Planning with Retirement Benefits after the SECURE Act & the Proposed Treasury Regulations

2022 UNC Tax Summit

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Introduction

- The SECURE Act (formally called the Setting Every Community Up for Retirement Enhancement Act) went into effect on January 1, 2020, which directly affected retirement accounts, specifically Required Minimum Distributions (“RMDs”) and beneficiary’s payout options.

- Since its enactment, we have been working under fairly well accepted assumptions regarding the application of the new laws. In February of 2022, the IRS released Proposed Regulations to help provide more clarity on applying the new laws, however, surprisingly some portions of the Proposed Regulations contradicted many of the assumptions that professionals have been working under.

- We anticipate that the IRS will make some adjustments to the Proposed Regulations based on the numerous comments submitted to the IRS after the Proposed Regulations were published, which may change some of the unexpected items discussed below. The IRS has alluded that the final regulations will be published by the end of this year. Since the regulations are proposed regulations, they are not a legal requirement until finalized and published.

Introduction

- The laws regarding retirement assets, specifically the RMD rules, are especially important for advisors to know and understand. While not many of the clients that we work with still have estate tax concerns, almost all of our clients have retirement plan assets. For many of our clients, the bulk of their wealth are held within their retirement plans. These assets are directed by a mere beneficiary designation form that often was completed quickly and without real thought or professional advice. Furthermore, retirement plan assets are one of the few assets that creates income taxes for the beneficiary, so additional consideration should be given to who should receive this asset.

Refresher on SECURE Act Terminology

- **Required Minimum Distributions ("RMD"):** A minimum amount that must be distributed from a retirement account for a year.
- **Required Beginning Date ("RBD"):** Either:
  - April 1st of the year after the account owner reaches age 72, unless the taxpayer falls under the "still working" exception
  - April 1st of the year after the account owner retires if the account owner falls under the "still working" exception
- **Eligible designated beneficiary("EDB"):** A beneficiary who is:
  - the surviving spouse of the IRA owner
  - a *child* of the IRA owner who has not yet reached the age 21,
  - a disabled individual (as defined under Section 72(m)(7),
  - a chronically ill individual (as defined under Section 7702B(c)(2), or
  - an individual who is either older than the IRA owner or not more than 10 years younger than the IRA owner.

Terminology, cont'd

- **Designated Beneficiary ("DB"):** A beneficiary who is a person but does not qualify as a EDB, or certain qualifying trusts
- **Non-designated beneficiary ("Non-DB"):** a beneficiary that does not qualify as a EDB or a DB, such as estate, charities, business entities, and certain trusts that fail the "see-through" test.
- **Successor Beneficiary:** a beneficiary that inherits a retirement account from an EDB or from a DB who inherited a retirement account before the SECURE ACT, but died after 2020 when the SECURE Act was effective.
- **Beneficiary Determinate Date ("BDD"):** The deadline for determining who the beneficiaries of a retirement account are, being September 30th of the year following the year of the account owner's death
- **Separate Account Date:** The deadline for establishing separate accounts for multiple beneficiaries so that the RMD rules will apply separately to each separate account, being December 31st of the year following the year of the account owner's death

WHAT'S NEW AFTER THE PROPOSED REGULATIONS

The Biggest Surprise:

- Before the Proposed Regulations, the 10-year rule was thought to be applied like the 5-year rule, which we were familiar with from before the SECURE Act. The general consensus was all benefits are to be withdrawn at any time within 10 years after the account owner’s death. It did not matter whether the account owner’s death occurred before or after his RBD.
- This is no longer true.
- If the IRA owned died after his Required Beginning Date (“RBD”), then due to the At Least As Rapidly “ALAR” rule still being in effect, that rule requires that the beneficiary must continue taking RMDs each year, and the application of the new 10-year rule then requires all funds be withdrawn by the end of the 10th year.
- Essentially, once lifetime RMDs begin, they must continue. The only exception is spousal rollover.

There is some relief for this surprise.

- The IRS issued Notice 2022-53 this month stating that it will be waiving the 50% penalty for missed RMDS in 2021 and 2022 for inherited retirement accounts. It also seemed to allude to that the RMDs for 2021 and 2022 would not be required to be made up by stating that a "defined contribution plan that failed to make a specified RMD will not be treated as having failed to satisfy section 401(a)(9) merely because it did not make that distribution"
- If a taxpayer has already paid an excise tax for a missed RMD in 2021, that taxpayer can request a refund of that tax.

The Second Surprise: Older EDBs may not be able to use the 10-year rule

- The Proposed Regulations provided that an EDB can elect to use the 10-year rule instead of the life expectancy payout only if the account owner dies *before* his RBD. This election is not allowed if the owner died *after* his RBD.
- If the account owner died *after* his RBD, the EDB must use their life expectancy, even if it is less than 10 years (i.e. a mid-80 beneficiary will have a life expectancy of approximately 8 years). The EDB can no longer elect the longer of the two options.
- If the older EDB is a spouse, the spouse still cannot elect the 10-year rule if the account owner died after his RBD, but can at least take the longer of (i) the spouse's life expectancy or (ii) the decedent's life expectancy (i.e. the ghost life expectancy).

Other changes: Age of Majority

- The Proposed Regulation clarified that the “age of majority” for a minor child is age 21, ***regardless of state law or education enrollment***. A child under the age of majority is one of the five classes of EDBs.

Other changes: Clarification of "disabled"

- For beneficiaries under the age of 18, the beneficiary must have a **medically determinable physical or mental impairment** that results in **marked or severe functional limitations** and that can be expected to result in death or to be of **long, continued and indefinite duration.**
- For beneficiaries that are age 18 or older, the beneficiary must be **unable to engage in any substantial gainful activity** by reason of any **medically determinable physical or mental impairment** that can be expected to result in death or to be of **long continued and indefinite duration**.

Other Changes: New Safe Harbor

- The new Safe Harbor provided that regardless of the beneficiary's age, any beneficiary who has been determined to be disabled by the Social Security Administration is automatically deemed to be disabled. (See section 72(m)(7))

- Both Disabled and Chronically Ill individuals must provide documentation no later than October 31 of the year following the year of the account owner's death.

Other Changes: Trusts as Recipients

- When trusts are named as a beneficiary of an IRA, it requires an examination of the trust to confirm that it meets certain requirements. The Proposed Regulations tried to make the examination of the trust easier by providing more clarity.

Steps to Determine Which Rules Apply

1. Is the trust a see-through?
2. Conduit or accumulation?
3. Who are the Beneficiaries?
4. The Three Tiers

1 Is the trust a see-through?

The rules to qualify as a see-through trust are fairly simple to meet:

- The Trust is valid under state law
- The Trust is irrevocable, or will, by its terms, become irrevocable upon the death of the owner of the IRA account
- The documentation requirements are satisfied, which includes providing a copy of the trust agreement to the plan administrator; and
- The beneficiaries of the trust who have an interest in the IRA account are identifiable by the BDD

- If a trust fails the above rules, the 5-year rule applies, and you do not need to look any further.

- If the trust meets the above rule, the trust qualifies as a DB, and may also qualify as an EDB. In order to determine which, you first need to know whether the trust is a conduit or accumulation trust

2

Conduit trust or accumulation trust?

- A **Conduit Trust** provides that when the Trustee takes a distribution from the retirement account, the **Trustee will, upon receipt, distribute the funds to (or for the benefit) of the beneficiary of the trust**.
- The Trustee cannot take a distribution from the retirement account or receive a RMD and retain such amount in the trust. It must be distributed to the beneficiary within that calendar or fiscal year. A conduit trust is often needed to preserve EDB status (i.e. spouse and minor child).

2

Sample Conduit Language (Non-Marital Trust)

Notwithstanding anything in this Agreement to the contrary, in the event that any trust established hereunder shall be the beneficiary of any qualified pension, profit-sharing or similar plan, any tax deferred or tax sheltered arrangement described in Internal Revenue Code Section 403(b) or 401(k), or any individual retirement account or similar arrangement (each a "Retirement Account"), the Trustee shall require that the annual distributions made from the Retirement Account to said trust be determined in accordance with the statutory minimum requirements imposed under Internal Revenue Code Section 401(a)(9) or 408(a)(6) and the regulations promulgated thereunder (the "Minimum Required Distributions") **and the Trustee shall distribute to or for the benefit of the beneficiary of the trust all such Minimum Required Distributions each year and take such other action as the Trustee deems appropriate in its discretion to ensure that the beneficiary of said trust shall qualify as a designated beneficiary in accordance with said Code sections and regulations. It is the Grantor's intent that any trust created hereunder be treated as a "conduit" trust.**

2

Conduit trust or accumulation trust?

- An **Accumulation trust** provides that the **Trustee can retain the retirement asset in trust upon receipt**, and therefore doesn’t qualify as a Conduit Trust.
- From a income tax perspective, even if a Trust is an accumulation trust, the Trustee will still generally distribute any part of the retirement account it receives to the beneficiaries to reduce the Trust’s income taxes, but the Trustee has the discretion to decide what is appropriate

2

Sample Accumulation Language

Notwithstanding anything in this Agreement to the contrary, in the event that any trust established hereunder shall be the beneficiary of any qualified pension, profit-sharing or similar plan, any tax deferred or tax sheltered arrangement described in Internal Revenue Code Section 403(b) or 401(k), or any individual retirement account or similar arrangement (each a "Retirement Account"), the Trustee shall require that the annual distributions made from the Retirement Account to said trust be determined in accordance with the statutory minimum requirements imposed under Internal Revenue Code Section 401(a)(9) or 408(a)(6) and the regulations promulgated thereunder (the "Minimum Required Distributions"). **The Trustee may, in its sole discretion, distribute to or for the benefit of the beneficiary any or all such Minimum Required Distributions each year along with any other amounts withdrawn by the Trustee from the Retirement Account during that year (net of expenses properly charged thereto). In addition, the Trustee shall take such other action as the Trustee deems appropriate in its discretion to ensure that the beneficiary of said trust shall qualify as a designated beneficiary in accordance with said Code sections and regulations. It is the Grantor's intent that any trust created hereunder be treated as an "accumulation" trust.**

3

Who are the Beneficiaries?

- The **first tier** is any beneficiary who could receive amounts in the trust, whether mandatory or permissible.
- The **second tier** is any beneficiary that could receive only amounts that were not distributed to Tier 1 beneficiaries.
- The **third tier** is any beneficiary that could receive amounts solely because of the death of a second tier beneficiary.

  - If a beneficiary qualifies as both a second tier and third tier, the beneficiary is characterized as a second beneficiary.

3

Who are the Beneficiaries?, cont'd

- For a Conduit Trust, only Tier 1 beneficiaries are considered.
- For an Accumulation Trust, Tier 1 and Tier 2 beneficiaries are considered. Tier 3 beneficiaries can be entirely regarded.
- Therefore, for an accumulation trust, the RMD treatment will depend on who or what is deemed to be Tier 2.

3

Who are the Beneficiaries?, cont'd

- If **any** of the Tier 1 or 2 beneficiaries do not qualify as a EDB (only a DB), the **10-year rule applies** (unless falls under AMBT exception).
  - Apply the 10 year rule, then check the RBD
    - If the owner had started taking his RMD, use the life expectancy of the oldest beneficiary to determine the annual distributions for years 1-9
- If **all** of the Tier 1 or 2 beneficiaries qualify as a EDB, **the life expectancy rule applies** based on the **age of the oldest EDB**, and 100% of the account must be paid within 10 years after the death of the oldest EDB
- Note: if one of the beneficiaries is a **charity**: the trust would not qualify as a see-through trust, and the **5-year rule applies**

Naming Trusts as Beneficiaries

- In general, if there are multiple beneficiaries of a retirement account, the retirement account (postmortem) can be divided into separate accounts for each beneficiary if the division occurs before the Separate Account Date.
- *However*, the Proposed Regulations provide that **separate account treatment is not allowed for multiple trust shares under a single trust unless the separate trust shares are named directly as the beneficiaries**. This means you should not list "John Dutton Revocable Trust" as the primary or secondary beneficiary of a retirement account if your intent is to fund multiple trusts!

Naming Trusts as Beneficiaries

- If you name a single trust that feeds into multiple separate see-through trusts, the RMDs of each separate trust will be based on the oldest beneficiary of all of the separate trusts, not the oldest beneficiary of each trust.

- Instead, on the beneficiary designation form, you must list each separate trust.

- Use attachments to standard beneficiary designation forms, as needed.

Sample Beneficiary Designation Language

- **Primary Beneficiaries:** I hereby designate One Hundred Percent (100%) of the Benefit to be divided among my primary beneficiaries as follows:
  - If my child, Beth Dutton, survives me, then Fifty Percent (50%) of the Benefit shall be distributed to the Trustees of the separate trust established for the benefit of my child, Beth Dutton, under Article VIII of the John Dutton Revocable Trust dated December 16, 2021, as may be amended and restated from time to time; and
  - If my child, Kayce Dutton, survives me, then Fifty Percent (50%) of the Benefit shall be distributed to the Trustees of the separate trust established for the benefit of my child, Kayce Dutton, under Article VIII of the John Dutton Revocable Trust dated December 16, 2021, as may be amended and restated from time to time.

If either one of my children shall predecease me, leaving issue who survive me, the share set aside for the deceased child shall be distributed to the deceased child's issue, per stirpes, and retained in trust for the sole benefit of said issue pursuant to Article VIII of the revocable trust referenced above. If either of my children shall predecease me, leaving no issue who survive me, the share set aside for the benefit of the deceased child shall be added to his or her sibling's part, to be held as if originally constituting a portion of such child's original share.

Sample Language for “pot trust” for Minor Children

Contingent Beneficiaries if Spouse Predeceases:

(1) If my spouse predeceases me and my youngest then living child is under age 21, I hereby designate One Hundred Percent (100%) of the Benefit to be distributed to the Trustee of the Trust established for the benefit of my children under Paragraph A. of Item VI of my Last Will and Testament dated 10/28/2022, provided that

(2) If my then living youngest child is over the age of 21, I hereby designate the contingent beneficiaries as follows:

(i) Fifty Percent (50%) of the Benefit shall be distributed to the Trustee of the separate Trust established for the benefit of my child, Beth Dutton (DOB: 01/14/2009), under Paragraph B. of Item VI of my Last Will and Testament dated 10/28/2022, and

(ii) Fifty Percent (50%) of the Benefit shall be distributed to the Trustee of the separate Trust established for the benefit of my child, Kayce Dutton (DOB: 04/04/2012), under Paragraph B. of Item VI of my Last Will and Testament dated 10/28/2022.

Powers of Appointment

- The Proposed Regulations did clarify that powers of appointments can be ignored for identifying the beneficiaries, unless the power is exercised. If the power of appointment has not been exercised before the BDD then the taker in default is treated as the beneficiary. ***However***, the Proposed Regulations seemed to suggest **that if the power of appoint is exercised after the BDD, then a change to the minimum distribution schedule may be required**, but we anticipate more clarification on this.

What if No Beneficiary was Named

- If the owner died **before** his RBD: the **5 year rule applies**.
  - The entire account must be distributed by December 31st of the year that contains the fifth anniversary of the owner's death.
  - No distributions are required prior to that year.

- If the owner died **after** his RBD: then the beneficiary (i.e. a Non-DB) must take **annual installments** over what would have been the owner's remaining life expectancy, often referred to as the "**ghost life expectancy**".

No Beneficiary Named

- Most often Non-Designated Beneficiaries will be:
  - the participant’s estate
  - a trust that does not meet the requirement as a “see-through” trust
  - charities
- ***However***, in a Non-DB situation where the spouse is the sole beneficiary of the estate or trust, there still might be hope.
  - There have been hundreds of PLR rulings in which the IRS has allowed spousal rollover treatment.
  - We hope that eventually the IRS will get tired of ruling on the same thing and make the approval permanent.

Successor Beneficiaries

- For all post-SECURE Act deaths for either the account owner or the original beneficiary, a Successor Beneficiary is bound by **the 10-year rule**.
- *However*, application of the 10-year rule will depend on two factors:
  - (1) If the original owner died before or after his or her RBD; and
  - (2) If the original beneficiary is an EDB or a non-EDB.

Successor Beneficiary when original Owner died before 1/1/20

- Original beneficiary is grandfathered in under pre-SECURE Act rules, and can stretch RMDs over their own life expectancy.
- If original beneficiary also dies before 01/01/2020, Successor Beneficiary can continue take RMDs based on the original beneficiary's life expectancy.
- When original beneficiary dies after 01/01/2020, the 10-year rule applies and if the:
  - **original owner** died before his RBD: the Successor Beneficiary is not required to take annual distributions during the 10-year period
  - **original owner** died after his RBD: the Successor Beneficiary must take annual RMDs within years 1-9 of the 10-year period.

Successor Beneficiary when original Owner died after 1/1/20

- The 10-year rule applies, but if the:
- Original beneficiary was a DB operating under the 10-year Rule,
  - the Successor Beneficiary **inherits the same 10-year window** as the original beneficiary, and
  - if the **original owner** had reached his RBD so that the original beneficiary was required to take annual distributions, then the Successor Beneficiary will also have to take annual distributions
- Original beneficiary was a EDB able to stretch the RMDs:
  - Successor Beneficiary receives a **new 10-year window, and**
  - if the **original owner** had reached his RBD, then the Successor Beneficiary will have to take annual distributions

Charitable Interests

1. The Benefits
2. Designation Forms
3. Charitable IRA Rollovers (QCD)

1

The Benefits

- Charities do not pay income tax.
  - Full amount of your retirement account will directly benefit the charity of your choice.
- Estate will receive a charitable deduction.
  - Charitable gift could prevent a 40% estate tax plus federal and state income tax hit.
- Simplifies the estate plan.

2

Beneficiary Designation Form Language

- Charitable bequests should be made **directly on the beneficiary designation form**, not via the will or trust.
- Specify the **order of priority** when there are multiple distributions.
- You can designate a specific amount or a percentage of the account, but to be able to divide the assets into separate accounts by the Separate Account Date, you must **use a percentage of the account.**
- If you designate a specific amount to the charity, then that amount should be paid by the Beneficiary Designate Date so not to impact the other individual beneficiaries.

2

Beneficiary Designation Form Language

- Prepare a customized beneficiary form and direct the client to request a Change of Beneficiary Form from their IRA provider and to write "See Attachment" and attach the customized form

3

Charitable IRA Rollovers

- **Also known as Qualified Charitable Distribution (QCD)**
- If the account owner is over age 70 ½ (did not change to 72) or is a beneficiary who received an IRA and is subject to RMDs, the owner can gift up to $100,000 each calendar year by directing the RMDs directly to charity. The owner does not receive a charitable deduction for this, but it cancels out the income that would have had to be paid.
- Since the RMD doesn’t count as income, it can reduce your annual income level, which can lead to other tax benefits

3

Charitable IRA Rollovers

- If the account owner has "maxed-out" their charitable deduction, a QCD operates separately from the percentage rules that limit charitable gifts.
- If the account owner doesn't itemize, a QCD allows the owner to take the equivalent of a charitable deduction.
- A QCD cannot be made to a donor advised fund, private foundations, or supporting organizations, even though those are categorized as charities

Surviving spouses

1. Surviving Spouses, Generally
2. Spousal Rollover
3. Spouse as beneficiary
4. To Trust fbo Surviving Spouse

1 Surviving Spouses, Generally

- The most common beneficiary is “to my spouse, outright”
- This option is easy and best when the decedent is comfortable giving full control to his or her spouse
- Options for the spouse
  - (1) Rollover (the rules were not changed)
  - (2) Takes as Beneficiary using her life expectancy
  - (3) If the owner died before his RBD, the spouse could elect to use the 10-year rule instead of her life expectancy payout
  - (4) If the owner died after his RBD and the spouse is older, spouse can take annual distributions based on her life expectancy or the owner’s life expectancy, whichever one is longer

2 Spousal Rollover

- Surviving Spouse can add the account to their own retirement account or change it to their name so that the account is considered theirs. This allows the spouse to defer any required distributions until the spouse turns age 72
- After the Surviving Spouse reaches age 72, the Surviving Spouse will be required to take RMDs using the Uniform Lifetime Table (but this table is better than the Single Life Table)
- If the Surviving Spouse is under age 59 ½, the Surviving Spouse will be unable to withdraw any funds without being charged the 10% early withdraw penalty so if the spouse might need the funds, they should consider option 2 (discussed below)

2

Spousal Rollover

- There is no deadline on *when* a spousal rollover must occur, and it is possible to do so many years after the surviving spouse originally inherits the account if the spouse timely takes RMDs each year, but under Treasury Regulation 1.408-8, an inherited IRA will automatically be deemed a "rollover" if the surviving spouse fails to begin post-death RMDs in a timely manner or if the surviving spouse contributions to the account.

- A spousal rollover account would continue to be protected from creditors.

3 Spouse takes accounts as a beneficiary

- Because a Surviving Spouse is considered an EDB, a Surviving spouse is allowed to take RMDs based on her life expectancy using the Single Life Table, which is recalculated annually.
- The Surviving Spouse first RMD will begin either
  - When deceased spouse would have reached age 72, or
  - If deceased spouse was already 72, the year after deceased spouse's death.
- This option does not restrict the Surviving Spouse from choosing to roll over the account later.

4 To Trust FBO Surviving Spouse

Better Option when:

- children from a prior marriage
- concerns about the spouse responsibly managing the funds,
- the spouse remarrying and leaving the assets to a new beneficiary at their death,
- the spouse being taken advantage of, the spouse suffers or may develop some form of cognitive decline (i.e. Alzheimer's disease and related dementias)

4 To Trust FBO Surviving Spouse

- In this scenario, most often the trust for the spouse that will be receiving the retirement assets will be drafted to qualify for the marital deduction, such as a general power of appointment trust or a QTIP Trust, with the QTIP Trust being the more common option.
- A QTIP Trust requires all income be distributed to the spouse and generally allows principal distributions to the spouse for his or her health, maintenance and general support (the principal distributions can be further limited or broadened).

4 To Trust FBO Surviving Spouse

- A proper QTIP trust will likely be drafted as a conduit trust
- For a Conduit QTIP Trust, you only have to take into consideration the spouse as the designated beneficiary of the trust, and the spouse’s life expectancy can be used to calculate annual RMDs.

4 To Trust FBO Surviving Spouse

- For a Conduit QTIP Trust, the “all net income” requires the trust provisions to direct the Trustee to distribute the greater of (i) all income of the IRA or (ii) the RMD, otherwise the trust may not qualify as a Marital Trust.
- If the Trustee cannot determine the income that the IRA earned, then the Trustee must calculate 4% of the year-end IRA value. This 4% calculation is based off of most recent statement preceding the beginning of the accounting period, not 4% of the RMD. (This 4% calculation comes directly from the North Carolina State statue and is described in more detail N.C.G.S. 37A-4-409).

4 Sample QTIP language to ensure proper treatment:

If this Marital Trust is the beneficiary of death benefits under any "individual retirement account," "Roth IRA," "qualified retirement plan," or similar tax-deferred retirement arrangement or annuity (the "Plan"), the Trustee must withdraw from the Marital Trust's share of the Plan and must pay to the Grantor's husband each year whichever of the following amounts is the **greater**:

(1) the net income of the Marital Trust's share of such Plan for such year; or

(2) the "minimum distribution amount" which is required to be withdrawn from such share under §401(a)(9) of the Code or other applicable law.

This Paragraph shall not be deemed to limit the Trustee's power and right to withdraw from the Marital Trust's share of the Plan in any year more than the greater of the said amounts.

Time to change the industry standard?

- Is there still a compelling reason to name a trust as a beneficiary of the retirement account or should other assets be directed to trust instead and this asset be distributed outright?

Miscellaneous

1. The Keep Working Exception
2. ROTH IRAs
3. Incapacitated account owners
4. Applicable Multi-Beneficiary Trusts

1 The Keep Working Exception

- This exception is not as straightforward as it initially seems
- In general, there is no hourly requirement to be considered employed. However, the person must be employed the entire year.
  - Do not quit or retire on 12/31 because then the person will not be employed the entire year.
- There are ownership rules that can disqualify a person, which includes indirect ownership of stock owned by the person's spouse, lineal descendants, and parents.

ROTH IRAs

- The RMDs discussed here do not apply to Roth IRAs while the account owner is alive, but RMDs are required after the account owner dies. The RMD rules apply to the beneficiaries of a Roth IRA as if the account owner had died before his RBD, meaning that the account must be taken within 10 years, but no annual distributions are required.

3

Incapacitated Account Owners

- Check if account owner has a Durable Power of Attorney in place that specifically grants the owner's Agent the power to manage his retirement accounts, including completing a beneficiary designation form.
- If there is no Durable Power of Attorney in place, a guardianship and conservatorship proceeding would be necessary to appoint a guardian for the incapacitated account owner and the guardian will need specific court authority.

3

Sample Language for Durable Power of Attorney as to Retirement Plans

Retirement Plans. To exercise any right with regard to any retirement plan or individual retirement account I may have or entered into by my Agent on my behalf, or with regard to any retirement plan or individual retirement account as to which I am the beneficiary including, but not limited to, the power (i) to create and contribute to an individual retirement account, an employee benefit plan, or other retirement plan, (ii) to change the form of the plan as may be permitted by law such as to convert a traditional IRA into a Roth IRA; (iii) to "roll over" plan benefits, (iv) to receive distributions from such plan, and to endorse and deposit checks from such plans; (v) to borrow money from any such plan, (vi) to select options with respect to any such plan, and (vii) to make or change the beneficiary designation of any such plan, provided that a beneficiary shall include only individuals named as beneficiaries in my testamentary documents, charitable organizations, or trusts for any of the foregoing, and further provided that any such action taken by my Agent pursuant to this Paragraph shall be subject to the Self-Dealing provisions below.

3

Incapacitated Account Owners

Self-Dealing. Except where expressly allowed by this Durable Power of Attorney, my Agent may not enter into transactions on my behalf in which my Agent is personally interested unless (i) the terms of such transaction are fair to me; (ii) my Agent has given written notice to each "Qualified Beneficiary" as defined under N.C.G.S. 36C-1-103, and to each beneficiary under my Last Will and Testament (or if I have no Last Will and Testament, to any "Heir" as defined under N.C.G.S. §28A-1-1); and (iii) such notice is given at least fifteen (15) days prior to such transaction.

4

Applicable Multi-Beneficiary Trust (AMBT)

There are a couple of exceptions that allow an Accumulation trust that has EDB and DB as beneficiaries still to qualify as an EDB.

- When the trust has at least one beneficiary who is either disable or chronically ill, and none of the other trust beneficiaries have any right to the IRA until the death of the chronically ill or disabled beneficiary.
- There is a roadmap for qualifying a trust as a AMBT in the Proposed Regulations.

4 Applicable Multi-Beneficiary Trust (AMBT)

This option is intended to assist with beneficiaries who cannot receive income because it would disqualify them from certain governmental benefit, so a conduit trust is not appropriate. However, under the accumulation test, the disabled beneficiary would have to sacrifice being able to stretch the retirement benefit over his life expectancy.