SECURE's Changes to Retirement Plan Distribution Rules Applicable to Participants and Beneficiaries

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About the author; acknowledgements

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I. INTRODUCTION

Signed into law December 20, 2019, SECURE has radically changed the estate planning landscape for clients' retirement benefits. Except for a few types of beneficiaries, the life expectancy payout is gone with the wind, replaced by a maximum 10-year post-death payout period for most retirement benefits. With the change going into effect less than two holiday-shortened weeks after enactment, planners will be hard pressed to complete the now urgently needed estate plan reviews.

A. Meet SECURE

For over 30 years, the go-to estate plan for the owners of tax-favored retirement plans has been the "stretch IRA": Make your IRA or other retirement plan payable to a "designated beneficiary" (or see-through trust) and the designated beneficiary (or trust) could leave the plan in its tax-deferred status for years or decades after your death, withdrawing the benefits only gradually by taking annual distributions over his or her (or the oldest trust beneficiary's) life expectancy. With the life expectancy of a 50-year-old son or daughter being 34.2 years, or that of a grandchild or great-grandchild being potentially as long as 80 years, this estate plan was understandably popular.

SECURE has swept that option away for most people. The definition of designated beneficiary hasn't changed. The definition of see-through trust hasn't changed. What has changed is the payout period for those beneficiaries: With the exception of five particular types of beneficiaries ("eligible designated beneficiaries") (EDB), the life expectancy payout has been replaced by a 10-year payout rule. So, the 50-year old son or daughter who inherits Mom's IRA will now have to withdraw the entire account within 10 years after Mom's death instead of over the 34.2-year life expectancy payout period that would have applied if Mom had died before 2020.

But even pre-2020 deaths are not spared by SECURE; they get only a partial exemption from the 10-year payout rule. See "SECURE Effective Date; Pre-2020 Deaths," below.

The rest of this Outline will examine the new SECURE regime, how it works, who it applies to, which beneficiaries are exempt, what we still don't know, and what estate planners need to do about all this.

B. Where to Find the Law

The massive budget bill enacted by Congress and signed into law by President Trump on December 20, 2019, calls for over $1.7 trillion of spending. Some of this is apparently to be paid for by accelerating the distribution of our clients' tax-deferred retirement plans.

Where to find the law: See § 401, in TITLE V—REVENUE PROVISIONS of "DIVISION O" ("SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT") of the "Further Consolidated Appropriations Act, 2020." § 401(a) of this TITLE V [confusingly numbered, since the existing minimum distribution rules are in § 401(a) of the Tax Code] adds new subparagraph (H) to § 401(a)(9) of the Code and adds new definitions in § 401(a)(9)(E).

§ 401(b) of TITLE V provides the effective date of the new provisions—and contains some more minimum distribution rules. Because the effective date provisions are not contained in the Code, they have been reproduced in Appendix A of this Outline.

One website that purports to keep track of the various versions of the law that circulated prior to its final passage is https://www.govtrack.us/congress/bills/116/hr1994/text.

This Outline also refers to the "Committee Report," which is the only "legislative history" the author has discovered: the "DESCRIPTION OF THE CHAIRMAN'S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1994, THE "SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT (SECURE) ACT OF 2019," Scheduled for Markup by the HOUSE COMMITTEE ON WAYS AND MEANS on April 2, 2019, Prepared by the Staff of the JOINT COMMITTEE ON TAXATION, April 1." This document may be found at https://www.jct.gov/publications.html?func=fileinfo&id=5180.

The provisions of SECURE refer to the "employee" because SECURE amends § 401(a)(9), which governs qualified retirement plans maintained by employers for the benefit of their employees. As a reminder, these rules also apply to IRA owners, and when applied to IRAs the word "employee" is to mean "IRA owner." Reg. § 1.408-8A-1(b). In this Outline "participant" is used to mean the employee in a qualified plan or 403(b) plan or the owner of an IRA.

C. Abbreviations and Terminology You Need to Understand this Outline

This outline is written for experienced estate planners who are familiar with the minimum distribution rules of § 401(a)(9) (pre-SECURE) and regulations thereunder and are accordingly familiar with the following terms and abbreviations used in this Outline. If further explanation is needed see the author's book *Life and Death Planning for Retirement Benefits* (8^{th} ed. 2019).

§	Symbol indicates a section of the Code or unless otherwise indicated.
Accumulation Trust.	See III(D) below.
ADP	Applicable Distribution Period. See Reg. § 1.401(a)(9)-4, -5.
Code	The Internal Revenue Code of 1986, as amended through 2019.
Conduit Trust.	See III(D) below.
DB	Designated Beneficiary.
EDB	Eligible Designated Beneficiary. See IV below.

IRA	Individual Retirement Account. See § 408.
IRS	Internal Revenue Service
NonDB	A beneficiary who is not a designated beneficiary. See III(F) below.
QCD	Qualified charitable distribution.
RBD	Required Beginning Date (for commencement of lifetime distributions)
SECURE	See I(B) above.

D. What this Outline does NOT Cover

The following aspects of SECURE's changes to the minimum distribution rules are not covered in this Outline:

✓ Certain retirement benefits that are payable in the form of annuities, where the participant had made irrevocable elections prior to 2020, are not subject to SECURE's changes to the post-death rules. This exception is not covered in this Outline.

✓ There is a delayed effective date for some collectively bargained plans and government plans. This topic is not covered in this Outline.

✓ The meaning of "attaining majority" (for purposes of determining when the 10-year rule applies to an "EDB" who is the minor child of the participant) is not covered in this Outline.

✓ One category of EDB is the "chronically ill" designated beneficiary. This Outline does not cover the requirements of this category.

II. WHAT TO TELL CLIENTS

A. First Post-SECURE Meeting with New Client

Your new client is a mature competent adult who owns, among other assets, a $3 million IRA. His general intent is to leave all his assets to his two (competent, nondisabled, adult) children. What will you tell him are his options regarding the IRA?

Point out that the IRA is a big bag of taxable income. The $3 million asset is not "really" worth $3 million, because the account contains deferred income. If he cashed it out right now the net true worth would be about $1.8 million after payment of federal and state income taxes. If he dies right now leaving that account to the children, they would have to withdraw the money over the following 10 years (maximum of 11 taxable years).

At this point consider the income tax effect on the children: If they are already in the highest brackets, the hit will be the same on them as on client. If they are in lower brackets, this much income would probably put them into higher brackets If he intends to leave the money in trust for the children rather than outright to them, due to fear of their potential divorces or other mishaps, the income taxes will be even more likely to be at the highest rate.

Is there any way to reduce this tax hit, now that the life expectancy payout is no longer available? Here are ideas practitioners are working with now. If none of these is going to appeal to or work for this client, prepare to either accept the tax hit or perhaps buy some life insurance to help pay the income tax bill at the client's death.

✓ Investigate whether any of the people the client wants to benefit with his estate are in one of the categories that still qualifies for a life expectancy payout (EDB: surviving spouse, minor child of participant, disabled/chronically ill, or less-than-10-years-younger). For example, if the client has a disabled grandchild some of the benefits could be left to a lifetime payout trust for that beneficiary.

✓ Leaving traditional retirement benefits to a charitable remainder trust can essentially eliminate the income tax on the IRA itself and provide a lifetime payout to the human beneficiaries that can replace the lost "life expectancy payout." If the client has no charitable intent whatsoever, this approach will not appeal because a substantial amount must go to the charity and the after tax dollars left for the children may not be greater than what they would have received by inheriting the IRA directly. The lifetime CRT payout idea does not work for very young beneficiaries (under 30 maybe?) due to the statutory requirements of CRTs. See Leimberg Information Services newsletters by such authors as Bruce Steiner, Esq., explaining the requirements, benefits, and limitations of this idea.

✓ If the IRA owner is in a lower tax bracket than his expected beneficiaries (which is especially likely to be the case if the "beneficiary" is going to be a trust that accumulates the IRA distributions), the IRA owner could consider doing Roth conversions during his lifetime, since he can thus absorb the tax hit at a lower rate than will apply to his future beneficiaries. The risks and nonappeal of this strategy are obvious—who wants to pay taxes today that can be put off until tomorrow? Especially when there is no guarantee what anybody's tax bracket will be "tomorrow"—or what the Roth IRA rules will be tomorrow? But in some cases it would make sense.

✓ If the tax cannot be reduced or avoided, identify how the taxes will be paid....out of the benefit distributions themselves? Buy some life insurance?

These topics are not further explored in this outline. Leimberg Information Services Inc. (LISI) newsletters by Bruce Steiner, Esq., Bob Keebler, CPA, Mike Jones, CPA and others are strongly recommended for further studies, analysis and ideas on these subjects.

B. How SECURE Affects Existing Estate Plans

The good news is, most clients' estate plans will still "work" in the sense that their designated beneficiary is still the designated beneficiary and the see-through trust is still a see-through trust. The bad news is, most plans will not work the way they were expected to work. And with SECURE, there is not one universal fix to update all clients' situations. SECURE affects different clients in very different ways. There is no one-size-fits-all change that will "fix" existing plans to accommodate SECURE.

Here are examples of what the SECURE changes mean to some client estate plan situations:

Some clients will not be affected at all

The client who does not own any retirement benefits.

The client who leaves all of her retirement benefits to charity.

These clients will be MAJOR affected; their estate plans must be reviewed and updated as soon as possible

The client whose entire estate plan for his/her retirement benefits is centered on providing a long-term stretch payout for, *e.g.*, his/her grandchildren must basically scrap the plan and start over.

Any client whose estate plan currently leaves his/her retirement benefits to a "conduit trust" should review their plan immediately. The conduit trust MIGHT still work fine–e.g., a conduit trust for a less-than-10-years-younger beneficiary. However, in many cases the conduit trust provisions will force the trustee to distribute the entire retirement plan to the conduit beneficiary within 10 years after the client's death which is probably a radically different scenario from what the client thought he/she was signing up for.

Some clients will be able to salvage their estate plan with a few changes, or no changes; but all have to be reviewed to figure out what changes are needed if any

Carol's current estate plan leaves all of her retirement benefits to a life trust for her spouse, Chuck. During Chuck's life, he is to receive, each year, all income from the retirement benefits, or the RMD if greater ("combination QTIP-conduit trust"). Since as her surviving spouse he is an EDB, this trust will still work as she intended, despite SECURE, during Chuck's life. Carol and Chuck need to look at disposition of the retirement benefits on the death of the surviving spouse.

Marcia's estate plan, written some years ago, left her IRAs to her children (who were at that time just out of school, starting to climb the career ladder, and struggling to afford a first home), and also set aside money (from other assets) to provide for Marcia's own siblings who were of limited means. With the children no longer entitled to a life expectancy payout on any IRA inherited from Marcia, and also now approaching their own peak earning years so in very high tax brackets, Marcia might switch things around and leave after-tax assets to her children and leave her IRA to her siblings (or trusts for them) because the siblings qualify for a life expectancy payout, being close to Marcia in age.

A client whose IRA is left to a "supplemental needs trust" in the form of a see-through accumulation trust for the benefit of a disabled individual can review the trust and update as necessary to make sure it qualifies as an EDB. For example, if the existing trust allows the trustee to make distributions to the disabled individual's siblings during the disabled individual's life, the trust could be amended to remove that provision so the disabled individual will be the sole life beneficiary and the trust will qualify for the life expectancy payout.

With the 10-year rule destroying the life expectancy payout, these will be the main considerations for most estate plans where retirement benefits are intended to benefit individuals:

✓ As discussed above, if the client's chosen beneficiary is the surviving spouse, a disabled or chronically ill individual, or a less-than-10-years younger person, the client's existing plan will probably still continue to work, with some tweaks possibly being required to accommodate SECURE (such as, for example, eliminating other discretionary beneficiaries from benefitting from a trust for a disabled person during the disabled person's lifetime). But for other beneficiaries:

✓ Conduit trusts could prove disastrous in some cases. Specifically, if the client strongly wanted a gradual payout over the beneficiary's lifetime, and instead is face with a 10-year payout rule, the client will have to switch to an accumulation trust, despite the accelerated taxes at high trust rates, or consider a charitable remainder trust (see below).

✓ Accumulation trusts will still work—but the trustee will be faced with a substantially accelerated tax bill, since all benefits must be distributed from the plan to the trust within 10 years. There are very limited options to avoid that tax bill, so figuring out how to pay it might be more fruitful.

✓ Most of the concerns discussed here pertain to traditional retirement plans and IRAs, where taxes are going to be substantially accelerated (and therefore probably also be in higher brackets) than under previous law. With a Roth IRA, acceleration does not increase taxes, since the distributions are tax-free—the acceleration just means loss of future tax-free growth. Thus, one response to SECURE will presumably be increased Roth conversions during life by IRA owners, especially if the IRA owner is in a lower tax bracket than he expects his beneficiary to be (often correctly if the beneficiary is a trust).

✓ A client who simply leaves his IRA outright to various individuals (e.g. his adult children) may have nothing to change. The children will have to pay taxes sooner than was previously expected, and that in turn may mean the taxes will be higher than if more spread out, but other than finding a new funding source for the taxes, or converting to a Roth IRA now if the client is in a lower bracket than his beneficiaries, there is not much that can be done about this.

✓ Charitable remainder trusts may have more appeal now for a client who has charitable intent and a desire to leave a lifetime income stream to the beneficiary rather than a 10-year payout taxed at high rates. Traditional retirement benefits can be paid income tax-free into the CRT, which then pays a lifetime stream of fixed dollar or fixed percentage payouts (taxable) to the human beneficiary.

✓ Trusteed IRAs will get some setbacks and some benefits from SECURE. The trusteed IRA must distribute all required distributions directly outright to the beneficiary, which is fine for the few beneficiaries who still qualify for the life expectancy payout. However, if the client's beneficiaries will be subject to the 10-year rule, the trusteed IRA will work only if the client wants the beneficiary to get the money that quickly. Going forward, for some clients the trusteed IRA will be a good way to qualify for whatever is the best payout period available for a particular beneficiary (10 years in most cases) without the trouble of drafting a "see through trust." Other clients may choose to give up the benefits of whatever limited "stretch" payout is available for their chosen beneficiaries and just leave their benefits to a non-see-through trust that, though it may not qualify for a stretch payout, will hold the after-tax IRA distributions on exactly the terms the client wants to provide for his/her beneficiary(ies); for those clients, a trusteed IRA would be attractive only for its lifetime advantages.

III. POST-DEATH RMD RULES: HOW SECURE FITS IN WITH THE OLD RULES

A. The Old Rules, Still Partially in Effect

To see how the SECURE changes fit into the Internal Revenue Code ("Code"), you have to first be familiar with the "old rules." The minimum distribution rules for retirement plan death benefits, until now, were entirely contained in Code section 401(a)(9)(B). As substantially enhanced and embroidered by Treasury Regulations, these pre-2020 rules were:

1. Upon the death of a retirement plan participant, the balance of his/her retirement account had to be distributed in annual instalments over the life expectancy of his/her designated beneficiary, or (if elected by the DB or required by the plan) under the paragraph #2 method, or more rapidly.

2. If the benefits were not left to a designated beneficiary, the inheritor had to withdraw the benefits within 5 years after the participant's death if the participant died before his/her required beginning date or (otherwise) in annual instalments over what would have been the remaining life expectancy of the participant if he/she had not died.

A "designated beneficiary" was (and still is) defined as an individual named as beneficiary by the participant or by the plan, or a trust so named as beneficiary if the trust met the IRS's requirements to be considered a see-through trust, in which case the life expectancy of the oldest trust beneficiary was the applicable distribution period. If a designated beneficiary died before the end of his life expectancy payout period, the next beneficiary in line (whether or not qualifying as a "designated beneficiary") stepped into the decedent's shoes and could withdraw over the remaining life expectancy of the original designated beneficiary.

There were various rules about how to calculate "life expectancy," special rules for the surviving spouse (who alone had the option to "roll over" the inherited benefits to his/her own retirement plan—that option is not part of the minimum distribution rules), and limited options for rearranging or removing beneficiaries for a short period of time after the participant's death to lock in a more favorable required minimum distribution (RMD) situation. This RMD death benefit regime remained unchanged from 2001 through 2019.

B. SECURE Nestles into the Old Rule Regime

SECURE does not amend or replace § 401(a)(9)(B) or (with one exception) any of the existing regulations. It does not change the definition of designated beneficiary. Instead, SECURE adds a new section to 401(a)(9), § 401(a)(9)(H). "(H)" layers, on top of the existing rules, new payout periods that will apply to all designated beneficiaries: A 10-year payout replaces the life expectancy payout method for all but five categories of designated beneficiaries. Those five categories ("eligible designated beneficiaries") are entitled to a modified version of the life expectancy payout.

This "layering" is for the most part carefully done and (in my opinion) shows intent to preserve as much as possible of applicable current law except for the payout period and for other matters specifically legislated in § 401(a)(9)(H).

Please note: THE DEFINITION OF DESIGNATED BENEFICIARY IS NOT CHANGED BY SECURE. IT IS WORD FOR WORD THE SAME AS BEFORE. NOTHING IN SECURE "OVERRULES" THE IRS'S EXISTING "RMD TRUST RULES." A CONDUIT TRUST IS STILL A CONDUIT TRUST AND ITS CONDUIT BENEFICIARY STILL QUALIFIES AS A DESIGNATED BENEFICIARY. A SEE-THROUGH ACCUMULATION TRUST IS STILL A SEE-THRUGH ACCUMULATION TRUST AND ITS COUNTABLE BENEFICIARIES ARE STILL THE PARTICIPANT'S DESIGNATED BENEFICIARIES.

Do all of SECURE's provisions fit perfectly and neatly into the existing Code and regulatory RMD rules? No. There are some rough edges the IRS will have to sand down with regulations, and a few questions that are truly up in the air.

Note that SECURE applies only to "certain defined contribution plans." Defined benefit plans, including certain annuity payouts in an IRA or other defined contribution plan that were already locked in prior to enactment of SECURE, are not affected. TITLE IV, § 401(b)(4). That subject is not covered in this Outline.

C. Old Vs. New Categories of Designated (and Non-) Beneficiaries

Pre-SECURE, there were two categories of beneficiaries, one of which was divided into two subcategories:

- **Beneficiary who is not a designated beneficiary** (the participant's estate, a charity, or a trust that does not qualify as a see-through trust) ("non-DB"). The 5-year rule applied to this category for benefits of participant who died before his RBD, or the participant's remaining life expectancy if participant died on or after RBD).

- **Designated beneficiary** (individual(s) or see-through trust): Entitled to life expectancy payout (or to use the non-DB rules if more favorable). A designated beneficiary could be either the surviving spouse (one set of rules) or a nonspouse beneficiary (another set of rules).

With SECURE, there are now three categories of beneficiaries, one of which has five subcategories:

- **Beneficiary who is not a designated beneficiary** (the participant's estate, a charity, or a trust that does not qualify as a see-through trust) ("non-DB"): See III(F) below regarding the post-SECURE rules for this group.

- **Designated beneficiary** (individual(s) or see-through trust): Unless "eligible" (see next category), must withdraw benefits within 10 years after the participant's death. See "The 10-year Rule" below. The general distribution rule for designated beneficiaries is now the 10-year rule—but there is an exception (allowing use of the life expectancy payout) for certain beneficiaries:

- **Eligible designated beneficiary**: This subgroup of designated beneficiaries are still entitled to (a modified version of) the life expectancy payout method:

  ✓ **The surviving spouse of the participant.** § 401(a)(9)(E)(ii)(I). The surviving spouse can still use the life expectancy payout. However on her death the exception ceases to apply and a 10-year payout applies. See "Planning for the Surviving Spouse," below.

  ✓ **Minor child of the participant.** § 401(a)(9)(E)(ii)(II). The life expectancy payout applies to a "child of the employee who has not reached majority (within the meaning of subparagraph (F)." However, upon reaching majority, the 10-year rule kicks in. See "Planning for Minor Children" below.

  ✓ **Disabled beneficiary.** The life expectancy payout applies to a designated beneficiary who is disabled (within the meaning of § 72(m)(7). Upon his/her death the 10-year payout rule kicks in. See "Planning for Disabled and Chronically Ill Beneficiaries" below.

  ✓ **Chronically ill individual.** The life expectancy payout applies to a designated beneficiary who is chronically ill (within the meaning of § 7702B(c)(2)). Upon his/her death the 10-year payout rule kicks in. See "Planning for Disabled and Chronically Ill" below.

  ✓ **Less than 10 years younger beneficiary**. The life expectancy payout applies to an individual who is not more than 10 years younger than the participant; upon his or her death, the 10 payout rule kicks in. See "Planning for Less-than-10-years-younger Beneficiary," below.

D. Effect on Conduit and Accumulation Trusts

The conclusions in this Outline are based on my reading of the statute before and after SECURE. The (brief) minimum distribution rules contained in the Code changed little or perhaps not at all from 1986 through 2019. The Treasury regulations attempting to apply this sparse statute underwent some trial and error (1987 proposed regulations; 2001 proposed regulations) before final regulations were adopted governing all defined contribution plan participants and beneficiaries for calendar years beginning after 2002. See Reg. § 1.401(a)(9)-0 through § 1.401(a)(9)-9; § 1.403(b)-6(e); § 1.408-8; § 1.408A-6, A-14, A-15; § 54.4974-1 and § 54.4974-2; § 1.402(c)-2, answers A-3(b)(2), A-7, and A-8. **These regulations have changed not at all (other than nuances developed through private letter rulings) since issuance.**

The SECURE statute itself shows awareness of these regulations; see discussion of "Planning for Disabled Beneficiary" below. See also the Committee Report, Note 230. The intent appears to be to fit within the existing regulatory rules, not replace them wholesale.

My conclusion is: Under pre-SECURE rules, two types of trusts could qualify as see-through trusts, "conduit trusts" (which automatically qualify) and "accumulation trusts" (which could be either see-through or nonqualifying). **The exact same types of trusts defined in exactly the same way still qualify as see-through trusts under the new RMD regime created by SECURE.** This conclusion is based on the fact that SECURE did not change the definition of designated beneficiary, and therefore the IRS's minimum distribution trust rules are still applicable exactly as they were pre-SECURE, except to the extent explicitly modified by SECURE. I have not yet determined whether these conclusions are universally shared and of course the Treasury has not yet spoken on SECURE.

So (I suggest) understanding the tests and definitions discussed here is still critically important to estate planning post-SECURE. For full detail and more citations on these types of trusts see Chapter 6 of the author's book *Life and Death Plannning for Retirement Benefits* (8th ed. 2019):

Under a **conduit trust**, all distributions made from the retirement plan to the trust during the lifetime of the "conduit" beneficiary of the trust must be passed out (after deduction of applicable expenses) more or less immediately to the individual life beneficiary. The conduit beneficiary is considered the sole beneficiary of that trust and of the plan for RMD purposes, regardless of who will inherit the trust and remaining plan benefits if the conduit beneficiary dies prior to complete distribution of the retirement plan, so a conduit trust "automatically" qualifies as a see-through trust. Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2.

Post-SECURE, leaving benefits to a conduit trust for a single individual beneficiary will still be treated, for minimum distribution purposes, the same as leaving the benefits outright to that individual. Accordingly, the individual will be deemed the participant's sole designated beneficiary and the trust will be entitled to the "10-year payout rule"; or, if the individual "conduit beneficiary" is an EDB, the trust will be entitled to the "life expectancy payout" exactly as such individual (as an EDB) would be entitled if named directly as beneficiary.

If the beneficiary of a conduit trust is not an EDB, then the 10-year rule will apply to the retirement benefits that are payable to that trust and the conduit beneficiary will receive outright distribution of 100% of the retirement benefits within 10 years after the participant's death (because the conduit provision requires the trustee to pass all retirement plan distributions out to the conduit beneficiary more or less immediately upon receipt).

With an **accumulation trust**, the trustee can "accumulate" retirement plan distributions in the trust during the lifetime of the initial beneficiary(ies) for possible later distribution to another beneficiary. All beneficiaries who might ever be entitled to receive such accumulations are "counted" as beneficiaries for purposes of applying the minimum distribution rules, except that a beneficiary who is a "mere potential successor" to another beneficiary is disregarded. An accumulation trust qualifies as a see-through trust only if all of the countable beneficiaries are identifiable individuals. Reg. § 1.401(a)(9)-5, A-7(c)(1).

Accumulation trusts are more complicated than conduit trusts, because an accumulation trust may or may not qualify as a see-through trust. If any "countable" beneficiary of an accumulation trust is not an individual, the trust does not qualify as a see-through.

Here is what happens to these trusts under SECURE, in my opinion:

♦ Generally, without issuance of new regulations, an accumulation trust cannot qualify for EDB treatment, even if the primary or life beneficiary of the trust is an EDB, because if the EDB is not the sole beneficiary of the participant EDB treatment does not apply. For explanation of this harsh conclusion, see "Practitioner's Wishlist" below. Exception: An accumulation trust for a disabled or chronically ill beneficiary is the exception to the rule—it can qualify for EDB treatment even though the disabled/chronically ill individual, as life beneficiary of the accumulation trust, is not deemed to be the "sole" beneficiary of the retirement plan.

♦ With the exception noted above of certain trusts for the sole life benefit of disabled or chronically ill beneficiaries, an accumulation trust that is a see-through trust must take distribution of the entire plan balance within 10 years after the participant's death.

♦ **Good news for drafters:** Since the life expectancy payout is no longer an option for accumulation trusts, it no longer matters who is the "oldest beneficiary" of the trust. For example, parent could leave an IRA to a see-through accumulation trust for the benefit of her nondisabled, non-chronically ill, adult child, with the provision that (say) the trust will be distributed outright to child at age 40, but if child dies before age 40, the trust will be distributed to parent's sister Matilda. Even though the adult child and Matilda are both considered beneficiaries of the trust, and Matilda is older than the child, it makes no difference because the 10-year rule applies regardless of the respective ages of the "countable" trust beneficiaries.

♦ An accumulation trust that does *not* qualify as a see-through trust must, as before SECURE, take distributions under the rules applicable to nonDBs (5-year rule or life expectancy of the participant). **Example:** Todd leaves his IRA to a trust for the benefit of his son Herbie. The trustee is to pay Herbie all income for life, plus principal if needed for health or support. On Herbie's death the trust is to terminate and be distributed to Charity X. Since this is not a conduit trust, both beneficiaries "count," and since one of the countable beneficiaries is not an individual the trust does not qualify as a see-through trust, therefore the nonDB rules apply.

E. The 10-year Rule

Since SECURE operates by "borrowing" the "5-year rule" of § 401(a)(9)(B)(ii) to create the 10-year rule, the 10-year rule presumably operates in the same manner as the longstanding (and still extant) 5-year rule: All amounts must be distributed by December 31 of the year that contains the 10th anniversary of the date of death; and in the interim, no distributions are required, as long as funds are out of the plan by that deadline. See Reg. 1.401(a)(9)-3, A-2. Although the statute says the deadline is the "10th anniversary of the" participant's date of death, by referencing the 5-year rule it appears the intent was to use the same approach as the regulations' interpretation of the 5-year rule, namely, that the deadline is the end of the year that contains the fifth anniversary of the date of death. The Committee Report (see I(B) above) affirms that conclusion.

The 10-year rule is imposed by SECURE in a very odd way.

Pre-SECURE, § 401(a)(9)(B)(ii) provided as follows: "(ii) 5-year rule for other cases. A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), the entire interest of the employee will be distributed within 5 years after the death of such employee."

New § 401(a)(9)(H) states that "Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii) shall be applied by substituting '10 years' for '5 years," and (II) shall apply whether or not distributions of the employee's interests have begun in accordance with" the lifetime RMD rules.

Parsing this out, we find that for a beneficiary who is not a designated beneficiary, the rules don't change, but for every designated beneficiary the NEW rule is: "A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest is completed (regardless of whether distribution had begun prior to death), the entire interest of the employee will be distributed within 10 years after the death of such employee."

Note that:

✓ The actual payout period could extend over 11 taxable years of the beneficiary. Example: Rita dies in 2020, leaving her IRA to her adult daughter Julie. Julie must withdraw the entire IRA by December 31, 2030. Assuming Rita died early enough in 2020 to allow this, Julie's distributions could be spread over 11 taxable years, 2020–2030.

✓ Unlike with the life expectancy payout, there is no requirement of annual distributions. The distributions can be made at any time or times during the 10-year period as long as the plan is totally distributed by the end of the period.

Code section 401(a)(9)(B)(iii) provides that there is an exception to the 5-year (now 10-year) general rule: Benefits payable to a designated beneficiary can be paid in annual instalments over such beneficiary's life expectancy in accordance with regulations. The new § 401(a)(9)(H) overrides this: This life expectancy payout shall apply ONLY in the case of an "*eligible* designated beneficiary."

F. NonDB Payout Rules are Unchanged

Prior to SECURE, the payout rules for a nonDB were simple: If the participant died before his RBD, the "5-year rule" applied: the nonDB had to withdraw the entire account by the end of the year that contained the fifth anniversary of the participant's death. Reg. § 1.401(a)(9)-3, A-2, A-4(a)(2), § 1.401(a)(9)-4, A-3. (SECURE borrowed the "5-year rule" to create the "10-year rule" now applicable to the nonEDB DBs of post-2019 decedents). If the participant died on or after his RBD, the nonDB had to withdraw the remaining benefits over what would have been left of the participant's life expectancy if the participant had not died. Reg. § 1.401(a)(9)-2, A-5.

SECURE did not change these rules applicable to nonDBs.

The new 10-year rule and its handful of life-expectancy exceptions are contained in new Code § 401(a)(9)(H), which begins with these words: "Except in the case of a beneficiary who is not a designated beneficiary..." Though the double negative makes it a bit hard to read, the meaning is not capable of any interpretation other than: The new 10-year rule and its exceptions do not apply to a nonDB. The House Committee Report is in accord with this interpretation: "2. The proposal changes the after-death required minimum distribution rules applicable to defined contribution plans, as defined, *with respect to required minimum distributions to designated beneficiaries*. ..." Emphasis added.

What is now up in the air is the following. Under pre-SECURE rules, IRS regulations stepped on the Code's strict and bare-bones rules by permitting a DB to use the nonDB payout rules if that would give the DB a longer payout period than the life expectancy of the DB, or if for some other reason the DB wanted the nonDB payout period to apply. See, *e.g.*, Reg § 1.401(a)(9)-3, A-4(c). This sensible rule prevented DBs from being "worse off" than the nonDB. The question is, does this "DB's choice" rule still apply?

Why this is important: Under new IRS actuarial tables that will probably take effect in 2021 (they were proposed by the IRS in November 2019), a participant's "remaining life expectancy" will be longer than 10 years if the participant dies between approximately ages 73 and 80. Thus, if the "DB's choice" rule is NOT continued, we will have the surely-not-intended result of DBs being worse off than nonDBs if the participant dies during that time period.....and the unseemly sight of practitioners scrambling to disqualify their "see-through trusts" to enable the beneficiary to take advantage of the nonDB rule.

This is a question for the IRS to resolve by regulation presumably.

IV. PLANNING FOR ELIGIBLE DESIGNATED BENEFICIARIES

There are five categories of EDB. SECURE's rules are a bit different for each category. Clients whose intended beneficiaries fall into these categories will have more planning options than the client whose beneficiaries are just "plain old DBs" and not "EDBs."

A. Planning for the Surviving Spouse

The "surviving spouse of the" participant is an EDB.

The options for leaving benefits to the surviving spouse are little changed. The surviving spouse named as (outright) beneficiary still has the option to roll over the inherited benefits to his/her own IRA or (in the case of an inherited IRA) to elect to treat it as his/her own IRA. The election/rollover rules are not minimum distribution rules and are not affected by SECURE.

A conduit trust for the surviving spouse will be entitled to all the minimum distribution benefits of the surviving spouse under the IRS's rule that the conduit beneficiary is considered the sole beneficiary of the plan. Thus:

✓ The trust does not have to commence taking RMDs until the end of the year in which the deceased participant would have reached age 72. See § 401(a)(9)(B)(iv)(I), as amended by SECURE.

✓ The spouse's life expectancy, recalculated annually, will be the Applicable Distribution Period.

✓ The 10-year rule will not apply during the spouse's life.

One common type of trust-for-spouse is the combination QTIP-conduit trust under which the spouse receives the greater of the income or the RMD each year. This model will continue to work just fine under SECURE—during the spouse's life. Upon the spouse's death, the 10-year rule kicks in. See *"**What Happens on Death of the EDB?**"* below.

A see-through accumulation trust for the surviving spouse will not be eligible for the life expectancy payout, even if the spouse is sole life beneficiary—for example, an "income only" marital trust. This type of trust would have to cash out all the benefits within 10 years after the participant's death. What then happens to the proceeds so distributed depends on the terms of the trust.

Not everyone agrees with this conclusion—see "Practitioner's Wishlist."

B. Planning for Minor Child of the Participant

As under existing rules, leaving retirement benefits for the benefit of minor children is difficult without either accelerating the taxation of the benefits or accelerating the children's control.

A conduit trust for a minor child of the participant is entitled to the same treatment the minor child, as an EDB, would have, namely, the life expectancy payout, because, as conduit beneficiary, the child is considered the "sole designated beneficiary" of the retirement plan.

However, this entitlement does not last for the child's entire life—only until he/she attains majority, at which point the trust becomes subject to the 10-year rule. § 401(a)(9)(E)(iii). Thus, all benefits would have to be distributed outright to the minor within 10 years after he/she attained majority, which may or may not be what the parents would want. Some parents are content to have their children receive their inheritances outright at a young age, other are not. Here are important points, and questions, about this EDB category:

- The EDB exception for minor children applies only to the child of the participant—not to grandchildren or any other children.

- The exception ceases to apply once the child "reaches majority (within the meaning of subparagraph [§ 401(a)(9)] (F)." § 401(a)(9)(F) is an otherwise unrelated provision that deals with payments made to a minor child being treated as paid to the surviving spouse for some obscure statutory purpose not otherwise relevant to estate planners; SECURE is apparently just borrowing a definition from this unrelated section. Presumably the child reaches majority when he or she attains the age of majority applicable in his or her state (typically 18 or 21), unless the following regulatory exception (under § 401(a)(9)(F)) applies: "... a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26. In addition, a child who is disabled within the meaning of section 72(m)(7) when the child reaches the age of majority may be treated as having not reached the age of majority so long as the child continues to be disabled." Reg. § 1.401(a)(9)-6, A-15. The author has been unable to find anyone who has any experience with what this regulatory definition means, so the topic is not covered in this Outline.

- If the minor dies prior to attaining majority, the 10-year rule would kick in at that time. See "What Happens at Death of EDB?" below.

This exception seems straightforward enough, subject to possible difficulties in determining "majority" status based on education status, which hopefully someone other than I will figure out.

How does the exception work if there is a conduit trust for multiple minors? That is unknown. Since the IRS has rarely if ever acknowledged that there can even be a conduit trust for multiple beneficiaries it might be wise to avoid this approach if seeking to qualify for the exception.

Another unknown is whether the "minors" exception would be available if the IRA is left to a trust for multiple children of the participant only some of whom are minors. Suppose the trust is required by its terms to divide immediately upon the participant's death into separate conduit trusts, one for each child. Can the minor children's subtrusts then qualify for the exception? That is unknown. Under existing IRS regulations, post-death trust divisions are ignored for purposes of determining the applicable distribution period. Reg. § 1.401(a)(9)-4, A-5(c). The SECURE drafters were apparently aware of this regulation, since SECURE specifically allows such post-death divisions to be used to establish an exception-qualifying trust for a disabled beneficiary (see "Planning for Disabled and Chronically Ill," below); the fact that SECURE does not do the same for minors' trusts suggests a negative answer, though some optimists are interpreting § 401(a)(9)(H)(iv)(I) as statutorily overruling Reg. § 1.401(a)(9)-4, A-5(c) for all EDBs.

An <u>accumulation trust</u> for the child enables the parents, through their chosen trustee, to control the funds for a longer time, until the child reaches a more mature age—but such a trust would not be an EDB because the minor child is not considered the sole beneficiary of an accumulation trust, even if he/she is the sole lifetime beneficiary. Reg. § 1.401(a)(9)-5, A-7(c)(1).Thus this trust would have to cash out the retirement plan within 10 years after the parent's death, causing an accelerated tax bill at high trust income tax rates. What happens to the after-tax proceeds left after this distribution occurs depends on the terms of the trust.

Many parents (and others seeking to benefit young children) will face this planning dilemma: They can't give control to a very young child, but distributions taxable to a trust will pay the highest possible income tax rate. The conduit trust (formerly a solution to this dilemma, due to its guaranteed designated beneficiary status and its small required distributions during the beneficiary's youth) is no longer available to solve this problem (except for children of the participant, if the participant is willing to accept a full payout 10 years after the child's attaining majority). Realistically in most cases those seeking to benefit very young beneficiaries will have to focus more on how to pay the taxes (buy life insurance?) rather than on how to defer them.

C. Planning for Disabled or Chronically Ill Beneficiary

A designated beneficiary who is "disabled (within the meaning of section 72(m)(7))" is an EDB. § 401(a)(9)(E)((ii)(III). § 72(m)(7) provides that "an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require." Entitlement to Social Security disability benefits is something of a litmus test for "disabled" status under § 72(m)(7).

A designated beneficiary who is "a chronically ill individual (within the meaning of section 7702(B)(c)(2)" is an EDB—"except that the requirements of subparagraph (A)(I) [of § 7702B(c)(2)] shall only be treated as met if there is a certification that as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature)." § 401(a)(9)(E)((ii)(IV).

The beneficiary's status as disabled or chronically ill is determined as of the date of the participant's death. Thus an able designated beneficiary who becomes disabled at some later date will not be entitled to switch over to a life expectancy payout.

On the death of the disabled or chronically ill individual, as with other EDBs, the life expectancy payout period terminates and the 10-year rule kicks in. See "What Happens on Death of EDB," below.

Trusts for disabled and/or chronically ill EDBs are given two special breaks not granted to trusts for surviving spouses, minor children, and less-than-10-years-younger beneficiaries. These breaks apply to "applicable multi beneficiary trusts," defined in § 401(a)(9)(H)(v) as:

"Applicable multi-beneficiary trust. For purposes of this subparagraph, the term "applicable multi-beneficiary trust" means a trust—

(I) which has more than one beneficiary,

(II) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph, and

(III) at least one of the beneficiaries of which is an eligible designated beneficiary described in subclause (III) [disabled] or (IV) [chronically ill] of subparagraph (E)(ii)."

Note the requirement that "all of the beneficiaries of which are treated as designated beneficiaries..." This appears to incorporate by reference the IRS's minimum distribution trust rules as contained in Reg. § 1.401(a)(9)-4, A-5(a).

Here are the two "breaks" given to an applicable multi-beneficiary trust:

- If the trust is required by the terms of the trust instrument to be divided immediately upon the death of the employee into separate trusts for each beneficiary, the payout rules "shall be applied separately with respect to the portion of the employee's interest that is payable to" any disabled or chronically ill EDB. § 401(a)(9)(H)(iv)(I), (v). NOTE: The statute does not grant any such "grace" to other trusts to be divided immediately into separate trusts upon the participant's death, even if following such division one of the separate trusts is solely for the benefit of the participant's surviving spouse, minor child, or less-than-10-years-younger beneficiary. Could the IRS extend that grace by regulation, effectively repealing Reg. § 1.401(a)(9)-4, A-5(c)? Since that regulation was inserted into the final regulations without any notice or hearing, and since it was a 100% reversal of the IRS's prior ruling position, it's about time for that regulation to go. Also note: Apparently, the portion "payable to" the disabled/chronically ill EDB means the portion payable to either a conduit trust or a see-through accumulation trust for the sole life benefit of that EDB (see next bullet point).

- If under the terms of the trust [or subtrust created as provided in the preceding paragraph] "(II) no individual (other than a eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii)) [*i.e.*, a disabled or chronically ill individual] has any right to the employee's interest in the plan until the death of *all such eligible designated beneficiaries* with respect to the trust," then the life expectancy exception "shall apply to the distribution of the employee's interest and any beneficiary who is not such an [EDB] shall be treated as a beneficiary of the [EDB] upon the death of such" EDB. § 401(a)(9)(H)(iv)(II), (v).

This exception, by its reference to "all such" EDBs, clearly contemplates a trust that benefits multiple disabled/chronically ill EDBs within a single trust or subtrust. Strangely, no other section of SECURE mentions the possibility of multiple EDBs within a single trust—see "**What we don't know**," below.

How is this treatment different than for other EDBs? For one thing, this special rule is saying the disabled or chronically ill EDB does not have to be the "sole" beneficiary of the trust—just the sole *life* beneficiary. Thus an accumulation trust for a disabled beneficiary, for example, could get the life expectancy payout treatment, even though (under the regulations) the disabled beneficiary is not considered the sole trust beneficiary.

In the case of the surviving spouse, minor child, or less-than-10-years-younger individual, the trust would get the EDB's life expectancy payout treatment only if it were a conduit trust, since that is the only way the EDB would be considered the sole beneficiary.

This special rule "overrules" the IRS's normal rule that, when retirement benefits are left to a single trust, which then immediately divides into separate subtrusts for separate beneficiaries, such division does not create separate accounts for purposes of determining the applicable distribution period unless the separate subtrusts were each named separately as beneficiary in the beneficiary designation form. See Reg. § 1.401(a)(9)-4, A-5(c), as applied in PLRs 2003-17041, 2003-17043, 2003-17044, 2004-32027–2004-32029, 2004-44033–2004-44034, and 2015-03024.Under SECURE's special rule in § 401(a)(9)(H)(iv)(I), separate subtrusts can be treated as separate accounts even if not so separately named in the beneficiary designation form—for the sake of a disabled or chronically ill individual.

Unfortunately, by spelling out a rule whereby a separated-at-death subtrust or life-income-only nonconduit trust for a disabled or chronically ill beneficiary can qualify for the life expectancy payout, this provision of SECURE could be read as signaling that no such grace can be granted to subtrusts or nonconduit life trusts for the benefit of other EDBs.

D. Planning for Less-than-10-years-younger Beneficiary

The final category of EDB is "an individual [who is not a surviving spouse, minor child, disabled or chronically ill individual and] who is not more than 10 years younger than the employee." As with other EDBs, the exception permitting a life expectancy payout ends at the death of the EDB; see "What Happens on Death of the EDB?," below.

For a small number of clients, this exception will work perfectly. For example, an unmarried older individual whose chosen beneficiaries are his/her siblings:

Patty Example: Patty never married. Now age 75, she wishes to leave her $3 million IRA to her three siblings, all of whom are older than age 65. Each sibling, as an EDB, will be able to withdraw his or her share of the inherited IRA over his or her life expectancy (assuming they divide the inherited IRA into separate accounts by 12/31 of the year after the year of Patty's death). This is exactly what Patty wanted to achieve in her estate plan, and it still works under the new rules. The only difference is, as each sibling dies, his or her inherited IRA will become subject to the 10-year rule. While that is not a welcome modification, the family can deal with it. For example, Sibling #1 might decide to name the surviving siblings as her successor beneficiaries, knowing that they could use and might welcome the additional money, and name a charity as contingent beneficiary, giving the surviving siblings the option to disclaim the IRA to the charity if it turns out they don't need the money.

E. What Happens on Death of the EDB?

As we have seen, EDBs are entitled to an "exception" from application of the 10-year rule: The EDB is entitled to a life expectancy payout, just like all designated beneficiaries used to get in the old days (though the minor child's right to the exception ends at majority). Upon the EDB's death, however, § 401(a)(9)(H)(iii) provides that "the exception under clause (ii) [granting life expectancy payout to the EDB] shall not apply *to any beneficiary of such eligible designated beneficiary* and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary." Emphasis added.

This means exactly what it appears to mean according to the Committee Report (page 94): "Further, under the proposal, the 10-year rule also applies after the death of an eligible beneficiary or after a child reaches the age of majority. Thus, for example, if a disabled child of an employee (or IRA owner) is an eligible beneficiary of a parent who dies when the child is age 20 and the child dies at age 30, even though 52.1 years remain in measurement period,[242] the disabled child's remaining beneficiary interest must be distributed by the end of the tenth year following the death of the disabled child. If a child is an eligible beneficiary based on having not reached the age of majority before the employee's (or IRA owner's) death, the 10-year rule applies beginning with the earlier of the date of the child's death or the date that the child reaches the age of majority. The child's entire interest must be distributed by the end of the tenth year following that date."

So if (for example) a surviving spouse who is life beneficiary of a conduit trust established by the deceased participant later dies while there is still something left in the retirement plan, the RMD schedule after her death would be as follows:

- The RMD for the year of the spouse's death, calculated based on her life expectancy as usual, must be distributed by year-end if it was not distributed prior to her death.

- All remaining assets must be distributed to the trust by December 31 of the year that contains the 10th anniversary of the spouse's death.

Hopefully, the term "beneficiary of such eligible designated beneficiary" merely means the "successor beneficiary" of the original EDB (whoever or whatever that may be) or (even better) "whoever becomes entitled to ownership of the benefits at that point." The term *sounds* as if it means the beneficiary who was designated by the EDB him or herself to succeed to the benefits after the EDB's death. However, if the EDB's benefits are in a trust, the EDB would never have the option to actually name or designate a beneficiary—the benefits just pass to the remainder beneficiary of the trust. In such a case the EDB never has "a beneficiary" in any normal sense of the term. This is the type of rough edge the IRS will need to sand down with regulations.

F. Practitioners' Wish List

A number of practitioners have voiced disagreement with the above interpretation of the EDB rules. For example, some think that if all beneficiaries of an accumulation trust are EDBs, the life expectancy payout should be allowed:

Ed Example: Ed dies after 2019, leaving his IRA to an accumulation trust for the life benefit of his nondisabled less-than-10-years-younger sister Katy. On Katy's death the trust will terminate and pass immediately outright to Ed's nondisabled less-than-10-years-younger brother Manuel. Since all countable beneficiaries of the trust are EDBs, Ed believes the life expectancy payout should be allowed to continue even after Katy's death.

Maybe Ed is right. Since the whole "EDB" concept is entirely new with SECURE, no prior regulation deals with this possibility. It is the author's conclusion that only future Treasury regulations could authorize this interpretation. SECURE calls for the 10-year rule to kick in at the death of "the" EDB, as if there can be only one. Of course as noted elsewhere herein SECURE sometimes seems to ignore the possibility of multiple designated beneficiaries and other times seems to assume that possibility exists and the effects are obvious (they are not) (see the rule for "applicable multi-beneficiary trusts").

Zelda agrees that under the "old" rule, conduit payments to the life beneficiary of a conduit trust had to continue for the entire lifetime of the conduit beneficiary. But, says Zelda, for a (non-EDB) conduit beneficiary post-SECURE the longest payout possible is 10 years...therefore, Zelda thinks, the conduit requirement (all IRA distributions must be paid out forthwith to the conduit beneficiary) should also continue for only 10 years. I cannot see an argument for this. For one thing, that interpretation would permit the trustee to take NO IRA distributions for the entire 10 years...take all money out at the end of that period...and then pay it to someone other than the conduit beneficiary? The conduit concept derives from the Code's iron-clad and still extant rule that the payout period depends on the identity of the beneficiary—i.e. WHO IS ACTUALLY GOING TO GET THE MONEY? The concept that somehow we can ignore who actually gets the money and impose an arbitrary limit on the conduit duration is a nonstarter under existing rules (so would require legislation or a new regulation to implement)....but will be a nonstarter even under SECURE because nobody other than Zelda is looking for ways to separate the payout period from the identity of the actual recipient of the benefits.

Larz thinks the regulations should now be loosened up, so that the life expectancy (for EDBs) or 10-year payout (for plain old DBs) would be available for accumulation trusts that would ultimately pass to charity, or that a mere "life beneficiary" should be treated the same under SECURE as a "conduit beneficiary" was treated pre-SECURE (i.e., as the "sole beneficiary" of the retirement benefits). Possibly the IRS will take that approach through new regulations now that the stakes are not so high—*e.g.*, permitting the 10-year rule for some trusts that would not have qualified for a life expectancy payout under the old rules. On the other hand the IRS may take the view that, since Congress has most rudely and forcefully expressed its dislike of long post-death payout periods for retirement benefits, the IRS might conclude that this is not the time for it to jump in and loosen the rules to resurrect the longer payout periods SECURE has killed. We shall have to wait and see.

G. Don't Confuse the Payout Rule with the Trust Terms

There is a tendency to confuse the payout rule applicable to a trust with the terms of the trust itself. Whatever payout rule applies to the trust (10-year rule, 5-year rule, etc.) does not change the terms of the trust....it just dictates when the trustee must withdraw all the money from the retirement plan, not what the trustee can/must do with that distribution once received (except in the case of a conduit trust that requires all plan distributions to be forthwith transmitted to the conduit beneficiary).

Edie Example: Edie leaves her IRA to a see-through accumulation trust for the life benefit of her son Ian. The trustee is to use all income and principal as the trustee deems advisable for Ian's benefit. Upon Ian's death the trust is to terminate and be distributed outright to Ian's four children. Edie dies in 2020. The trustee must withdraw all of the IRA money no later than December 31, 2030. But that doesn't mean the trust will suddenly terminate in 2030. The trustee will continue to hold the after-tax proceeds of the IRA distribution on the same trust terms as before until Ian's death.

V. SECURE'S RULE FOR PRE-2020 DEATHS

§ 401(b) of SECURE is entitled "effective dates," which it does provide, but this section also provides various exceptions to the new regime. Since this part of SECURE is not included in the Internal Revenue Code, it has been reproduced in full in Appendix A of this Outline.

A. Partial exemption for pre-2020 deaths

Generally, SECURE's amendments to the post-death minimum distribution rules "shall apply to distributions with respect to employees who die after December 31, 2019." However, the following language in Section 403(b) of the Act makes a grab for benefits of pre-2020 decedents also.

Whereas most of SECURE's other changes are fairly clear (with inevitable questions for particular situations), the attempt to impose the rule on pre-2020 deaths cannot realistically be implemented, except in the simplest situations, without regulatory interpretation of the language italicized in the following quote:

"(5) EXCEPTION FOR CERTAIN BENEFICIARIES.—

(A) IN GENERAL.—If an employee dies before the effective date [*i.e.*, before 2020] then, in applying the amendments made by this section to *such employee's designated beneficiary* who dies after such date—

(i) such amendments shall apply to *any beneficiary of such designated beneficiary*; and

(ii) the designated beneficiary [*i.e.*, the dying-post-2019 designated beneficiary of the died-before-2020 participant] shall be treated as an eligible designated beneficiary for purposes of applying section 401(a)(9)(H)(ii) of the Internal Revenue Code of 1986 (as in effect after such amendments)."

The referenced section of 401(a)(9)(H) is the one providing that, upon the death of an Eligible Designated Beneficiary who was enjoying the life expectancy payout, the 10-year rule kicks in.

B. What Does (A)(i) Mean?

The above-quoted pre-2020 deaths rule appears unclear on its face. Subparagraph (ii) could be clear on its own terms in some situations (see "C" below): it seems to say, when the original designated beneficiary dies, the 10-year-rule kicks in just as if (under the post-2020-deaths rules) such original designated beneficiary had been an EDB. However, subparagraph (i) seems to suggest the opposite: When the original designated beneficiary dies post-2020, we will start looking at HIS (or her) beneficiary to see if such (successor) beneficiary is a designated beneficiary, EDB, or non-designated beneficiary, then we'll apply the appropriate "new rule" distribution period based on the result of that examination.

To resolve this potential contradiction, I have assumed that the meaning of "(i)" is, "SECURE shall be applied to the benefits of a pre-2020 decedent upon the post-2019 death of such pre-2020 decedent's designated beneficiary, only in the manner and to the extent provided in (ii)." The following sections present the issues arising under this "simpler" interpretation.

Is it unfair to apply SECURE retroactively?

The retroactive application of the 10-year rule seems on the face of it unfair. The deceased participant planned his estate distribution in full conformity with the law at the time and cannot make changes from the grave. On the other hand, the fault may lie with the Treasury's pre-SECURE regulatory approach to the life expectancy payout: Where the Code grants a life expectancy payout to a "designated beneficiary," did it ever make sense to continue the life-payout beyond the death of that designated beneficiary? Perhaps, in retrospect, this change was inevitable.

C. Pre-2020 Decedent with Just One DB

In the simple situations of a single designated beneficiary (either outright or through a conduit trust), this "effective date rule" (hereinafter referred to as SECURE's pre-2020 deaths rule) works as the writers seem to have visualized, at least if that single beneficiary dies after 2019:

Single Designated Beneficiary Example (Outright): Gloria died in 2012, leaving her IRA to her son Alfred as sole designated beneficiary. Since then, Alfred has been taking annual minimum required distributions from the inherited IRA computed based on his 34.2-year life expectancy. Alfred names his son Carl as successor beneficiary to the account in case Alfred dies in less than 34.2 years. Alfred dies in 2020, when there are still over 20 years left in his original "life expectancy" Applicable Distribution Period. [Note: new IRS life expectancy tables are planned effective beginning in 2021, which will extend all "life expectancies" somewhat.] Under the old rules, grandson Carl would simply step into the shoes of the deceased designated beneficiary Alfred and take distributions over the remaining 26 years of Alfred's life expectancy. Thanks to SECURE, grandson Carl is subject, instead, to the 10-year rule. He will have to withdraw the entire remaining balance of this inherited IRA by December 31, 2030.

But: Suppose Gloria's son Alfred, having survived Gloria, then ALSO died prior to 2020. Alfred was unquestionably the "sole designated beneficiary" of Gloria. On his death in, say, 2018, his interest passed to grandson Carl, who continued taking the RMDs Alfred would have been required to take had Alfred not died prior to the end of his life expectancy. SECURE's pre-2020-deaths rule apparently does not apply and can never apply to this inherited IRA since BOTH the participant AND her designated beneficiary died prior to the 2020 effective date.

Single Designated Beneficiary Example (Conduit Trust); conduit beneficiary dies after 2019: Phyllis died in 2012, leaving her IRA to a conduit trust for the sole life benefit of her son Todd. Since then, the trustee of the conduit trust has been taking annual minimum required distributions from the inherited IRA computed based on Todd's 34.2-year life expectancy (and additional distributions in the trustee's discretion) and passing out all such distributions (required or discretionary) (after payment of applicable fees and expenses) to Todd (or for his benefit). Phyllis's trust provides that if Todd dies when there is still money left in the IRA, the trust ceases to be a conduit trust, and instead continues as a "family pot" trust for the benefit of Phyllis's five grandchildren: The Trustee is to hold all trust funds, including IRA distributions, in trust, using the income and principal of the trust as the trustee deems advisable for the health, education, and support of such grandchildren until the youngest grandchild reaches age 35 at which time all remaining trust assets are passed out to the surviving grandchild(ren). Todd dies in 2020, when there are still over 25 years left in his original life expectancy Applicable Distribution Period. Pre-SECURE, the trustee could withdraw the remaining IRA assets gradually over what was left of Todd's life expectancy, then distribute them to or for the benefit of the grandchildren either immediately or in a later year. Under SECURE, the trustee will have to withdraw the entire remaining balance of this inherited IRA by December 31, 2030. He will then administer the remaining funds (after payment of tax on the IRA distributions, to the extent such distributions are not passed out to the trust beneficiaries as DNI) for the benefit of the grandchildren as provided in the trust instrument.

Beyond this simple situation of one-individual-designated-beneficiary-who-dies-post-2019, however, application of the pre-2020 deaths rule is not clear. In particular it is not clear what will happen if the pre-2020 decedent left his benefits to multiple designated beneficiaries or to a see-through accumulation trust.

D. Benefits Left to Multiple Designated Beneficiaries

Despite the apparently contrary impression of the SECURE drafters, a retirement plan participant is not limited to a single designated beneficiary. See for example the following regulations applicable to multiple designated beneficiaries. If the participant has more than one beneficiary:

✓ The participant has no Designated Beneficiary unless all of the beneficiaries are individuals. Reg. § 1.401(a)(9)-4, A-3, third sentence.

✓ If all of the beneficiaries are individuals, the ADP is the oldest beneficiary's life expectancy. Reg. § 1.401(a)(9)-5, A-7(a)(1).

So if a pre-2020 decedent left his IRA to multiple designated beneficiaries does the 10-year rule kick in when ALL OF THEM die after 2019? Or when THE OLDEST ONE dies after 2019? Or when ANY ONE OF THEM DIES after 2019? Or when some newly-created category such as "primary designated beneficiary" dies?

This situation is most likely to arise when the pre-2020 decedent's benefits were left to an accumulation trust:

E. Benefits Left to Accumulation Trust

With an accumulation trust, all beneficiaries of the trust are "countable" (except beneficiaries who are "mere potential successors" of other beneficiaries) and all such countable beneficiaries must be individuals for the trust to qualify as a see-through trust. The life expectancy of the oldest such countable beneficiary then becomes the Applicable Distribution Period for the trust.

So under such a trust, who is the participant's "designated beneficiary" upon whose death SECURE requires that the life expectancy payout ends and is replaced with the 10-year rule? Are all countable beneficiaries considered "designated beneficiaries" of the pre-2020-decedent? Or is only the oldest beneficiary, whose life expectancy dictated the ADP, considered "the" designated beneficiary of that pre-2020 decedent? Or is there to be some new subset category such as "principal" designated beneficiary?

If the legislation is to be interpreted strictly in favor of the taxpayers whose estate plans SECURE seeks to upend, the 10-year rule will not apply to the accumulation trust of a pre-2020 decedent until all of the trust's countable beneficiaries have died. But another interpretation would be that the life expectancy payout will end at the death of the oldest trust beneficiary, the individual whose life expectancy is the ADP. Or will the Treasury have to invent a new category of designated beneficiary to apply this rule such as "the trust's primary designated beneficiary?"

It is clear under the regulations that a participant can have multiple designated beneficiaries. See, e.g., Reg. § 1.401(a)(9)-5, A-4 (meaning of spouse is "sole designated benfeiciary), and A-7(a): "General rule. (1) Except as otherwise provided in paragraph (c) of this A-7, *if more than one individual is designated as a beneficiary* with respect to an employee as of the applicable date for determining the designated beneficiary under A-4 of § 1.401(a)(9)-4, *the designated beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the applicable distribution period.*" Emphasis added.

From that language it is clear: There can be multiple designated beneficiaries. The oldest one of them will be considered "the" designated beneficiary *for one specific purpose*—determining which life expectancy will be the ADP. But all of them are the participant's "designated beneficiaries."

Unfortunately that distinction is sometimes elided in various writings including private letter rulings, so that instead of saying "All of these individual countable trust beneficiaries are the decedent's designated beneficiaries, and the oldest one is 'the' designated beneficiary for purposes of determining the ADP, i.e., his or her life expectancy will be the ADP," the writer will say "X is the oldest beneficiary so X is the designated beneficiary," as if the definition of designated beneficiary meant ONLY the oldest beneficiary.

That confusion of terminology will compound the difficulty of discovering a workable way to apply SECURE's pre-2020-deaths rule to accumulation trusts.

F. Opinion: All the DBs Must Die

If the trust qualifies as a see-through, all the countable individuals are regarded as designated beneficiaries of the deceased participant: From Reg. § 1.401(a)(9)-5, A-7(c)(1): "Thus, for example, if the first beneficiary has a right to all income with respect to an employee's individual account during that beneficiary's life and a second beneficiary has a right to the principal but only after the death of the first income beneficiary (any portion of the principal distributed during the life of the first income beneficiary to be held in trust until that first beneficiary's death), *both beneficiaries must be taken into account* in determining the beneficiary with the shortest life expectancy and whether only individuals are beneficiaries." Emphasis added.

With an accumulation trust, the oldest countable beneficiary's life expectancy becomes the Applicable Distribution Period for the trust. This fact leads to a tendency among practitioners, and even the IRS in Private Letter Rulings, sometimes to refer to the oldest beneficiary as "the" designated beneficiary of the participant. However, the regulation is clear: All countable beneficiaries of the trust are the participant's designated beneficiaries.

PLR 2008-43042 perfectly illustrates the dilemma of trying to apply SECURE's pre-2020-deaths rule to a typical see-through trust. In this PLR, the decedent's IRA was left to an accumulation trust for the benefit of his child, C, with the trustee directed to pay the income to C, plus principal if needed for health, education, maintenance and support. The trust would terminate and be distributed outright to C in stages at various ages, with the final distribution to occur when C attained age 40. If C died before that age, the trust would terminate and be distributed outright to C's mother B. The IRS ruled that the trust qualified as a "see-through trust" and that "Individuals B and C are the only individuals who need to be considered for purposes of determining who is the designated beneficiary of IRA X." Since B was the older, her life expectancy was the ADP for the IRA.

In the above PLR 2008-43042 situation, upon whose death does the 10-year rule kick in? There are three possibilities:

Mother's death? Mother B's life expectancy is the ADP—if she dies must the IRA be totally distributed within 10 years after her death, even if C is then only two years old? Clearly that would make no sense. Mother was not only not the "primary" beneficiary of the trust, she was actuarially extremely unlikely to ever receive a dollar from the decedent's IRA...she would have been entitled to benefits only if her child died before age 40. Note: This difficulty arises directly from the IRS's strict past regulatory approach of considering remainder beneficiaries of an accumulation trust as countable designated beneficiaries regardless of how minimal the actuarial value of their interest.

Child's death? Does the 10-year rule kick in if child C dies before age 40? That would seem to make sense since the trust is clearly for his primary (probably sole) benefit....but there is no category or definition under present law by which C's death would have any significance for purposes of the minimum distribution rules. He is just one of multiple countable trust beneficiaries as far as the minimum distribution rules are concerned, with no special status at all. Thus, though it would make the most sense to treat C's death as the trigger for the 10-year rule to apply, this simply cannot be done without new legislation or regulations.

Deaths of both beneficiaries? In my opinion, the 10-year rule should not apply to this IRA until BOTH B and C are deceased. Both of them are the deceased participant's designated beneficiaries under the definition in Reg. § 1.401(a)(9)-5, A-7(c)(1). Since the statute is unclear (it applies when "such employee's designated beneficiary" dies after 2019, without specifying what happens if such employee's benefits were left to multiple designated beneficiaries), it should be interpreted most favorably to the taxpayer.

VI. WHAT WE DON'T KNOW

In addition to the unknowns mentioned throughout this Outline, the biggest "unknown" at this time is how SECURE will apply to trusts with multiple beneficiaries. For example, suppose Parent leaves his $1 million IRA to a conduit trust for his three minor children. All three are EDBs.

If Parent left the IRA in equal shares to three separate conduit trusts, one for each child, each child's trust would clearly be entitled to the life expectancy payout, flipping to the 10-year rule as each child reached majority. But if all three are beneficiaries of the same trust....now what? We would assume that, if all beneficiaries of a conduit trust are EDBs, the trust must get the life expectancy payout...and perhaps the IRS's existing regulation (oldest DB's life expectancy is the Applicable Distribution Period for the trust) would apply...and the trust would flip to the 10-year rule when the oldest child reached majority? That would be as close as you can come to applying the new rules using the existing regulations. But Parent might be unhappy with this acceleration upon the oldest child's reaching majority especially if the youngest ones are much younger.

Another mystery: What if the participant's surviving spouse is also disabled, so she qualifies as an EDB in two categories. Who chooses which set of EDB rules applies?

The multi-EDB question has no analogy in pre-SECURE regulations. Pre-SECURE, there was only one type of designated beneficiary who had special status, the participant's surviving spouse...and by definition there could be only one surviving spouse, so this category of problems did not arise.

Another unknown: There is an apparent contradiction in the provisions about what happens on the death of an EDB who was receiving a life expectancy payout. § 401(a)(9)(H)(iii) says "the exception under clause (ii) shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary." I.e., when the EDB dies, the 10-year rule kicks in regardless of what beneficiary is next in line. But: The special rules for an "applicable multi-beneficiary trust" indicate that a trust established for the sole life benefit of a disabled/chronically ill beneficiary is entitled to the "(B"(iii)" life expectancy payout (even if it is not a conduit trust), and "upon the death of such" EDB, "any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary." This may be intended to mean merely that the 10-year rule kicks in when the disabled/chronically ill life beneficiary dies....but by limiting its application to "any beneficiary who is not an" EDB the statute leaves up in the air...what happens if, upon death of the disabled/chronically ill life beneficiary, the successor beneficiary is also an EDB?

VII. PRACTITIONER TO DO LIST

First, check all estates your firm is currently administering. If still within the deadline for qualified disclaimers (generally nine months from the date of death), consider whether a qualified disclaimer could improve RMD results for any pre-2020 decedent's heirs.

Example: Dad died in November 2019, leaving his $1 million IRA to Mom as primary beneficiary with their three nondisabled adult children as contingent beneficiaries. If Mom accepts the IRA, rolls it over to her own IRA, and dies after 2019 leaving it to the children [the typically recommended scenario pre-SECURE], the best payout period the children will get is 10 years. If she doesn't need the money, she could consider disclaiming the IRA and allowing it to pass to the children as Dad's contingent beneficiaries. As beneficiaries of a pre-2020 decedent, the children would be entitled to a life expectancy payout.

Then, contact all clients for whom retirement benefits are a significant part of their estate plan, explain what has happened and urge a review of the plan. Perhaps review, on your own motion without charge, recently completed estate plans, so you can suggest possible changes. Review the new landscape of planning choices described in this Outline and when the client chooses one, implement the plan.

VIII. SECURE'S LIFETIME CHANGES

Most of this Outline is about SECURE's changes to the post-death minimum distribution rules, but SECURE also makes some changes to lifetime rules.

A. Starting Age for RMDs Increased from 70½ to 72

Although most of SECURE's changes deal with post-death minimum distribution rules, there is one change to the lifetime rules: A delay in the starting point for RMDs. For any individual born after June 30, 1949, the required beginning date is April 1 of the year after the year in which such individual reaches age 72 (or, in the case of certain plans, if he or she is still working, after the year in which he or she retires if later). Previously the trigger age was 70½.

As a result of this change, no IRA owner will have a required beginning date in 2021:

Example: John was born June 30, 1949. He reaches age 70½ on December 30, 2019. Because he turned 70½ before 2020, he is still governed by the old rule. The required beginning date for his IRA is still April 1, 2020. Jane was born a day after John, on July 1, 1949. She will reach age 70½ a day later too, on January 1, 2020—so she is governed by the new rule. Her required beginning date will not be until April 1 of 2022, the year after the year (2021) in which she turns age 72.

"Age 70½" was not completely eliminated from the Code however. It is still the trigger age for making qualified charitable contributions (QCDs). A QCD must still be "made on or after the date that the individual for whose benefit the plan is maintained has attained age 70½." § 408(d)(8)(B)(ii). See "C" below for a new SECURE rule affecting QCDs.

B. Age Cap for Traditional IRA Contributions Removed

From the inception of IRAs in 1974 (year ERISA was passed, the law that among many other things created IRAs), an individual could not contribute to a traditional IRA in or after the year in which he/she reached age 70½. See § 219(d)(1) as it existed prior to 2020. Traditional IRAs were the only type of retirement plan that had an age cap on contributions. § 107(a) of SECURE repeals § 219(d)(1). Starting in 2020, any worker can contribute to a traditional IRA regardless of age.

C. QCD Exclusion Limited By Post-Age-70½ Deductible IRA Contributions

SECURE made a slight change in the QCD rules to avoid potential game-playing due to elimination of the age cap on IRA contributions. An individual's IRA contributions may or may not be tax deductible depending on such individual's gross income and participation in employer retirement plans (or on the income and plan participation of the individual and his or her spouse); see § 219 for details. With removal of the age cap on IRA contributions, an individual could (without the following SECURE-imposed change) make a tax-deductible IRA contribution and an income-excludable QCD with the same dollars. SECURE prevents this "double dipping" by modifying the income exclusion for QCDs.

A QCD is normally excludable from the IRA owner's gross income up to a maximum of $100,000 per year. SECURE reduces the individual's permitted exclusion by the amount of post-age-70½-year deductible IRA contributions. See § 408(d)(8)(A), as amended by SECURE effective for years after 2019:

> "The amount of distributions not includible in gross income by reason of the preceding sentence for a taxable year (determined without regard to this sentence) shall be reduced (but not below zero) by an amount equal to the excess of—
>
> > (I) the aggregate amount of deductions allowed to the taxpayer under section 219 for all taxable years ending on or after the date the taxpayer attains age 70½, over
>
> (ii) the aggregate amount of reductions under this sentence for all taxable years preceding the current taxable year."

The new income exclusion amount for a QCD therefore is: The individual's total QCDs for the year (up to a maximum of $100,000), minus "the aggregate amount of deductions allowed to the taxpayer under section 219 for all taxable years ending on or after the date the taxpayer attains age 70½." Once a deductible IRA contribution has been used by the Tax Code to offset/reduce the QCD income exclusion, it expires for that use and won't affect future QCDs.

Note: Contributions to a SEP-IRA (see § 408(k)) will NOT have this effect of reducing the QCD income exclusion cap. SEP-IRA contributions are deductible under § 404(h), not § 219.

Martin Example: In 2020, Martin, who is single, turns age 70½ and has compensation income of $50,000. He is not a participant in any employer retirement plan. He makes a tax-deductible contribution of $7,000 to his traditional IRA for 2020. In the same year, after his age 70½ "birthday," he transfers $100,000 (maximum QCD amount) from one of his traditional IRAs to his favorite charity. Only $93,000 of the contribution is excludable from his 2020 income. In 2021, Martin makes another traditional IRA contribution, but this one is not tax-deductible due to his new high-paying job and participation in an employer retirement plan. He again makes a $100,000 QCD. Because the SECURE-added limitation applied to him in 2020, and penalized him in 2020 to the full extent of his $7,000 tax deductible 2020 IRA contribution, his 2021 $100,000 QCD is fully excludable from his 2021 gross income.

Dorothy Example: In 2020, Dorothy, who is single, turns age 70½ and has compensation income of $60,000. She is not a participant in any employer retirement plan. She makes a tax-deductible contribution of $7,000 to her traditional IRA for 2020. In the same year, after her age 70½ "birthday," she transfers $30,000 from one of her traditional IRAs to her favorite charity. Her 2020 income-excludable QCD amount is only $23,000: Total QCD ($30,000) reduced by tax-deductible IRA contribution ($7,000). $7,000 of her QCD will be includible in her 2020 gross income.

Louise Example: In 2020, Louise, who is single, turns age 70½ and has compensation income of $60,000. She is not a participant in any employer retirement plan. She owns a substantial IRA. She makes a tax-deductible contribution of $7,000 to her traditional IRA for 2020. She makes no QCDs in 2020 or 2021 and no further traditional IRA contributions at all, ever. In 2022, the RMD from her IRA is $75,000. She satisfies this RMD by transferring $75,000 from her IRA to her favorite charities via QCDs. Unfortunately for her, SECURE "remembers" the $7,000 tax deduction she took in 2020 for a post-age-70½ IRA contribution. Accordingly, only $68,000 ($75,000 minus $7,000) of her 2022 QCD is excludable from her income. $7,000 of her normally-income-tax-free QCD is includible in her gross income. Once she has paid that debt to society, her future QCDs will be totally income-excludable (up to $100,000 per year) provided she is a good girl and does not make any more tax deductible IRA contributions.

In reality, few may be affected by this particular change in the law. An individual who is working and earning after age 70½, and who wants to continue contributing to retirement plans, is usually best served by participating in a qualified employer plan (even a "solo 401(k)" if self-employed), rolling all traditional IRAs into the qualified plan, and making a non-tax-deductible IRA contribution followed by a back-door Roth conversion.

D. Qualified Plans Can Be Created After Year-End

Until now, if you wanted to set up a "401(k)" or other qualified retirement plan for your business, you had to act before the end of the year to get a contribution/deduction for that year. This was unlike IRAs (including SEP-IRAs) which could be set up after the end of the year retroactively any time up to the due date of the tax return for the year. Now this grace period is extended to qualified plans beginning with the 2020 year (sorry, can't do it for a 2019 deduction). A qualified plan can be set up, effective for 2020 or any later year, as late as the due date (including extensions) of the tax return for such year. Section 201 of the Act, amending section 401 of the Code.

Appendix A
SECURE Effective Dates

Because SECURE's "effective date" rules contain important "substantive" rules, yet are not included in the Internal Revenue Code, they are reproduced here for convenience.

As discussed in the Outline, SECURE's changes to the retirement plan distribution rules are contained in Section 401(a) of the Act. The following section 401(b) contains the effective dates of the 401(a) changes; this is copied from pp. 1646-1650 of the Act.

(b) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in this subsection [b], the amendments made by this section [SEC. 401. MODIFICATION OF REQUIRED DISTRIBUTION RULES FOR DESIGNATED BENEFICIARIES] shall apply to distributions with respect to employees who die after December 31, 2019.

(2) COLLECTIVE BARGAINING EXCEPTION.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before the date of enactment of this Act, the amendments made by this section shall apply to distributions with respect to employees who die in calendar years beginning after the earlier of—

(A) the later of—

(I) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof agreed to on or after the date of the enactment of this Act), or

(ii) December 31, 2019, or

(B) December 31, 2021.

For purposes of subparagraph (A)(I), any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by this section shall not be treated as a termination of such collective bargaining agreement.

(3) GOVERNMENTAL PLANS.—In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), paragraph (1) shall be applied by substituting "December 31, 2021" for "December 31, 2019."

(4) EXCEPTION FOR CERTAIN EXISTING ANNUITY CONTRACTS.—

(A) IN GENERAL.—The amendments made by this section shall not apply to a qualified annuity which is a binding annuity contract in effect on the date of enactment of this Act and at all times thereafter.

(B) QUALIFIED ANNUITY.—For purposes of this paragraph, the term “qualified annuity” means, with respect to an employee, an annuity—

(I) which is a commercial annuity (as defined in section 3405(e)(6) of the Internal Revenue Code of 1986);

(ii) under which the annuity payments are made over the life of the employee or over the joint lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the joint life expectancy of such employee and a designated beneficiary) in accordance with the regulations described in section 401(a)(9)(A)(ii) of such Code (as in effect before such amendments) and which meets the other requirements of section 401(a)(9) of such Code (as so in effect) with respect to such payments; and

(iii) with respect to which—

(I) annuity payments to the employee have begun before the date of enactment of this Act, and the employee has made an irrevocable election before such date as to the method and amount of the annuity payments to the employee or any designated beneficiaries; or

(II) if subclause (I) does not apply, the employee has made an irrevocable election before the date of enactment of this Act as to the method and amount of the annuity payments to the employee or any designated beneficiaries.

(5) EXCEPTION FOR CERTAIN BENEFICIARIES.—

(A) IN GENERAL.—If an employee dies before the effective date, then, in applying the amendments made by this section to such employee’s designated beneficiary who dies after such date—

(I) such amendments shall apply to any beneficiary of such designated beneficiary; and

(ii) the designated beneficiary shall be treated as an eligible designated beneficiary for purposes of applying section 401(a)(9)(H)(ii) of the Internal Revenue Code of 1986 (as in effect after such amendments).

(B) EFFECTIVE DATE.—For purposes of this paragraph, the term “effective date” means the first day of the first calendar year to which the amendments made by this section apply to a plan with respect to employees dying on or after such date.