2020 ESTATE PLANNING, PROBATE, AND & TRUST UPDATE

(The Good, Bad, and Ugly)

A. The Good:

I. The CARES Act

1. §2104. Not clear whether it was designed to increase charitable giving after the Trump Tax Act raised the standard deduction, virtually eliminating the itemizing of deductions for many taxpayers, or merely to provide a means for the common man to deduct some of his charitable giving. This section permits eligible individuals who ***do not*** itemize deductions to deduct $300 of qualified charitable contributions as an "above the line" deduction, ie., as an adjustment in determining adjusted gross income (AGI), for tax years beginning in 2020.

2. Under existing law you had to itemize to take a charitable deduction, which was limited to 60% of AGI. ***For 2020 only***, the CARES Act allows ***itemizers*** to deduct contributions up to 100% of their AGI.

3. Under the TCJA(the "Trump Tax Act"), the annual charitable deduction by a corporation is generally limited to 10% of taxable income, while a 15% limit applies to charitable contributions of food. The CARES Act increased these amounts to 25% of taxable income ***for 2020.*** Donations in excess of 25% may be deducted in the following five years.

Note, donations must be supported with documentation. For amounts less than $250, a receipt or canceled check is sufficient. For amounts greater than $250 a written acknowledgment from the charity is required.

4. §2202 and Notice 2020-50 dated 6/19/2020. Provides for corona-virus related distributions and loans from qualified plans to qualified individuals for corona-virus related distributions.

5. §2203 and Notice 2020-51 dated 6/23/2020. **Provides for a temporary waiver/suspension of 2020 RMDs.** It applies to defined contribution plans and IRAs and virtually anyone who was otherwise required to take RMDs, even beneficiaries of inherited IRAs. The Notice clarifies how the waiver/suspension applies if the Required Beginning Date (RBD) is in 2020.

II. Qualified Charitable Distribution from an IRA.

QCDs became permanent in 2015. A person age 70 ½ or older is permitted to make a qualified charitable distribution from their IRA ***direct*** to charity, not to exceed $100,000 in the aggregate. No charitable deduction results, but the distribution is also not taxable income to the transferor. The Secure Act referenced below did not change the age of the persons who can take advantage of this provision. Moving to the bad, effective for contributions/distributions after 2019, the $100,000 QCD income exclusion is reduced by the aggregate post 70 ½ deductible IRA contributions.

B. The Bad

I. Who may witness a Will. ARS §14-2505.

As you are aware, under the common law a beneficiary of a Will was deemed incompetent to be a witness. In Arizona, by statute, that rule was extinguished. Now, however, pursuant to ARS §14-2505, effective for any Will executed on or after October 1, 2019, ***unless the Will is made self proved*** as prescribed in ARS §§ 14-2504 or 14-2519, a person may not act as a witness to a Will if that person is a ***devisee*** under that Will or is related by blood, marriage or adoption to a devisee under the Will.

"***Devisee***" is specially defined for purposes of this section to mean a person who is designated in the Will to receive a devise ***or who is a beneficiary of a trust that is to receive a devise***.

I think increasing the formalities to execute a valid Will is a mistake and a trap for the unwary. Since self proving is available in Arizona, there is no reason not to use it and I have for some time thought an attorney might actually be committing malpractice by not having the Wills he prepared self proved. In these times, however, I can envision a practitioner having his married clients cross witness and then forgo the self proving process so as to keep the number of persons involved to a minimum. Those Wills will now be invalid. Persons electing to make their own Will are also likely to trip over this provision because they don't even know about self proving and are more likely to use an available family member as a witness. Also, what if the self proving provision fails to meet the requirements of the two above referenced statutes, is the Will then invalid if a now "deemed incompetent" related person was used as a witness? And what if the devisee trust contains a general power to appoint, due to the special definition of "devisee", are all persons deemed incompetent to witness the Will unless the Will is self proved? Now more than ever, it may be malpractice to not self prove a Will.

II. Electronic Wills. ARS §14-2518, et seq.

This sequence of statutes provides for electronic Wills in Arizona. Probably not practical for any of us, but will likely facilitate large already established electronic platforms providing legal services in Arizona. ARS §14-2518 expressly does not apply to a Trust, except testamentary trusts contained in a Will. It is not the answer for our COVID times as it requires the witnesses to have been physically present with the testator when the testator signs or acknowledges his signature or the Will.

ARS §14-2519 provide for electronic self proving of the Will. It provides that in addition to meeting the requirements of ARS §14-2504, to be self proved, an electronic Will must contain an electronic seal and signature of the notary and designate a qualified custodian to maintain custody of the electronic Will.

Before being offered to probate or printed to paper, the electronic Will must be under exclusive control of a qualified custodian at all times.

ARS §14-2520 sets forth the provisions governing qualified custodians. They must consistently employee and store electronic records of electronic Wills in a system that protects the records from destruction, alteration or unauthorized access and detects any change to a record. In addition to the electronic Will, the custodian shall also store 1) an electronic photo or

other visual record of the testator and witnesses taken contemporaneously with the execution; 2) a contemporaneous proof of identities; and 3) an audio and video of each placing their electronic signature on the electronic Will. ARS §14-2521 provides for a qualified custodian agreement governing its service and the ceasing of its service.

ARS §14-2522 provides for the means of accessing and destroying the electronic record. The electronic record may be destroyed at the earlier of 100 years after the testator's ***death*** or 5 years after admission to probate and all appeals have been exhausted. Part C of this section provides that a custodian shall cancel, render unreadable, or obliterate an electronic record if testator directs in a ***writing executed with the same formalities required for execution of the electronic Will.*** Query, is construction of the electronic record the only way, other than next kidding a later Will, to revoke an electronic Will?

ARS §14-2523 sets forth the method for obtaining a certified paper or original of the electronic Will.

III. Electronic Notarization. Article 4, Title 4. ARS §§41-371 et. seq. and amended §§ 41-319 and 44-7011.

Due to COVID, this new Act, Senate Bill 1030, effective June 30, 2020, garnered a lot of buzz when the governor via Executive Order 2020-26 moved up the effective date of the statute to April 10, 2020. Query, does the governor have the power to change the effective date of a statute? Come on man? You are going to ask that question? Come on man?

The Act initially provided that the Secretary of State adopt rules for RONs (Remote Online Notarizations) on or before July 1, 2020. Administrative Rules R 2-12-1301 through R 2-12-1308 are those rules. While there was a lot of buzz and I started getting questions from clients, I doubt anybody is currently using RON. Again, this will likely facilitate already existing electronic based platforms providing legal services in Arizona.

It provides that the identity of the person whose signature is being acknowledged could be based on "credential analysis" and "identity proofing"; or personal knowledge; or a credible witness. It requires an electronic journal. Credential analysis is a process or service that meets standards set by statute through which a third person affirms the validity of an ID credential through review of public or private data sources. Identity proofing is a process or service meeting standards set forth by statute through which a third person affirms the identity of a remotely located individual by a review of personal information from public or private data sources.

Note, there needs to be an audio and visual recording of the performance of each RON act.

A RON satisfies any law requiring the notary to be in the presence of the other person for whom they are performing the notarial act.

Failure of the notary to comply with the Act does not invalidate the electronic record or transaction as long as the notary was authorized to perform RONs. They are authorized through the Secretary of State.

To the extent there's any conflict with ARS §41-351 dealing with electronic signatures, this Act's terms take precedence.

Query, are we all going to be left behind if we don't adopt these new electronic means of creating and executing important legal documents. Probably.

C. The Ugly

THE SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019 (THE SECURE ACT)
(Or the, What Congress giveth, Congress may taketh away Act)

I think the last time I spoke to you I ended my discussion expressing my concerns with the Secure Act, which had yet to be passed but was being worked on in both chambers. It was passed. It appears as an add on, Section O, at the end of a 1700 + page budget Act signed by Trump on 12/29/2019. Generally, its effective for years after 2019. Its purpose was to expand the adoption of defined contribution plans by employers. I have attached the House Summary. I will primarily be dealing with what they labeled as, Title IV, Revenue Provisions and in particular , Section 401 of the Act, which amends IRC § 401(a)(9).

Congress has been concerned with retirement Plans being used to pass on wealth instead of just as a means to provide for one's retirement. For a lot of Americans, however, who have been building wealth in their 401(k) and IRA Plans, this Act takes a direct shot at the wealth building capability of those Plans. The amount of the damage, of course, depends on the internal rate of return on the Plan investments and the term of the Plan's existence, but the loss of the life expectancy stretch out will reduce the value of all retirement Plans. Congress did so in order to raise revenue so that tax credits can be given to employers to provide an incentive for them to adopt 401(k) plans. Congress is concerned with the large number of Americans who have no retirement savings. They know Social Security was not intended and never will for most people provide fully for their retirement income needs. They see these provisions as the beginning of a way to address this problem. I said beginning, because Congress is already floating the Secure Act II, which will make participation in a retirement plan mandatory, instead of elected, if it is passed.

If you're old enough you will recall the complexity associated with the rules governing required minimum distributions (RMDs) to be taken from non-defined benefit retirement plans and IRAs and how we, as planners, were seeking something called a "stretch out". The rules were changed, changed again, and again. Just when we thought we understood them and had gotten comfortable with them, Congress adds another layer of rules. These rules amend and build on the existing rules, principally IRC §401(a)(9). So, you still have to understand the basics of "see-through trusts", "conduit" trusts, and terms of art like "designated beneficiary" (DB) and a host of acronyms.. Because the new rules build on the existing rules, how these new rules are to be administered together with the old gives rise to new questions for which we will await answers. In the meantime, we'll do the best we can.

I. The New Required Beginning Date (RBD) and Contributions Limits

These actually could be seen as good things. Effective for Participants attaining age 701/2 after 12/31/2019, the required beginning date (RBD) is now April 1st of the year after the Plan Participant attains age 72, or later if a non 5% owner (in other words, when the non-owner employee who keeps working retires). There is no longer an age limitation for contributions to an IRA. Also, effective for years after 2019, contributions to an IRA can be the lesser of $6000 or compensation (add $1000 if 50 or older).

II. The New Ten Year Rule

The IRS in its own summary of the Act, states that the new 10 year RMD will apply to all distributions to a Designated Beneficiary (DB) from a defined contribution retirement plan or IRA, except distributions to Eligible Designated Beneficiaries (EDBs) or some trusts for EDBs, regardless of whether the distribution to the DB was before, on, or after the plan owner's Required Beginning Date (RBD).

You will recall a DB is an individual or a trust that is treated as an individual with a life expectancy. Under this new rule there is only one RMD and that is the one that requires the DB's interest in the Plan to be entirely withdrawn by December 31st of the year in which the 10th anniversary of the plan owner's death falls, unless the DB is an EDB. Thus, the demise of the stretch out over the DB's life expectancy, again, unless the DB is an EDB.

The new 10 year rule also applies to DB s of Roth IRAs.

III. The New Class of DB, The EDB

An EDB is: 1) the Plan Participant's spouse; 2) the Plan Participant's minor child (not stepchild); 3) a "disabled" person; 4) a chronically ill individual; 5) a person not more than 10 years younger than the Participant; or 6) a "see-through trust" established for the sole benefit of an individual eligible designated beneficiary. As you can see, most importantly, the Plan Participant's spouse is an EDB, so the surviving spouse gets to use the life expectancy method of payout and still has the option of a spousal rollover.

The Plan Participant's minor child is also an EDB and gets a life expectancy payout ***until the child reaches the age of majority***. Congress invoked Treasury Regulation 1. 401 (a)(9)-6, A-15 for the definition of majority which looks to state law and also includes a provision for a child up to age 26 who is enrolled in but has not completed a specific course of education. When the minor child attains the age of majority, the payout method shifts to the 10 year RMD described above. Should a minor child EDB die before reaching the age of majority, then its successor in interest to the child's interest in the Plan must use the 10 year RMD. If a minor child of Participant becomes disabled before reaching majority, then the age of majority is being suspended until the disability ends. So, unlike the surviving spouse, because the minor child only gets to use the life expectancy payout until it attains majority, it does not get to take advantage of a stretch out over its full life expectancy.

Similarly, the disabled person or chronically ill individual (D/CIDB) gets a life expectancy payout until the disability or chronic illness ends or the person dies, at which time the successor in interest to the D/CIDB gets the 10 year RMD described above. The test for disability is similar to that used to determine Social Security disability and is set forth in IRC § 72(m)(7) and Reg. 1.72-17(f). The person must be unable to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment expected to result in death or to be of indefinite duration and long continued. Congress borrowed the definition of chronically ill from IRC §7702B(e)(2) regarding long-term care contracts. The person must be certified by a healthcare practitioner as being unable to perform at least two activities of daily living for a period of 90 days due to a loss of functional capacity or requiring substantial supervision to protect from harm due to severe cognitive impairment. Obviously, this definition is generally applied to the elderly, so there may be problems applying it to younger persons.

It is unclear to me where the rule for a person not more than 10 years younger than the Participant came from, but I suspect it was designed to cover the class of persons whom are sometimes referred to as significant others and whom most likely will be close in age to the Plan Participant. Unfortunately, that leaves out the older significant other. So, if the rule was designed to try to bring some parity between unmarried companions and married persons, it fails.

The see-through trust, you may remember, is a trust the existence of which is disregarded, which lets you look through the trust and treat its beneficiaries as the Plan's beneficiaries when determining the RMD; the life expectancy of the oldest trust beneficiary is the measuring life for calculating a life expectancy based RMD. To be a see-through trust, it must be valid under state law, irrevocable at the time of the Plan Participant's death, have clearly identifiable beneficiaries (reference to a class of persons is fine; powers to appoint may cause a problem), and certain documentation must be delivered to the Plan Administrator no later than October 31st of the year following the Plan Participant's death. The rule treating a see-through trust as an EDB when the trust is established for the sole benefit of an individual EDB probably contemplates a supplemental needs trust established for a D/CIDB.

Congress has also adopted rules for an Applicable Multi-Beneficiary Trust (AMBT). This is a trust for more than one beneficiary and, again, it is a see-through trust (but not likely a "conduit" trust), all beneficiaries are DBs and at least one DB is n D/CIDB. During the D/CIDB's life all distributions must go to the D/CIDB. Because it's not a conduit trust, it's unclear which DB's life expectancy will be the measuring life for the life expectancy payout. If the trust includes a provision that requires a division into sub trusts and the sub trust for the D/CIDB is a conduit trust then the D/CIDB's sub trust gets the life expectancy payout.

IV. Some Old Rules That Still Apply

The Plan Participant still gets a life expectancy payout using the Uniform Table, a two life table, his life and a person 10 years younger.

If the Plan Participant dies without a DB, then there is a five-year payout. All of the plans assets must be distributed by the end of the calendar year in which the fifth anniversary of the Plan Participant's death falls.

If a trust is the beneficiary and there is a non-DB trust beneficiary, the five-year rule applies unless the non-DB trust beneficiary is not a trust beneficiary as of September 30th of the year following the Plan Participant's death (the "snapshot" date). For instance, if one of the beneficiaries is a charity, a non-DB, you can cure the problem by distributing to the charity its entire interest in the trust prior to September 30 of the year following the Participant's death, leaving only DB s as trust beneficiaries on the snapshot date.

If you are including a conduit trust provision in a trust, the provision must provide that ***al**l* ***Plan distributions*** must flow through to the beneficiary in the year of the distribution, not just the RMDs.

The "separate share" rule still exists. Use it by making sure clients on the Plan's beneficiary designation form sets forth separate shares for each named beneficiary. Then, each beneficiary will get whatever payout method applies to their share. For instance, a D/CIDB will get to take advantage of the life expectancy method. Note, the named beneficiary could be a separate stand alone trust or subtrust established for the beneficiary.

The "see through trust" rules have not changed.

The "conduit" trust rules have not changed.

The 5 year rule still applies to non-DB s.

The excise tax for not taking an RMD still applies and becomes even more important because the new required shifts from the life expectancy method to a 10 year method upon a minor attaining age of majority, etc., may be missed (like UTMAs still in existence past age 21) resulting in a failure to take the RMD. It is applied yearly and thus could, over several years exhaust the fund.

V. Some Old Rules That We Don't Know If They Still Apply

Under the pre-Act rules, the Code provided that if the Plan Participant died after distribution of his interest had begun, generally after his RBD, then the remaining portion of his interest would be distributed "at least as rapidly" as under the method being used as of the Participant's death. The Regs then stated that such rule was satisfied if the Participant had a DB and the distribution was taken over the longer of (1) the remaining life expectancy of the DB and (2) the remaining life expectancy of the Participant (the "ghost life"). We don't know whether the ghost life has any life anymore. For example, if the new 10 year rule is substituted for the DB's life expectancy and the DB is older than the deceased Plan Participant, does the ghost life of the Plan Participant apply or does the new 10 year rule apply.

VI. Can You Still Get A Life Expectancy Stretch Out For Non-EDB DB s?

I don't think so. Notwithstanding, you are going to hear lots of sales pitches about ways to still get the stretch out. They will involve charitable contributions. Thus, generally, they are not work arounds for people other than those who are charitably inclined. The most prominent option is to name a Charitable Remainder Trust (CRT) as the beneficiary of the Plan. The distribution of the plan to the CRT, a non-DB, will need to occur within the five-year payout rule, but will likely happen quickly. That's okay, because the CRT will pay no income tax on the amounts coming from the Plan, all of which are ordinary taxable income. The non-charitable beneficiary of the CRT will then receive over its life, or some other designated term, unitrust or annuity distributions (simulating the life expectancy stretch-out distributions). The remainder will go to charity upon the non-charitable beneficiary's death, or the end of the term if a term less than life is chosen when the CRT is designed. Problems with this plan include: the distributions to the non-charitable beneficiary will be taxed to the beneficiary as ordinary income, so you're not beating the income tax; it's rigid and inflexible, and the non-charitable beneficiary can't be given more from the CRT if needed; upon funding the CRT, the actuarial value of the remainder interest must be worth at least 10% of the value of the assets funding the CRT; they are complicated trusts to draft and administer; and finally, if the non-charitable beneficiary dies prematurely, it ends and whatever the value of the remainder is goes to charity.

The other program being sold as a replacement for the life expectancy payout, are charitable annuities. While these do not have the complexity of CRTs, the charities use actuarial calculations that are designed to pay 50% of the value to the charity.

VII. My Final Comments On Post Secure Act Plan Beneficiary Designations

The best beneficiary is a surviving spouse.

Next, individuals like adult children, rather than trusts, are the next best to be named as beneficiaries. If naming more than one adult child, use the beneficiary designation form to set forth the separate share each is to receive and what happens to it if the child is not living upon the Participant's death.

If you have minor children, then an accumulation trust may be required. An accumulation trust will not include a conduit trust provision. Income not flowing through the trust to the beneficiary will be taxed to the trust at its higher tax rate, the highest individual tax rate.

Consider doing something I used to recommend against, piecemeal the estate, giving the income tax sensitive retirement accounts to either EDBs or charity and give the rest of the estate to the non-EDBs.

Remember, the new 10 year RMD does not mesh well with the conduit trust provision, because there is only one required distribution, at the end of the ten-year period. In most cases, deferring any distribution from the Plan for the entire 10 year period will likely result in the greatest wealth accumulation for use by the DB when they receive the end of term distribution. This is due to the tax deferred growth that will occur during the 10 year term. Note, however, the beneficiary is not going to be happy with it and it may, depending on the value of the Plan, create a huge income tax consequence to the beneficiary at the end of the term, pushing the beneficiary up the brackets. Thus, you need to discuss this with the client. It may be that staggered distributions are preferable, even though less wealth will be generated in the long run. In any event, if you include a conduit trust provision so the lives of older remainder beneficiaries or remainder non-DBs can be excluded, the provision is going to have to mess with whatever direction is given to the Trustee regarding the rapidity of taking monies out of the Plan and it must state that whatever is taken out must be distributed to the beneficiary in the year it was taken out of the Plan.

If you are going to use an accumulation trust as part of the estate plan, remember, distributions from the Plan trapped in the trust will be taxed at trust rates, the highest individual income tax rate.

Start listening to the clients and what they want and then do the best you can. Every plan has positives and negatives. Explain the options to the client and let the client decide which negatives they're willing to accept and which options they want.

D. Other Stuff

A recent case dealing with life insurance reminds us, again, to read the statutes. The life insurance proceeds went to the Estate because no beneficiary was named. Remember, there is a statute that generally exempts life insurance proceeds from claims of creditors. The statute, however, expressly excludes from the exemption proceeds paid to the insured or his legal representatives. Thus, since the proceeds went to the insured's Estate, they became subject to the creditor's claims presented in the Estate..

The Rules of Probate Procedure incorporated some of the civil rules procedures, like scheduling orders, which can work against the old idea that probate matters were expedited.

The Estate Tax exemption equivalent for 2021 is $11,700,000. Good Luck and Stay Safe.

HOUSE COMMITTEE ON WAYS & MEANS
CHAIRMAN RICHARD E. NEAL

THE SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019 (THE SECURE ACT)

TITLE I: Expanding and Preserving Retirement Savings

Section 101. Expand Retirement Savings by Increasing the Auto Enrollment Safe Harbor Cap

The legislation increases the cap from 10 to 15 percent of employee pay that required automatic escalation of employee deferrals go no higher than under an automatic enrollment safe harbor plan.

Section 102. Simplification of Safe Harbor 401(k) Rules

The legislation changes the nonelective contribution 401(k) safe harbor to provide greater flexibility, improve employee protection and facilitate plan adoption. The legislation eliminates the safe harbor notice requirement, but maintains the requirement to allow employees to make or change an election at least once per year. The bill also permits amendments to nonelective status at any time before the 30th day before the close of the plan year. Amendments after that time would be allowed if the amendment provides (1) a nonelective contribution of at least four percent of compensation (rather than at least three percent) for all eligible employees for that plan year, and (2) the plan is amended no later than the last day for distributing excess contributions for the plan year, that is, by the close of following plan year.

Sec. 103. Increase Credit Limitation for Small Employer Pension Plan Start-Up Costs

Increasing the credit for plan start-up costs will make it more affordable for small businesses to set up retirement plans. The legislation increases the credit by changing the calculation of the flat dollar amount limit on the credit to the greater of (1) $500 or (2) the lesser of (a) $250 multiplied by the number of nonhighly compensated employees of the eligible employer who are eligible to participate in the plan or (b) $5,000. The credit applies for up to three years.

Section 104. Small Employer Automatic Enrollment Credit

Automatic enrollment is shown to increase employee participation and higher retirement savings. The legislation creates a new tax credit of up to $500 per year to employers to defray startup costs for new section 401(k) plans and SIMPLE IRA plans that include automatic enrollment. The credit is in addition to the plan start-up credit allowed under present law and would be available for three years. The credit would also be available to employers that convert an existing plan to an automatic enrollment design.

Section 105. Treat Certain Taxable Non-Tuition Fellowship and Stipend Payments as Compensation for IRA Purposes

Stipends and non-tuition fellowship payments received by graduate and postdoctoral students are not treated as compensation and cannot be used as the basis for IRA contributions. The legislation removes this obstacle to retirement savings by taking such amounts that are includible in income into account for IRA contribution purposes. The change will enable these students to begin saving for retirement and accumulate tax-favored retirement savings.

Section 106. Repeal of Maximum Age for Traditional IRA Contributions

The legislation repeals the prohibition on contributions to a traditional IRA by an individual who has attained age 70½. As Americans live longer, an increasing number continue employment beyond traditional retirement age.

Section 107. Qualified Employer Plans Prohibited from Making Loans through Credit Cards and Other Similar Arrangements

The legislation prohibits the distribution of plan loans through credit cards or similar arrangements. The change will ensure that plan loans are not used for routine or small purchases, thereby preserving retirement savings.

Section 108. Portability of Lifetime Income Options

The legislation permits qualified defined contribution plans, section 403(b) plans, or governmental section 457(b) plans to make a direct trustee-to-trustee transfer to another employer-sponsored retirement plan or IRA of lifetime income investments or distributions of a lifetime income investment in the form of a qualified plan distribution annuity, if a lifetime income investment is no longer authorized to be held as an investment option under the plan. The change will permit participants to preserve their lifetime income investments and avoid surrender charges and fees.

Section 109. Treatment of Custodial Accounts on Termination of Section 403(b) Plans

Under the provision, not later than six months after the date of enactment, Treasury will issue guidance under which if an employer terminates a 403(b) custodial account, the distribution needed to effectuate the plan termination may be the distribution of an individual custodial account in kind to a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to the 403(b) rules in effect at the time that the individual custodial account is distributed. The Treasury guidance shall be retroactively effective for taxable years beginning after December 31, 2008.

Section 110. Clarification of Retirement Income Account Rules Relating to Church-Controlled Organizations

The legislation clarifies individuals that may be covered by plans maintained by church controlled organizations. Covered individuals include duly ordained, commissioned, or licensed ministers, regardless of the source of compensation; employees of a tax-exempt organization, controlled by or associated with a church or a convention or association of churches; and certain employees after

separation from service with a church, a convention or association of churches, or an organization described above.

Section 111. Allowing Long-term Part-time Workers to Participate in 401(k) Plans

Under current law, employers generally may exclude part-time employees (employees who work less than 1,000 hours per year) when providing a defined contribution plan to their employees. As women are more likely than men to work part-time, these rules can be quite harmful for women in preparing for retirement. Except in the case of collectively bargained plans, the bill will require employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (with the 1,000-hour rule) or three consecutive years of service where the employee completes at least 500 hours of service. In the case of employees who are eligible solely by reason of the latter new rule, the employer may elect to exclude such employees from testing under the nondiscrimination and coverage rules, and from the application of the top-heavy rules.

Section 112. Penalty-free Withdrawals from Retirement Plans for Individuals in Case of Birth or Adoption

The legislation provides for penalty-free withdrawals from retirement plans for any "qualified birth or adoption distributions."

Section 113. Increase in Age for Required Beginning Date for Mandatory Distributions

Under current law, participants are generally required to begin taking distributions from their retirement plan at age 70 ½. The policy behind this rule is to ensure that individuals spend their retirement savings during their lifetime and not use their retirement plans for estate planning purposes to transfer wealth to beneficiaries. However, the age 70 ½ was first applied in the retirement plan context in the early 1960s and has never been adjusted to take into account increases in life expectancy. The bill increases the required minimum distribution age from 70 ½ to 72.

Section 114. Community Newspapers Pension Funding Relief

Community newspapers are generally family-owned, non-publicly traded, independent newspapers. This provision provides pension funding relief for community newspaper plan sponsors by increasing the interest rate to calculate those funding obligations to 8%. Additionally, this bill provides for a longer amortization period of 30 years from 7 years. These two changes would reduce the annual amount struggling community newspaper employers would be required to contribute to their pension plan.

Section 115. Treating Excluded Difficulty of Care Payments as Compensation for Determining Retirement Contribution Limitations

Many home healthcare workers do not have a taxable income because their only compensation comes from "difficulty of care" payments exempt from taxation under Code section 131. Because such workers do not have taxable income, they cannot save for retirement in a defined contribution plan or IRA. This provision would allow home healthcare workers to contribute to a plan or IRA by amending Code sections 415(c) and 408(o) to provide that tax exempt difficulty of care payments are treated as compensation for purposes of calculating the contribution limits to defined contribution plans and IRAs.

TITLE II: Administrative Improvements

Section 201. Plans Adopted by Filing Due Date for Year May Be Treated as in Effect as of Close of Year

The legislation permits businesses to treat qualified retirement plans adopted before the due date (including extensions) of the tax return for the taxable year to treat the plan as having been adopted as of the last day of the taxable year. The additional time to establish a plan provides flexibility for employers that are considering adopting a plan and the opportunity for employees to receive contributions for that earlier year and begin to accumulate retirement savings.

Section 202. Combined Annual Reports for Group of Plan

The legislation directs the IRS and DOL to effectuate the filing of a consolidated Form 5500 for similar plans. Plans eligible for consolidated filing must be defined contribution plans, with the same trustee, the same named fiduciary (or named fiduciaries) under ERISA, and the same administrator, using the same plan year, and providing the same investments or investment options to participants and beneficiaries. The change will reduce aggregate administrative costs, making it easier for small employers to sponsor a retirement plan and thus improving retirement savings.

Section 203. Disclosure Regarding Lifetime Income

The legislation requires benefit statements provided to defined contribution plan participants to include a lifetime income disclosure at least once during any 12-month period. The disclosure would illustrate the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant's surviving spouse and a single life annuity. The Secretary of Labor is directed to develop a model disclosure. Disclosure in terms of monthly payments will provide useful information to plan participants in correlating the funds in their defined contribution plan to lifetime income. Plan fiduciaries, plan sponsors, or other persons will have no liability under ERISA solely by reason of the provision of lifetime income stream equivalents that are derived in accordance with the assumptions and guidance under the provision and that include the explanations contained in the model disclosure.

Section 204. Fiduciary Safe Harbor for Selection of Lifetime Income Provider

The legislation provides certainty for plan sponsors in the selection of lifetime income providers, a fiduciary act under ERISA. Under the bill, fiduciaries are afforded an optional safe harbor to satisfy the prudence requirement with respect to the selection of insurers for a guaranteed retirement income contract and are protected from liability for any losses that may result to the participant or beneficiary due to an insurer's inability in the future to satisfy its financial obligations under the terms of the contract. Removing ambiguity about the applicable fiduciary standard eliminates a roadblock to offering lifetime income benefit options under a defined contribution plan.

Section 205. Modification of Nondiscrimination Rules to Protect Older, Longer Service Participation

The legislation modifies the nondiscrimination rules with respect to closed plans to permit existing participants to continue to accrue benefits. The modification will protect the benefits for older, longer-service employees as they near retirement.

TITLE III: Other Benefits

Section 301. Benefits for Volunteer Firefighters and Emergency Medical Responders

The legislation reinstates for one year the exclusions for qualified State or local tax benefits and qualified reimbursement payments provided to members of qualified volunteer emergency response organizations and increases the exclusion for qualified reimbursement payments to $50 for each month during which a volunteer performs services.

Section 302. Expansion of Section 529 Plans

The legislation expands 529 education savings accounts to cover costs associated with registered apprenticeships; homeschooling; up to $10,000 of qualified student loan repayments (including those for siblings); and private elementary, secondary, or religious schools.

TITLE IV: Revenue Provisions

Section 401. Modifications to Required Minimum Distribution Rules

The legislation modifies the required minimum distribution rules with respect to defined contribution plan and IRA balances upon the death of the account owner. Under the legislation, distributions to individuals other than the surviving spouse of the employee (or IRA owner), disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee (or IRA owner), or child of the employee (or IRA owner) who has not reached the age of majority are generally required to be distributed by the end of the tenth calendar year following the year of the employee or IRA owner's death.

Section 402. Increase in Penalty for Failure to File

The legislation increases the failure to file penalty to the lesser of $400 or 100 percent of the amount of the tax due. Increasing the penalties will encourage the filing of timely and accurate returns which, in turn, will improve overall tax administration.

Section 403. Increased Penalties for Failure to File Retirement Plan Returns

The legislation modifies the failure to file penalties for retirement plan returns. The Form 5500 penalty would be modified to $105 per day, not to exceed $50,000. Failure to file a registration statement would incur a penalty of $2 per participant per day, not to exceed $10,000. Failure to file a required notification of change would result in a penalty of $2 per day, not to exceed $5,000 for any failure. Failure to provide a required withholding notice results in a penalty of $100 for each failure, not to exceed $50,000 for all failures during any calendar year. Increasing the penalties will encourage the filing of timely and accurate information returns and statements and the provision of required notices, which, in turn, will improve overall tax administration.

Section 404. Increase Information Sharing to Administer Excise Taxes

The legislation allows the IRS to share returns and return information with the U.S. Customs and Border Protection for purposes of administering and collecting the heavy vehicle use tax.

1 **DIVISION O—SETTING EVERY**
2 **COMMUNITY UP FOR RETIRE-**
3 **MENT ENHANCEMENT**

4 **SEC. 1. SHORT TITLE, ETC.**

5 (a) SHORT TITLE.—This Act may be cited as the
6 "Setting Every Community Up for Retirement Enhance-
7 ment Act of 2019".
8 (b) TABLE OF CONTENTS.—The table of contents of
9 this Act is as follows:

Sec. 1. Short title, etc.

TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

Sec. 101. Multiple employer plans; pooled employer plans.
Sec. 102. Increase in 10 percent cap for automatic enrollment safe harbor after 1st plan year.
Sec. 103. Rules relating to election of safe harbor 401(k) status.
Sec. 104. Increase in credit limitation for small employer pension plan startup costs.
Sec. 105. Small employer automatic enrollment credit.
Sec. 106. Certain taxable non-tuition fellowship and stipend payments treated as compensation for IRA purposes.
Sec. 107. Repeal of maximum age for traditional IRA contributions.
Sec. 108. Qualified employer plans prohibited from making loans through credit cards and other similar arrangements.
Sec. 109. Portability of lifetime income options.
Sec. 110. Treatment of custodial accounts on termination of section 403(b) plans.
Sec. 111. Clarification of retirement income account rules relating to church-controlled organizations.
Sec. 112. Qualified cash or deferred arrangements must allow long-term employees working more than 500 but less than 1,000 hours per year to participate.
Sec. 113. Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption.
Sec. 114. Increase in age for required beginning date for mandatory distributions.
Sec. 115. Special rules for minimum funding standards for community newspaper plans.
Sec. 116. Treating excluded difficulty of care payments as compensation for determining retirement contribution limitations.

TITLE II—ADMINISTRATIVE IMPROVEMENTS

Sec. 201. Plan adopted by filing due date for year may be treated as in effect as of close of year.
Sec. 202. Combined annual report for group of plans.
Sec. 203. Disclosure regarding lifetime income.
Sec. 204. Fiduciary safe harbor for selection of lifetime income provider.
Sec. 205. Modification of nondiscrimination rules to protect older, longer service participants.
Sec. 206. Modification of PBGC premiums for CSEC plans.

TITLE III—OTHER BENEFITS

Sec. 301. Benefits provided to volunteer firefighters and emergency medical responders.
Sec. 302. Expansion of section 529 plans.

TITLE IV—REVENUE PROVISIONS

Sec. 401. Modification of required distribution rules for designated beneficiaries.
Sec. 402. Increase in penalty for failure to file.
Sec. 403. Increased penalties for failure to file retirement plan returns.
Sec. 404. Increase information sharing to administer excise taxes.

TITLE V—TAX RELIEF FOR CERTAIN CHILDREN

Sec. 501. Modification of rules relating to the taxation of unearned income of certain children.

TITLE VI—ADMINISTRATIVE PROVISIONS

Sec. 601. Provisions relating to plan amendments.

1 # TITLE I—EXPANDING AND PRE-
2 # SERVING RETIREMENT SAV-
3 # INGS

4 **SEC. 101. MULTIPLE EMPLOYER PLANS; POOLED EM-**
5 **PLOYER PLANS.**

6 (a) QUALIFICATION REQUIREMENTS.—
7 (1) IN GENERAL.—Section 413 of the Internal
8 Revenue Code of 1986 is amended by adding at the
9 end the following new subsection:
10 “(e) APPLICATION OF QUALIFICATION REQUIRE-
11 MENTS FOR CERTAIN MULTIPLE EMPLOYER PLANS WITH
12 POOLED PLAN PROVIDERS.—

1 (2) COORDINATION WITH DEDUCTION FOR STU-
2 DENT LOAN INTEREST.—Section 221(e)(1) of such
3 Code is amended by adding at the end the following:
4 "The deduction otherwise allowable under subsection
5 (a) (prior to the application of subsection (b)) to the
6 taxpayer for any taxable year shall be reduced (but
7 not below zero) by so much of the distributions
8 treated as a qualified higher education expense
9 under section 529(c)(9) with respect to loans of the
10 taxpayer as would be includible in gross income
11 under section 529(c)(3)(A) for such taxable year but
12 for such treatment.".
13 (c) EFFECTIVE DATE.—The amendments made by
14 this section shall apply to distributions made after Decem-
15 ber 31, 2018.

16 TITLE IV—REVENUE 17 PROVISIONS

18 SEC. 401. MODIFICATION OF REQUIRED DISTRIBUTION 19 RULES FOR DESIGNATED BENEFICIARIES.

20 (a) MODIFICATION OF RULES WHERE EMPLOYEE
21 DIES BEFORE ENTIRE DISTRIBUTION.—
22 (1) IN GENERAL.—Section 401(a)(9) of the In-
23 ternal Revenue Code of 1986 is amended by adding
24 at the end the following new subparagraph:

1 "(H) SPECIAL RULES FOR CERTAIN DE-
2 FINED CONTRIBUTION PLANS.—In the case of a
3 defined contribution plan, if an employee dies
4 before the distribution of the employee's entire
5 interest—
6 "(i) IN GENERAL.—Except in the case
7 of a beneficiary who is not a designated
8 beneficiary, subparagraph (B)(ii)—
9 "(I) shall be applied by sub-
10 stituting '10 years' for '5 years', and
11 "(II) shall apply whether or not
12 distributions of the employee's inter-
13 ests have begun in accordance with
14 subparagraph (A).
15 "(ii) EXCEPTION FOR ELIGIBLE DES-
16 IGNATED BENEFICIARIES.—Subparagraph
17 (B)(iii) shall apply only in the case of an
18 eligible designated beneficiary.
19 "(iii) RULES UPON DEATH OF ELIGI-
20 BLE DESIGNATED BENEFICIARY.—If an el-
21 igible designated beneficiary dies before the
22 portion of the employee's interest to which
23 this subparagraph applies is entirely dis-
24 tributed, the exception under clause (ii)
25 shall not apply to any beneficiary of such

1 eligible designated beneficiary and the re-
2 mainder of such portion shall be distrib-
3 uted within 10 years after the death of
4 such eligible designated beneficiary.
5 "(iv) SPECIAL RULE IN CASE OF CER-
6 TAIN TRUSTS FOR DISABLED OR CHRON-
7 ICALLY ILL BENEFICIARIES.—In the case
8 of an applicable multi-beneficiary trust, if
9 under the terms of the trust—
10 "(I) it is to be divided imme-
11 diately upon the death of the em-
12 ployee into separate trusts for each
13 beneficiary, or
14 "(II) no individual (other than a
15 eligible designated beneficiary de-
16 scribed in subclause (III) or (IV) of
17 subparagraph (E)(ii)) has any right to
18 the employee's interest in the plan
19 until the death of all such eligible des-
20 ignated beneficiaries with respect to
21 the trust,
22 for purposes of a trust described in sub-
23 clause (I), clause (ii) shall be applied sepa-
24 rately with respect to the portion of the
25 employee's interest that is payable to any

1 eligible designated beneficiary described in
2 subclause (III) or (IV) of subparagraph
3 (E)(ii); and, for purposes of a trust de-
4 scribed in subclause (II), subparagraph
5 (B)(iii) shall apply to the distribution of
6 the employee's interest and any beneficiary
7 who is not such an eligible designated ben-
8 eficiary shall be treated as a beneficiary of
9 the eligible designated beneficiary upon the
10 death of such eligible designated bene-
11 ficiary.

12 "(v) APPLICABLE MULTI-BENE-
13 FICIARY TRUST.—For purposes of this sub-
14 paragraph, the term 'applicable multi-bene-
15 ficiary trust' means a trust—

16 "(I) which has more than one
17 beneficiary,

18 "(II) all of the beneficiaries of
19 which are treated as designated bene-
20 ficiaries for purposes of determining
21 the distribution period pursuant to
22 this paragraph, and

23 "(III) at least one of the bene-
24 ficiaries of which is an eligible des-
25 ignated beneficiary described in sub-

1 clause (III) or (IV) of subparagraph
2 (E)(ii).
3 "(vi) APPLICATION TO CERTAIN ELI-
4 GIBLE RETIREMENT PLANS.—For purposes
5 of applying the provisions of this subpara-
6 graph in determining amounts required to
7 be distributed pursuant to this paragraph,
8 all eligible retirement plans (as defined in
9 section 402(c)(8)(B), other than a defined
10 benefit plan described in clause (iv) or (v)
11 thereof or a qualified trust which is a part
12 of a defined benefit plan) shall be treated
13 as a defined contribution plan.".
14 (2) DEFINITION OF ELIGIBLE DESIGNATED
15 BENEFICIARY.—Section 401(a)(9)(E) of such Code
16 is amended to read as follows:
17 "(E) DEFINITIONS AND RULES RELATING
18 TO DESIGNATED BENEFICIARIES.—For pur-
19 poses of this paragraph—
20 "(i) DESIGNATED BENEFICIARY.—The
21 term 'designated beneficiary' means any
22 individual designated as a beneficiary by
23 the employee.
24 "(ii) ELIGIBLE DESIGNATED BENE-
25 FICIARY.—The term 'eligible designated

1 beneficiary' means, with respect to any em-
2 ployee, any designated beneficiary who is—
3 "(I) the surviving spouse of the
4 employee,
5 "(II) subject to clause (iii), a
6 child of the employee who has not
7 reached majority (within the meaning
8 of subparagraph (F)),
9 "(III) disabled (within the mean-
10 ing of section 72(m)(7)),
11 "(IV) a chronically ill individual
12 (within the meaning of section
13 7702B(c)(2), except that the require-
14 ments of subparagraph (A)(i) thereof
15 shall only be treated as met if there is
16 a certification that, as of such date,
17 the period of inability described in
18 such subparagraph with respect to the
19 individual is an indefinite one which is
20 reasonably expected to be lengthy in
21 nature), or
22 "(V) an individual not described
23 in any of the preceding subclauses
24 who is not more than 10 years young-
25 er than the employee.

1 The determination of whether a designated
2 beneficiary is an eligible designated bene-
3 ficiary shall be made as of the date of
4 death of the employee.

5 "(iii) SPECIAL RULE FOR CHIL-
6 DREN.—Subject to subparagraph (F), an
7 individual described in clause (ii)(II) shall
8 cease to be an eligible designated bene-
9 ficiary as of the date the individual reaches
10 majority and any remainder of the portion
11 of the individual's interest to which sub-
12 paragraph (H)(ii) applies shall be distrib-
13 uted within 10 years after such date.".

14 (b) EFFECTIVE DATES.—

15 (1) IN GENERAL.—Except as provided in this
16 subsection, the amendments made by this section
17 shall apply to distributions with respect to employees
18 who die after December 31, 2019.

19 (2) COLLECTIVE BARGAINING EXCEPTION.—In
20 the case of a plan maintained pursuant to 1 or more
21 collective bargaining agreements between employee
22 representatives and 1 or more employers ratified be-
23 fore the date of enactment of this Act, the amend-
24 ments made by this section shall apply to distribu-

1 tions with respect to employees who die in calendar
2 years beginning after the earlier of—
3 (A) the later of—
4 (i) the date on which the last of such
5 collective bargaining agreements termi-
6 nates (determined without regard to any
7 extension thereof agreed to on or after the
8 date of the enactment of this Act), or
9 (ii) December 31, 2019, or
10 (B) December 31, 2021.
11 For purposes of subparagraph (A)(i), any plan
12 amendment made pursuant to a collective bargaining
13 agreement relating to the plan which amends the
14 plan solely to conform to any requirement added by
15 this section shall not be treated as a termination of
16 such collective bargaining agreement.
17 (3) GOVERNMENTAL PLANS.—In the case of a
18 governmental plan (as defined in section 414(d) of
19 the Internal Revenue Code of 1986), paragraph (1)
20 shall be applied by substituting "December 31,
21 2021" for "December 31, 2019".
22 (4) EXCEPTION FOR CERTAIN EXISTING ANNU-
23 ITY CONTRACTS.—
24 (A) IN GENERAL.—The amendments made
25 by this section shall not apply to a qualified an-

1 nuity which is a binding annuity contract in ef-
2 fect on the date of enactment of this Act and
3 at all times thereafter.
4 (B) QUALIFIED ANNUITY.—For purposes
5 of this paragraph, the term "qualified annuity"
6 means, with respect to an employee, an annu-
7 ity—
8 (i) which is a commercial annuity (as
9 defined in section 3405(e)(6) of the Inter-
10 nal Revenue Code of 1986);
11 (ii) under which the annuity payments
12 are made over the life of the employee or
13 over the joint lives of such employee and a
14 designated beneficiary (or over a period
15 not extending beyond the life expectancy of
16 such employee or the joint life expectancy
17 of such employee and a designated bene-
18 ficiary) in accordance with the regulations
19 described in section 401(a)(9)(A)(ii) of
20 such Code (as in effect before such amend-
21 ments) and which meets the other require-
22 ments of section 401(a)(9) of such Code
23 (as so in effect) with respect to such pay-
24 ments; and
25 (iii) with respect to which—

1 (I) annuity payments to the em-
2 ployee have begun before the date of
3 enactment of this Act, and the em-
4 ployee has made an irrevocable elec-
5 tion before such date as to the method
6 and amount of the annuity payments
7 to the employee or any designated
8 beneficiaries; or
9 (II) if subclause (I) does not
10 apply, the employee has made an ir-
11 revocable election before the date of
12 enactment of this Act as to the meth-
13 od and amount of the annuity pay-
14 ments to the employee or any des-
15 ignated beneficiaries.
16 (5) EXCEPTION FOR CERTAIN BENE-
17 FICIARIES.—
18 (A) IN GENERAL.—If an employee dies be-
19 fore the effective date, then, in applying the
20 amendments made by this section to such em-
21 ployee's designated beneficiary who dies after
22 such date—
23 (i) such amendments shall apply to
24 any beneficiary of such designated bene-
25 ficiary; and

1 (ii) the designated beneficiary shall be
2 treated as an eligible designated bene-
3 ficiary for purposes of applying section
4 401(a)(9)(H)(ii) of the Internal Revenue
5 Code of 1986 (as in effect after such
6 amendments).
7 (B) EFFECTIVE DATE.—For purposes of
8 this paragraph, the term "effective date" means
9 the first day of the first calendar year to which
10 the amendments made by this section apply to
11 a plan with respect to employees dying on or
12 after such date.

13 **SEC. 402. INCREASE IN PENALTY FOR FAILURE TO FILE.**

14 (a) IN GENERAL.—The second sentence of subsection
15 (a) of section 6651 of the Internal Revenue Code of 1986
16 is amended by striking "$330" and inserting "$435".
17 (b) INFLATION ADJUSTMENT.—Section 6651(j)(1) of
18 such Code is amended by striking "$330" and inserting
19 "$435".
20 (c) EFFECTIVE DATE.—The amendments made by
21 this section shall apply to returns the due date for which
22 (including extensions) is after December 31, 2019.

1 **SEC. 403. INCREASED PENALTIES FOR FAILURE TO FILE**
2 **RETIREMENT PLAN RETURNS.**

3 (a) IN GENERAL.—Subsection (e) of section 6652 of
4 the Internal Revenue Code of 1986 is amended—
5 (1) by striking "$25" and inserting "$250";
6 and
7 (2) by striking "$15,000" and inserting
8 "$150,000".
9 (b) ANNUAL REGISTRATION STATEMENT AND NOTI-
10 FICATION OF CHANGES.—Subsection (d) of section 6652
11 of the Internal Revenue Code of 1986 is amended—
12 (1) by striking "$1" both places it appears in
13 paragraphs (1) and (2) and inserting "$10";
14 (2) by striking "$5,000" in paragraph (1) and
15 inserting "$50,000"; and
16 (3) by striking "$1,000" in paragraph (2) and
17 inserting "$10,000".
18 (c) FAILURE TO PROVIDE NOTICE.—Subsection (h)
19 of section 6652 of the Internal Revenue Code of 1986 is
20 amended—
21 (1) by striking "$10" and inserting "$100";
22 and
23 (2) by striking "$5,000" and inserting
24 "$50,000".
25 (d) EFFECTIVE DATE.—The amendments made by
26 this section shall apply to returns, statements, and notifi-

1 cations required to be filed, and notices required to be pro-
2 vided, after December 31, 2019.

3 **SEC. 404. INCREASE INFORMATION SHARING TO ADMIN-**
4 **ISTER EXCISE TAXES.**

5 (a) IN GENERAL.—Section 6103(o) of the Internal
6 Revenue Code of 1986 is amended by adding at the end
7 the following new paragraph:

8 "(3) TAXES IMPOSED BY SECTION 4481.—Re-
9 turns and return information with respect to taxes
10 imposed by section 4481 shall be open to inspection
11 by or disclosure to officers and employees of United
12 States Customs and Border Protection of the De-
13 partment of Homeland Security whose official duties
14 require such inspection or disclosure for purposes of
15 administering such section.".

16 (b) CONFORMING AMENDMENTS.—Paragraph (4) of
17 section 6103(p) of the Internal Revenue Code of 1986 is
18 amended by striking "or (o)(1)(A)" each place it appears
19 and inserting ", (o)(1)(A), or (o)(3)".