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**Re: Guidance on SECURE Act Sec. 401**

Dear Ms. Weiser and Ms. Judson,

On behalf of The Special Needs Alliance ("SNA"), I write asking for certain guidance on the Setting Every Community Up for Retirement Enhancement (SECURE) Act. Specifically, we offer practical insight for regulations implementing the SECURE Act's provisions modifying required distribution rules for individuals with disabilities (§401(a)(9)(E)(ii)(III)) or who are chronically ill (§401(a)(9)(E)(ii)(IV)).

Our member attorneys are committed to the practice of disability and public benefits law throughout the United States. The SNA is an invitation-only organization of attorneys. SNA members are peer-selected, and must demonstrate: 1) relevant legal experience advising individuals with disabilities and their families; 2) active participation with national, state and local disability advocacy organizations, and 3) evidence of their professional reputation and good-standing in the legal community. Our 143 SNA members have an average of 18 years of relevant legal experience, and no member may join without a minimum of five years of special needs planning experience. As a result, we believe we are uniquely positioned to offer practical direction when providing further guidance for these specific areas of the SECURE Act.<sup>1</sup>

**Residuary Beneficiaries of Trusts for the benefit of Individuals with Disabilities or Who Are Chronically Ill**

Our typical client is desperately concerned about the future well-being of a child or other family member with a disability. These clients aim to set aside funds at the end of their lifetimes to assure their loved one's dignity and quality of life is

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<sup>1</sup> We also join previously submitted comments by the National Academy of Elder Law Attorneys (NAELA) and The American College of Trust and Estate Counsel (ACTEC).

properly maintained. Retirement plan accounts are often a crucial part of their savings (as they are for many Americans).

To ensure that the retirement plan accounts can benefit a loved one with a disability, these retirement plan accounts must be directed into a supplemental needs trust (“SNT”) upon a client’s death. That SNT must give its trustee complete discretion over principal and income distributions for a loved one to remain eligible for means-tested government benefits. As such, SNTs are almost always “accumulations trusts” for retirement plan purposes.

To be clear, taxpayers should encourage the use of SNTs because they provide enhanced quality of life for individuals with disabilities and reduce the burdens on government. Very few families could even come close to financially supporting the medical and other costs that government benefit programs provide. As such, without the ability to create an SNT, a family would disinherit a loved one with a disability because otherwise, the loss of government benefits would be catastrophic. But an SNT supplements government benefits in critical ways that promote the long-term health, safety, and independence of its beneficiary, which often reduces the current and future need for government intervention and support.

The SECURE Act recognizes the critical role that retirement plan accounts play in planning for a loved one with a disability or chronic illness by exempting these beneficiaries from the new 10-year distribution rule. Recognizing the important role that SNTs play in this planning, a retirement plan left to an SNT can be distributed over the lifetime of a beneficiary with a disability or who is chronically ill. IRC §401(a)(9)(H)(iv).

Yet we ask for clarification as to whether the trust remaindermen (i.e., a trust beneficiary or beneficiaries after the death of the eligible designated beneficiary) have any bearing on the calculation of the life expectancy payout for a trust beneficiary with a disability or chronic illness. **We urge guidance stating that the remaindermen, whether they are an individual, a continuing trust, or a charitable organization, have no bearing on the life expectancy payout during the life of the eligible designated beneficiary.** The SECURE Act’s clear intent is to allow for the retirement benefits to be paid out over the lifetime of certain eligible designated beneficiaries, and it should not matter who receives the trust property on the death of the eligible designated beneficiary.

Before SECURE, our members had to advise our clients to pay close attention to who they named as a remainder beneficiary of an SNT. SNTs are almost always accumulation trusts, and thus the remainder beneficiaries were taken into consideration when determining the applicable distribution period. For example, if the remainder beneficiary was a much older beneficiary, that older beneficiary’s life expectancy would determine the applicable distribution period. Moreover, if the remainder beneficiary was a charitable organization, the Trust would be deemed to have no designated beneficiary, and it would subject to either the 5-year or the remaining single life expectancy of the participant rule.

Under the SECURE Act, we believe the remainder beneficiaries of the SNT are entirely disregarded when determining whether an eligible designated beneficiary is entitled to a lifetime distribution payout for the following reasons:

- Only certain eligible designated beneficiaries are allowed to deviate from the 10-year rule under the SECURE Act. IRC § 401(a)(9)(H)(ii). Individuals with disabilities and individuals who are chronically ill are among the few eligible designated beneficiaries still entitled to a life expectancy distribution period. IRC §401(a)(9)(E)(ii)(III) and (IV).
- Furthermore, when a multi-beneficiary trust is the beneficiary of a retirement plan, and “no individual other than an eligible designated beneficiary has any right to the employee’s interest in the plan until the death of all such eligible designated beneficiaries with respect to the trust,” the retirement plan can still be paid out over the eligible designated beneficiary’s life expectancy. IRC § 401(a)(9)(H)(iv)(II). Here, it is our interpretation that Congress clearly intended to allow an employee to designate an SNT

as the beneficiary of a retirement plan, and preserve the eligible designated beneficiaries' right to receive a lifetime payout without regard to who is named as remainderman.

- Finally, “any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary upon the death of such eligible designated beneficiary.” IRC § 401(a)(9)(H)(iv). This section shows Congress’s intent that the remaindermen beneficiaries of an SNT should not be analyzed until after the eligible designated beneficiary dies.

While we believe Congress’s intent is clear, we ask for official guidance confirming that the applicable distribution period and required minimum distributions of an SNT shall be solely based on the life expectancy of the oldest eligible designated beneficiary of an SNT, and that all remaindermen are to be disregarded. This clarification will allow families to confidently carry out Congress’s intent when planning for their loved ones with disabilities.

### **Designated Beneficiaries and Applicable Multi-Beneficiary Trusts**

IRC § 401(a)(9)(H)(v) states an “Applicable Multi-Beneficiary Trust” (AMBT) means a trust:

- (I) which has more than one beneficiary;
- (II) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph; and
- (III) at least one of the beneficiaries of which is an eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii). “

This section of the statute does not delineate between lifetime beneficiaries and remainder beneficiaries. An honest read, in connection with the existing treasury regulations, could lead to the conclusion that for a Supplemental Needs Trust to be considered an AMBT, all of the Trust beneficiaries, both lifetime and remainder beneficiaries, must be “designated beneficiaries.” “Designated beneficiary” is defined as an individual or group of individuals. What if a charity is a remainder beneficiary after the eligible designated beneficiary? Would this mean a trust fails as an “applicable multi-beneficiary trust,” and therefore the eligible designated beneficiary would not be entitled to distributions over his or her life expectancy under IRC § 401(a)(9)(H)(iv)?

Surely not. Congress intended to disregard remaindermen altogether in determining the applicable distribution period in stating, “any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary upon the death of such eligible designated beneficiary.” IRC § 401(a)(9)(H)(iv). The intent of IRC § 401(H)(iii)-(v) ensures that no *individual* other than the eligible designated beneficiary is allowed to stretch IRA distributions beyond ten years. Its purpose is not to eliminate charities as remainder beneficiaries.

Disregarding all remainder beneficiaries is also consistent with the planning goals of those that this section seeks to assist. Many parents, and other loved ones, want to supplement existing government benefits by supporting charities otherwise reliant on Medicaid (e.g., local ARCs and similar organizations). These organizations play a crucial role in assisting individuals with disabilities, and lessen the taxpayer burden by providing services the government would otherwise need to provide. It is not consistent with broader public policy goals to insist that family members must choose between loved ones, and the charities supporting loved ones in their trusts, nor do we believe the statute should be interpreted to require families to do so.

### **Meeting the Disability Definition**

Under IRC §401(a)(9)(E)(ii)(III), an eligible designated beneficiary includes someone who is “disabled within the meaning of section 72(m)(7).” This section states:

#### **(7) Meaning of disabled**

For purposes of this section, an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require.

Under §401(a)(9)(E)(V), this disability determination is made “as of the date of the death of the employee.”

A significant number of our clients are planning for children with diagnoses where it is difficult, or premature, to determine if an individual is able to engage in “substantial gainful activity” and otherwise meet this definition. Further, a strict interpretation of requiring proof “as of the date of the death of the employee” may unfairly penalize an individual with a disability whose family member simply dies young before a beneficiary has the life experience to meet this definition.

We recommend that the Service/Treasury implement the following:

- Allow the disability election to be made and proof of disability to be provided after the “special rule for children” period expires under IRC §401(a)(9)(E)(iii). That is, ten years after the age of majority. Similar to the regulations adopted under the ABLE Act, this timing requirement of IRC §401(a)(9)(E)(V) can still be met by a certification that the disabling condition traces back to the date of the employee’s death.
- We also encourage two processes for disability certification. First, an individual should automatically meet the definition of disabled or chronically ill if the beneficiary is receiving Supplemental Security Income, Social Security Disability Insurance, or long-term care Medicaid. Second, there should be a process independent of qualification for government programs to certify, as an employee’s ability to designate an eligible designated beneficiary should not be dependent on that beneficiary having sought government benefits. The certification processes for establishing an ABLE Account offer a consistent framework that is already well-recognized and used across the nation for similarly situated beneficiaries. *See* proposed regulation 26 CFR § 1.529A-2(e).

### **Conclusion**

In summary, on behalf of the membership of the SNA, we respectfully request that the Service/Treasury issue guidance that:

- (1) Confirms that remainder beneficiaries, whether they are individuals or charitable organizations, of an applicable multi-beneficiary trust shall not be taken into account when determining the applicable distribution period for an eligible designated beneficiary entitled to receive deferrable retirement benefits from the Trust during the eligible designated beneficiary’s lifetime.
- (2) Clarifies that when an eligible designated beneficiary is a minor, proof of disability or chronic illness shall not need to be made until the special rules for children period expire; and
- (3) Allows for a dual process for disability certification: (1) where the individual is eligible for Social Security Disability Benefits, Supplemental Security Income, or long-term care Medicaid; or (2) a separate disability certification process similar to the certification that existing regulations require for establishing an ABLE Account.

Thank you for your consideration of our recommendations and request for guidance. If you have any questions, please contact Brian Lindberg at 202-306-6128.

Sincerely,



Jennifer L. Lile, CELA  
SNA 2019-2020 President