

What are the Risks of a 72(t) Payment Plan?

By Sean Mullaney¹

Introduction

The early retirement planning landscape has changed due to the convergence of three factors.

First, as I write this in the beginning of 2026, the U.S. stock market is on a roll. For the five years ended December 31, 2025, the S&P 500 is up **82.25%**.² Second, worker dissatisfaction has surged.³ Third, as discussed below, 72(t) payment plans have become more user friendly.

When we combine significant financial asset wealth with worker dissatisfaction and more desirable 72(t) payment plan contours, it's easy to see a potential surge in early retirees using 72(t) payment plans.

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Thanks to Denise Appleby who provided helpful comments on a previous draft version of this article. This article only reflects the views of Sean Mullaney and does not represent the views of anyone else, including but not limited to current or former employers of Sean Mullaney. Any and all mistakes in this article are my own.

² Yahoo! Finance, S&P 500 (^GSPC), available at <https://finance.yahoo.com/quote/%5EGSPC/>.

³ Korn Ferry, An Epidemic of Dissatisfaction, available at <https://www.kornferry.com/insights/this-week-in-leadership/an-epidemic-of-dissatisfaction>. In 2024, Korn Ferry released a survey and stated “More than half of those surveyed say they are struggling with stress, aren’t happy with their jobs, and don’t feel their work has purpose.”

It's time for early retirees, financial planners, tax return preparers, and the IRS to come to grips with 72(t) payment plans. Grasping what the downside is and how to mitigate risks is vital for both early retirees and their advisors. Risk also exists for the IRS. Might the IRS waste enforcement resources defending unsustainable rules?

This article explores all of the above. It peels back the curtain when it comes to the uncertainties of 72(t) payment plans.

Roadmap

This article proceeds in five main parts. The first part is a brief introduction to 72(t) payment plans, the rules governing them, and planning developments. Second is a discussion of the risk associated with the initial 72(t) payment plan fixed amortization calculation and mitigation tactics. Third is a discussion of the risk associated with impermissible modifications of a 72(t) payment plan and mitigation tactics. Fourth is a discussion of risks presented by transfers into and out of 72(t) IRAs. Fifth, I offer proposals for 72(t) payment plan regulations. Last, I offer a conclusion to the article.

This article has headers stating the following, but it bears repeating and clarifying: this article is not tax advice for any individual. Further, this article deals with some uncertain areas of the tax law. This article takes an academic approach to assess the possibilities in these uncertain areas.

I. The Series of Substantially Equal Periodic Payments (a “72(t) Payment Plan”)

A. Statutory Background

1. The 72(t) 10 Percent Early Withdrawal Penalty

The Tax Reform Act of 1986⁴ (hereinafter “the ‘86 Act”) ushered in the current version of the 10 percent early withdrawal penalty⁵ for taxable distributions from retirement accounts, including traditional 401(k)s and traditional IRAs.⁶

As a default rule, taxable withdrawals from retirement accounts occurring prior to the owner turning age 59 ½ years old are subject to a 10 percent early withdrawal penalty (the “10% penalty”).⁷ The 10% penalty is logical. There ought to be at least some deterrence to withdrawing money from “retirement” accounts prior to retirement age.

⁴ Public Law 99-514, 100 Stat. 2085, available at <https://www.ucop.edu/research-policy-analysis-coordination/files/Public%20Law%2099-514.pdf>. See Section 1123 for the enactment of today’s 72(t) early withdrawal penalty and the series of substantially equal periodic payments exception. 100 Stat. 2472, available at <https://uscode.house.gov/statviewer.htm?volume=100&page=2472#>.

⁵ The Internal Revenue Code refers to this as an “additional tax” on distributions. Colloquially, it is often referred to as an early withdrawal penalty.

⁶ Joint Committee on Taxation, Joint Committee Report JCS-10-87: General Explanation of the Tax Reform Act of 1986, available at <https://www.taxnotes.com/research/federal/legislative-documents/jct-blue-books/joint-committee-report-jcs-10-87-general-explanation-of-the/1r3py#99#1r3py#99-514jcs-10-87IItitleXIC2>.

⁷ For those who live in California, add a 2.5 percent California additional early withdrawal penalty. See Franchise Tax Board, Early distributions, available at <https://www.ftb.ca.gov/file/personal/income-types/early-distributions.html>.

The statute is replete with exceptions to the 10% early withdrawal penalty. Many of these exceptions require fitting into narrow parameters, such as using the money for a specific use or withdrawing only under certain circumstances.

2. The 72(t) Payment Plan Exception

There is one exception to the 10% penalty that has no use restriction and can, at least in theory, be used at any time:⁸ a series of substantially equal period payments.⁹ This exception is found in **Section 72(t)(2)(A)(iv)**. Hereinafter, this article will mostly refer to them as “72(t) payments” or, collectively, as a “72(t) payment plan” though many call them SEPPs or 72(t) SEPPs.

A 72(t) payment plan is “a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of such employee and his designated beneficiary.”¹⁰

That definition is a bit cryptic. What does “substantially equal” mean? Do the payments need to occur over the full remainder of the owner’s lifetime? The remainder of Section 72(t) provides some additional details.

First, Section 72(t)(3)(B) imposes a requirement on 72(t) payment plans from 401(k)s and other workplace retirement plans: the owner must

⁸ A taxpayer can establish a 72(t) payment plan from an individual retirement account (an “IRA”) at any time. There are two restrictions on the ability to have a 72(t) payment plan from a 401(k) or other qualified plan at any time. First, as discussed below, an employee must separate from service prior to initiating a 72(t) payment plan from that particular employer’s 401(k) or other qualified plan. Second, as observed by Natalie B. Choate in her excellent treatise, as a practical matter 72(t) payment plans are rarely established using 401(k)s and other qualified plans since these accounts generally cannot be split into a “72(t) account” and a “non-72(t) account” in the way an IRA can be. Natalie B. Choate, Life and Death Planning for Retirement Benefits, Ataxplan Publications, 8th. Edition 2019, page 595.

⁹ Section 72(t)(2)(A)(iv).

¹⁰ Id.

separate from service in order to initiate a 72(t) payment plan from that employer's 401(k) or other plan.¹¹ As a practical matter, this is a rule of little consequence. From a planning perspective, few employees earning W-2 income will want to add taxable payments from current employer retirement accounts to their taxable income prior to retirement. Most employees want to contribute to workplace retirement accounts rather than take distributions from those accounts.

Second, Section 72(t)(4) provides the rules for modifications to a 72(t) payment plan.

Subparagraph (A) provides that if there is a modification to the 72(t) payments prior to the later of (1) the end of the 5 year period beginning on the date of first 72(t) payment or (2) when the taxpayer attains age 59 1/2,¹² two bad things happen.

The first bad thing is that in the year of the modification, the taxpayer's tax includes the 10% penalty that was avoided by the previous qualification for the 72(t) payment plan exception.¹³ Second, underpayment interest is charged on those previously forgiven 10% penalties.¹⁴ Essentially, blowing up a 72(t) payment plan assesses the 10% penalty on all previously taken 72(t) payments and related interest on the current year's tax return. This clearly presents a risk to any taxpayer starting a 72(t) payment plan.

While Section 72(t)(4)(A) provides for potentially harmful outcomes, it also gives us a key insight. By time limiting the term of required 72(t) payments, the rule of Section 72(t)(4)(A) waters down, to a significant degree, the substantially equal periodic payments exception's requirement that the payments be made over the owner's lifetime (or the owner's and another beneficiary's joint lifetimes).

¹¹ Section 72(t)(3)(B).

¹² Section 72(t)(4)(A).

¹³ Section 72(t)(4)(A).

¹⁴ Id.

3. SECURE 2.0 Section 323 Modifies the 72(t) Payment Plan Rules The 72(t) Payment Plan Exception

The SECURE 2.0 Act of 2022¹⁵ (“SECURE 2.0”) passed both houses of Congress in late 2022.¹⁶ Section 323 made two significant changes to the 72(t) payment plan rules.

First, it added a safe harbor¹⁷ providing that annuity payments count as valid 72(t) payments so long as they are for the ordinary 72(t) payment plan term and would satisfy the required minimum distribution (“RMD”) rules of Section 401(a)(9).

The new flush language of Section 72(t)(2)(A) provides that:

periodic payments shall not fail to be treated as substantially equal merely because they are amounts received as an annuity, and such periodic payments shall be deemed to be substantially equal if they are payable over a period described in clause (iv) and satisfy the requirements applicable to annuity payments under section 401(a)(9).¹⁸

Second, new Section 72(t)(4)(C) limits, to a certain extent, the ability to do partial or full roll-outs from a retirement plan subject to a 72(t) payment plan. It requires that if such a roll-out occurs, the combined distributions from the transferor and transferee retirement accounts must continue to equal the total required annual 72(t) payment in order for the roll-out

¹⁵ Section 1(a) of the SECURE 2.0 Act of 2022, available on page 2046 of this PDF file: <https://www.appropriations.senate.gov/imo/media/doc/JRQ121922.PDF>.

¹⁶ For information about litigation surrounding SECURE 2.0 passing the House of Representatives, see Sean Mullaney, 2026 401(k) Catch-Up Contributions and the Quorum Clause, available at <https://fitaxguy.com/2026-401k-catch-up-contributions-and-the-quorum-clause/>.

¹⁷ Joint Committee on Taxation, General Explanation of the Tax Legislation Enacted by the 117th Congress, page 452, available at <https://www.jct.gov/publications/2023/jcs-1-23/>.

¹⁸ Section 72(t)(2)(A) flush language.

itself to avoid being an impermissible modification blowing up the 72(t) payment plan.

B. 72(t) Calculation

1. The Statute

The statute has no explicit guidance on the calculation of the amount of a 72(t) payment. However, two things are true:

1. Payments must be either:
 - a. “Substantially equal,” or
 - b. An annuity meeting the RMD requirements.
2. At least to some degree, payments must be made with respect to the owner's life expectancy, or the life expectancy of the owner and a beneficiary.

The first point seemingly indicates that no initial 72(t) payment calculation is required. Rather the requirement appears to be simply that annually the payments are “substantially equal” or an annuity meeting the RMD requirements.

The second point, however, could be viewed as suggesting that a calculation of some sort is required.

But the statute does not explicitly state such a requirement. If a calculation is required, and the statute does not provide the calculation, ***why is there no call in the statute for regulations providing that calculation?***

The statute does call for regulations when it comes to 72(t) payments. Not to produce a payment calculation, but rather to determine the “recapture

tax,¹⁹ i.e., the retroactive 10% penalty and related interest charges in the year of an impermissible modification.²⁰

Lastly, the importance of the owner's life expectancy (or a joint life expectancy), which presumably drives any potential need for a calculation, is reduced by Section 72(t)(4)(A), which limits the required payment term to the longer of 5 years or the owner attaining age 59 1/2.

2. Legislative History

The Joint Committee on Taxation Report for the '86 Act has some interesting language when it comes to computing the annual 72(t) payment. It states:

Congress intended that, in the case of a defined contribution plan or an IRA, the exception to the early withdrawal tax is to be available if the plan or IRA purchases a commercial annuity to fund the participant's benefit under which payments are to be made in substantially equal payments over the life of the participant or the joint lives of the participant and the participant's beneficiary or, alternatively, if the plan or IRA distributes the participant's account in substantially equal payments over the life expectancy of the participant or the joint life expectancies of the participant and the participant's beneficiary. A series of payments will not fail to be substantially equal solely because the payments vary on account of (1) certain cost-of-living adjustments; (2) a benefit increase provided to retired employees; (3) an adjustment due to the death of the employee's beneficiary; or (4) the cessation of a social security supplement.²¹

¹⁹ Joint Committee on Taxation, Joint Committee Report JCS-10-87: General Explanation of the Tax Reform Act of 1986, available at <https://www.taxnotes.com/research/federal/legislative-documents/jct-blue-books/joint-committee-report-jcs-10-87-general-explanation-of-the/1r3py#99#1r3py#99-514jcs-10-87IIItitleXIC2>.

²⁰ Section 72(t)(4)(A).

²¹ Joint Committee on Taxation, *supra* note 19.

Interestingly, the legislative history too has no mention of any potentially required calculation. Rather, it points to either funding the payment with an annuity or making the payments over the remaining lifetime of the owner. Note that the remaining lifetime of any owner is highly speculative in a manner no calculation can eliminate.

It is also noteworthy that the legislative history has, as quoted above, four potential reasons why payments that are not equal would be considered substantially equal.

Someone at the Joint Committee believed “substantially” modified “equal” substantially (pun intended).

3. IRS and Treasury Guidance

a) No Final Regulations

When the IRS and Treasury issue rules binding taxpayers, they must do so by ultimately issuing final regulations. Final regulations are first issued as proposed regulations. Prior to finalization, proposed regulations go through the Administrative Procedure Act's notice and comment process.²² The IRS and Treasury have issued three pieces of guidance short of final regulations to implement Section 72(t)(2)(A)(iv)'s series of substantially equal periodic payments: Notice 89-25 Q&A 12,²³ Revenue Ruling 2002-62,²⁴ and, most recently, Notice 2022-6.²⁵

²² See <https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf>, Kristin E. Hickman, *Coloring Outside the Lines*, 82 *Notre Dame L. Rev.* 1727, 1730-31 (2007) (available at <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1307&context=ndlr>), and Reuven S. Avi-Yonah, *The Administrative Procedure Act Problem Reconsidered*, Tax Notes, June 17, 2024 (available at <https://www.taxnotes.com/featured-analysis/administrative-procedure-act-problem-reconsidered/2024/06/14/7k99v>).

²³ Available at https://bradfordtaxinstitute.com/Endnotes/Notice_89-25.pdf.

²⁴ Available at <https://www.irs.gov/pub/irs-drop/rr-02-62.pdf>.

²⁵ Available at <https://www.irs.gov/pub/irs-drop/n-22-06.pdf>.

Four decades after the '86 Act, there are no final series of substantially equal periodic payments regulations.

b) Fundamental Problem

IRS and Treasury guidance when it comes to 72(t) payments has largely focused on the calculation of the annual payment amount. As stated in the currently effective guidance, Notice 2022-6, “[p]ayments in a series are considered substantially equal periodic payments within the meaning of section 72(t)(2)(A)(iv) if they are determined in accordance with one of the three methods described in section 3.01(a) through (c) of this notice.”²⁶

The guidance puts the emphasis on the calculation instead of the amount. This is odd for two reasons. First, the statute calls for “substantially equal” payments. The statute never calls a calculation of any sort. Further, the statute provides neither a required calculation method nor a grant of regulatory authority to provide calculation methods.

Second, Notice 2022-6 contains a fundamental flaw. Whether an amount is equal to another amount is determined by the amounts, not the calculation of the amounts involved.

For example, on Tuesday I end the day with 3 apples. On Thursday I end the day with 3 apples. Suppose I started the day on Tuesday with 4 apples and gave one to my toddler Goddaughter, such that I ended the day with 3 apples. On Thursday, I started the day with 2 apples and then went to the grocery store where I bought an additional apple.

Both days I end the day with 3 apples, equivalent amounts. However, the calculations of how I got there were very different.

²⁶ Notice 2022-6, Section 3.01.

Under the logic of Notice 2022-6 and its predecessors, Tuesday's 3 apples equals Thursday's 3 apples **only if** Tuesday's 3 apples were calculated a particular way.

This approach is both exceedingly odd and not contemplated by the statute.

c) Three Calculation Methods

Notice 2022-6 lays out three calculation methods for calculating the annual payment in a 72(t) payment plan. The three methods originated with Notice 89-25 Q&A 12 and were refined in Revenue Ruling 2002-62.²⁷

The three calculation methods are:

- 1) Fixed amortization method
- 2) Fixed annuitization method
- 3) RMD method

From a planning perspective, the fixed amortization method is generally the method most taxpayers will want to use to start a 72(t) payment plan, as it generally yields the greatest annual payment for the particular traditional retirement account size.

The fixed amortization method produces an annual payment considering an interest rate, a hypothetical payment term based on the owner's life expectancy provided by IRS tables, and the size of the retirement account.²⁸ Once the annual payment is determined for the first year, "the annual payment is the same amount in each succeeding distribution year."²⁹

²⁷ Notice 2022-6 Sections 2.05 and 2.06.

²⁸ Notice 2022-6, Section 3.01(b).

²⁹ Id.

C. 72(t) Modification

Under Notice 2022-6, absent a one-time change to the RMD method,³⁰ there is no mechanism in place to change the annual amount of a 72(t) fixed amortization payment, even by a slight amount.

Other than the possible change to the RMD method, the only possible permissible modifications are those caused “by reason of death [or] disability”³¹ and “a distribution to which section 72(t)(10) applies.”³² Section 72(t)(10) applies to distributions to a “qualified public safety employee.”³³

As discussed above, an impermissible modification triggers the 10% penalty on previously taken 72(t) payments (if the owner was under age 59 ½ at the time of the payment) and related interest charges. This increases the risk profile of a 72(t) payment plan the earlier in the owner's life it is initiated.

D. Change in the 72(t) Planning Environment

Notice 2022-6, issued in early 2022, marked a significant change in the 72(t) payment environment. Prior to the issuance of the Notice, an early retiree considering a 72(t) payment plan was at the mercy of the prevailing interest rate environment.

Under Revenue Ruling 2002-62, effective until Notice 2022-6, the fixed amortization calculation allowed an interest rate no greater than the

³⁰ Notice 2022-6, Section 3.03(b).

³¹ Notice 2022-6, Section 2.04.

³² Id.

³³ Section 72(t)(10), available at https://www.law.cornell.edu/uscode/text/26/72#t_10.

highest 120 percent of the applicable mid-term federal rate for the two months prior to the first distribution.³⁴

This made planning into a 72(t) payment plan quite difficult. Consider a 72(t) payment plan starting in November 2020. The previous two months had 120 percent of the applicable federal rate numbers of 0.42 percent and 0.46 percent.³⁵ Thus, the highest possible interest rate available under the then-applicable Revenue Ruling 2002-62 was just 0.46 percent. Using such a low interest rate generates a rather small annual payment even out of a very large traditional IRA.

With the 5 percent interest rate always available under Notice 2022-6, early retirees are no longer at the mercy of the prevailing interest rate environment.

II. Risks of the Initial 72(t) Payment Plan Calculation

A. Overview

From a planning perspective, there are two main risks to using a 72(t) payment plan. The first is an initial calculation error. The second is an impermissible modification of the series of substantially equal periodic payments triggering both retroactive penalties and related interest charges.

First, we will discuss the risk associated with the 72(t) payment calculation. Then the article discusses the risk associated with subsequent modifications of 72(t) payment amounts.

³⁴ Revenue Ruling 2002-62, Section 2.02(c), available at <https://www.irs.gov/pub/irs-drop/rr-02-62.pdf>.

³⁵ See <https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates-for-prior-years#2020>.

B. The Initial Calculation Risk

Most early retirees will want to use the fixed amortization method to compute their 72(t) payment. As a practical matter, what most retirees compute is not the 72(t) payment itself, but rather the size of the “72(t) IRA,” the traditional IRA from which to take the annual 72(t) payment.

The fixed amortization calculation requires three inputs to solve for the size of the 72(t) IRA. First is the interest rate, which can be no greater than the greater of (i) 5 percent or (ii) 120 percent of the mid-term applicable federal rate (AFR) for the two months immediately preceding the distribution.³⁶ Second is a lifetime expectancy factor off IRS tables.³⁷ Third is the desired annual payment, which is based on the taxpayer's needs and wants. An amortization present value calculation computes the size of the 72(t) IRA required to generate the desired flat annual payment.

There are risks that the taxpayer uses an impermissible interest rate or uses the wrong lifetime expectancy factor off the IRS tables he or she will distribute an amount from their 72(t) IRA that exceeds what Notice 2022-6 allows from a 72(t) IRA of the size of their particular 72(t) IRA.

Example 1: Bruce started a 72(t) payment plan in June 2024. He turned 53 in 2024. Confused as to the 72(t) fixed amortization rules, he computed a 72(t) annual payment using 120 percent of the applicable mid-term rate, 5.61 percent, for June 2024, the month of the distribution.³⁸ This rate exceeds the applicable rates for May 2024 (5.31 percent)³⁹ and April 2024

³⁶ Notice 2022-6 Section 3.02(c), available at <https://www.irs.gov/pub/irs-drop/n-22-06.pdf>.

³⁷ Notice 2022-6 Section 3.01(b), available at <https://www.irs.gov/pub/irs-drop/n-22-06.pdf>.

³⁸ Revenue Ruling 2024-12, available at <https://www.irs.gov/pub/irs-drop/rr-24-12.pdf>. See also <https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates-for-prior-years#2024>.

³⁹ Revenue Ruling 2024-9, available at <https://www.irs.gov/pub/irs-drop/rr-24-09.pdf>.

(5.17 percent).⁴⁰ Recall Notice 2022-6 Section 3.02(c) allows Bruce's maximum interest rate to be the greater of 5 percent or the applicable rates *for the previous two months*.

Thus, Bruce has not used a Notice 2022-6 permissible interest rate, as 5.61 percent exceeds the maximum allowed rate.

To generate a \$100,000 annual payment, Bruce did the following computation.

Interest Rate	5.61%
Single Life Expectancy Years at Age 53 ⁴¹	33.4
Account Balance	\$1,494,600.00
Annual Payment	\$100,000.00

Bruce divided his existing traditional IRA into two IRAs. The one he labeled as his "72(t) IRA" out of which he took his annual \$100,000 payment started with an account balance of \$1,494,600. Using the maximum allowable rate under Notice 2022-6, the highest annual payment a \$1,494,600 traditional IRA could have produced in June 2024 under the rules of Notice 2022-6 is \$96,505.

Bruce takes the \$100,000 annual payment for each of 2024, 2025, and 2026. Late in 2026 the IRS examines Bruce's 2024 and 2025 tax returns and issues a proposed adjustment assessing the 10 percent early withdrawal penalty and routine underpayment interest with respect to the 2024 and 2025 \$100,000 withdrawals.

Bruce has strong arguments against the IRS. First, he's made three equal periodic payments. The payment stream squarely agrees with the Internal Revenue Code. The IRS would attempt to disqualify it based on not exactly

⁴⁰ Revenue Ruling 2024-7, available at <https://www.irs.gov/pub/irs-drop/rr-24-07.pdf>.

⁴¹ IRS Single Life Expectancy Table, available at https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/retirement/single-life-expectancy-table.pdf.

conforming to an IRS notice that has never been through the Administrative Procedure Act's notice and comment process. The IRS has had four decades to issue final regulations governing 72(t) payment plans and has, as of this writing, failed to do so.

Who should a judge side with? Bruce, who has made three payments that conform with the language in the Internal Revenue Code, or the IRS, who would need to argue that conforming to the Internal Revenue Code is not sufficient—Bruce must also conform to a notice that has never been through the notice and comment process.

Bruce can validly argue Section 72(t)(2)(A)(iv) requires him taking “substantially equal” payments. It does not require him to **additionally** fit precisely within the contours of a complex calculation.

Why should a judge rule against a taxpayer who has made three equal annual payments in order to uphold the notice of an agency that hasn't issued final regulations on the statute in question in four decades?

Second, consider that the IRS's overly technical approach requires what are absurd results when applied to similarly situated taxpayers.

Were the IRS to issue the proposed adjustment to Bruce, they are saying that if he took the first \$100,000 distribution on July 1, 2024, it, and each of the subsequent distributions are not subject to the 10 percent early withdrawal penalty.⁴² But if Bruce takes the first \$100,000 distribution on June 30, 2024, ***it and each of the subsequent annual \$100,000***

⁴² In this scenario, Bruce would be allowed to use the 5.61 percent interest rate, as it was 120 percent of the applicable mid-term federal rate for June 2024. Applied to a \$1,494,600 traditional IRA, it would allow for Bruce's \$100,000 distribution to qualify under the rules of Notice 2022-6.

distributions⁴³ are all subject to the 10 percent early withdrawal penalty and related interest.⁴⁴

Similarly situated taxpayers should be treated equally. Bruce's interpretation of the rules treats similarly situated taxpayers similarly. Ambiguities when it comes to the 72(t) payment plan rules should be resolved in favor of treating similarly situated taxpayers similarly.

Notice 2022-6's fatal flaw is that it often does not treat similarly situated taxpayers similarly.

Treating Bruce in a manner wildly different depending on whether the first distribution occurs in June or July strongly suggests Notice 2022-6 is not a permissible construction of Section 72(t)(2)(A)(iv).

Further, consider Section 408(d)(2)(B),⁴⁵ which provides that regardless of when an IRA distribution occurs during the year, all IRA distributions are aggregated into a single distribution. By treating all IRA distributions as a single distribution, Section 408(d)(2)(B) strips away **timing within the year** as a relevant consideration for the taxation of a traditional IRA distribution.

Bruce's example demonstrates that Notice 2022-6 attaches great significance to the **timing within the year**. Doing so appears to violate Section 408(d)(2)(B).⁴⁶ Under Notice 2022-6, Bruce gets very different tax

⁴³ But see the possibility that future distributions could be protected by the Backdoor 72(t) Payment Plan. See the following discussion in Example 2 below.

⁴⁴ A theoretically pure application of Notice 2022-6's fixed amortization method appears to produce an absurd result when comparing similarly situated taxpayers. Such an application appears unwarranted considering Section 408(d)(2)(B), which treats all IRA distributions during the year as a single distribution for purposes of Section 72, thus negating the importance of the timing of the distribution within the year.

⁴⁵ Available at https://www.law.cornell.edu/uscode/text/26/408#d_2_B.

⁴⁶ Nothing in the series of substantially equal periodic payments sections of Section 72 turns off the application of Section 408(d)(2)(B).

results **depending on the month of the year** he takes the first distribution.

Third, consider the possibility that the 72(t) IRA has increased in value since Bruce started the 72(t) payment plan. Imagine Bruce's 72(t) IRA is invested in VTI, an exchange traded index fund of domestic equities. On June 28, 2024 VTI closed at 263.37.⁴⁷ As of the end of 2025, VTI is at 335.27.⁴⁸ This means that while paying out \$100,000 per year to Bruce, the 72(t) IRA has likely increased in value. This is indicative that Bruce's 5.61 percent interest rate is modest enough to support a payment over Bruce's lifetime, meeting the Code's requirement for 72(t) payment plans.

Bruce can very reasonably argue that he has made equal annual payments over his lifetime. Can the IRS successfully argue the payments are not a permissible application of Section 72(t)(2)(A)(iv)?

C. Initial Calculation Risk Duration

Consider how long Bruce is subject to initial calculation risk for any tax year. If Bruce's initial 72(t) calculation is invalid, the risk is that in the year of any payment, he would owe an unpaid 10 percent early withdrawal penalty plus any normally computed underpayment interest.

Pursuant to Section 6501(a), the statute of limitations with respect to that underpayment is generally three years from the filing of the federal income tax return.⁴⁹ Assuming Bruce filed his 2024 federal income tax return for 2024 by April 15, 2025, the latest the IRS can assess the 10 percent early withdrawal penalty is April 14, 2028.

⁴⁷ Vanguard Total Stock Market Index Fund ETF Shares (VTI), available at <https://finance.yahoo.com/quote/VTI/history/?period1=1717200000&period2=1722470400>.

⁴⁸ Vanguard Total Stock Market Index Fund ETF Shares (VTI), available at <https://finance.yahoo.com/quote/VTI/history/?period1=1736299537&period2=1767571200>.

⁴⁹ Section 6501(a), available at <https://www.law.cornell.edu/uscode/text/26/6501>.

You can see that the risk associated with initial calculation errors is mitigated by the ordinary statute of limitations. As a practical matter, the initial calculation risk often boils down to, at most, the early withdrawal penalty on only three or four years' worth of withdrawals. After that time penalties on previous withdrawals are generally beyond the statute of limitations.

There is a second risk mitigation factor that can work in favor of taxpayers when it comes to the risk associated with the initial calculation: what I refer to as the **Backdoor 72(t) Payment Plan**.

D. The Backdoor 72(t) Payment Plan

The Backdoor 72(t) Payment Plan occurs when an incorrect initial calculation becomes correct upon a subsequent payment. This can occur because of changes in interest rates, account balances, and remaining life expectancies. The Backdoor 72(t) Payment Plan can save most of a 72(t) payment plan without the taxpayer knowing it until they are examined by the IRS.

An example can illustrate the concept.

Example 2: Caroline turned 53 in 2023. She started a 72(t) payment plan in October 2023 using the fixed amortization method.

Caroline, like Bruce, incorrectly assumed she could use the current month's interest rate to do the fixed amortization calculation. Thus, she used October 2023's 5.33 percent interest rate⁵⁰ when the maximum permissible rate was September 2023's 5.04 percent interest rate.⁵¹

⁵⁰ Revenue Ruling 2023-18, available at <https://www.irs.gov/pub/irs-drop/rr-23-18.pdf>.

⁵¹ Revenue Ruling 2023-16, available at <https://www.irs.gov/pub/irs-drop/rr-23-16.pdf>. See also <https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates-for-prior-years#2023>.

She established a 72(t) IRA of \$1,545,016.19 and took a \$100,000 payment from it in October 2023. Here is what her erroneous 72(t) payment looks like:

Interest Rate	5.33%
Single Life Expectancy Years at Age 53 ⁵²	33.4
Account Balance	\$1,545,016.19
Annual Payment	\$100,000.00

In October 2024, Caroline took her second \$100,000 distribution. Imagine that her 72(t) IRA is worth \$1.57M on December 31, 2023. Under Notice 2022-6 Section 3.02(d), taxpayers can always use the prior-year's December 31st balance to establish the 72(t) IRA balance, although other account balances can also be permissible.

Assuming, only for the sake of argument, that Caroline's 2023 \$100,000 distribution did not successfully start a 72(t) payment plan, Caroline's 2024 \$100,000 distribution starts a new, valid 72(t) payment plan. For August 2024, 120 percent of the applicable mid-term federal rate was 5.22%. When we put all of that together, we get a maximum 72(t) payment over \$101,000:

Interest Rate	5.22%
Single Life Expectancy Years at Age 54 ⁵³	32.5
12/31/2023 Account Balance	\$1,570,000.00
Annual Payment	\$101,345.41

Thus, even if we believe Caroline's 2023 \$100,000 distribution was not part of a valid 72(t) payment plan, **Caroline's 2024 \$100,000 distribution starts a new valid 72(t) payment plan**, a Backdoor

⁵² IRS Single Life Expectancy Table, available at https://www.fidelity.com/bin-public/o60_www_fidelity_com/documents/retirement/single-life-expectancy-table.pdf.

⁵³ Id.

72(t) Payment Plan. Taxpayers can “backdoor” into a valid 72(t) payment plan, as there is no particular documentation or intention requirement to have a valid 72(t) payment plan.

The possibility of a Backdoor 72(t) Payment Plan mitigates, to a certain extent, the risks associated with errors made when initially computing a 72(t) payment plan. In Caroline's case, only her \$100,000 distribution in 2023 could possibly attract the 10 percent early withdrawal penalty.

Recall from the Example 1 analysis that Caroline would have good arguments against the application of the penalty to her 2023 distribution.

E. Practical Ways to Mitigate Risks Associated with the 72(t) Payment Plan Initial Calculation

I view the risks associated with the initial calculation as very manageable. One available risk mitigation tool is referring to the IRS's own Substantially equal periodic payments website. It's Question & Answer 7 (available at <https://www.irs.gov/retirement-plans/substantially-equal-periodic-payments#q7>) provides an example of a fixed amortization 72(t) payment plan calculation. Taxpayers starting a 72(t) payment plan should, at a minimum, apply their own calculation to the IRS's numbers in Q&A 7. Ensuring the calculation gets very close to the IRS's results helps validate the taxpayer's own calculation.

Another way a taxpayer can help validate their 72(t) payment plan initial calculation is to run it through the MyFRS calculator, available at <https://www.myfrs.com/calculators/Retire72T.html>. While I have never validated the MyFRS calculator, I am not aware of a situation where it produces an incorrect result.

Consulting great educational resources prior to initiating a 72(t) payment plan can help mitigate 72(t) payment plan risks. Unsurprisingly, I like pages 157 through 166 of Tax Planning To and Through Early Retirement, a book I co-authored with Cody Garrett, CFP®. In those pages, we provide

an extensive discussion of 72(t) payment plans, including the fixed amortization initial calculation.

Another risk mitigation tactic is the timely filing of federal income tax returns when one has a 72(t) payment plan. The idea is to get the statute of limitations running as soon as possible so as to mitigate any downside risk presented by the initial 72(t) payment plan fixed amortization calculation having been incorrect.

Generally speaking, many early retirees on 72(t) payment plans have relatively simple federal income tax returns, considering they start a 72(t) payment plan because they have mostly or fully exhausted income generating assets other than retirement plans. This makes the income tax return relatively easy to prepare. The tax return may only require collecting three documents: a Form 1099-INT for a bank account, a Form 1099-R for the 72(t) payment, and a Form 1095-A reporting ACA medical insurance information. Why not get the tax return filed prior to April 15th to start the statute of limitations starting on April 15th?

Would I ever recommend someone like Bruce or Carolyn use an interest rate in excess of what Notice 2022-6 allows? In today's environment, of course not. But if someone did what Bruce and Carolyn did, do I believe they would have a relatively high likelihood of success were the issue to be litigated and they have a documented history of reasonable, equal annual payments? I do.

III. Modification Risks

An impermissible modification of a 72(t) payment plan subjects the entire previously taken series to the 10 percent early withdrawal penalty and related interest charges.

Some degree of modification of the payments must be permissible.

How do we know that? The Code does not require equal payments. It requires “**substantially** equal” payments. Based on the use of the word

“substantially” to modify and expand the word “equal” we know that some degree of inequality between the payments must be permissible.

A. Modifications and “Substantially Equal”

Notice 2022-6 and its predecessors do not honor “substantially” in the statutory term “substantially equal.”

From its context in the statute and other tax authorities, it is clear that “substantial equal” means “equal or close to equal.” We can look to the favorable Subchapter C corporate reorganization transaction rules.⁵⁴ Those rules often require transferring “substantially all” the properties of a corporation⁵⁵ in a transaction in order to obtain favorable tax results.

For purposes of considering private letter rulings, Revenue Procedure 77-37 provides that a corporation will be considered to have transferred substantially all of its properties if it transfers “assets representing at least 90 percent of the fair market value of the net assets and at least 70 percent of the fair market value of the gross assets held by the corporation.”⁵⁶

This shows us that in other contexts, the IRS acknowledges that “substantially” in a statute does have effect. It’s time for the IRS to acknowledge that “substantially” has real effect in Section 72(t)(2)(A)(iv).

B. Examples

Two examples will illustrate the potential absurdity of the current rules when it comes to modifications and failing to comply exactly with the contours of Notice 2022-6.

⁵⁴ Revenue Procedure 77-37, Section 3.01, available at <https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/rev-proc-77-37/dlps>.

⁵⁵ See Section 368, available at <https://www.law.cornell.edu/uscode/text/26/368>.

⁵⁶ Revenue Procedure 77-37, Section 3.01.

Example 3: Jeff turns 55.5 on August 1, 2025. On May 2, 2025, he took his first \$100,000 72(t) payment using the fixed amortization method. He took his 72(t) payments as follows.

Date	Age	Distribution Amount
May 2, 2025	55	\$100,000
April 30, 2026	56	\$100,000
May 3, 2027	57	\$100,000
May 4, 2028	58	\$100,000
April 28, 2029	59	\$100,000

Based on Jeff taking these payments, an IRS examiner reviewing his 2029 tax return in 2031 proposes no additional taxes with respect to the 72(t) payment plan.⁵⁷

Example 4: Larry turns 55.5 on July 15, 2025. On May 2, 2025, he took his first \$100,000 72(t) payment using the fixed amortization method. He took his 72(t) payments as follows.

⁵⁷ There is no requirement that the annual 72(t) payment be taken on the exact anniversary date as the first 72(t) payment date. See *Arnold v. Comm'r*, 111 T.C. 250 (1998) (available at https://scholar.google.com/scholar_case?case=1955427695759177944) and Choate, *supra* note 8, at page 600. In *Arnold*, the Tax Court ruled a 72(t) payment plan was blown up by an extra \$6,776 payment in November 1993. Prior to that, the taxpayer had taken \$44,000 payments in December 1989, January 1990, January 1991, January 1992, and January 1993. There's no indication that the IRS challenged the 72(t) payment plan based on payments occurring on a date other than the anniversary date of the first payment, which occurred in December. Further, the Tax Court's opinion does not provide actual dates for the distributions, but only the month of each distribution, indicating they had little interest in the exact date of each annual distribution.

Good sense and aforementioned Section 408(d)(2)(B) support the idea that the timing of an annual 72(t) fixed amortization payment during the year should be irrelevant. The taxation of an IRA distribution should not turn on when the distribution occurs during the year. In addition, an exception requiring annual payments on one and only one anniversary date each year is no real exception and requires a compliance act (payments only on anniversary dates) that furthers no tax policy objective.

Date	Age	Distribution Amount
May 2, 2025	55	\$100,000
April 30, 2026	56	\$100,000
May 2, 2027	57	\$100,000
May 3, 2028	58	\$100,000
April 29, 2029	59	\$105,000

Based on Larry taking these payments, an IRS examiner reviewing his 2029 tax return in 2031 proposes **\$50,500** in additional taxes (under Section 72(t)(4)(A)) and related interest with respect to the 72(t) payment plan. The examiner claims that increasing the required payment by \$5,000 is an impermissible modification, triggering the retroactive penalty and interest on the previous four payments and subjecting the last payment to the 10% penalty and underpayment interest (since the exam occurs after the 2029 10% penalty was due).

Other than \$5,000 of distributions, Jeff and Larry have practically carbon copy 72(t) payment plans. Yet that \$5,000 in additional distributions could, at least in theory, create more than 10 times that amount of penalties and interest.

Would I feel confident were I the IRS examiner proposing over \$50,000 in recapture taxes? Absolutely not.

First, Larry can argue that the \$105,000 2029 payment is “substantially equal” to the 2025 \$100,000 payment. From a present value perspective, it is likely the case that \$105,000 in 2029 is worth less, perhaps significantly less, than \$100,000 in 2025. Barring deflation, surely the “proper” \$100,000 payment in 2029 is less valuable than \$100,000 in 2025. Yet the IRS maintains that \$100,000 in 2029 is “substantially equal” to \$100,000 in 2025. Said differently, if the IRS chooses a literal approach to apply Notice 2022-6’s fixed amortization method, it’s arguing

that the words “substantially equal” in Section 72(t)(2)(A)(iv) require taxpayers to disregard the laws of mathematics.

Further, a literal interpretation of Notice 2022-6 forecloses the possibility of considering that \$105,000 in 2029 could be “substantially equal” to \$100,000 in 2025.

If \$105,000 in 2029 is not “substantially equal” to \$100,000 in 2025, “substantially” in Section 72(t)(2)(A)(iv) is a nullity. Constructing the tax law giving the word “substantially” no meaning is an impermissible construction of the statute.

Second, consider the Joint Committee on Taxation report on the '86 Act. It mentions four possible deviations from “equal” that could qualify as “substantially equal.” One of them is “certain cost-of-living adjustments.”⁵⁸ Surely a 5 percent increase in the payment four years after the original payment could qualify as a valid “cost-of-living adjustment.”

Larry and Jeff are very similarly situated taxpayers. They should achieve very similar results when it comes to the application of the 10% early withdrawal penalty. Basic equity calls for that result. The IRS can achieve that result by **honoring the word “substantial” in Section 72(t)(2)(A)(iv)**.

C. *Arnold v. Commissioner*

In *Arnold v. Commissioner*,⁵⁹ the Tax Court took a dim view of *pro se* litigants claiming that adding \$6,776 to a \$44,000 annual 72(t) payment initiated four years prior was a cost-of-living adjustment. The *Arnold* case

⁵⁸ Joint Committee on Taxation, Joint Committee Report JCS-10-87: General Explanation of the Tax Reform Act of 1986, available at <https://www.taxnotes.com/research/federal/legislative-documents/jct-blue-books/joint-committee-report-jcs-10-87-general-explanation-of-the/1r3py#99#1r3py#99-514jcs-10-87IItitleXIC2>.

⁵⁹ 111 T.C. 250 (1998) (available at https://scholar.google.com/scholar_case?case=1955427695759177944).

dealt with an increase from the original nominal payment of over 15 percent. The taxpayers argued the increase was a permissible 72(t) payment plan modification as a permitted cost-of-living adjustment.

According to the court, the Arnolds produced no substantial evidence of a proper cost-of-living adjustment for the relevant period. The court added that the evidence showed the IRA distribution increase was likely due to a separate income stream ending.

Arnold merely addresses whether one particular modification was a permissible “cost-of-living adjustment.” It does not resolve the question of the scope and scale of the word “substantial” in front of “equal” in Section 72(t)(2)(A)(iv).

Interestingly, in *Arnold* the IRS conceded that a cost-of-living adjustment to a 72(t) payment plan could be a permissible modification to a 72(t) payment plan.

[P]etitioners argue that the November 1993 distribution was part of a **cost-of-living adjustment which respondent [IRS] concedes would be a permissible modification** to the series of substantially equal periodic payments during the applicable 5-year period.⁶⁰

That the IRS conceded this point in litigation when the then applicable rules, Notice 89-25 Q&A 12, did not provide for a cost-of-living adjustment being a permissible modification **tells us that permissible modifications to 72(t) payment plans extend past the four corners of IRS 72(t) payment plan guidance.**

While *Arnold* turns 28 this year, it is further notable that in neither Revenue Ruling 2002-62 nor Notice 2022-6 did the IRS and Treasury provide rules allowing cost-of-living adjustments to be permissible modifications to 72(t) payment plans.

⁶⁰ *Arnold v. Comm’r*, 111 T.C. 250, 255 (1998) (emphasis added), available at https://scholar.google.com/scholar_case?case=1955427695759177944.

D. Managing Modification Risk

There are several ways to manage and reduce impermissible modification risk.

First, it is usually advantageous to start a 72(t) payment plan as late in life as possible. This generally means exhausting other readily available resources, such as taxable brokerage account assets, prior to initiating a 72(t) payment plan. The later in life the 72(t) payment plan is initiated, the lower the risk presented by a later impermissible modification blowing up the 72(t) payment plan, since there will be fewer years' worth of 10 percent early withdrawal penalties and related interest on the table.

Second, consider labeling the 72(t) IRA as such with the relevant financial institution.⁶¹ Some financial institutions allow owners to put nicknames on an IRA. Why not put a 72(t) IRA nickname on the 72(t) IRA out of which the 72(t) payment must be made?

Third, I strongly favor making 72(t) payments as annual payments. Other intervals are possible. But “take a \$75,000 payment around July 1st” is easier to successfully implement than “take \$6,250 every month.” At a minimum, a taxpayer who started an annual 72(t) payment on July 1st should put an annual reminder on their electronic calendar on July 1st to take the annual required 72(t) payment. If it slips to later in the month, it should not be a problem. I like the idea of having months to take the payment rather than taking monthly payments and risking December's payment slipping during year-end busyness, travel, illness, etc.⁶²

Fourth, taxpayers and their advisors finding themselves in a controversy surrounding modifications to 72(t) payment plans should remember that the four corners of Notice 2022-6 are not likely to be the exclusive domain

⁶¹ Cody Garrett and Sean Mullaney, Tax Planning To and Through Early Retirement, 2025, page 164.

⁶² At a minimum, those taking 72(t) payments may want to consider automating the distributions.

of acceptable modifications to 72(t) payments. We saw this play out in *Arnold* where the IRS acknowledged that a 72(t) payment plan could be modified to account for cost-of-living adjustments even though then-relevant Notice 89-25 Q&A 12 did not contain such adjustments. Further, Natalie Choate has observed that the IRS has given taxpayers private letter rulings allowing them to recalculate 72(t) payments originally computed under the fixed amortization and fixed annuitization methods.⁶³

Taxpayers and advisors dealing with 72(t) payment plan controversies should consider whether distributions and actions conform to Section 72(t)(2)(A)(iv) and other relevant statutory provisions and how to best demonstrate that conformance.

IV. Changes to the Account Balance Risk

Notice 2022-6 Section 3.02(e) provides a rule deeming additions and subtractions to the 72(t) IRA balance (other than by reason of investment performance) to be an impermissible modification that blows up a 72(t) payment plan,⁶⁴ causing the imposition of the 10 percent early withdrawal penalty and related interest on previously taken 72(t) payments.

⁶³ Choate, *supra* note 8, at pages 591-92. Note that under Section 6110(k)(3) (available here https://www.law.cornell.edu/uscode/text/26/6110#k_3), private letter rulings cannot be cited as precedent.

⁶⁴ This rule appears inconsistent with Treas. Reg. Sec. 1.408A-4 Q&A 12 (available at <https://www.law.cornell.edu/cfr/text/26/1.408A-4>), which provides that if the entire 72(t) IRA is converted to a Roth IRA, the 72(t) payment plan is not considered modified if the owner continues to take the required payments from the Roth IRA.

This regulation raises more questions than it answers. It applies to a situation that would be rather rare from a planning perspective: converting an entire traditional IRA subject to a 72(t) payment plan to a Roth IRA.

Future 72(t) payment plan regulations should provide easy to apply, flexible rules with respect to any Roth conversions of 72(t) IRAs and taking future 72(t) payments from the combination of the 72(t) IRA and the Roth IRA.

Thus, annual contributions to a 72(t) IRA and rollovers into and out of a 72(t) IRA blow up the 72(t) payment plan.

The rule of Notice 2022-6 Section 3.02(e) is not expressly called for in the statute. Interestingly, after the issuance of Notice 2022-6, SECURE 2.0 added Section 72(t)(4)(C), allowing for potential roll-outs from a 72(t) IRA as long as the total future annual 72(t) payments remain proper. The IRS has not issued guidance updating Notice 2022-6 Section 3.02(e), which is now at least partially out of date after the enactment of Section 72(t)(4)(C).

Limiting rollovers of amounts inside a 72(t) IRA during the 72(t) payment plan term is understandable. Those amounts need to be present to support future taxable 72(t) payments. Policing “**breaking out of jail**” is logical in this regard. However, the current rule is overly restrictive, particularly in light of new Section 72(t)(4)(C). The government should issue new regulations allowing roll-outs so long as the total future 72(t) payments are properly withdrawn.

The current rule prohibiting “**breaking into jail**” is highly problematic. There is no significant disadvantage to the IRS and tax policy if taxpayers roll other retirement accounts into an existing 72(t) IRA.⁶⁵ There is no reason for such a transaction to blow up a 72(t) payment plan, costing a taxpayer thousands of dollars.

Further, there is no statutory authority to police breaking into jail transactions in Section 72(t)(4)(C) or anywhere else.

The only significant disadvantages of breaking into jail **roll-ins** to 72(t) IRAs are to the taxpayer. By rolling a non-72(t) retirement account into a 72(t) IRA, the taxpayer restricts their ability to do another 72(t) payment plan from the non-72(t) retirement account. Further, breaking into jail increases the balance, increasing the amount of a 72(t) IRA annual

⁶⁵ The same can be said for annual contributions properly supported by self and/or spousal earned income. Otherwise qualifying annual contributions to IRAs should be allowed into 72(t) IRAs.

payment if the taxpayer elects to do a one-time change to the RMD method.⁶⁶

The above said, those with a 72(t) IRA in today's environment benefit from viewing the 72(t) IRA as a locked cage. Other than the required annual payment, nothing should go in and nothing should go out during the 72(t) payment plan term.

V. Proposals for the IRS and Treasury

It is time for the IRS and Treasury to issue proposed regulations addressing 72(t) payment plans. Below I share four main recommendations in that regard.

A. Payment Amounts That Mirror the Statute

It's time to simplify 72(t) payments and deeply root them in the statute. I recommend that payments be determined in three ways, consistent with the statutory language.

- 1) Simplified substantially equal periodic payments
- 2) Annuities purchased inside a 72(t) IRA the payouts of which conform with the RMD rules
- 3) RMD method

⁶⁶ "Stuffing" a 72(t) IRA with a non-72(t) IRA to increase a payout from a switch to the RMD method or to increase the annual RMD from a 72(t) IRA already on the RMD method confers practically no advantage to the taxpayer. The taxpayer could have achieved the same result by leaving the existing 72(t) IRA alone (possibly with a switch to the RMD method) and by electing a 72(t) payment plan under the RMD method out of the second IRA.

The only potential advantage of stuffing is the ability for those over age 54 ½ to avoid the slightly longer 72(t) payment term (five years instead of until age 59 ½). To have a rule based on a tiny potential advantage available to some taxpayers is illogical and adds unwarranted complexity.

1. Simplified Substantially Equal Periodic Payments (“Simple SEPP”)

Under my proposed Simple SEPP, for those turning 50 or older during the year, a 72(t) total annual payment equal to or less than 7 percent of the account balance is a valid initial payment. For those under age 50 by year-end, a 72(t) total annual payment equal to or less than 6.5 percent of the account balance is a valid initial payment. When looking at historic stock market returns,⁶⁷ these percentages should, generally speaking, provide for a sufficient retirement account balance to support a 72(t) payment over the owner's lifetime.

To put some numbers to the Simple SEPP, a traditional IRA of \$1 million dollars would support a 72(t) initial annual payment of up to \$70,000 per year for those 50 or older by year-end. A \$1 million traditional IRA would support a 72(t) initial annual payment of up to \$65,000 per year for those under 50 by year-end.

The Simple SEPP would replace the fixed amortization and fixed annuitization methods in a manner that aligns much more closely with the statute. The fixed amortization and fixed annuitization methods share several drawbacks, including being overly complicated, requiring an unnecessary calculation, and relying heavily on interest rates. Heavy reliance on interest rates is odd considering that 72(t) IRAs can own stocks, bonds, annuities, and other investments.

Further, the Simple SEPP honors Section 408(d)(2)(B). Under the Simple SEPP, month-to-month changes in interest rates become irrelevant. Today's fixed amortization and fixed annuitization methods inappropriately make important distinctions based on which month the first payment occurs. It's time to uphold the spirit of Section 408(d)(2)(B) by ending distinctions based on when during the year the 72(t) payment plan begins.

⁶⁷ See JL Collins, *The Simple Path to Wealth*, Author's Equity 2025, page 63, observing that over the half-century from the end of 1974 to the end of 2024, the Dow Jones Industrial Average averaged approximately 12.2 percent returns on an annualized basis.

As a practical matter, the Simple SEPP opens up 72(t) payments that are slightly larger than what is possible under today's fixed amortization method with a five percent interest rate. Considering historic stock market performance this is appropriate.

This table compares the maximum initial annual payment generated by a \$1 million traditional IRA under Notice 2022-6's fixed amortization method using a 5 percent interest rate and under the Simple SEPP method.

Age	Maximum Initial 72(t) Payment 5% Fixed Amortization	Maximum Initial 72(t) Payment Simple SEPP
49	\$59,783	\$65,000
50	\$60,312	\$70,000
58	\$66,149	\$70,000

In addition, I propose an **annual 10 percent flexibility window** to honor the use of "substantially" in the statute.

The annual 10 percent flexibility window would allow increases and decreases of up to 10 percent of the initial annual payment amount in any subsequent year.

To put numbers to the flexibility window, suppose a taxpayer started a \$100,000 annual 72(t) payment. In subsequent years, the test to determine whether an amount modification would be satisfactory would be to determine whether that year's total payment was \$90,000 to \$110,000. As long as that year's annual payment was \$90,000 to \$110,000, it would be "substantially equal" to the initial year's \$100,000 payment.

The annual 10 percent flexibility window applies flexibly every year and only with reference to the first year's total annual 72(t) payment. In theory, a taxpayer on a \$100,000 annual 72(t) payment plan could take \$5,000 extra in Year 2 (\$105,000 total), then take only \$95,000 in Year 3, and go back to \$100,000 in Year 4. All three of those payments would qualify as being substantially equal to Year 1's \$100,000 payment.

The flexibility I'm recommending is a reasonable interpretation of "substantially equal" and continues the payments as a reasonable annual stream of payments from the retirement account. There is no tax policy disadvantage to the reasonable distribution flexibility window.

As a transition rule, all current 72(t) payment plans under the fixed amortization method and fixed annuitization method prior to the finalization of the new regulations should enjoy the benefit of the annual 10 percent flexibility window.

2. Annuities

New regulations should be issued to account for SECURE 2.0 adding the new flush language to Section 72(t)(2)(A). These regulations should provide the rules for using annuities in 72(t) IRAs to generate the 72(t) payment plan.

3. RMD Method

At least initially, I question whether the RMD method should be allowed as a series of "substantially equal" periodic payments. As a financial planner, I'm not unbiased in assessing the issue. Having the potential to change to the RMD method makes 72(t) payment plans more desirable. That change dramatically reduces the amount of the annual 72(t) payment and can be very useful if the retiree comes into other sources of money, such as an inheritance, during the 72(t) payment plan term.

Despite my initial questioning, I believe there are good reasons to keep the RMD method for 72(t) payment plans.

First, the RMD method computes the first year's payment using the fixed amortization method with a 0 percent interest rate. From there, it simply says "recompute the annual payment each year, using the fixed amortization method and a 0 percent interest rate."

In a Simple SEPP world, the RMD method will always yield an initial annual payment well less than the maximum Simple SEPP annual payment. Then the RMD method simply requires recalculating that payment annually.

I believe this approach honors "substantially" in "substantially equal." The RMD method is essentially a smaller Simple SEPP annual payment with the additional wrinkle of annual recalculation.

Further, those who previously started a fixed amortization or fixed annuitization 72(t) payment plan ought to be able to continue to make the one-time change to the RMD method, as that was part of the "terms and conditions" when they started their 72(t) payment plans. Having separate sets of rules going forward in terms of the ability to switch to the RMD method is inadvisable. Separate sets of rules should be avoided as much as possible.

Thus, I believe that future regulations should both keep the RMD method as an option for the initial payment calculation and keep the option to change to the RMD method.

B. Payment Aggregation Within the Year

The regulations should aggregate all 72(t) payments taken during the year. Thus, the date or dates the payment or payments are taken during the year are irrelevant, and the number of payments during the year are irrelevant. Consistent with Section 408(d)(2)(B), only the total amount taken during the year is relevant.

C. Three Permissible Annual Payment Modifications to the Simple SEPP

The regulations should provide that for purposes of the new Simple SEPP, the following three modifications are permissible:

- 1) A one time change to the RMD method;
- 2) Any change in total annual payments within the annual 10 percent flexibility window discussed above; and,
- 3) Any change in annual payments that is both (1) done to account for deflation, inflation, and/or cost-of-living and (2) supported by a reasonable calculation.

The latter two additional permissible modifications to any later total annual payment would finally honor the word “substantially” in Section 72(t)(2)(A)(iv) in a meaningful way.

D. Eliminate Traps for the Unwary

72(t) payment plan regulations should, as much as possible, eliminate traps for the unwary, including prohibitions on breaking into jail rollovers and annual contributions.

New regulations should eliminate the rule of Notice 2022-6 Section 3.02(e) deeming any addition to a 72(t) retirement account to be an impermissible modification that blows up a 72(t) payment plan.

From a planning perspective, a change of any existing 72(t) payment plan to the RMD method is usually done to reduce—as much as possible—the annual payment. If the taxpayer wants to stuff a 72(t) IRA in a way disadvantageous to themselves, the 72(t) payment plan regulations should not prohibit that act by blowing up the 72(t) payment plan. The current Notice 2022-6 Section 3.02(e) prohibition on breaking into jail is a trap for the unwary that advances no significant tax policy objective and should be eliminated.

Further, the rules in Notice 2022-6 Section 3.02(e) should be updated to account for new Section 72(t)(4)(C) as it relates to breaking out of jail transactions.

Conclusion

The risk associated with the initial calculation is less than many might initially suspect. There are plenty of risk mitigation tactics available to taxpayers and their advisors as the calculation is made, as discussed on pages 20 through 22 of this article.

Further, three realities further mitigate the risk associated with the initial calculation. First, the additional tax exposure is, as a practical matter, limited to the early withdrawal penalty and associated underpayment interest, for just three or four years at any time due to the statute of limitations.

Second, the possibility of the Backdoor 72(t) Payment Plan might eliminate the 10 percent early withdrawal penalty in all but one or two years of the original 72(t) payment plan.

Third, recall Bruce in Example 1. His initial calculation was erroneous under Notice 2022-6. It is certainly possible that having made three \$100,000 annual payments, a court might decide that he had complied with Section 72(t)(2)(A)(iv)'s requirement to take substantially equal payments and thus his calculation error under Notice 2022-6 is irrelevant.

In my opinion, the risk magnitude significantly increases when it comes to subsequent modifications. The statute of limitations does not apply to impermissible modifications in the same way it applies to mistakes made with respect to the initial calculation. Subsequent modifications can open up many years of correct 72(t) payments to the 10 percent early withdrawal penalty and related interest.

The Backdoor 72(t) Payment Plan demonstrates that taxpayers can luck into risk mitigation when it comes to the initial calculation. The opposite is

true when it comes to payment modifications. One misstep could subject years of correctly taken 72(t) payments to both the 10 percent early withdrawal penalty and related interest.

That said, those facing controversies with respect to 72(t) payment plan modifications should think outside the box, or at least outside the four corners of Notice 2022-6. The IRS and Treasury have never issued guidance that has gone through notice and comment. Thus, distributions conforming with the 72(t) payment plan statutory language, even if they do not conform perfectly with Notice 2022-6, may ultimately succeed against the imposition of the 10 percent early withdrawal penalty.

Taxpayers and their advisors are not the only group subject to risk when it comes to 72(t) payment plans. The IRS may waste enforcement resources enforcing a notice that strays too far from the Internal Revenue Code.

Above, I have laid out the case that significant portions of Notice 2022-6 may not be sustainable from an enforcement perspective. The IRS and Treasury should do their examiners a favor and issue proposed regulations for 72(t) payment plans. Absent guidance that has been through notice and comment, IRS examiners are left to try to enforce a notice that appears to stray from the language of the Internal Revenue Code.