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Please Address Reply to:

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Submitted Electronically
IRS REG-122770-18

CC:PA:LPD:PR (REG-122770-18)
Room 5203, Internal Revenue Service
P.O. Box 7604
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Washington, DC 20044

RE: Comments and Recommendations Regarding Proposed Regulations Published in IRS REG-122770-18

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit its comments regarding IRS Proposed Rules on Use of Actuarial Tables in Valuing Annuities, Interests for Life or a Term of Years, and Remainder or Reversionary Interests, published in the Federal Register on May 5, 2022 ("Proposed Regulations"). The Proposed Regulations make amendments to the income tax regulations, estate tax regulations, and gift tax regulations through revisions to certain tables, based on mortality data from the 2010 census, used for determining the valuation of interests in property under section 7520 of the Code.

ACTEC is a nonprofit association of lawyers and law professors. Its more than 2,400 members are called "Fellows" and practice throughout the United States, Canada and other foreign countries with extensive experience in the preparation of wills and trusts, estate planning, and administration of trusts and estates of decedents, minors and incompetents. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar association activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of transfer tax planning. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

ACTEC's comments and recommendations regarding the Proposed Regulations are set forth in the attached memorandum. If you or your staff would like to discuss the contents of this memorandum with the ACTEC Fellows who created it, please contact Larry Katzenstein (314-552-6187, lkatzenstein@thompsoncoburn.com), who led the relevant task force of the Estate and Gift Tax Committee, or Deborah McKinnon, ACTEC Executive Director (202-684-8460, domckinnon@actec.org).

Respectfully submitted,

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President of ACTEC
ACTEC President 2022-2023

American College of Trust and Estate Counsel (ACTEC)

Comments and Recommendations
Regarding Proposed Regulations Published in IRS REG-122770-18

Treasury Notice 87 Fed. Reg. 26806 (05/05/2022) requested comments on proposed regulations issued under section 7520 of the Internal Revenue Code.[1] The proposed regulations update the section 7520 regulations using mortality data from the 2010 census. The American College of Trust and Estate Counsel (ACTEC) is pleased to submit these comments on the proposed regulations.

A. BACKGROUND

Section 7520, effective for transfers for which the valuation date is on or after May 1, 1989, generally provides that the value of an annuity, an interest for life or a term of years, and a remainder or reversionary interest is to be determined under tables published by the Secretary of the Treasury or her delegate (Secretary). Originally section 7520(c)(2) directed the Secretary to issue tables not later than December 31, 1989, utilizing the then most recent mortality experience. Thereafter, the Secretary is directed to revise these tables not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision. These proposed regulations are based on data from the 2010 census.

While these proposed regulations are primarily computational, we do have a few comments regarding rounding and effective dates.

B. COMMENTS AND RECOMMENDATIONS

1. Rounding of Adjusted Payout Rates.

The example showing how to compute the value of the remainder of a charitable remainder unitrust for the shorter of a life or a term of years illustrates the calculation using an adjusted payout rate adjusted to three decimal places. That is consistent with prior regulations and historically in Publication 1458. The other unitrust illustration in the proposed regulations, that of a unitrust for a life or lives, uses a payout rate carried out to four decimal places but if the change is intended to reflect a change in practice, that should be made explicit in the regulations and treat adjusted payout rates consistently whether they are for a life, term, or the shorter of life or term. We believe rounding to four rather than three places in that single illustration may have been inadvertent. Rounding to four places may be more accurate mathematically but is unnecessary and creates other problems. For example, should software designers round the adjusted payout rate to three places for transactions occurring before the regulations become final and four places thereafter? The purpose of the tables is to provide an easy, consistent method of determining actuarial values rather than provide precision mathematical accuracy down to the last decimal point. The proposed regulations recognize that fact implicitly by allowing exact computation of unitrust factors directly from adjusted payout rates or by the less-accurate interpolation method which was necessary before computers were widely used, even though the methods produce different results. The proposed regulations provide:

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[1] Unless otherwise stated, references herein to “section(s)” or to “Code” are to the Internal Revenue Code of 1986, as amended. References herein to “§” are to relevant sections of the Treasury regulations.

> "If the adjusted payout rate is a percentage that is between the adjusted payout rate for which factors are provided by Table U(1), an exact method of obtaining the applicable factors (such as through software using the actual rate of return and the actuarial formula provided in §1.664-4(e)(5)(i)) or a linear interpolation must be used, provided whichever method used is applied consistently."

Using an exact method rather than an interpolated method can make a difference in actuarial values that is more than trivial. For example, take a charitable remainder unitrust created for the life of a 70-year old beneficiary when the 7520 interest rate is 3.6%, paying 5% quarterly at the end of each quarter. The adjusted payout rate is .04891. Using the interpolation method, the remainder factor is .49742. Doing it by the exact method, the remainder factor is .49736. Whether the payout rate is rounded to three or four places may also in a particular case determine whether the 10% actuarial remainder test of Code section 664(d)(2)(D) is met, so taxpayers will want to determine these values in the same way the Service determines them.

2. Effective Date of the New Tables.

The proposed regulations provide that a taxpayer may elect to use the new mortality assumptions for any transaction entered into on or after January 1, 2021. However because Code section 7520 *mandates* the adoption of new tables no less frequently than once every 10 years, we believe the regulations must allow taxpayers to elect to use the proposed new tables in connection with any transaction occurring on or after May 1, 2019.

Section 7520(c)(2) provides as follows:

> "The Secretary shall revise the initial tables prescribed for purposes of subsection (a) to take into account the most recent mortality experience available as of the time of such revision. Such tables shall be revised not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision."

The mortality assumptions were last updated effective May 1, 2009, so new mortality assumptions should have been available for use by taxpayers for transactions occurring on or after May 1, 2019. We understand that the delay was caused by unavailability until August, 2020 of the decennial life table data compiled by the National Center for Health Statistics of the Centers for Disease Control on which prior tables issued under Code section 7520 were based. However, nothing in Code section 7520 requires use of any particular mortality data source, only that the tables "take into account the most recent mortality experience available as of the time of the revision." The proposed tables are based on mortality data which was already 9 years old in 2019. Given the mandate of Code section 7520 it seems appropriate, and perhaps legally required under Code section 7520, that the proposed new tables be available, at the election of the taxpayer, for any transaction occurring on or after May 1, 2019.

3. Further Guidance Needed on Election.

With regard to the election to use the new mortality assumptions for 2021 (or, if permitted, earlier transactions), it would be helpful to know how the election should be made, how taxpayers should indicate which tables have been used for a particular transaction, and whether the election once made is irrevocable.