SAVING YOUR CLIENTS'. . . .
RETIREMENT SAVINGS --
RECENT DEVELOPMENTS IN ESTATE PLANNING FOR RETIREMENT ASSETS

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I. INTRODUCTION

A. If you take a step back and honestly assess the portion of total estate planning time spent for a client on planning for the client's retirement benefits, do you feel it is proportionately appropriate?

B. Prior to 2010, one could argue that, due to the relative estate/gift tax rates and exemptions then applicable and the number of clients to which the estate/gift tax applied, the majority of our planning time was necessarily focused on estate and gift tax planning techniques, to the potential detriment of appropriately considering the planning options with respect to retirement benefits.

C. I wish to make the case that, in the current tax law environment, especially with the enactment of the new tax law, planners should spend a disproportionate amount of planning time with respect to clients' retirement benefits.

1. According to the Urban-Brookings Tax Policy Center, the current estate and gift tax rates and exemptions impact only .15% of the U.S. population in general.

2. To the contrary, almost every client we encounter in the planning context has a retirement plan interest of sufficient size to warrant a greater amount of our attention.

D. Let us remind ourselves why retirement benefits are so unique so as to warrant a disproportionate amount of our planning time.

1. During a participant's life, retirement plan assets, while enjoying terrific income tax deferral options, remain "pregnant" with future income tax liability.

2. Maximum funding of retirement plan assets are a very effective asset protection technique.

3. The mere completion of a beneficiary designation form, which happens on many occasions with the assistance of someone who provides no tax or planning advice whatsoever, greatly impacts the amount and the timing of income taxation on the distribution of these benefits.

4. Unlike any other asset, directing retirement benefit assets <u>to a trust</u> involves a myriad of complicated rules and planning implications, as well as potential non-sensical income tax results.

5. Unlike most items of inheritance, every dollar distributed from a qualified retirement plan to a non-charitable beneficiary is subject to income tax.

6. In <u>some</u> states, a <u>beneficiary's</u> interest in a deceased participant's retirement plan can continue to enjoy creditor protection.

7. Retirement plan benefits open the door for a variety of proactive charitable planning techniques.

8. Absent expert intervention, much "estate planning for retirement benefits" may be done by non-professionals who have no idea of the income tax, estate tax, and distributive results they have inadvertently set in motion.

E. All references in this outline to an IRA shall be deemed to refer to a non-Roth IRA, unless specifically provided otherwise.

II. DESIGNATION OF INDIVIDUALS AS BENEFICIARIES OF QUALIFIED PLANS/IRAS

A. You Must Follow the Literal Guidelines of the Retirement Plan Document in Completing a Qualified Plan Beneficiary Designation!

1. In Ruiz v. Publix Super Markets, Inc., Case No. 8:17-cv-735-T-24 TGW, the U.S. District Court of the Middle District of Florida held that substantial compliance with plan requirements for designation of a beneficiary of a qualified retirement plan was not good enough to constitute an effective beneficiary designation.

2. The District Court relied heavily on the principles of the Supreme Court decision in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, 555 U.S. 285 (2009).

B. Distribution Rules During Life and After Death

1. Distributions During The Taxpayer's Lifetime

a. In order to advise your client in structuring his or her IRA beneficiary designation, you have to be familiar with the minimum distribution rules. The required minimum distribution ("RMD") rules specify how long a taxpayer (and after the taxpayer's death, the beneficiary(s)) may defer withdrawals from retirement accounts. IRC § 401(a)(9).

b. During life, the taxpayer must generally begin taking withdrawals by April 1 of the year after the taxpayer reaches age 70 ½. This date is referred to as the required beginning date ("RBD"). (For certain employees, the RMDs do not have to begin until the calendar year of retirement if the employee retires after age 70½).

c. An IRS table that takes into account the taxpayer's life expectancy sets the RMD amount the taxpayer must withdraw in each year after the RBD. Treas. Reg. § 1.401(a)(9)-5.

(1) Unless the account owner's spouse is more than ten (10) years younger than the account owner, then the account owner will use the "Uniform Lifetime Table." Treas. Reg. § 1.401(a)(9)-9(A-2).

(2) If there is a spouse more than ten (10) years younger, then the account owner uses the "Joint and Last Survivor Table." Treas. Reg. § 1.401(a)(9)-9(A-3).

d. Distributions from qualified retirement plans that are taken before the taxpayer reaches the age of 59 ½ are subject to an additional 10% "early withdrawal" tax, unless the distribution falls within a statutory exception. IRC § 72(t).

(1) Code §72(t) was amended recently to expand the "Public Safety Employee" exception to the general rule of requiring a 10% additional tax on early distributions. Specifically, the Defending Public Safety Employees Retirement Act (H.R. 2146) was enacted after being signed by President Obama on June 29, 2015. One aspect of this legislation allows retired federal public safety officers to access their Thrift Savings Plan funds at age 50 without incurring the 10% early withdrawal penalty.

e. Recently, the courts have clarified under what circumstances this 10% tax will be imposed.

(1) In Kott v. C.I.R., T.C. Summ.Op. 2015-42 (2015), a taxpayer who was younger than age 59 ½ and delinquent in his mortgage payments withdrew funds from his 401(k) plan account in order to use such funds to avoid foreclosure. The Tax Court held that the taxpayer was liable for the 10% early distribution penalty as the Code does not include an exception for a general "financial hardship." While the Tax Court noted Reg. § 1.401(k)-1(d)(3)(iii)(B)(4), which allows for distributions to be made to employees for payments necessary to prevent eviction from the employee's principal residence or foreclosure, the Tax Court held that this exception only permitted the hardship distributions be made, and does not exempt the distributions from the 10% additional early distribution tax.

(2) In Adams v. Commissioner, the taxpayer lost his job with the Department of Defense and immediately filed suit for wrongful termination based on discrimination. Because he could not find another comparable job, the taxpayer took out over $220,000 from his IRA; he was under 59½ years old at the time. He reported all but $70,000 as income, and did not self-assess the premature withdrawal penalty. Upon examination by the IRS, Adams claimed that the penalty should not apply, as the withdrawals resulted from discrimination at work and were needed for medical care and "to fight for justice." The Service said fine, please provide receipts and other documentation. Adams never provided any documentation, and the Tax Court held that the 10% premature withdrawal penalty applied (as well as the other penalties for underreporting income).

(3) In *In re* Bradford, 2015 WL 4549603 (Bankr. M.D. Ga., July 20, 2015), a Georgia bankruptcy court indicated that the early distribution tax imposed by §72(t) is an excise tax, and not a punitive tax measure, for purposes of bankruptcy.

(a) In examining the legislative history behind §72(t) of the Code and several relevant Supreme Court cases, the court held that this tax was enacted to deter debtor conduct rather that to support the government. Specifically, the court believed that the tax sought "to prevent retirement plans from being treated as savings accounts, to recapture a measure of tax benefits that have been provided prior to the withdrawal, and to deter the use of retirement funds for nonretirement purposes." *In re* Cassidy, 983 F.2d at 164.

(b) Next, the Court determined whether the penalty was entitled to priority as compensation of the government's actual pecuniary loss. After finding that the government sustains little loss if any when the tax recoups a loss to the government incurred through the taxpayer's deferment of income and that the losses claimed by the IRS do not constitute actual pecuniary loss, the Court held that Code § 72(t) is not entitled to priority.

(c) Ultimately, the court found the exaction was neither a tax, as it was not enacted to support the government, nor a penalty in compensation for actual pecuniary loss under Code § 507(a)(8). Therefore, the 10% exaction was not entitled to priority in the debtor's bankruptcy case.

f. How to reduce your clients RMDs.

(1) Your client can buy a qualified longevity annuity contract. This contract does not start paying the client an annuity until the client attains age 85. The funds used to purchase the annuity will have many years to accumulate and grow, so

the income eventually received will be larger. Normally, such a delayed annuity is not permitted for IRAs, as the minimum distribution rules require RMDs no later than the RBD. The IRS has made an exception for qualified longevity annuities with up to $125,000 of the IRA balance, or 25% of the IRA owner's total IRA balance if it is less than $125,000.

(2) If a client is still working after attaining age 70½, he or she may be entitled to reduce compensation income by tax deductible contributions to some type of retirement plan. These tax deductible contributions provide a current tax deduction reducing the income tax effect of his or her RMDs from other IRAs. If the client is self-employed, the client can adopt a SEP-IRA, to which such contributions may be made.

(3) If your client works for a non-profit entity, or a for-profit company if the client has less than 5% ownership in that company, and such entity has a qualified retirement plan that accepts rollovers from IRAs, the client can rollover his or her IRA into the company plan and then not have to take RMDs from that plan until actual retirement from that employer.

(4) If the client participates in an employer's qualified retirement plan, and has "after-tax money" in that plan, then upon retirement from that company the client should request that the plan send a direct rollover of all pre-tax money to a traditional IRA and the after-tax money to a Roth IRA. In essence, this is a tax-free Roth IRA conversion.

(5) Of course, there is always the plain old Roth conversion of the client's traditional IRA, as Roth IRAs do not require RMDs during the owner's life. However, the client must be willing to pay tax on the amount converted as though it were distributed from the plan at that time.

2. Distributions After Death if the Spouse is Beneficiary.

a. We are all familiar with the rules enabling a spouse to roll over retirement benefits upon the death of his or her spouse, and they will not be repeated here. However, there are a few recent developments in this area that are worth discussing.

b. In 2009, the ACTEC Estate Planning for Employee Benefits Committee initially requested that the IRS issue a revenue ruling with respect to spousal rollovers of qualified plan and IRA benefits when an estate or trust is named beneficiary of a decedent's interest.

(1) This request was repeated in 2010 and again earlier this year, and guidance on this issue has been requested in connection with the ACTEC recommendations for the IRS Guidance Priority Plan in each of the last four (4) years.

(2) Several hundred favorable private letter rulings have been issued over the last ten years, and it makes no sense for taxpayers to expend the filing fee required for a private ruling.

(3) As an example, in PLR 201511036, the IRS allowed spousal rollover treatment when the decedent's estate was named as beneficiary of several IRAs, and the spouse was the executor of the estate, the Trustee of decedent's trust, and was the income beneficiary and had a general power of appointment over the trust which was ultimately to receive the IRA proceeds.

(4) The most recent ruling in this regard is PLR 201707001. The decedent and the taxpayer/surviving spouse were residents of a community property state, and held all of their assets as community property. At the time of his death, Decedent owned seven Roth IRAs and one traditional IRA. Decedent and surviving spouse had established a joint revocable Trust, under which they were the sole trustees. Upon decedent's death, the surviving spouse became sole Trustee, and three subtrusts were created by the Trust instrument. First, a Survivor's Trust was created, consisting of her separate property and her share of community property, with respect to which surviving spouse is entitled to all of the income and principal during her life. Then, a Marital Trust and a Bypass Trust were established pursuant to an estate tax minimization formula. Spouse is entitled to all income from each of the Bypass and Marital Trusts, and discretionary principal for health, education, maintenance and support. She is also entitled to receive any IRA distributions made to wither the Bypass or Marital Trusts. Four of the Roth IRAs named "the trust" as beneficiary, and the other three Roth IRAs and the traditional IRA named the marital Trust as beneficiary. After decedent's death, surviving spouse went to the local court and obtained an Order reforming the Marital Trust beneficiary designations, retroactive to the date they were signed, to show "the Trust" as the beneficiary. Spouse, as Trustee, then allocated all of the first four Roths to the Survivor's Trust, and half of the other three Roths and the traditional to the Survivor's trust, and the other half of each to the Marital Trust. Spouse then sets up a Roth IRA in her name, and a traditional IRA in her name, and intends to roll over each distribution of Decedent's Roth IRA to her Roth IRA, and each distribution of Decedent's traditional IRA to her traditional IRA. The IRA ruled that spousal rollover treatment would be allowed for each distribution transaction (with the caveat that the spouse had to combine all of the Decedent's Roth IRAs into one Roth IRA in tax-free trustee-to-trustee transfers, so that one rollover transaction would occur in each one-year period).

c. The impact of the **Windsor** holding.

(1) As we all know, on June 26, 2013, the U.S. Supreme Court held in U.S. v. Windsor, 133 S.Ct. 2675 (2015) that Section 3 of the Defense of Marriage Act "DOMA" is unconstitutional.

(2) The IRS issued follow-up guidance for same-sex marriages in Revenue Ruling 2013-17 and Notice 2014-19.

(3) Generally, participants and their spouses who are in same-sex marriages must be treated as married for all purposes under a qualified retirement plan as of June 26, 2013.

(a) A sponsor of a qualified plan may elect to recognize only same-sex marriages of participants as of June 26, 2013 who lives in a state that recognizes same-sex marriages.

(b) For participants who live in a state that does not recognize same-sex marriages, a sponsor of the plan is permitted to delay recognition of their marriages until September 16, 2013, the date that Revenue Ruling 2013-17 was issued.

(c) A plan amendment is required to reflect the use of this optional effective date.

(4) A sponsor of a qualified retirement plan may elect to recognize same-sex marriages as of a date that is prior to June 26, 2013, for some or all purposes under the plan. A plan amendment would be required to implement this optional retroactive effective date.

(5) Possible amendment of plan definitions required.

(a) If a qualified plan defines "spouse", "legally married spouse", "spouse under federal law", etc. in a manner consistent with Windsor, or does not define those terms, then the plan does not need to be amended so long as the plan has been properly administered.

(b) However, if the plan's definitions of these terms are not consistent with the holding in Windsor, then the plan must be amended.

(6) For ERISA, Internal Revenue Code, and DOL Regulation purposes, the following is true:

(a) The term "spouse" includes an individual married to a person of the same gender IF he or she is lawfully married under state law (including foreign jurisdictions).

(b) The term "marriage" includes a marriage between individuals of the same gender.

(c) The term "spouse" does not include an individual in a registered domestic partnership or a civil union, and the term "marriage" does not include a registered domestic partnership or a civil union.

(d) A same-sex marriage validly entered into in a state or foreign jurisdiction that permits same-sex marriages will be recognized regardless of whether the couple moves to or lives in a state that does not permit or recognize same-sex marriages.

(7) In Schuett v. FedEx Corporation, et al., No. 15-CV-0189, N.D. Calif., 2016 U.S. Dist. LEXIS 224, the Federal District Court in the Northern District of California applied Windsor retroactively, allowing a lesbian widow to pursue her claim to spousal benefits under her deceased spouse's pension plan. This same sex couple was married on June 19, 2013, and one of the spouse's passed away one (1) day later. Six (6) days later, the United States Supreme Court issued its decision in Windsor.

d. The Impact of the **Obergefell** holding.

(1) Following in the wake of Windsor in 2013, on June 26, 2015, the United States Supreme Court in Obergefell v. Hodges, 135 S.Ct. 2584 (2015) held that same-sex married couples are entitled to equal protection under the laws of every state, and that their marriages must be recognized nationwide. As such, any state prohibitions against the recognition of a same-sex marriage were held to violate the 14th Amendment and were invalidated.

(2) Because state laws banning same sex marriage are effectively invalidated, after Obergefell, same-sex couples are afforded the same spousal rights that other couples enjoy. Spousal rights that occur independent of proactive planning and that are now equally granted to same-sex couples include, among others, (i) spousal survivorship rights under state pension or other retirement benefits, even in states that previously did not recognize same-sex marriage and the ability to file tax returns as a married couple and (ii) take advantage of the married couple's state estate tax exemption where applicable.

(3) After Windsor, same-sex married couples are to receive equal treatment under federal law and are to be treated the same as any other married couple for federal tax purposes and for other benefits under federal law (including spousal rights under ERISA, etc.). Now, in the aftermath of Obergefell, same-sex couples have been elevated to equal stature with other marriages and are entitled to equal protection under the laws of every state.

3. Distributions After Death if a Non-Spouse is Beneficiary (Non-Spouse Rollovers)

a. If someone other than the spouse is the beneficiary, the beneficiary's RMD depends on whether there is a "Designated Beneficiary" of the account, as that term is specifically defined in Treasury Regulation § 1.401(a)(9)-5. Although individuals qualify as Designated Beneficiaries, estates, states, charities, and business entities do not qualify as Designated Beneficiaries for these purposes. Treas. Reg. § 1.401(a)(9)-4.

(1) A trio of 2016 private letter rulings illustrate the rigidity of the Designated Beneficiary rules. In each of these letter ruling fact patterns, the taxpayer had designated a beneficiary on his IRA showing three separate trusts, each of which qualified as a Designated Beneficiary. Later that year, the taxpayer's financial advisors joined another firm and became affiliated with a different custodian, which required new IRA documents. At that time, the custodian had the taxpayer sign new beneficiary forms, which named the taxpayer's estate as the primary beneficiary. Upon the owner's death, this error was discovered and the trustees of the trusts petitioned the local probate court to reform the beneficiary designation retroactive to the time before the mistaken form was executed by the decedent which relief was granted by the local court. However, in each of these rulings, the IRS refused to recognize the reformed designations, and held that the estate was the beneficiary at the time of the taxpayer's death, and therefore, none of the IRAs had a Designated Beneficiary.

(2) If you inherit a situation like this, don't give up on trying multiple post-mortem remedies!

b. If there is a Designated Beneficiary -

(1) If the taxpayer died before the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the beneficiary's life expectancy. This is the "Single Life Table," found at Treas. Reg. § 1.401(a)(9)-9(A-1).

(2) If the taxpayer died after the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the longer of (i) the beneficiary's life expectancy from the Single Life Table (based on the beneficiary's age in the calendar year after the calendar year of the account owner's death), or (ii) the taxpayer's life expectancy from the Single Life Table, based on the taxpayer's age in the calendar year of the taxpayer's death.

c. If there is no Designated Beneficiary

(1) If the taxpayer died before the taxpayer's RBD, then the beneficiary must withdraw all of the retirement account within 5 years of the taxpayer's death.

(2) If the taxpayer died after the taxpayer's RBD, then the beneficiary's RMD is based on the Single Life Table that takes into account the deceased taxpayer's life expectancy (immediately before death).

d. The beneficiary may withdraw more than the RMD in a given year, but the beneficiary must withdraw at least the RMD each year to avoid IRS imposition of a penalty. When a beneficiary takes his RMD based on his life expectancy, it is often referred to as a "stretch" of the IRA.

(1) Although life expectancy payouts in IRAs are common, not all IRAs offer this option.

(2) Many qualified plans do not allow a life expectancy payout option, and they typically require a lump sum distribution upon death.

(3) However, the Pension Protection Act of 2006 added Code § 402(c)(11), which now allows a non-spouse Designated Beneficiary to rollover a qualified plan account into an IRA by a trustee to trustee transfer.

(4) It is important to ensure that the beneficiary of a qualified plan is a Designated Beneficiary, so that such a non-spousal rollover will be a planning option upon the participant's death.

(5) This rollover is not as favorable as the spousal rollover, as the non-spouse rollover is treated as an inherited IRA, not as a contributory IRA. The main benefit of the non-spouse rollover is the ability to transfer the account to an IRA that allows a life expectancy payout option.

e. Following a recent court decision, a designated beneficiary of a traditional IRA may be responsible for including the entire distribution of an IRA in his or her gross income, even if the beneficiary distributed a portion of the IRA among others.

(1) In Morris v. C.I.R., T.C. Memo. 2015-82 (2015), a beneficiary of an IRA who had received an IRA in a lump sum after his father's death followed his father's wishes by sharing the IRA with his siblings, but did not include the lump sum or the distributions on his income tax return. Finding that the taxable status of the distributions themselves is determined by the Code, and not by the conduct of the beneficiary, the Court found that the beneficiary bore the responsibility of reporting the IRA distribution on his tax return and not telling his siblings to report it as well.

(2) The court in Morris noted that the beneficiary could have done a variety of things to avoid having to pay tax on the entire distribution, including the following:

(a) The beneficiary could have required each sibling to report one-third of the IRA distribution rather than bearing the tax implications on his own.

(b) The beneficiary could have issued a Form 1099-R to each sibling and included an explanation of the issue with his tax return.

(c) The beneficiary could have persuaded the life insurance company to issue the IRA in 3 equal portions.

(d) Alternatively, a family settlement agreement could have been created, acknowledging that although he was a sole beneficiary, he was merely an agent for all of the children. Under this scenario, the beneficiary could have withheld and paid income tax for all the siblings.

4. Sixty (60) day rollover for inherited retirement benefits

a. A participant, IRA owner or spousal beneficiary may take distributions of qualified plan or IRA assets and roll them over into another qualified plan or IRA within sixty (60) days of such distribution. However, any other non-spousal beneficiary cannot do such a rollover, but may do a direct trustee-to-trustee transfer.

b. Recent Private Letter Rulings have addressed specific scenarios that allow for a waiver of the 60-day rollover requirement:

(1) In PLR 201529016, the IRS, pursuant to Code §402(c)(3)(B), waived the 60-day rollover requirement where the taxpayer's failure to timely rollover funds was due to her medical and emotional condition following her spouse's death that impaired her ability to manage her financial affairs.

(2) In PLR 201529017, pursuant to Code §408(d)(3)(I), the IRS waived the 60-day requirement where the taxpayer's failure to timely rollover funds was due to the financial institution's failure to follow the taxpayer's instructions to keep those funds in his IRA.

(3) In PLR 20152901, again, pursuant to Code § 408(d)(3)(I), the IRS waived the 60-day rollover requirement where the taxpayer's failure to timely rollover funds was due to the bank making unauthorized distributions from his retirement accounts.

c. Rev. Proc. 2016-47, issued on August 24, 2016 establishes a "self-certification" procedure enabling the taxpayer to complete a rollover without the expense and hassle of a private letter ruling request.

(1) Prior to this Revenue Procedure, you could obtain a waiver of the 60-day rollover deadline only by making application to the IRS, paying a $10,000 filing fee, and waiting at least a year to get an answer.

(2) To qualify for this new self-certification approach, you must satisfy three requirements.

(A) You must not have been previously denied a waiver by the IRS for this particular distribution.

(B) You must have been unable to complete the rollover due to one or more of the eleven reasons listed below; and

(C) You must complete the rollover as soon as practical after you are no longer prevented from doing so due to the reasons you have certified.

(3) The following eleven (11) reasons are "blessed" by the IRS as justifying a waiver:

(A) An error was committed by the financial institution receiving the contribution or making the distribution to which the contribution relates.

(B) The distribution was made in the form of a check which was misplaced and never cashed.

(C) The distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan.

(D) The taxpayer's principal residence was severely damaged.

(E) A member of the taxpayer's family died.

(F) The taxpayer or a member of the taxpayer's family was seriously ill.

(G) The taxpayer was incarcerated.

(H) Restrictions were imposed by a foreign country.

(I) Postal error.

(J) The distribution was made on account of a levy under Internal Revenue Code Section 6331 and the proceeds of the levy have been returned to the taxpayer.

(K) The party making the distribution delayed providing information that the receiving plan or IRA required to complete the rollover despite the taxpayer's reasonable efforts to obtain the information.

(4) Be careful! If the taxpayer's return is audited, and a material misstatement was made in the self-certification of the rollover of an IRA distribution or one of the other requirements for self-certification was in fact not met, the IRS can still disallow the waiver, which will lead to income taxes, plus interest, plus penalties.

C. Separate Accounts and Multiple Beneficiaries

1. If there are multiple beneficiaries of a retirement account, then the RMD is based on the life expectancy of the oldest beneficiary. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1).

2. If separate accounts are "established" for multiple beneficiaries prior to December 31 of the year after the calendar year of the taxpayer's death, then the RMD rules will apply separately to each such separate account. Treas. Reg. § 1.401(a)(9)-4, A-5(c); Treas. Reg. § 1.401(a)(9)-8, A-2(a)(2).

a. A separate account allows you to calculate the RMD based on the life expectancy of the oldest beneficiary of such separate account.

b. To establish separate accounts, the beneficiaries' interests must be fractional (i.e. not pecuniary). In addition, some affirmative act is required to establish the separate accounts (i.e., a physical division of a single account into completely separate accounts, or using separate account language on the beneficiary designation form).

c. Whenever possible, it is best to create the separate accounts with appropriate language directly on the beneficiary designation form.

3. Is separate account treatment available when a trust is the beneficiary of an IRA?

a. Treas. Reg. § 1.401(a)(9)-4, A-5(c) clearly provides that the separate account rules are not available to individual beneficiaries of a trust with respect to the trust's interest in the participant's retirement plan.

b. PLR 201503024 provides a lesson to the effect that, you should not believe every word you read in IRS regulations! This PLR involved an IRA wherein the decedent's trust was named as beneficiary, and such trust provided for ultimate distribution of its residuary to five (5) individual beneficiaries. In PLR 201503024, the IRS made the following rulings:

(1) The decedent's trust constitutes a "see-through" trust within the meaning of the Section 401(a)(9) regulations.

(2) Five separate beneficiary IRAs, established by the Trustee for each of the five residuary trust shares, will be considered "inherited IRAs" within the meaning of Section 408 of the Code.

(3) Sections 401(a)(9) and 408 of the Code do not preclude the division of decedent's IRA and the establishment of the five beneficiary IRAs, each in the name of the decedent for the benefit of one of the five beneficiaries of the trust.

(4) The trustee-to-trustee transfers to the five beneficiary IRAs will not constitute taxable distributions, nor will they be considered attempted rollovers.

(5) The trustee-to-trustee transfers to the five beneficiary IRAs will not cause the beneficiary IRAs to lose their qualified status under Section 408(a) of the Code.

(6) Each of the individuals may receive the required minimum distribution under Section 401(a)(9) of the Code from his or her respective beneficiary IRA, using the life expectancy of the oldest of the five individuals who remains a beneficiary as of the Beneficiary Determination Date of September 30, 2014.

C. Eliminating Unwanted Beneficiaries Prior To September 30th

1. The deadline for determining who the initial beneficiaries of a retirement account are is the date of the taxpayer's death.

2. However, between the taxpayer's death and September 30th of the year following the year of the taxpayer's death, non-individual beneficiaries may be removed by a disclaimer of the interest, creating separate accounts, or eliminating them as beneficiaries by distributing their benefits outright to them in full. Treas. Reg. § 1.401(a)(9)-4, A-4(a).

D. Roth IRAs

1. Although we do not have near as much heartburn about the structure of beneficiary designations on Roth IRAs, the above-described RMD rules apply to the beneficiaries of a Roth IRA, and the RMD is computed as though the decedent had died before his RBD. Treas. Reg. § 1.408A-6, Q&A (14)(b).

2. As you know, contributions to a Roth IRA have already been taxed, and therefore, qualified distributions from such Roth IRAs are not subject to income tax. Nonetheless, it is still important to defer distributions from the Roth IRA as long as possible, so that the assets inside the Roth IRA continue to appreciate income tax free. Accordingly, it is still critical for the beneficiary of a Roth IRA to be considered a "Designated Beneficiary".

3. If the Roth IRA owner is interested in generation-skipping planning with adult grandchildren, naming the adult grandchildren as the beneficiaries of the Roth IRA will be a more efficient utilization of the GST exemption than naming them as beneficiary of a traditional IRA (since parts of the traditional IRA proceeds will be consumed by income tax liability).

E. What if the IRA owner is incapacitated, and there is no or an inadequate beneficiary designation in place?

1. An agent under a durable power of attorney will need to be specifically empowered to make a new beneficiary designation.

2. Here is suggested sample language –

"To make contributions to and withdrawals from, rollovers, voluntary contributions, or any elections with respect to any retirement plans, including an individual retirement account, and to designate beneficiaries for any rollovers consistent with my overall estate plan;"

3. If there is no general durable power of attorney in place, then a court-appointed conservator (guardian in some states) will need specific court authority, and the acceptance of the IRA custodian, in order to make an effective beneficiary designation.

III. LEAVING RETIREMENT ASSETS TO TRUSTS

A. Situations In Which Trusts Are Crucial

1. In some situations a trust must be named as beneficiary, such as when (i) the beneficiary is a special needs child that relies on government benefits, (ii) the beneficiary is a second spouse whom you want to have limited access to the trust principal, (iii) the beneficiary is a minor, (iv) the beneficiary is a spendthrift, has substance abuse problems, etc., and (v) when retirement account assets must be used to fund a credit shelter trust. (discussed below).

2. In these situations, the client may decide the reasons for naming a trust as beneficiary of the IRA outweigh the lost income tax deferral, or may decide a look-through trust is appropriate.

B. What Are Look-Through Trusts, or See-Through Trusts?

1. A trust that qualifies as a Designated Beneficiary is often referred to as a "look-through trust".

a. If a taxpayer names a look-through trust as the beneficiary, then the trust may make withdrawals from the account based on the life expectancy of the oldest beneficiary of the trust (i.e. the trust's RMD is based on the age of the oldest beneficiary).

b. In essence, for these purposes, the trust is ignored and the beneficiaries of the trust are treated as the beneficiaries of the retirement account.

2. A trust must satisfy five tests to qualify as a Designated Beneficiary.

a. The first four tests are as follows: (i) the trust must be valid under state law, (ii) the trust must be irrevocable or become irrevocable at the taxpayer's death, (iii) the trust beneficiaries must be identifiable, and (iv) certain documentation must be provided to the plan administrator or IRA custodian by October 31 of the year after the taxpayer's death.

b. If these four tests are met, then the trust is a Designated Beneficiary and the RMD will be based on the <u>oldest</u> trust beneficiary's life expectancy.

c. There is, in essence, a fifth test for the trust to be a Designated Beneficiary, as all of the beneficiaries of the trust must be individuals the oldest of whom can be identified.

3. What Trust Beneficiaries Can Be Ignored

a. It is sometimes a challenge to draft a trust that only has individual beneficiaries and where it is possible to ascertain the oldest beneficiary (especially when the IRS has not told us which contingent beneficiaries can be ignored!).

b. The regulations provide that if the first four tests above are met, then the beneficiaries of the trust are considered beneficiaries of the retirement account. The question is, which beneficiaries must be considered?

(1) The regulations provide two rules in this regard.

(2) The general rule is that with respect to determining if there is a beneficiary of the trust that is not an individual (which would disqualify the trust as a Designated Beneficiary), and determining who is the oldest beneficiary, a "contingent beneficiary" must be taken into account.

(3) The second rule provides that, a person will not be considered a beneficiary for purposes of determining who is the beneficiary with the shortest life expectancy, or whether a person who is not an individual is a beneficiary, merely because the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death. However, the preceding sentence does not apply to a person who has any right (including a contingent right) to an employee's benefit beyond being a mere potential successor to the interest of one of the employee's beneficiaries upon that beneficiary's death.

c. This rather unhelpful regulation tells us that a "contingent beneficiary" must be taken into account, but a "mere potential successor" beneficiary can be ignored. However, it does not bother to define these terms!

d. ACTEC has requested a revenue ruling on this issue on five occasions, the most recent query being made last summer. Stay tuned!

e. Recent private IRS letter rulings have not been terribly helpful in providing additional guidance as to which contingent remainder beneficiaries can be ignored.

(1) Under the IRS's analysis in these rulings, if a trust is to distribute the assets outright to a beneficiary upon a life income beneficiary's death, then the only remainder beneficiaries that must be counted are the individuals that would receive those assets, provided those individuals are alive on the taxpayer's death and they have already attained the required age to receive the assets outright.

(2) This ruling is not helpful to dynasty trusts or lifetime trusts with periodic principal distributions or withdrawal rights, as the beneficiary may never be required to take outright ownership of the trust assets.

f. PLR 201633025, published in mid-August of 2016, sheds very important light on the IRS' current thinking on this issue.

(1) In this ruling, a trust was named as beneficiary of an IRA. Under the terms of the trust, the Trustee is to distribute all of the net income of the trust to the decedent's child, and the trustee also has discretion to make principal distributions to the child or the child's issue for health, education, support or maintenance. When the child attains age fifty (50), the trust will terminate and all remaining income and principal will be distributed to the child.

(2) If the child dies prior to attaining age fifty (50), the trust provided that the trust will terminate and will be distributed to the children of the child. If the child and all of the child's issue are deceased prior to the final distribution of the trust assets, the trustee shall distribute the remaining trust assets to the decedent's siblings. If the child, all the child's issue, and the decedent's siblings are all then deceased, then the rest of the trust shall be distributed to various charitable organizations.

(3) The IRS ruled that the only beneficiaries which must be taken into account are the child and the child's children for purposes of determining whether the trust qualifies as a "Designated Beneficiary" for RMD purposes. Therefore, the trust qualified as a "see-through" trust and the trust may receive minimum distributions after the owner's death based on the child's life expectancy. All

other potential recipients of the trust were deemed to be mere potential successors!

g. In informal conversations with some of my colleagues, the IRS representative who has been writing many of the above-described private letter rulings over the years made a few observations in this regard.

(1) For example, in a trust share created for a minor, which terminates and fully distributes at a stated age which the minor has not attained as of the Determination Date (i.e., the 9/30 date), then the "first tier remaindermen" who would take if the minor died on that Determination Date must be taken into account.

(2) In a trust for a surviving spouse's life, which terminates at spouse's death, the beneficiaries to be taken into account are the spouse and the remaindermen who would take if the spouse died on the Determination Date. However, if the trust continues after the spouse's death, then additional contingent beneficiaries must be taken into account.

(3) What about a trust with a power of appointment?

(a) If it is a general power of appointment, there will be no Designated Beneficiary, per this IRS representative!

(b) If the permissible appointees are limited to all individuals in the world younger than the powerholder, the agent agreed that this class would be "identifiable" and Designated Beneficiary treatment would be allowed.

C. “Conduit Trusts”

1. Fortunately, the 401(a)(9) regulations do provide a type of safe harbor trust, a “conduit trust”, where a beneficiary will be treated as a Designated Beneficiary.

a. A conduit trust requires the trustee to distribute all of the retirement account withdrawals to the beneficiary.

b. The trustee may use conduit trust assets to pay expenses attributable to such assets.

c. As the trust may not accumulate any assets withdrawn from the retirement account, the IRS allows the trust beneficiary to be treated as the oldest beneficiary of the retirement account.

2. Although conduit trusts have the advantage of certainty as they are specifically described in the treasury regulations, they also have a major disadvantage.

a. A conduit trust cannot withdraw retirement account proceeds and accumulate them inside of the trust.

b. This is often contrary to the intent of the client, who may be using a trust to prevent the retirement account assets from being distributed to the beneficiary for one reason or another.

D. Accumulation Trusts

1. A trust that allows accumulation of retirement account withdrawals (an “Accumulation Trust”) may also qualify as a Designated Beneficiary.

a. As noted above, the only IRS guidance in this area is embodied in the above-described private letter rulings.

b. If a trust does not fit within such framework and is not a conduit trust, it is unclear how remote of a contingent beneficiary the IRS will take into account.

c. To be safe, one must draft the trust assuming the IRS may take into account all contingent beneficiaries. Although this may be possible by adding certain savings clauses to the trust, there still is no specific guidance that this approach works.

d. Obtaining a private letter ruling may provide certainty, but is expensive and time-consuming. It appears a private letter ruling may be granted while the account owner is still living or after the account owner's death.

2. Finally, the compressed income tax brackets of a trust lead to a significant tax cost to the usage of an accumulation trust.

a. A trust pays the highest rate of tax after the first $12,000 in income.

b. If significant amounts will likely be accumulated, the income tax cost is a significant detriment to consider before utilizing this type of trust.

E. Marital Trusts

1. We are all aware that one of the major requirements for a marital trust (either a general power of appointment trust or a QTIP trust) is that the surviving spouse be entitled all income of the Trust, at least annually.

2. Rev. Rul. 2006-26, 2006-1 C.B. 939, considered whether the "all income" requirement of I.R.C. §2056 and Treas. Reg. §§20.2056(b)-5(f)(1) and 20.2056(b)-7(d)(2) was satisfied in three fact situations. In each, a marital deduction trust held an IRA or a defined contribution plan.

a. Assuming that a QTIP marital trust was governed by the law of a state that had adopted the 1997 version of the Uniform Principal & Income Act ("UPIA"), the ruling concluded that the trust may not meet the "all income" requirement if: (1) the trust language did not require the trustee to distribute to the spouse the greater of all the income of the IRA (considered as if the IRA were a separate trust) or the annual required minimum distribution under I.R.C. §408(a)(6), and (2) the governing law included §§409(c) and (d) of the 1997 version of the UPIA.

(1) This was because UPIA §409(c) provided that a required minimum distribution from the IRA was allocated 10 percent to income and 90 percent to principal of the recipient trust, whereas the view of the IRS was that such an apportionment between principal and income was not based on the total return of the IRA and did not reflect a reasonable apportionment of the total return between income and remainder beneficiaries.

(2) If the trust language did not require the distribution of at least the income of the IRA when the spouse exercised the spouse's right to direct a withdrawal and UPIA §409(c) applied, the "all income" requirement may not be satisfied, according to the ruling.

(3) Although §409(d) of UPIA 1997 states that a trustee must allocate a larger portion of any distribution to income to the extent that doing so is necessary to qualify for the marital deduction, the Service in Rev. Rul. 2006-26 stated that this

provision was ineffective to reform an instrument for tax purposes, analogizing the statute to a savings clause in a document that would be ineffective to reform the document for federal tax purposes.

b. This ruling set forth a "safe harbor" that would apply if a QTIP election were made over both the trust and the IRA or retirement plan and the spouse had the power exercisable annually to compel the trustee to withdraw the income earned on the IRA or retirement plan and to distribute that income and all income earned on the other trust assets to the spouse.

c. The ruling concluded that marital trusts governed by §§409(c) and (d) of UPIA 1997 could not qualify for the safe harbor.

3. The Uniform Law Commission considered Rev. Rul. 2006-26 and made the changes discussed below to permit trusts governed by the 2008 version of the UPIA to qualify for the above-described safe harbor.

a. The 2008 UPIA §409 retains a 90/10 allocation for trusts other than QTIP and general power of appointment marital trusts.

b. However, for trusts intended to qualify for the estate tax marital deduction, the trustee is required to separately determine the income of each "separate fund" in such a trust for each accounting period. Separate funds include annuities, IRAs, pensions, profit sharing and bonus sock funds and stock ownership plans.

(1) All distributions received by a trust from such a separate fund are considered income until the income determined in this manner is reached. Distributions in excess of that amount are considered principal.

(2) If the distributions are less than this amount, the 2008 UPIA §409 states that the spouse may require that the trustee allocate principal from a source other than the separate fund to income, to make up the difference.

(3) Subsection (f) of the 2008 UPIA §409 requires that a trustee demand that the person administering the fund distribute the internal income to the trust upon the request of the surviving spouse.

(4) Under UPIA 2008, if a trustee cannot determine the income of a separate fund, the trustee is to apply a percentage between 3 and 5 percent, depending on the adopting state's choice, to the fund's value to determine the income.

(5) Further, if the value of the separate fund cannot be determined, the trustee is to compute an income equivalent by multiplying the I.R.C. §7520 rate by the present value of the payments, based on the §7520 rate.

4. The Service has published no new guidance on this issue since the 2008 revisions to the UPIA.

a. A new revenue ruling replacing Rev. Rul. 2006-26 and concluding that the "all income" requirement is satisfied by marital trusts governed by the laws of a state adopting §409 of UPIA 2008 is needed.

b. ACTEC has formally requested that the Service to issue a revenue ruling concluding that marital trusts governed by UPIA 2008 that hold IRAs or defined contribution plan benefits satisfy the "all income" requirement.

F. Separate Accounts For Trusts

1. Treasury Regulations provide that the separate account rules are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit.

a. The IRS now takes the position that separate account treatment is not available when a single trust is named as beneficiary.

b. Under the IRS's interpretation, if all of the separate trusts created under a revocable trust are look-through trusts, then the RMDs of all such separate trusts will be based on the oldest beneficiary of all of the separate trusts together, not the oldest beneficiary of each trust share at issue.

c. Therefore, on the beneficiary designation form, it is best to directly name the separate trusts to be created, as opposed to naming the funding trust. For example, instead of naming the "John T. Smith Revocable Trust" as the beneficiary, designate each separate share of the John T. Smith Revocable Trust as fractional beneficiaries.

2. Separate accounts for trusts is only an issue if each such separate trust is a look-through trust (a conduit trust or Accumulation Trust), otherwise the ages of the trust beneficiaries are irrelevant in determining the trust RMDs, and separate account treatment is not necessary.

3. However. . .see PLR201503024 (released January 16, 2015), which in effect allowed separate account treatment in part for a trust which paid out equally to five children.

G. Outright to Spouse Versus a Marital Trust

1. Leaving qualified retirement assets outright to the surviving spouse is always the best tax strategy.

2. On many occasions, a client is extremely reticent to leaving retirement assets outright to a spouse, for a variety of reasons, including the existence of a second marriage, asset protection concerns, spendthrift concerns, or disability concerns.

a. A "QTIP" Trust for a surviving spouse has the following consequences:

(1) The surviving spouse cannot rollover the IRA, and therefore distributions from the IRA must begin in the calendar year after the first spouse's death, instead of being deferred until the surviving spouse attains the age 70½. Therefore, if the surviving spouse is younger than 70½ years old, a tremendous tax deferral opportunity will be lost.

(2) Minimum distributions during the spouse's life will be based on a single life expectancy table. If the benefits were left outright to the surviving spouse, then once the spouse begins distributions of her rolled over IRA, she uses the Uniform Lifetime Table, which is based on the joint life expectancy of the surviving spouse and a hypothetical new spouse who is ten years younger. Thus, the QTIP trust beneficiary designation forces larger annual distributions and less income tax deferral.

(3) The distributions from the IRA will be subject to more income taxes than if the benefits were payable to the spouse outright. Each state's law regarding principal and income allocations are different, but in any event, a portion of the received IRA distributions will constitute "principal" for trust accounting purposes and such principal will be retained in the QTIP trust and taxed at trust income

tax rates. As we all know, a trust reaches the highest income tax bracket at approximately $12,500 in income.

(4) If the intention is for the QTIP Trust to qualify for the estate tax marital deduction, then the trust must receive the greater of the minimum distribution amount, or the amount of income earned by the IRA. If the income earned by the IRA exceeds the minimum distribution amount, then greater amounts must be distributed from the IRA and less deferral is achieved.

b. As an alternative to the QTIP Trust technique in second marriage situations, I have been successful in persuading clients to instead leave a fractional amount to the surviving spouse and fractional amounts to the children of the first marriage.

c. Another alternative is to leave the total retirement asset amounts to the surviving spouse, and "compensate" the children of the first marriage with non-retirement assets.

d. If asset protection, spendthrift protection, or some other disability protection is the objective motivating the client to consider a trust for the spouse, we must make sure that the client understands the real cost in naming a trust versus naming the spouse outright.

H. Estate Taxes and Funding Credit Shelter Trusts

1. Retirement accounts are not only subject to income tax when distributed to the beneficiary, they are also subject to estate tax at the death of the owner.

a. For 2017, the combined impact of the 40% estate tax, a top federal income tax rate of 39.6%, and a possible state income tax, can be devastating, even though the estate taxes on the retirement account assets are deductible for income tax purposes. IRC section 691(c).

b. In planning for estates that are subject to estate tax, one of the most troublesome areas is the use of retirement assets to fund a credit shelter trust.

2. There are five main reasons to avoid naming a credit shelter trust as beneficiary of a retirement account.

a. If the credit shelter trust is the beneficiary: (i) distributions from the retirement account must begin quicker (the year after the taxpayer's death) than if the spouse was directly named beneficiary, if the surviving spouse is under age 70 ½, (ii) the RMDs are larger after the spouse's death, (iii) the trust will often be in the highest income tax bracket, (iv) the use of trust assets to pay income taxes on the RMDs wastes the first spouse's estate tax exemption, and (v) we now have portability (at least for the moment!).

I. Trusts which include gifts to charities involve potential traps for this unwary if the Trust is named as beneficiary of a qualified retirement plan, as discussed infra.

IV. CREDITOR ACCESS TO INHERITED IRAs

A. It is always big news when an "estate planning" topic is addressed by the U.S. Supreme Court, and it happened most recently in the summer of 2014 in Clark v. Rameker, 573 U.S. ____, 134 S.Ct. 2242 (June 12, 2014).

1. In Clark, the United States Supreme Court granted c*ertiorari* to resolve a conflict between the Circuits on the issue of whether a beneficiary of an inherited IRA can claim a federal bankruptcy exemption from creditors for such inherited IRA.

2. The federal bankruptcy law provides an exemption for "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under §§ 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. §§ 522(b)(3)(c), 522(d)(12) (It is noteworthy that an "inherited IRA" is an IRA classification specifically recognized by Code Section 408(d).)

3. In a unanimous decision, the Court first defined "retirement funds" as funds set aside for the day when an individual is no longer working, and then cited three (3) characteristics which, in the view of the Court, prevents inherited IRAs from being considered "retirement funds."

a. The holder of an inherited IRA may never make contributions thereto, as opposed to traditional IRAs and Roth IRAs which receive tax incentives for the accumulation of additional funds for retirement.

b. A holder of an inherited IRA is required to withdraw money from such account, without regard to how far away that person is from retirement.

c. The holder of an inherited IRA may withdraw all of the funds at any time without penalty, and use them for any purpose, while the owner of a traditional IRA or a Roth IRA must wait until attaining age 59½ in order to withdraw funds from such accounts without penalty.

4. In a crowning blow, the Court stated that nothing about an inherited IRA's legal characteristics prevents or discourages an individual from using the entire balance immediately after bankruptcy for purposes of current consumption.

B. The history behind Clark.

1. Remember that IRAs belonging to the original account owner are generally exempt from the account owner's creditors in federal bankruptcy and otherwise.

2. One major source of confusion in this area is, although bankruptcy law is federal law decided in federal bankruptcy courts, many states opt out of the federal bankruptcy scheme, thus activating the application of state exemption statutes in federal bankruptcy cases (some states, like Texas, allow a debtor to select state or federal exemptions). The majority of states opt out, and thus the bankruptcy exemptions are decided under state exemption laws.

3. Prior to Clark, there were twelve (12) reported cases dealing with beneficiaries of inherited IRAs within the federal bankruptcy context.

a. Eight of these courts (all of which are in "opt-out" states, except for Texas) found that the inherited IRAs were not exempt from the bankrupt estate in federal bankruptcy, including: *In re* Sims, 241 B.R. 467 (Bankr. N.D. Okla. 1999); *In re* Greenfield, 289 B.R. 146 (Bankr. S.D. Cal. 2003); *In re* Navarre, 332 B.R. 24 (Bankr. M.D. Ala. 2004); *In re* Taylor, Bank. No. 05-93559, 2006 WL 1275400 (Bankr. C.D. Ill. May 9, 2006); *In re* Kirchen, 344 B.R. 908 (Bankr. E.D. Wis 2006); *In re* Jarboe, 365 B.R. 717 (Bankr. S.D. Tex. 2007); *Robertson v. Deeb*, 16 So. 3d 936 (Fla. 2d DCA 2009); and *In re* Chilton, 2010 WL 817331 (Bankr. E.D. Tex. March 5, 2010).

b. Four of the courts found that the inherited IRA was exempt in federal bankruptcy, those being: *In re* McClelland, Bank No. 07-40300, 2008 WL 89901 (Bankr. D. Idaho Jan. 7, 2008); *In re* Nessa, 2010 Bankr. Lexis 931 (B.A.P. 8th Cir. Apr. 9, 2010); *In re* Tabor, 2010 105 AFTR 2d (Bankr. M.D. Pennsylvania June 18, 2010); and *In re* Hamlin, 465 B.R. 863 (BAP 9th Cir. 2012).

c. The Nessa decision (in a non-opt-out state) led many district courts, in unreported decisions, to allow the inherited IRA to be an exempt asset, until Clark came along.

C. Some states' statutes provide a different result than Clark.

1. In some opt-out states, the interpretation of existing statutes with broad exemption language may allow the exemption of inherited IRAs for state exemption purposes, and state exemptions are recognized under U.S. Bankruptcy Code § 522(b)(3)(A).

a. The state of Kansas has such a broad statute which could arguably be construed to exempt inherited IRAs.

b. However, in Mosby v. Clark (In Re Mosby), 15-5193-JWL (D Kan. Oct. 30, 2015), the Kansas District Court held that an inherited IRA is not exempt under the Kansas exemption statute.

2. In my home state of Missouri, along with Alaska, Arizona, Florida and Texas, the Clark holding is completely irrelevant, as these states have statutes which specifically exempt inherited IRAs for state exemption purposes and have opted to use the state exemptions for federal bankruptcy law purposes.

3. In a post-Clark decision, the federal Bankruptcy Court in New Jersey held that a debtor's inherited IRA was not property of the bankruptcy estate under New Jersey law. *In re* Andolino, 525 B.R. 588 (Bankr. D.N.J. 2015). The Bankruptcy Court stated that the question of inclusion in the estate must be reached first, before the Clark analysis of the application of an exemption can be made.

D. Use of spendthrift trusts as an alternative asset protection device.

1. If you are in a state where the applicable exemption is either indefinite or not existent, you should consider naming a spendthrift trust for the benefit of any beneficiary with creditor issues as the beneficiary of the IRA.

2. However, if the RMD amount received by the trust must be distributed from the trust (i.e. in a conduit trust), the Uniform Trust Code reverses the common law spendthrift protection for this type of a distribution interest and allows any creditor to attach the RMD amount from a spendthrift trust.

3. As an alternative, consider a "Trusteed IRA." If the provider offers a Trusteed IRA, and the Trusteed IRA agreement contains a spendthrift clause, then creditor protection should be accomplished.

V. IRA OWNERS/RETIREMENT PLAN ADMINISTRATORS BEHAVING BADLY

A. Prohibited transactions disqualifying an IRA from recognition as such.

1. As discussed previously, IRAs are tax exempt as well as exempt from bankruptcy proceedings. However, when an IRA engages in a prohibited transaction, those exemptions are lost. One prohibited transaction occurs when an IRA is transferred to, or used by or for the benefit of, a disqualified person.

2. In Ellis v. Commissioner, Decision No. 14-1310, (8th Cir. June 5, 2015), the 8th Circuit affirmed a Tax Court holding that an IRA owner engaged in prohibited transactions under Code §4975(c) by directing his IRA to acquire a membership interest in an LLC with the expectation that the LLC would employ him (and in fact he received wages from the LLC). The facts of this case arose out of a business established in Harrisonville, Missouri, wherein Mr. Ellis invested almost his entire rollover IRA ($321,253) in a 98% membership interest

in an LLC, under which Ellis served as General Manager. As a result of these transactions, the IRA lost its status as an individual retirement account and its entire fair market value was treated as taxable income as of the date of its establishment.

3. A different result was reached in *In re* Nolte, 2015 Westlaw 2128670 (Bankr. E.D. Va. 2015). At Nolte's instructions, the IRA investment advisor invested $100,000 out of the IRA in a 5% interest in an LLC. Nolte later served on the Board of the LLC but received no compensation. In a bankruptcy proceeding, a creditor objected to the debtor's discharge on the basis that the IRA had lost its exemption because Nolte had engaged in a prohibited transaction under Code §4975. In this case, the Bankruptcy Court found that merely investing in a 5% interest in an entity in which the IRA owner served on the Board was not a prohibited transaction, and the IRA was not disqualified.

4. In contrast to Nolte, Mr. Kellerman's IRA was found not to be exempt due to actions taken by Mr. Kellerman. *In re* Kellerman, 2015 Westlaw 3377907 (Bankr. E.D. Ark. 2015). Kellerman formed a partnership between his self-directed IRA and another LLC which was wholly owned by Kellerman. Kellerman ordered the IRA custodian to sell a substantial portion of the assets of the IRA and purchase a tract of land, in which the LLC and his IRA owned undivided interests. After finding that the IRA had engaged in prohibited transactions, the Court held the IRA had been disqualified and was not entitled to a bankruptcy exemption.

5. In McGaugh v. Commissioner, T.C. Memo. 2016-28, the taxpayer's IRA custodian initially refused to purchase shares in a closely-held entity since it was not on the custodian's approved buy list. The taxpayer then instructed the custodian to wire IRA funds directly to the corporation whereupon shares were issued by the Corporation in the name of the IRA which were then delivered by the taxpayer to the IRA custodian. Despite the fact that the taxpayer "pulled all strings" and controlled the wired funds in the transaction, the Tax Court held that the taxpayer was merely acting as a conduit for the custodian and that this transaction did not constitute constructive receipt of IRA proceeds. However, in Vandenbosch v. Commissioner, T.C. Memo. 2016-29, the taxpayer moved funds from his IRA to a joint account, followed by a move from the joint account into the taxpayer's personal account, followed by the taxpayer wiring the funds directly to a borrower, in exchange for a note from the borrower payable to the taxpayer and not the taxpayer's IRA. Here, the court held that the taxpayer was not a mere conduit in the same manner as in McGaugh, and the court held constructive receipt of IRA funds had occurred.

B. Claim of Breach of Fiduciary Duty against Plan Trustees

1. In Tibble v. Commissioner, 135 S.Ct. 1823 (2015), retirement plan participants brought suit against the plan for investing in mutual funds with high fees as opposed to low-cost mutual funds. The 9th Circuit had found that the statute of limitations of six years after "the date of the last action which constituted a part of the breach or violation" was a bar to this suit, because the mutual funds in question were purchased more than six years before the suit was instituted. However, the Supreme Court reversed this decision, holding that the plan trustees engaged in a continuing breach of their duty of prudence in failing to monitor the investments, and remanded the case to the trial court for determination of whether that issue was timely raised.

C. Loss of Bankruptcy Exemption

1. In Running v. Miller, 77 F.3d 711 (8th Cir. 2015), the taxpayer purchased an annuity from Minnesota Life Insurance Company for a lump sum purchase payment of $267,319. Miller used funds from his IRA to make this payment. Miller later filed for bankruptcy and claimed that the annuity was exempt from the bankruptcy estate as an individual retirement account. The bankruptcy trustee

objected, and the bankruptcy court overruled her objection. The bankruptcy trustee had claimed that, because Miller had used the IRA funds to purchase an annuity with a lump-sum premium, the funds thus became property of the bankruptcy estate.

VI. NAMING CHARITY(S) AS BENEFICIARY OF THE IRA

A. If a client indicates a desire to leave funds to charity(s) upon his or her death, the first words out of our mouths should be to consider making such at-death gifts from qualified retirement plans or traditional IRAs.

1. If the client's estate plan contemplates benefits both to charity and to children or other individual beneficiaries, the most efficient income tax planning is accomplished by satisfying the charitable gifts with retirement plan assets, and using other assets to leave to the individual beneficiaries. While the charity will not pay income tax on any inheritance it receives, including retirement plan benefits, individual beneficiaries will pay income tax on the distribution of a retirement plan interest, and will not pay income tax on almost all other forms of inheritance.

2. In addition to satisfying the client's charitable desires, a variety of charitable giving techniques involving retirement benefits will help realize additional estate planning objectives as well.

3. With this planning, charitable intent should be more important than tax savings!

4. In contrast, since Roth IRAs pass to the designated beneficiary without any income tax liability, naming charity as beneficiary of the Roth IRA is not tax efficient.

B. There are various techniques for leaving retirement benefits to charity(s) upon a taxpayer's death.

1. The easiest way to leave retirement plan benefits to charity(s) is to name the charity(s) as a direct beneficiary of one hundred percent (100%) of the benefits payable upon the taxpayer's death.

a. A properly completed beneficiary designation form in this regard is easy to accomplish.

b. Although all of the income associated with retirement benefits will be included in the income of the charitable organization named as beneficiary, such charity's income tax exemption will make the retirement plan benefit distribution not taxable.

c. In addition, the deceased taxpayer's estate will receive a dollar for dollar estate tax charitable deduction for the estate tax value of the retirement plan interest.

2. In many instances, the client will want to leave a specific dollar amount to one or more charities, with the balance of the retirement plan interest passing to other individual beneficiaries (i.e., his or her lineal descendants, per stirpes).

a. This usually requires an attachment to the beneficiary designation form setting forth the specific amount gift, and a description of the residual beneficiaries.

b. In my experience, you should be sure at the planning stage that the retirement plan administrator will accept and honor this attachment!

c. In order for the individual beneficiaries to be able to use separate accounts and a life expectancy payout, it will be necessary to be sure that the charity(s) are "cashed out" (i.e., fully paid from the retirement plan) before September 30 of the year following the year of the taxpayer's death.

d. Be careful doing this through a trust vehicle!

(1) In PLR 201438014, decedent's Trust was named as beneficiary of his IRA, and the Trust provided for payment of pecuniary bequests to two charities and the residue to be distributed to individuals.

(2) A state court ordered a reformation of the Trust, providing that either the Trust's transfers to the charities were to be treated as direct bequests of the IRA amounts to the charities, or such transfers were to be considered to be made out of the trust's gross income pursuant to the terms of the governing instrument.

(3) The IRS ruled that the Trust must treat the payments to the charities as sales or exchanges (since the IRA is being used to satisfy a pecuniary legacy), and the Trust must include in its gross income the amount of the IRA used to satisfy the charitable legacies. Further, the Trust is <u>not</u> entitled to a charitable income tax deduction for these distributions. The bottom line was, because the purpose of the reformation was not to resolve a conflict but merely to obtain tax benefits, then the IRS will not respect the reformation and treat it as part of the governing instrument. PLR 201438014.

e. Careful drafting will be necessary when an IRA is designated to be distributed to a Trust, which contains residuary charitable bequests.

(1) Chief Counsel Memorandum 200848020 (July 28, 2008), provides that a Trust is denied a charitable income tax deduction after it receives taxable IRA distributions and then distributes some of those amounts to charities.

(a) CCM 200848020 involved a decedent who left his IRA payable to his Trust upon his death, which benefited his six children and several charities. The Trust received distributions from the IRA, and the Trustee immediately paid those amounts to the charities, leaving the six children as the only remaining beneficiaries of the Trust. The Chief Counsel's Office concluded that the Trust had taxable income from the IRA distribution, but was <u>not</u> entitled to claim an offsetting charitable deduction (remember only an estate may claim an income tax charitable "set aside" deduction").

(b) In order for the distribution of IRA proceeds to charity to be deductible by the Trust, the Trust must meet the legal requirement for a trust to claim a charitable income deduction. In order to claim a charitable income tax deduction, the charitable payment must be traced to income <u>and</u> must generally be made pursuant to the terms of the governing instrument specifically requiring income to be paid to a charity. IRC § 642(c).

(c) In the Trust involved in CCM 200848020, there was no specific instruction to distribute income to a charity, just a general provision for a percentage of the residuary to be paid to several charities. Therefore, the Trust could not claim the charitable income tax reduction.

(2) Ostensibly, one solution would be to include a clause in the Trust document that instructs all residuary charitable gifts to be made, to the extent possible, from property that constitutes "income in respect of the decedent" as that term is defined under the U.S. income tax laws.

(a) However, Treas. Reg. § 1.642(c)-3(b)(2) provides that instructions in a trust instrument to distribute specific types of income to a charity will not be respected for federal income tax purposes unless the instruction has an "economic effect independent of income tax consequences".

(b) The examples in this Regulation provide that, unless the amount to be paid to charity is dependent upon the type of income from which it is to be paid, the above-described ordering provision is considered to not have economic effect independent of income tax consequences.

(3) Interestingly, in PLR 201444024, where the Trust was named as the beneficiary of decedent's IRA and the Trust provided that, after two pecuniary bequests, the residue shall be immediately distributed to charity, the IRS held that the Trust may re-title the name of the IRA to reflect the name of the charity in a non-taxable transfer, and the charity, not the trust, will include the taxable amount of the IRA distributions in charity's income for tax purposes, as if the charity were the direct beneficiary.

(4) The alternative answer at the planning stage is to draft the beneficiary designation of the IRA so as to mirror the dispositive provisions of the Trust (i.e., list the children and the charities and their respective percentages on the IRA designation itself, rather than sending the IRA to the decedent's Trust).

(5) In addition, the will and/or revocable trust of the decedent must provide that no estate taxes are to be charged against or paid out of the charity's share of trust assets.

3. Charitable Remainder Trusts

a. This technique involves a charitable remainder trust ("CRT") as that term is defined in IRC § 664.

b. Income tax consequences

(1) Since a charitable remainder trust is exempt from income tax, the distribution of all the retirement benefits to a charitable remainder trust results in no current income tax liability.

(2) The individual beneficiaries of the charitable remainder trust will receive their lifetime interest earned from the entire amount, as opposed to an after-tax amount, of the distributed retirement benefit interest.

(3) However, the tax-deferred income received by the CRT must be "booked" from day one by the CRT, and will gradually "leak out" to the individual beneficiaries with the distribution of each lifetime payment. Under the "tiered" approach to income taxation of CRT distributions, the distribution to the individual lifetime beneficiary is deemed first to be derived from ordinary income earned in all prior years and the current year, to the extent such amount has not already been allocated to a prior distribution.

(4) Although an individual IRA beneficiary is entitled to a Section 691(c) income tax deduction for the portion of federal estate taxes attributable to retirement plan benefits, this deduction is rarely if ever available to an individual beneficiary of a CRT, as all of the tiers of ordinary income, capital gain income and tax exempt income would need to be exhausted before any CRT distribution would carry out the use of the IRD deduction.

c. Estate tax consequences

(1) The decedent's estate is entitled to a federal estate tax charitable deduction for the actuarial value of the charitable remainder interest at the time of the decedent's death.

(2) The actuarial value of the charitable remainder interest must be at least ten percent (10%) of the date of death value of the trust in order for the CRT to be qualified.

(3) Because the non-charitable actuarial interest in the CRT is taxable in the decedent's estate, the decedent's tax clause in his or her will or revocable trust will need to provide for payment of any estate tax attributable to the non-charitable CRT interest from other sources of the decedent's estate.

d. Leaving a retirement plan interest to a CRT is not a good idea in all situations.

(1) If the individual beneficiary or beneficiaries are young enough, the actuarial value of the charitable interest may not exceed ten percent (10%) of the total value of the trust, and the trust will not qualify as a CRT. However, a term of years could be used to make the CRT work in this situation.

(2) If the CRT will receive a large amount of retirement benefits, it is possible that there will not be enough non-retirement assets to pay any estate tax due because of the actuarial value of the non-charitable interest in the CRT.

e. If the "stretch IRA" technique is eliminated, then a designation of a charitable remainder trust will allow some "stretching" to still occur.

4. Charitable Lead Trusts

a. Since a charitable lead trust ("CLT") is the theoretical opposite of a charitable remainder trust (i.e., the initial stream of payments is paid to a charity for a term of years, with the remainder passing to one or more individuals at the end of the term), this seems on its face to be a viable technique.

b. However, the charitable lead trust has one important characteristic which is different from a CRT; the CLT is <u>not</u> exempt from income tax. Therefore, when all of the retirement benefits are distributed to the CLT, the trust must pay income tax on the entire amount of benefits distributed.

c. Because of the drastic income tax consequences, one should not advise leaving retirement benefits to a CLT.

VII. LIFETIME GIFTS OF QUALIFIED RETIREMENT BENEFITS TO CHARITY

A. Lifetime Gifts From Retirement Plan Distributions

1. For some of our clients, the most readily available funds with which to make lifetime charitable gifts are their retirement plan funds.

2. Except for the charitable IRA rollover discussed below, the only way for this client to make such a gift is to withdraw funds from the qualified plan or IRA and then gift such funds to the charity.

a. This of course results in the immediate taxation of the distributed assets from the plan on the donor's income tax return.

b. One would hope that the income tax charitable deduction will result in a "wash" of this income for income tax purposes. However, there are some circumstances which will prevent a complete wash of the income.

(1) If the charitable donations exceed the applicable percentage of AGI limits, then a complete wash will not result.

(2) For high income taxpayers, there is an automatic reduction of itemized deductions under Code § 68 which could also prevent a complete wash of the income.

(3) Of course, if the taxpayer is under age 59½ at the time of the withdrawal, he or she will suffer a ten percent (10%) penalty on the distribution. The charitable deduction will not in any way reduce this penalty.

(4) If the taxpayer resides in a state that does not allow a charitable deduction in computing its state income tax, then a complete wash will not be possible.

(5) Of course, any individual who does not itemize deductions would not achieve a wash of the income since he or she would not be itemizing the charitable deduction. There will be many more non-itemizers under the new tax law, with the increase of the amount of the standard deduction!

B. Gifts of RMD Amounts to Charity(s)

1. A taxpayer who is already receiving RMDs from his or her IRA or qualified plan may use the distributed amounts for charitable giving.

2. Although the above-described obstacles may prevent a complete wash of the income, since the taxpayer is <u>required</u> to receive the RMD in any event, he or she may as well attempt to receive some income tax relief through charitable giving.

C. There are Potential Charitable Gifts of Unique Retirement Plan Benefits That Can Be Beneficial During Life

1. An individual under age 59½ may avoid the ten percent (10%) premature withdrawal penalty through implementing a "series of substantially equal periodic payments" from a retirement plan, and such taxpayer could use those payments to make offsetting charitable gifts.

2. In certain limited circumstances, wherein a distribution is made from a qualified plan of employer stock which includes "net unrealized appreciation", the taxpayer is not immediately taxed on such net unrealized appreciation at the time of the plan distribution. Instead, taxation of this unrealized appreciation is deferred, and may be completely avoided through certain future charitable gifts.

3. A lump sum distribution from a qualified plan to a participant who is born before January 2, 1936 (or to the beneficiaries of such a participant) may exclude the distribution from the recipient's gross income and is taxed under a different rate schedule. In some circumstances, the distributee may give the distributed amount to charity, and effectively deduct the gift from his or her other income, since the lump sum distribution is taxed at a much lower rate.

4. "Qualified replacement property" received by a business owner who has sold his or her stock to an ESOP, wherein the owner did not have to pay income tax on the sale, may be gifted to charity to avoid permanently some or all of the tax on such sale.

D. IRA Charitable Rollover

1. Congress has had an on-again/off-again love affair with the IRA Charitable Rollover.

a. The 2006 Pension Protection Act first established the "IRA Charitable Rollover" concept. After being allowed to expire in 2008, this provision was renewed temporarily two more times, and expired again on January 1, 2014.

b. The "Public Good IRA Rollover Act" was introduced in the Senate on November 21, 2013, which sought to renew and make permanent the IRA Charitable Rollover. Comparable legislation was introduced in the House in early 2014, and passed on July 17, 2014. Finally, on December 16, 2014, the Senate signed off on several "extenders," including this provision, which was signed into law by the President on December 19, 2014. Unfortunately, the IRA Charitable Rollover provision expired <u>again</u> as of January 1, 2015!

c. After months of watching two separate bills which proposed to enact the IRA Charitable Rollover on a permanent basis sit idle in the House of Representatives, action finally came in December, 2015. President Obama signed the "Protecting Americans from Tax Hikes Act" into law on December 18, 2015. Among other things, this Act finally makes the IRA Charitable Rollover permanent.

2. What constitutes an "IRA Charitable Rollover"?

a. A "Qualified Charitable Distribution" is an otherwise taxable distribution from an IRA (not including an ongoing SEP or SIMPLE IRA) owned by an individual who is at least age 70½, and that is paid directly from the IRA to "eligible charitable organizations."

b. A taxpayer can exclude from gross income up to One Hundred Thousand Dollars ($100,000) of a Qualified Charitable Distribution made for a given year.

(1) The Qualified Charitable Distribution can be used to satisfy any required minimum distributions from the IRA for that year.

(2) Likewise, the amount of the Qualified Charitable Distribution excluded from gross income is not shown as an itemized deduction for a charitable contribution.

c. An eligible charitable organization for these purposes includes a public charity, other than a donor advised fund or supporting organizations. Individuals can make a Qualified Charitable Distribution to a private operating foundation or to a private foundation that elects to meet certain conduit rules in the year of the distribution.

d. The donor must instruct their IRA administrator to make the contribution directly to the eligible charity.

3. Who really benefits from this continued IRA Charitable Rollover technique?

a. A high income donor who itemizes deductions and whose charitable contribution deductions are reduced by the percentage of income limitation (otherwise, such individuals who receive a distribution from their IRA and make a corresponding charitable contribution, must count the entire distribution as income and receive a charitable deduction for a lesser amount).

b. Individuals who do not itemize their deductions.

c. Individuals in certain states where the operation of the state income tax law would offer greater benefits as a result of a charitable rollover.

d. Those rare individuals who already exceed their percentage of income limitation in terms of charitable contribution limits (i.e., more than 50% of their adjusted gross income for gifts of cash to public charities).

VIII. IS THE BAND ABOUT TO BREAK ON THE STRETCH IRA?

A. Introduction

1. In January or early February of 2012, Senate Bill 1813, the "Highway Investment, Job Creation and Economic Growth Act," which was primarily a highway enhancement bill, included a provision that would no longer permit "stretching" of an IRA for beneficiaries other than a spouse, minor children or a disabled beneficiary. All other beneficiaries would be left with the five (5) year distribution period.

2. After many Republican Senators cried foul, Senator Harry Reed withdrew the provision from the Bill doing away with stretch IRAs in late February 2012.

3. In July 2013, the Senate proposed eliminating the stretch IRA in a similar fashion as described above in order to increase revenue and keep a 3.4% interest rate in place on federally subsidized Stafford loans for low and moderate income students. Again, the proposal failed to gain any traction amongst a majority of Senators.

4. A similar proposal was revived in conjunction with a 2014 bill aimed at extending funding for the Highway Trust Fund. This proposal echoed part of President Obama's 2014 fiscal year budget proposal. Again, this proposal was abandoned after failure to reach much consensus in the Senate.

5. Once again, the Obama administration included elimination of the stretch IRA in its 2015 fiscal year budget proposal, and most recently in its 2016 fiscal year budget proposal.

6. In September of 2016, The Senate Finance Committee unanimously voted in support of a bill which would eliminate the stretch for the majority of non-spouse beneficiaries. This is the first evidence of bi-partisan approach for this concept, but it WAS prior to the 2016 election!

7. The obvious question is, is this a precursor of things to come in 2017 or thereafter? The good news is, none of this proposal was included in The Tax Cuts and Jobs Act of 2017!

B. The Policy Arguments in Favor of and Against the Stretch IRA Concept

1. Those who would argue in favor of limiting the ability of tax-deferred stretching of IRAs by most beneficiaries claim that:

a. Such a change in the tax law is a relatively easy method of raising significant revenue (the Senate Finance Committee estimated in 2012 that such a provision would raise over $4.6 billion over the next ten (10) years).

b. The primary purpose of IRAs is for the retirement of the creator of the IRA, and not the provision of tax-free benefits to later generations.

c. This change would encourage consumption spending, as opposed to savings.

d. How many children actually "stretch" the distributions anyway?

e. This provision could put a sizeable dent in the current governmental deficit.

f. Such a provision appropriately taxes the "rich."

g. As planners, we will no longer agonize over the structure of trusts who will be beneficiaries of an IRA.

2. Those who would argue in favor of maintaining the ability to stretch the tax deferral of IRAs by beneficiaries say the following:

a. The ability of a taxpayer's beneficiary to continue tax deferral of IRA funds is an important component of the creator's decision to implement IRA planning.

b. Such a policy encourages savings.

c. Doing away with the stretch IRA option forces the timing of an inheritance and eliminates the beneficiary's ability to implement his or her own estate planning.

d. A quick payout of an inherited IRA provides a windfall to creditors.

e. Any additional revenue created by such a proposal will only fuel more governmental spending.

f. Such a proposal in fact hurts the middle class.

C. Planning Opportunities in the Event the Stretch IRA is Ultimately Curtailed

1. Charitable Planning

a. Such a change will provide even more incentive for benefitting charity with IRAs upon death.

b. Funding a CRT with an IRA will achieve some of the deferral lost if the IRA stretch technique is eliminated.

2. Such a change will add more fuel to the fire in Roth IRA conversion planning.

3. Such a change will arguably provide more need for ILIT's.

4. If generation skipping planning is a major objective of a client, utilizing IRAs to push taxable inheritance down to lower bracket beneficiaries should be strongly considered.

5. The advisor should anticipate to the extent feasible the possible use of disclaimers by designated beneficiaries of the IRA, in the structuring of the IRA owner's beneficiary designation.

IX. THE TAX CUTS AND JOBS ACT OF 2017?

A. Although the Tax Cuts and Jobs Act makes vast revisions to the Internal Revenue Code, very few of these revisions affect estate planning for retirement assets.

B. Roth IRA Conversions.

1. The Act eliminates the taxpayer's right to recharacterize or undo a Roth IRA Conversion. For any Roth IRA Conversions made in taxable year 2018 and going forward, the taxpayer will no longer be able to undo the conversion.

2. The provision disallowing this recharacterization says that it "shall apply to taxable years beginning after December 31, 2017." This vagueness left us wondering whether any Roth Conversions made during 2017 could be undone, or whether this new provision applied to Roth Conversions made during 2017 so that no recharacterization could be made after December 31, 2017. The IRS has since issued a pronouncement, indicating that 2017 conversions can be re-characterized as late as an extended return due date of October 15.

C. Making Roth IRA contributions through the "back door".

1. Although the Tax Cuts and Jobs Act is silent on this, the Conference Committee's statement explaining the law confirms that an individual who is under age 70-1/2 and who has current compensation income can make an annual contribution to a Traditional IRA and then convert that Traditional IRA to a Roth IRA, with no income limit on the amount being converted. This allows an individual, whose adjusted gross income is above the limit permitting an annual compensation to a Roth IRA, to still accomplish a Roth IRA through the proverbial "back door."

D. There are also relatively minor provisions affecting rollovers for certain qualified plan loan distributions, a special provision for "Qualified 2016 Disaster Distributions" from Qualified Plans (but not for 2017 Disasters), and a provision resulting in non-deductibility of net losses from the complete distribution of IRA's (i.e., where the net amount distributed upon termination is less than the amount of after tax contributions to those accounts).