AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

September 17, 2024

Internal Revenue Service
Attn: CC:PA:01:PR (REG 103528-23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Proposed Regulations Regarding Required Minimum Distributions (RIN 1545–BQ66)

The American Retirement Association (ARA) is writing in response to the Notice of Proposed Rulemaking regarding required minimum distributions ("RMDs") published in the Federal Register on July 19, 2024, and referenced above (the "Proposed Regulation"). ARA thanks the Internal Revenue Service (IRS or "Service") and the Department of the Treasury ("Treasury") for the opportunity to provide input on these matters.

ARA is a national organization of more than 35,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA) and the American Society of Enrolled Actuaries (ASEA). ARA's membership is diverse but united in a common dedication to America's employer-based retirement plan system.

Summary

ARA recommends that the Service clarify a number of issues related to the Proposed Regulation. In particular, ARA recommends the Service provide the following guidance:

- Regarding a surviving spouse's election to be treated as the employee under Treasury Regulation § 1.401(a)(9)–5(g)(3)(i):
    - Provide the election is automatic regardless of whether the employee dies before, on, or after the employee's required beginning date (RBD);
    - Clarify that if the employee dies before the employee's RBD, the spouse can delay commencement of life expectancy payments until the calendar year the employee would have reached the applicable RMD age;
    - Permit a surviving spouse who is subject to an automatic election to revoke such election by the end of the calendar year before the year in which RMDs would be required to commence to the surviving spouse;
    - Clarify that if a surviving spouse who is treated as the employee executes a rollover of the plan benefit into the spouse's own IRA, the election for the spouse to be treated as the employee is revoked (and in that case, the 10-year rule for distributions following the surviving spouse's death in Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(D) does not apply).

- With regard to the use of annuities to satisfy a RMD:
    - Clarify that "an annuity contract purchased with a portion of the employee's account balance" includes a qualified plan distribution annuity, as defined in Code section 401(a)(38)(B)(iv) and Treasury Regulation § 1.402(c)-2(h); an investment in a deferred annuity contract; and a rollover from the plan to purchase an individual retirement annuity as described in Code section 408(b); and
    - Permit a plan administrator to rely on a participant's self-certification regarding the value of a contract if the contract issuer does not provide a third-party disclosure unless the administrator has actual knowledge to the contrary.
- With regard to qualifying longevity annuity contracts:
    - Confirm that if a participant rescinds a QLAC purchase as described in Treasury Regulation § 1.401(a)(9)-6(q)(1)(iv) or excess premiums are returned as described in § 1.401(a)(9)-6(q)(4)(i)(B), the returned assets will not be subject to qualified joint and survivor annuity requirements that did not apply before the transaction; and
    - Clarify that the reference to "annuity starting date" throughout Treasury Regulation § 1.401(a)(9)-6(q)(3) is the definition of "annuity starting date" in Code section 417(f)(2)(A)(ii).
- The effective date of the regulation should be delayed until 18 months after publication of the final rule.

Discussion

I. Surviving Spouse Election to Be Treated As Employee

a. The election should be automatic in all cases

Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(A) provides that if the employee dies before the employee's required beginning date (RBD), and the beneficiary is the employee's surviving spouse who will receive life expectancy payments and who is eligible to make the election in paragraph (g)(3)(i) of the same section, the surviving spouse is treated as having made the election to be treated as the employee. If, however, the employee dies on or after the employee's RBD, paragraph (g)(3)(ii)(B) provides the surviving spouse must affirmatively make the election under paragraph (g)(3)(i) unless the plan provides that the election is the default. Treating the spouse as having made the election in one scenario but not the other creates administrative burdens for plan sponsors and recordkeepers. As stated in the preamble to the Proposed Regulation, it is expected that surviving spouses would rarely opt out of the default because of the tax benefit of the election. This is true whether the employee died before, on, or after the employee's RBD. For example, if the employee dies on, or after the employee's RBD, the denominator used if the election is made would always be greater than, or equal to, the denominator used if the spouse did not make the election.

ARA recommends the Service revise Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(A) and (B) to provide that the surviving spouse receiving life expectancy payments is treated as having made the election to be treated as the employee, absent the spouse revoking the automatic election (discussed in III. below), regardless of whether the employee dies before, on, or after the employee's RBD.

b. Clarify an electing surviving spouse can delay RMDs to the employee's RBD

Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(C) provides that in a defined contribution plan, if the employee dies before the employee's RBD and the election under paragraph (g)(3)(i) applies to the surviving spouse, the applicable denominator for each distribution calendar year beginning with the calendar year following the year of the employee's death and up to the calendar year that includes the surviving spouse's death is determined using the Uniform Life Table.

The language appears to require that distributions to the surviving spouse in a defined contribution plan must begin in the calendar year following the calendar year of the employee's death. However, this is contrary to Proposed Regulation § 1.401(a)(9)–4(d) which provides that if the employee dies prior to the employee's RBD, and the employee's surviving spouse is the employee's sole beneficiary, then the commencement of RMDs may be delayed until the end of the calendar year in which the employee would have attained the applicable RMD age. The timing of distribution to the surviving spouse in paragraph 4(d) is consistent with the language in IRC § 401(a)(9)(B)(iv) as amended by section 327 of the SECURE 2.0 Act.

ARA recommends the Service amend the language in Proposed Regulation § 1.401(a)(9)-5(g)(3)(ii)(C) to clarify that the delay of commencement of RMDs to the surviving spouse in § 1.401(a)(9)-4(d) is still available when the surviving spouse has made, or is deemed to have made, the election in Treasury Regulation § 1.401(a)(9)–5(g)(3)(i).

c. Automatic election should be revocable

IRC § 401(a)(9)(B)(iv), as amended by section 327 of the SECURE 2.0 Act, provides the surviving spouse's election to be treated as the employee shall be made at such time and in such manner prescribed by the Secretary, shall include a timely notice to the plan administrator, and once made may not be revoked except with consent of the Secretary. If the regulations provide that the surviving spouse is treated as having made the election automatically, then, absent regulatory guidance permitting revocation of an election, the surviving spouse to whom the automatic election applies will be precluded from making a different election.

ARA recommends the Service revise Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(A) and (B) to provide that the surviving spouse can revoke the automatic election to be treated as the employee if the spouse provides timely notice to the plan administrator by the deadline established by the plan administrator, which may not be earlier than the end of the calendar year preceding the first calendar in which RMDs must commence to the spouse.

d. Surviving spouse's election should be revoked upon rollover to IRA

The preamble to the Proposed Regulation provides that a surviving spouse may roll the assets over to the spouse's own IRA and treat the assets as the spouse's own at any time after the election is made and after any required RMDs are made for the calendar year. However, as stated above, IRC § 401(a)(9)(B)(iv) provides that the election to be treated as the employee, once made, may not be revoked except with consent of the Secretary.

In addition to affecting the required RMDs to the surviving spouse, whether this election continues to apply would impact the treatment of the surviving spouse's IRA beneficiaries. Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(D) provides that if the election in paragraph (g)(3)(i) applies and either the employee died on or after the employee's RBD or the surviving spouse dies after distributions are considered to have begun to the spouse, then the final distribution of the employee's total interest must be made by the end of the calendar year that includes the tenth anniversary of the surviving spouse's death.

ARA recommends that the Service clarify that if the assets have been rolled into the surviving spouse's own IRA, the election to be treated as the employee is automatically revoked and the rule described is Proposed Regulation § 1.401(a)(9)–5(g)(3)(ii)(D) no longer applies.

II. Use of annuities to satisfy a required minimum distribution

Treasury Regulation § 1.401(a)(9)-5(a)(5)(iv) provides that "In the case of an annuity contract purchased with a portion of the employee's account balance" the employee may apply IRC § 401(a)(9) by aggregating the contract and remaining account balance. If aggregated, the fair market value of the contract is added to the remaining account balance and distributions from the annuity contract are treated as distributions from the employee's individual account. ARA recommends the Service clarify the eligibility of certain annuity contracts and also provide relief for plans with respect to the valuation of these contracts.

a. Clarify eligible annuity contracts

There are a variety of possible annuity contract products, and members have inquired whether certain products are eligible for aggregation. In particular, ***ARA recommends*** the Service clarify that "an annuity contract purchased with a portion of the employee's account balance" includes a qualified plan distribution annuity, as defined in Code section 401(a)(38)(B)(iv) and Treasury Regulation § 1.402(c)-2(h); investment in a deferred annuity contract; and a direct rollover from the plan to purchase an individual retirement annuity as described in Code section 408(b).

b. Value of annuity contract

The operation of this aggregation provision assumes that a plan administrator is able to correctly assess the fair market value of the insurance contract and the amount of payments. *Section II. Paperwork Reduction Act* of the Special Analyses section of the Proposed Regulation states that "under these rules of operation, annuity contract issuers are expected to provide the annuity valuations as a third-party disclosure. In addition, the amount of payments made under the annuity contract and the underlying value of the annuity contract is expected to be reported to the employer as a third-party disclosure."

While a plan administrator may request this information, it might not have the ability to force a contract issuer to timely provide the fair market value of an annuity contract prior to a distribution and, in the case of a 403(b) plan, the information may be reported directly to the employee. Further, participants and plan administrators generally do not possess expertise sufficient to question the reported value of an annuity contract. As a result, ***ARA recommends*** the Service provide that (1) if a third-party provides a disclosure of the fair market value and payments to be made under the contract, the employee and the plan administrator are entitled to rely on that information and (2) if the contract issuer does not provide the information, then the plan administrator may rely on the certification of the employee regarding the fair market value and payments to be made under the contract.

III. Qualifying longevity annuity contracts

a. Return of assets is not subject to QJSA requirements

In certain instances, assets used to purchase a qualifying longevity annuity contract (QLAC) may be returned to the employee's plan account. In particular, Treasury Regulation § 1.401(a)(9)-6(q)(1)(iv) permits the contract to be revoked within 90 days of purchase and Treasury Regulation § 1.401(a)(9)-6(q)(4)(i)(B) contemplates the return of excess premiums to the employee's account. Generally, assets used to purchase an annuity contract from a defined contribution plan are subject to the qualified joint and survivor annuity (QJSA) and spousal consent requirements under the Code. Because these assets were subject to these requirements when used to purchase the annuity, ARA members have questioned whether the returned assets would be subject to the QJSA and spousal consent rules for all future distributions. ARA believes that because these transactions are effectively reversing the original purchase, the returned assets should be subject only to any QJSA or spousal consent requirements that applied prior to the original purchase. ARA recommends the Service specifically provide in final regulations that if a participant rescinds a QLAC purchase as described in Treasury Regulation § 1.401(a)(9)-6(q)(1)(iv) or excess premiums are returned as described in § 1.401(a)(9)-6(q)(4)(i)(B), the returned assets will not be subject to QJSA or spousal consent requirements that did not apply prior to the original transaction.

b. Clarify meaning of annuity starting date for QLACs

Many requirements throughout the regulations applicable to employee plans are based on the "annuity starting date" for a distribution. Under IRC §417(f)(2)(A), the "annuity starting date" is (i) the first day of the first period for which an amount is payable as an annuity or (ii) in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit. This definition creates confusion when applied to a QLAC because the contract is purchased years, if not decades, before any amount becomes payable under the contract.

Although a QLAC is an annuity contract, practically the definition under IRC §417(f)(2)(A)(ii) must apply because there is no way to comply with the applicable notice and consent requirements if the date payments begin under the QLAC is treated as the annuity starting date. The definition of "annuity starting date" similarly impacts the required distributions under Treasury Regulation §1.401(a)(9)-6(q)(3). To ensure a uniform, administrable definition, ***ARA recommends*** the Service clarify that the reference to "annuity starting date" throughout in 1.401(a)(9)-6(q)(3) is the definition of "annuity starting date" in Code section 417(f)(2)(A)(ii).

IV. Effective date

ARA recommends that the Service provide that the regulation, once final, will not take effect until the calendar year that begins at least eighteen (18) months after the date of publication of the final regulations. Nearly all plan sponsors rely on service providers to monitor and calculate RMDs. These service providers will need to process the final regulations and then program their recordkeeping systems to account for the final regulations. Our recordkeeping members regularly report that a period of 18 months is the minimum amount of time necessary to build out system updates. Providing adequate time to ensure proper implementation will promote tax compliance and sound administration.

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These comments are submitted on behalf of ARA and were prepared by ASPPA's IRS Subcommittee, Claire P. Rowland, Esq., QPA, QKA, Chair. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at kmayo@usaretirement.org or (704) 342-5307. Thank you for your time and consideration.

Sincerely,

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