposed rule, then an IRFA must be developed and published in the Federal Register with a period for notice and comment. An IRFA must contain:

1) A description of the reasons why the regulatory action is being taken.
2) The objectives and legal basis for the proposed regulation.
3) A description and estimated number of regulated small entities.
4) A description and estimate of compliance requirements, including any differential for different categories of small entities.
5) Identification of duplication, overlap, and conflict with other rules and regulations.
6) A description of significant alternatives to the rule.[24]

A key requirement of an IRFA is the consideration of significant alternatives that will achieve the agency's goal while minimizing the burden on small entities. If given the opportunity to comment on regulatory alternatives, practitioners will likely provide valuable input that will help IRS achieve the goals of the rulemaking while addressing small entity concerns.

Advocacy recommends that the IRS publish for public comment either a supplemental RFA assessment with a valid factual basis in support of a certification or an IRFA before proceeding with this rulemaking. By publishing for comment either a supplemental RFA assessment or an IRFA, small businesses will have adequate data to assess the potential cost burden of the

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[23] 5 U.S.C. § 605(b).
[24] 5 U.S.C. § 603.

proposed rules. The IRS will also gain valuable insight into the effects of the proposal. Advocacy encourages extension of the comment period by an additional 60 days to allow small businesses more time to consider the impact of the proposed regulations.

IV. Conclusion

Advocacy is concerned that the proposed regulations misinterpret and add unnecessary complexity to the SECURE Act's 10-year rule. IRS should take into consideration the potential impacts of that interpretation, including the additional time that practitioners will need to familiarize themselves with new regulations that are contrary to their prior understanding of the Code and the possibility that beneficiaries may be subject to penalties despite good-faith efforts to comply with tax law. Further, Advocacy recommends that the IRS publish for public comment either a supplemental RFA assessment supporting a valid factual basis for certification or an IRFA. In conjunction with these recommendations, Advocacy encourages the IRS to extend the comment period for the proposed regulations by 60 days.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/
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/s/
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Copy to: Dominic Mancini, Deputy Administrator
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