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Participant Guide

Moving the Needle With Your Clients' Retirement Asset Planning

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Presents

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TABLE OF CONTENTS

Page

I. TAXATION AND DISTRIBUTION RULES FOR IRAS AND QUALIFIED PLANS UNDER SECURE ACT AND CARES ACT 1

A. SECURE ACT 1

1. *Required Beginning Date Change* 1
2. *Introduction of "Eligible Designated Beneficiary" Concept* 1
3. *Minimum Required Distribution Rules Under SECURE Act* 2
4. *Summary of Trust Planning Under SECURE Act* 2

B. CARES Act 4

II. ROTH CONVERSIONS 5

A. In General 5
B. Mechanics of a Conversion 5
C. Contributions to a Roth IRA 6
D. Distributions From a Roth IRA 6
E. Trust as Beneficiary of a Roth IRA 7
F. Roth IRAs and Charitable Giving 7

III. USING IRAS AND QUALIFIED PLANS FOR CHARITABLE GIVING 7

A. In General 7
B. Naming a Charitable Remainder Trust as Beneficiary 8

IV. ASSET PROTECTION FOR RETIREMENT ASSETS 9

A. ERISA Funds 9
B. Non-ERISA Funds 9

1. *Bankrupt Debtor* 9
2. *Non-Bankrupt Debtor* 11

Moving the Needle With Your Clients' Retirement Asset Planning

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I. Taxation and Distribution Rules for IRAs and Qualified Plans Under SECURE Act and CARES Act

A. SECURE Act

The SECURE Act (the "Setting Every Community Up for Retirement Enhancement Act of 2019" (P.L. 116-94)) was signed by the President on December 20, 2019. Sections 114 and 401 of the SECURE Act contain a number of provisions important to estate planners primarily in connection with distributions from defined contribution plans ("plans") and individual retirement accounts ("IRAs").

1. *Required Beginning Date Change*

The term required beginning date ("RBD") refers to the date when the plan participant or IRA owner (the "employee") begins receiving required minimum distributions ("RMDs") from the plan or IRA. Before the SECURE Act, the RBD was April 1 of the year following the year in which the employee reached age 70½ or, if not a 5% owner, retired, whichever was later. Section 114 of the SECURE Act, amending Internal Revenue Code ("IRC") §§ 401(a)(9)(B) & (C) and 408(b), changes the RBD for employees who reach age 70½ after December 31, 2019 to April 1 of the year following the year in which the employee reaches age 72 or, if not a 5% owner, retires, whichever is later. One result of this change is that no one will have an RBD in 2021.

This is a small positive development for taxpayers because, while there is no prohibition against or penalty for starting to receive distributions a year or two earlier than one's RBD, those who can afford to defer starting to receive distributions until the new RBD may have as much as an extra year of tax-deferred earnings on the amount of their initial RMD.

2. *Introduction of "Eligible Designated Beneficiary" Concept*

Section 401 of the SECURE Act, amending IRC § 401(a)(9)(E), introduces the term "eligible designated beneficiary" ("EDB"). An EDB includes an employee's surviving spouse ("SS"), an employee's child who has not reached majority[1], a "disabled" individual (within the meaning of IRC § 72(m)(7)), a chronically ill individual (within the meaning of IRC § 7702B(c)(2)) and an individual not more than ten years younger than the employee. An

[1] An employee's child who has neither "completed a specified course of education" nor attained age 26.

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employee's child who has reached majority is no longer an EDB. EDB status is determined as of the employee's date of death.[2]

3. *Minimum Required Distribution Rules Under SECURE Act*

Before the SECURE Act, if the beneficiary of a defined contribution plan or IRA was a designated beneficiary ("DB") (very simply, an individual who is designated as a beneficiary under the plan (or IRA)), RMDs could generally be made to the DB over his or her life expectancy. The opportunity to spread RMDs over a beneficiary's life expectancy was (and is) generally considered to be a positive attribute because it usually enables accumulation and compounding of tax-deferred earnings within the plan or IRA for a relatively long period.

The SECURE Act left the defined contribution plan and IRA distribution options pertaining to a SS largely unchanged. As before, a SS may elect to treat a SS's IRA as her or his own, implement a spousal rollover or take plan or IRA distributions over her or his life expectancy as annually recalculated. A SS may delay the start of distributions until the predeceased spouse would have reached age 72.

Also left undisturbed by the SECURE Act are the RMD rules applicable when there is no DB. In that case, if the employee dies before reaching his or her RBD, all plan or IRA proceeds must be distributed by the end of the fifth year after the year of the employee's death, and, if the employee dies on or after reaching his or her RBD, all plan or IRA proceeds must be distributed over the employee's then remaining life expectancy without annual recalculation.

However, under the SECURE Act, if and only if a plan or IRA beneficiary is an EDB, he or she may receive plan or IRA proceeds over his or her life expectancy (but, unless such beneficiary is the employee's SS, without annual recalculation). If a plan or IRA beneficiary is a DB but not an EDB, that DB must take all plan or IRA proceeds by the end of the tenth year after the year of the employee's death. These provisions are effective with respect to plans and IRAs where the employee died or dies after December 31, 2019.

4. *Summary of Trust Planning Under SECURE Act*

A so-called "conduit trust" is a trust whose terms **mandate** that any and all distributions the trust receives from a plan or IRA pursuant to the applicable beneficiary designation shall be immediately paid over to the current beneficiary. A conduit trust is the ultimate "see-through trust" because, when determining the amounts of MRDs distributable from a plan or IRA to the trust, one simply looks to the identity and age of the current beneficiary.

If plan or IRA benefits are payable to a conduit trust for the benefit of the employee's SS, those benefits may be paid over the annually recalculated life expectancy of the SS. Following the death of the SS, any remaining benefits will have to be paid no later than the end of the tenth year after the year of death of the SS.

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[2] Internal Revenue Code ("IRC") §401(a)(9)(E)(ii).

If plan or IRA benefits are payable to a conduit trust for the benefit of a non-spousal EDB, those benefits may be paid over the life expectancy of the EDB without recalculation. Following the death of the non-spousal EDB, any remaining benefits will have to be paid no later than the end of the tenth year after the year of such death. The **major exception** to these rules, however, is that, if the non-spousal EDB is a minor child of the employee, the plan or IRA benefits payable to the conduit trust can no longer be paid over the EDB's life expectancy (without recalculation) from and after the point when that child has reached majority. From and after that time, any remaining benefits will have to be paid no later than the end of the tenth year after the year in which the child reached majority.

If plan or IRA benefits are payable to a conduit trust for the benefit of a DB who is not an EDB, those benefits will have to be paid no later than the end of the tenth year after the year of the employee's death.

A so-called "accumulation trust" is a "see-through trust"[3] whose terms **do not require** that any and all distributions the trust receives from a plan or IRA pursuant to the applicable beneficiary designation shall be paid over to any trust beneficiary at any particular time.

In general, if plan or IRA benefits are payable to an accumulation trust, those benefits will have to be paid no later than the end of the tenth year after the year of the employee's death. The exceptions to this general rule are as follows:

- If the accumulation trust is for the benefit of a disabled individual or a chronically ill individual, (two categories of EDB as defined in amended IRC § 401(a)(9)(E)) and has multiple beneficiaries, it is an "applicable multi-beneficiary trust" ("AMBT"). Plan or IRA benefits payable to an AMBT may be paid using the life expectancy method, but it is not entirely clear whether the measuring life is that of the disabled or chronically ill individual or another beneficiary.

- If one or more beneficiaries of the accumulation trust are non-DBs:

  - If the employee dies before his or her RBD, plan or IRA benefits will have to be paid no later than the end of the fifth year after the year of the employee's death.

  - If the employee dies on or after his or her RBD, plan or IRA benefits may be paid over the employee's then remaining life expectancy without recalculation.

[3] A trust which is valid under state law, irrevocable, has identifiable, human beneficiaries and as to which certain documentation is provided to the plan or IRA custodian or trustee by October 31 of the year after the employee's death. Treas. Reg. § 1.401(a)(9)-4, A-5(b).

B. CARES Act

The CARES Act (the "Coronavirus Aid, Relief and Economic Security Act" (P.L. 116-136)), signed by the President on March 27, 2020, includes a provision (Section 2203, amending IRC §§ 401(a)(9) & 402(c)(4)) granting a waiver of any and all defined contribution plan and IRA RMDs that, in the absence of the waiver, would have been required in 2020. Thus, amounts that would have been mandated RMDs for 2020 (even for those who reached age 70½ in 2019 and so would have been required to take two RMDs in 2020) can instead remain inside the plan or IRA in 2020 and continue to generate tax-deferred investment return.

On June 23, 2020, the Internal Revenue Service ("IRS") issued Notice 2020-51. Notice 2020-51 explicitly allows a recipient of a RMD in 2020 to roll it over – essentially reversing the transaction and its otherwise applicable tax consequences.

The timing of enactment of the CARES Act in relation to the 2020 RMD waiver it grants, however, created a dilemma for those employees who wanted to take advantage of the waiver but at the time of enactment or shortly thereafter had already taken their 2020 RMD and allowed sixty days to pass. To alleviate this problem, Notice 2020-51 also expanded the usual sixty-day rollover period so that any RMD received in 2020, regardless of when received in 2020, could be rolled over until August 31, 2020, at the earliest.

Other important provisions of the CARES Act include Section 2202, amending IRC § 72, which allows the following:

- A "qualified individual"[4] may receive in-service "coronavirus-related distributions" from a plan or IRA of up to $100,000.00 from January 1, 2020 through December 30, 2020 without being subject to the 10% early distribution penalty if the recipient is under age 59½ and with the options to elect ratable income taxation of the amount distributed over a three-year period or to repay to the plan or IRA within three years the amount distributed as if the repayment were validly rolled-over in a trustee-to-trustee transfer within sixty days of the distribution.

- A qualified individual may receive loans from a qualified plan of up to $100,000.00 or the employee's nonforfeitable, accrued benefit (an increase in the loan limit from $50,000 or one-half of the employee's nonforfeitable, accrued benefit benefit) through September 22, 2020. A plan sponsor may delay a qualified individual's loan repayment obligation for one year.[5] Subsequent repayments with respect to any such loan are required to be adjusted to reflect that delay and any interest accruing during that delay.

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[4] An individual who is diagnosed with SARS-CoV-2 or COVID-19, whose spouse or a dependent diagnosed with SARS-CoV-2 or COVID-19 or who experiences adverse financial consequences from being quarantined, furloughed or laid off, having work hours reduced, being unable to work due to lack of child care or closing or reducing the hours of a business owned or operated by such individual.

[5] *See* IRS Notice 2020-50.

II. ROTH CONVERSIONS

A. In General

Upon a conversion from a traditional IRA to a Roth IRA, the assets held in the IRA, other than IRA contributions that were not deductible upon contribution, are fully and immediately subject to ordinary income tax. However, the owner may receive qualified distributions from the Roth IRA tax-free (after satisfying a five-year waiting period and reaching age 59½, discussed below), the assets in the Roth IRA grow tax-free, and the Roth IRA is not subject to RMDs during the owner's lifetime. However, a non-spouse beneficiary (including a trust) of the Roth IRA will be subject to the RMD rules. A surviving spouse who is the beneficiary of a Roth IRA still has the ability to treat the Roth IRA as his or her own. IRC § 408A(c)-(e); Treas. Reg. § 1.408A-6, A-14. The surviving spouse who is the beneficiary of a Roth IRA, therefore, is essentially a "substituted owner," with no RMDs or income tax.

Thus, an individual who is likely to be in the same or a higher income tax bracket at the time he or she receives a distribution, or a person who believes that the assets in the Roth IRA will grow substantially in value, will benefit from a Roth conversion. Reduced income tax rates under An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018 (the "2017 Tax Act") may favor conversion now. Under the 2017 Tax Act, the maximum individual federal income tax rate was reduced from 39.6% to 37%. Depending on the 2020 election results, the 37% maximum individual federal income tax rate could be increased but seems highly unlikely to be reduced further for the foreseeable future. Thus, for individuals subject to the maximum federal income tax rate, deferring tax under a traditional IRA may not be as beneficial as converting to a Roth IRA and paying the tax now at lower tax rates. State income tax rates can also factor into the tax savings arising from a conversion, assuming the IRA owner does not already live in or does not retire to a non-income tax state such as Florida.

B. Mechanics of a Conversion

The conversion can be accomplished through: (a) a rollover of a distribution within 60 days of receiving the distribution; (b) a trustee-to-trustee transfer; or (c) redesignating a traditional IRA as a Roth IRA (which is the form of most conversions). Treas. Reg. § 1.408A-4, A-1(b). A conversion may be made at any time; the one-year waiting period that limits successive rollovers between traditional IRAs does not apply to Roth conversions. Announcement 2014-32, 2014-46 I.R.B. 907.

One of the biggest impediments to converting is the up-front tax cost, and, if the IRA owner is under 59½, any amount withdrawn to pay the tax usually will be subject to a 10% penalty. Treas. Reg. § 1.408A-6, A-5. In addition, the funds used to pay the tax and penalty will reduce the future tax-free growth of the assets in the Roth IRA because there will be fewer assets in the Roth IRA. The IRA owner may address this issue by implementing only a partial conversion so that the resulting tax will be affordable. The portion of the traditional IRA that is not converted can be converted later in the same year or in future years.

C. Contributions to a Roth IRA

There is no age limit on the ability to make a regular contribution to a Roth IRA (or to a traditional IRA for that matter). With regard to the amount of regular contributions, the maximum amount in 2020 (whether made to a Roth IRA or a traditional IRA or both) is $6,000, plus an additional $1,000 if the individual is age 50 or over. IRC § 219(b)(5)(B); Notice 2019-59, 2019-47 I.R.B. 1091.

Regular contributions (*i.e.*, contributions of cash) to a Roth IRA are, like contributions to a traditional IRA for which an income tax deduction is sought, subject to limitations on modified adjusted gross income ("MAGI") and, unlike most contributions to traditional IRAs, are not deductible (IRC § 408A(c)(1)). The dollar amount limitations are indexed for inflation. For 2020, if an individual is married and will be filing a joint return, the amount of regular contributions that the individual may make to a Roth IRA begins to be phased out when MAGI reaches $196,000 and is completely phased out when it reaches $206,000. If the individual is single (or married, filing a separate return and does not live with his or her spouse during 2019), the dollar amounts are $124,000 and $139,000. MAGI is generally the individual's adjusted gross income, except that income attributable to RMDs is excluded, and any deduction for contributions to an IRA does not reduce MAGI. Treas. Reg. § 1.408A-3, A-5, 6; Notice 2019-59, 2019-47 I.R.B. 1091.

D. Distributions From a Roth IRA

Qualified distributions from a Roth IRA are not includible in gross income. A qualified distribution is a distribution made after the five-taxable-year period (i.e., five years after the conversion) under Treas. Reg. § 1.408A-6, A-1: (a) on or after the owner reaches age 59½; (b) to a beneficiary after the owner's death; (c) because of the owner's disability; or (d) for a first time home purchase (but only up to a maximum lifetime amount of $10,000, referred to as a "qualified special purpose distribution" under IRC § 408A(d)(5)). Treas. Reg. § 1.408A-6, A-1. Upon the Roth IRA owner's death, the beneficiary will inherit the owner's holding period, so the beneficiary will not have to restart the five-taxable-year period. Treas. Reg. § 1.408A-6, A-7(a). However, an IRA owner who makes a Roth conversion during life cannot treat the holding period of the traditional IRA as the holding period of the new Roth IRA. Treas. Reg. § 1.408A-6, A-2.

Nonqualified distributions may be included in gross income and may also be subject to the 10% additional tax that applies to distributions before reaching age 59½. Treas. Reg. § 1.408A-6, A-5. In general, nonqualified distributions are characterized as first coming from amounts that already have been subject to income tax and, therefore, will not be taxed again. Thus, only post-conversion earnings of a nonqualified distribution are includible in gross income. Because of these ordering rules, even though a distribution is nonqualified, if the distribution is small enough, the taxpayer may be able to avoid recognizing taxable income. A qualified rollover from a Roth IRA is not included in gross income, even if it is not a qualified distribution. Treas. Reg. § 1.408A-6, A-4.

E. Trust as Beneficiary of a Roth IRA

Funding a credit shelter trust with a traditional IRA is usually not an advantageous course of action, at least with regard to income tax exposure and investment growth. However, estate planning with a Roth IRA involves considerations almost entirely contrary to those that arise in connection with estate planning with a traditional IRA or qualified plan. So long as a Roth IRA remains intact, it is a tax-exempt entity and so can continue to grow and compound, tax-free. Further, in general, distributions from a Roth IRA, unlike a traditional IRA or qualified plan, do not give rise to any income taxes. Thus, there is no built-in income tax "lien" on the assets of a Roth IRA. Accordingly, a Roth IRA can be an excellent growth-oriented asset with which to fund a credit shelter disposition. It is important to remember, however, that a Roth IRA is subject to the RMD rules during any period in which its owner is not living, and so a Roth IRA whose beneficiary is a trust will, sooner or later, have some "leakage," albeit income tax-free leakage.

F. Roth IRAs and Charitable Giving

If a charitable entity is the beneficiary of the IRA, converting to a Roth IRA will likely result in a larger gift to the charitable beneficiary due to tax-free growth and the lack of RMDs (and, of course, resulting in a larger charitable deduction for estate tax purposes). In addition, during the owner's lifetime, withdrawals of Roth IRA assets followed by a transfer of funds to a charitable entity will result in a charitable deduction with no offsetting income tax upon the receipt of the funds from the Roth IRA.

III. USING IRAS AND QUALIFIED PLANS FOR CHARITABLE GIVING

A. In General.

One of the main disadvantages of holding retirement assets (*e.g.*, qualified plans and IRAs), which are considered income in respect of a decedent ("IRD"), is potential double taxation. The individual who receives the IRD, or the deceased employee's estate if the IRD is distributed to the estate, must include the IRD on such recipient's state and federal income tax returns for the year in which it was received. IRD may also be subject to net investment income tax. Treas. Reg. 1.1411-4. Additionally, IRD assets are included in a decedent's gross estate for federal estate tax purposes and, therefore, are subject to estate tax. Although the recipient can claim an income tax deduction for the federal estate tax attributable to the IRD, the effect of the double taxation is still to tax IRD assets at a relatively high rate.

The use of retirement benefits such as qualified plans and IRAs for charitable giving after death is tax efficient. A qualified charity is both income and estate tax exempt, and so the payment of such benefits to charity is tax free.

> **EXAMPLE**: Assume a client with a taxable estate wants to make a gift at his death of $100,000 to charity, and $100,000 to his niece. The client has a $100,000 IRA. Below are the net after-tax consequences if the IRA is given to charity or if the IRA is given to the niece. Assume that the niece is in a 37% income tax bracket. Paying the IRA to the niece produces a 40% estate tax on the client's gift to the niece, and

a 22.2% income tax on the IRA payable to the niece, after the applicable income tax deduction under IRC § 691(c).

IRA to Charity:	IRA to Niece:
Charity Receives: $100,000	Charity Receives: $100,000
Niece Receives: $60,000	Niece Receives: $37,800
IRS Receives: $40,000	IRS Receives: $62,200

While this example does not take into account any benefit the niece might derive from the income tax deferral she could enjoy if she were named as the beneficiary of the IRA, in many cases the benefits of using IRD to fund charitable gifts outweigh even these additional benefits. The advantage applies equally to all items of IRD, including non-qualified employee benefit plans and stock options.

B. Naming a Charitable Remainder Trust as Beneficiary.

The Trustee of a charitable remainder trust ("CRT") created under an individual's Will or revocable trust instrument can be designated as primary or contingent beneficiary of such individual's qualified plan or IRA. The employee can give other assets that are not subject to income tax to other, non-charitable beneficiaries.

The CRT does not realize taxable income upon receipt of the proceeds because the CRT is a tax-exempt entity. IRC § 664(c)(1). The character of distributions out of the qualified retirement plan or IRA is irrelevant with respect to the CRT (unless the CRT has unrelated business taxable income under IRC §§ 511-515). Because the IRD is distributed to the CRT, neither the employee's estate nor the employee's heirs will recognize taxable income when the IRD is distributed to the CRT.

The proceeds of the qualified plan or IRA in the CRT will remain and grow on an income tax-exempt basis, the same as if such proceeds had remained in the qualified plan or IRA. Distributions to the non-charitable beneficiary will be subject to ordinary income tax, for the most part, again, the same as if they were paid from a qualified plan or IRA.

There is no gift tax consequence to this transaction so long as the beneficiary designation remains revocable. Treas. Reg. § 25.2511-2(c). Also, the employee's estate will be entitled to an unlimited estate tax charitable deduction for the actuarial value of the remainder interest in the CRT at the employee's death. Treas. Reg. § 20.2055-2(e)(2)(v).

If the employee's spouse has an interest in the CRT and is the only noncharitable beneficiary, the marital deduction will shelter from estate tax the actuarially computed value of that interest, and the charitable deduction can be claimed for the balance of the value of the remaining trust property. IRC §§ 2056(b)(8), 2055(e)(2)(A).

If there are noncharitable beneficiaries other than the employee's spouse, the charitable deduction can be claimed only with respect to the actuarially computed value of the charitable

remainder interest, and estate tax may be due on the actuarially computed value of all noncharitable interests. In this case, naming a CRT as the beneficiary will not eliminate estate taxes, but it will allow the employee's children to receive a benefit from the IRD assets, and the children will be taxed only on the distributions from the CRT rather than on all of the income from the IRD assets.

For this strategy to succeed, it is critical, of course, that the CRT be a valid CRT, both in its design and operation, under IRC § 664 and applicable Treasury Regulations, rulings and cases. *Estate of Schaefer v. Commissioner*, 145 T.C. No. 4 (July 28, 2015), is an example of a situation in which a "net income with makeup charitable remainder unitrust" ("NIMCRUT") appeared to be a valid CRT under IRC § 664 but on close examination was determined not to qualify because it failed the minimum 10% remainder test prescribed by IRC § 664(d)(2)(D).

IV. ASSET PROTECTION FOR RETIREMENT ASSETS

A. ERISA Funds

Most types of qualified retirement plans must comply with the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 ("ERISA"). ERISA was intended to provide a uniform scheme of regulation of various types of qualified plans and preempt state law. ERISA may apply to IRC § 403(b) plans[6] if such plans meet certain requirements. Labor Dept. Reg. § 2510.3-2(f). IRAs, Roth IRAs and governmental plans are not subject to ERISA.

Generally, ERISA funds held in an ERISA-qualified profit sharing or pension plan are protected from creditors.[7] This protection stems from the fact that, to qualify under ERISA, the plan holding the funds must contain an anti-alienation provision. 29 USC § 1056(d)(1); IRC § 401(a)(13)(A). This provision is effective regardless of whether or not the debtor has declared bankruptcy, *Patterson v. Shumate*, 504 U.S. 753 (1992), and regardless of whether the debtor is the employee or inherited the ERISA funds from the employee.

B. Non-ERISA Funds

If the retirement funds are not ERISA funds ("non-ERISA funds"), such as funds in an IRA, then the extent of creditor protection for the funds depends in large part on: (a) whether the debtor has filed for bankruptcy; and (b) whether the debtor is the employee or the beneficiary.

1. *Bankrupt Debtor*

a. **<u>Bankruptcy Debtor is the Employee</u>**. As a practical matter, if the bankrupt debtor is the employee, the non-ERISA funds likely will be protected from creditors via one of two broadly-worded, identical exemptions granted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPA"). Under BAPA, debtors filing

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[6] IRC § 403(b) plans, also known as tax-sheltered annuities ("TSAs"), are available to employees of IRC § 501(c)(3) organizations, public schools, state colleges and state universities and certain other narrow categories of employees.

[7] However, a debtor's interest in retirement funds, whether or not such funds qualify under the Employee Retirement Income Security Act of 1974 ("ERISA"), are subject to the claims of certain preferred creditors, such as judgment creditors under QDROs and the IRS with a federal tax lien under 26 U.S.C. § 6321.

for bankruptcy after October 16, 2005, can claim an exemption for "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457 or 501(a)" of the IRC. To qualify as "exempt from taxation" for this purpose, either: (i) the fund or account must have received a favorable determination pursuant to IRC § 7805 that is in effect as of the date of the commencement of the case (although this creates only a presumption that the fund or account is "exempt from taxation"; or (ii) the debtor must demonstrate that no prior unfavorable determination pursuant to IRC § 7805 has been made by a court or the IRS, and either: (x) the retirement fund is in substantial compliance with the applicable requirements of the IRC; or (y) the debtor is not materially responsible for the lack of such compliance. 11 U.S.C. § 522(b)(4).

These rules apply regardless of which of the two bankruptcy exemption schemes applies to the debtor. If the debtor chooses the set of federal exemptions, under 11 U.S.C. § 522(b)(2), the cited language is made available to the debtor via 11 U.S.C. § 522(d)(12), and, if the debtor chooses (or is forced by state law to take) the applicable state exemptions plus the special federal exemptions set forth in 11 U.S.C. § 522(b)(3), the cited language is made available to the debtor via 11 U.S.C. § 522(b)(3)(C). The relevant text of the two exemption clauses (each hereinafter a "BAPA Exemption") is identical, and many courts interpreting one of these clauses have relied on cases interpreting the other as precedent. *See, e.g.*, *In re Mathusa,* 446 B.R. 601 (Bankr.M.D.Fla. 2011).

Both BAPA Exemptions are subject to a dollar limit if the funds: (i) are in a Roth IRA or a traditional IRA that is not part of a SEP under IRC § 408(b) or a SIMPLE IRA under IRC § 408(p); and (ii) do not represent rollover contributions from qualified plans and tax sheltered annuity plans (and the earnings thereon). The aggregate limit on the exemption available for non-ERISA funds that fall within these two descriptions is $1,000,000, subject to cost-of-living adjustments. 11 U.S.C. § 522(n). The cap may be increased if required in the interests of justice. BAPA § 1501(a). It is unclear whether the cap applies to IRAs created by spousal rollover.

Even if the employee withdraws funds from his IRA, thereby ostensibly forfeiting creditor protection for the funds, if he redeposits the withdrawn funds within sixty days after he withdrew them and before he files for bankruptcy protection, creditor protection for the redeposited funds is restored. *In Re Jones,* 2019 WL 1749219 (Bkrtcy.S.D.Ill. Apr.15, 2019).

b. **Bankrupt Debtor is Beneficiary**. The question of whether the BAPA Exemption applies to non-ERISA funds in the hands of a debtor who is the beneficiary (as, for example, when the debtor is the beneficiary of an inherited IRA), was settled by the United States Supreme Court in 2014 in *Clark v. Rameker*.[8] In *Clark*, the Supreme Court, affirming the Seventh Circuit, held that funds in an inherited IRA were not exempt pursuant to Section 522(b)(3)(C) and (d)(12) because, in the hands of the beneficiary, they were not "retirement funds." The Supreme Court pointed out characteristics of inherited IRAs showing that such accounts are not intended for retirement. First, the beneficiary may never invest additional money into the IRA. Second, beneficiaries of inherited IRAs "are required to withdraw money from such

[8] *Clark v. Rameker*, 573 U.S. 122, 134 S.Ct. 2242 (2014).

accounts, no matter how many years they may be from retirement." Third, the beneficiary may withdraw the entire balance of an inherited IRA at any time and for any reason without penalty.

2. *Non-Bankrupt Debtor*

When the debtor has not filed for bankruptcy, the extent of creditor protection afforded to the debtor's non-ERISA funds depends on applicable state law, which may provide varying degrees of protection according to whether the debtor is the employee or the beneficiary.

a. Non-Bankrupt Debtor is Employee. All states except Wyoming have specific statutes granting at least some degree of creditor protection for non-ERISA funds to the non-bankrupt employee, but the extent of the protection depends on the provisions of the particular statute. Many states' creditor protection statutes for retirement benefits place limits on the protected amount (for example, North Dakota has a general rule placing an aggregate limit of $200,000 on the protection afforded to certain retirement funds (NDCC § 28-22-03.1(7)); in contrast, New York's applicable statute generally protects retirement funds without reference to the debtor's needs or other limitation (C.P.L.R. § 5205(c)). The applicable statutes of some states do not confer creditor protection with respect to contributions to an IRA within a stated timeframe before the employee files for bankruptcy, and the laws of some states that are clearly applicable to traditional IRAs may not provide protection for Roth IRAs.

b. Non-Bankrupt Debtor Is Beneficiary. State laws protecting the employee's interest in non-ERISA funds may not be found to apply when the debtor is the beneficiary. Notably, Florida, Texas, Missouri and Arizona have passed or amended statutes specifically to protect inherited IRAs (Fl. Stat. Ann. § 222.21, Tx. Prop. Code. § 42.0021, Section 513.440, RSMo. (enacted July 2, 2013) and Az. Rev. Stat. Ann. § 33-1126). The great majority of authority interpreting the state law statutes that do not specifically protect inherited IRAs consists of bankruptcy opinions, where the applicable exemption scheme was the state law creditor protection statute, and the BAPA Exemptions were not available or not argued. The trend of these opinions is to find that state law does not protect inherited IRAs from creditors. For example, case law has found that the relevant statutes in Oklahoma, Alabama, Illinois, Wisconsin, Ohio and Indiana, do not extend to inherited IRAs. See, e.g., *In re Sims*, 241 B.R. 467 (Bankr.N.D.Okla. 1999), *In re Navarre*, 332 B.R. 24 (Bankr.M.D.Ala. 2004), *In re Taylor*, 2006 Bankr. LEXIS 755 (Bankr.C.D.Ill. 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), *In re Kuchta*, 434 B.R. 837 (Bankr.N.D.Ohio 2010); and *In re Klipsch*, 435 B.R. 586 (Bankr.S.D.Ind. 2010). The outlier is *In re McClelland*, 2008 Bankr. LEXIS 41 (Bankr.Idaho 2008), which held that an Idaho statute exempted an inherited IRA from the bankruptcy estate.

Finally, one additional form of protection may be available to debtors with inherited IRAs that are held in trust, either because the original IRA was held in trust or the original owner left the IRA to a trust for the beneficiary. In these cases, state spendthrift protection may also be available for the funds. Ordinarily, where non-ERISA funds are held by the debtor as the original owner, a state spendthrift statute would not protect the funds, even if held in a trust form, as they would be considered a self-settled trust and therefore ineligible for spendthrift protection.

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Participant Survey

We would love to hear your feedback for today's teleconference:

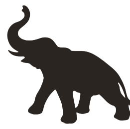
Moving the Needle With Your Clients' Retirement Asset Planning

September 22, 2020

Please use this link to tell us what you think.

http://livewebcast.net/cannon/092220

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
649 S. Milledge Ave., Ste. 4, Athens, Georgia 30605



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Certificate of Attendance

____

(Participant Name)

Has successfully completed the Cannon Financial Institute, Inc. course:

Moving the Needle with Your Clients' Retirement Asset Planning

September 22, 2020

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour.
  Instructional delivery method: Group-Internet-Based
  NASBA #103655; Field of Study –Tax
- **Enrolled Agent (IRS)** — **2.0 credit hours**
  Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
  Course # VRUGV-T-00137-20-O
- **Certified Financial Planner (CFP™)** — **1.5 credit hours**
  Course # 268638
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 credit hours**
- **Certified Wealth Strategists (CWS®)** — **2.0 credit hours**
- **Certified Investment Management Analyst (CIMA®)** — **1.5 credit hours**
  Course # 20CFI021
  If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your My IMCA account at www.imca.org/user
- **Certified Trust Financial Advisor (CTFA™)** — **2.0 credit hours**
- **Certified IRA Services Professional (CISP™)** — **2.0 credit hours**
- **Certified Retirement Services Professional (CRSP™)** — **2.0 credit hours**
- **Certified Retirement Plan Professional (CRPP™)** — **2.0 credit hours**
- **Certified Trust Operations Professional (CTOP™)** — **2.0 credit hours**
- **Certified Fiduciary and Investment Risk Specialist (CFIRS™)** — **2.0 credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant (**No Individual State Insurance Credit Available)** — **1.5 credit hours**
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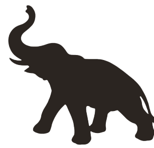
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
649-4 S. Milledge Ave., Athens, Georgia 30605



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Certificate of Attendance

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(Participant Name)

____

(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Moving the Needle with Your Clients' Retirement Asset Planning

September 22, 2020

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:
The following states have been approved for 1.5 hours of General Credit: (Course number is indicated in parenthesis):Alabama, Arkansas (TAX71083), California, Delaware, Georgia, Idaho, Illinois, Iowa (335756), Kentucky(215150), Louisiana, Maine (052151), Minnesota (284004), Mississippi, Montana (26527), Nebraska(189302), Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon (60202), Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (174075214), Utah, Vermont, Virginia, Washington, Wisconsin, & Wyoming

These states have been approved for the following General Credit: Colorado – 2 hours, Florida - 2 hours (1906546N), Missouri –1.8 hours (187302), Oklahoma – 2 hours, West Virginia – 1.8 hours

The following state is not approved for credit: Pennsylvania (unless participation is in a group setting)

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Hawaii, Maryland, Massachusetts, Michigan & South Dakota
The following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Connecticut-Attorneys can use this certificate to submit to Connecticut MCLE
Indiana & Ohio-Site Coordinators must apply for credit as the sponsor in order for participants to receive credit
Kansas–Attorney or Site may apply 30 days prior to program
New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit and self-report their attendance.*
New Jersey-Attorneys can use this certificate for New Jersey CLE for 1.5 General credits (Reciprocity Rule)
New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, DE, GA, KY, LA, MS, NM, NC, ND, OK. Type of credit: Areas of Professional Practice 1.5 Credits
****As required by the following State Bars, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Illinois, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington and West Virginia. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
649-4 S. Milledge Ave., Athens, Georgia 30605

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Moving the Needle with Your Clients' Retirement Asset Planning

Date and Time of Activity: September 22, 2020 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT, 10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics:

Elimination of Bias in the Legal Profession:

Competence:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: ________________________

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

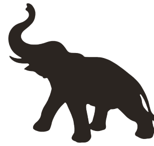
Legal Ethics:______________________________

Elimination of Bias in the Legal Profession:______________________________

Competence: ______________________________

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.



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Certificate of Attendance

____
(Participant Name)

____
(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Moving the Needle with Your Clients' Retirement Asset Planning

(777614)

September 22, 2020

Laurie Frye
Professional Education Coordinator

<u>Continuing Legal Education Credits for this course are as follows:</u>

Colorado – 2.0 General Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
649-4 S. Milledge Ave., Athens, Georgia 30605

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2D)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

Certify Your Attendance Online at www.vsb.org

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.
A $100 fee will be assessed for failure to comply with either deadline.

Member Name: ______________________________ **VSB Member Number:** ____________________

Address: ______________________________ **Daytime Phone:** ____________________

______________________________ **Email:** ____________________

____

City **State** **Zip**

Course ID Number: **NHH0350**

Sponsor: **Cannon Financial Institute**

Course/Program Title: **Moving the Needle with Your Clients' Retirement Asset Planning**

Live Interactive * **Approved CLE Credits (Ethics Credits):** **1.5** **(0.0)**

Date/time Completed:______________________________ **Location:** Distance Learning

To Be Completed by Sponsor

By my signature below I certify

___ I attended a total of ____________ (hrs/mins) of **approved CLE**, of which (______) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

____________________ ______________________________

Date Signature

This form may be mailed to:
Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
(804) 775-0577
www.vsb.org

[Office Use Only: Videoconference/Satellite]