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Planning for Retirement Benefits: Recent Developments: CARES, SECURE, and New Life Expectancy Tables

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Abbreviations Used in this Seminar Handout

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* (8th ed. 2019).

§ Refers to a section of the Code, unless otherwise indicated.

¶ Refers to a section of the author's book *Life and Death Planning for Retirement Benefits* (8th ed., 2019; Ataxplan Publications), which can be purchased for $99.95 plus shipping through www.ataxplan.com, or by calling 1-978-829-2553. Or subscribe to the electronic edition at www.retirementbenefitsplanning.us

ADP	Applicable Distribution Period. The number of years over which benefits must be distributed under the minimum distribution rules. See Reg. § 1.401(a)(9)-4, -5.
Code	Internal Revenue Code of 1986, as amended through March 31, 2020.
DB	Designated Beneficiary.
EDB	Eligible Designated Beneficiary.
IRA	Individual retirement account or individual retirement trust under § 408.
IRS	Internal Revenue Service.
NonDB	A beneficiary who is not a designated beneficiary.
QCD	Qualified charitable distribution.
QRP	Qualified retirement plan under § 401(a).
Reg.	Treasury Regulation.
RBD	Required Beginning Date (for commencement of lifetime distributions)
RMD	Required minimum distribution under § 401(a)(9).
WRERA	Worker, Retiree, and Employer Recovery Act of 2008.

New Development #1: The CARES Act
RMDs Not Required in 2020; Tax Breaks for Coronavirus-related Distributions

I. CARES ACT: SUSPENSION OF RMDS

A. Meet "CARES"; Where to Find the Law

The "Coronavirus Aid, Relief, and Economic Security Act" or "CARES Act" was enacted by Congress, and signed into law by President Trump, on Friday March 27, 2020. One section of the immense (880 pages) law, Section 2203, "suspends" required minimum distributions from most retirement plans for the year 2020, discussed in this PART I and in PART II. Another section of CARES, Section 2202, provides special favorable tax rules for "coronavirus related distributions." See PART III.

The CARES suspension of RMDs is found in § 401(a)(9)(I) of the Tax Code, added to the Code by Section 2203 of CARES.

As we study how the one-year suspension of RMDs affects our clients, it can be helpful to refer back to the one-year suspension of RMDs in 2009, enacted as part of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). That law added a new subparagraph (H) to § 401(a)(9), entitled "Temporary waiver of minimum required distribution". That subparagraph (H) has since disappeared from the Code, replaced (as a result of SECURE 2019) by a new "(H)" dealing with a different subject altogether. But the WRERA 2009 suspension still provides some guidance since WRERA's suspension provision was worded identically to the first subsection of the CARES provision on this subject. Though no IRS guidance on CARES has been issued yet, the IRS's interpretation of WRERA's similar suspension can be found in Notice 2009-9, 2009-5 IRB 419 (01/09/2009), and Notice 2009-82, 2009-41 IRB 491 (9/24/2009).

B. The Law, Word for Word

Here is the applicable portion of CARES Section 2203 as it is written. This is followed by a "translated" version.

"SEC. 2203. TEMPORARY WAIVER OF REQUIRED MINIMUM DISTRIBUTION RULES FOR CERTAIN RETIREMENT PLANS AND ACCOUNTS.

"(a) IN GENERAL.—Section 401(a)(9) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

''(I) TEMPORARY WAIVER OF MINIMUM REQUIRED DISTRIBUTION

> ''(i) IN GENERAL.—The requirements of this paragraph shall not apply for calendar year 2020 to—
>
> > ''(I) a defined contribution plan which is described in this subsection or in section 403(a) or 403(b),

''(II) a defined contribution plan which is an eligible deferred compensation plan described in section 457(b) but only if such plan is maintained by an employer described in section 457(e)(1)(A), or
''(III) an individual retirement plan.

''(ii) SPECIAL RULE FOR REQUIRED BEGINNING DATES IN 2020.—Clause (i) shall apply to any distribution which is required to be made in calendar year 2020 by reason of—
''(I) a required beginning date occurring in such calendar year, and
''(II) such distribution not having been made before January 1, 2020.

''(iii) SPECIAL RULES REGARDING WAIVER PERIOD.—For purposes of this paragraph
''(I) the required beginning date with respect to any individual shall be determined without regard to this subparagraph for purposes of applying this paragraph for calendar years after 2020, and
"(II) if clause (ii) of subparagraph (B) applies, the 5-year period described in such clause shall be determined without regard to calendar year 2020.''

"(b) ELIGIBLE ROLLOVER DISTRIBUTIONS.—Section 402(c)(4) of the Internal Revenue Code of 1986 is amended by striking ''2009'' each place it appears in the last sentence and inserting ''2020''.

"(c) EFFECTIVE DATES.—
(1) IN GENERAL.—The amendments made by this section shall apply for calendar years beginning after December 31, 2019."

C. Translation, Part 1: Which Retirement Plans Are Affected

Here is a "translated" and annotated version of 2203(a), to clarify exactly which retirement plans they are talking about:

"(a) IN GENERAL.—Section 401(a)(9) of the Internal Revenue Code of 1986 **[Section 401(a)(9) provides the minimum distribution rules applicable to most tax-favored retirement plans; prior to CARES, it ended with 401(a)(9)(H), now it will end with 401(a)(9)(I)]** is amended by adding at the end the following new subparagraph:

"(I) TEMPORARY WAIVER OF MINIMUM REQUIRED DISTRIBUTION

"(i) IN GENERAL.—The requirements of this paragraph **[i.e., paragraph 401(a)(9), the "minimum distribution rules"]** shall not apply for calendar year 2020 to—
"(I) a defined contribution plan which is described in this subsection **[i.e., subsection 401(a), the requirements for a "qualified plan"]** or in section 403(a) or 403(b) **[i.e., the requirements for tax-deferred annuity plans]**,

> “(II) a defined contribution plan which is an eligible deferred compensation plan described in section 457(b) **[i.e., tax-favored deferred compensation plans for tax-exempt organizations and state/local governments]** but only if such plan is maintained by an employer described in section 457(e)(1)(A) **[i.e., only government-employer type deferred comp plans]**, or
>
> “(III) an individual retirement plan **[i.e., IRAs, including Roth IRAs]**.”

Note the following:

The wording is identical to that in the 2009 suspension regarding which plans are covered.

“Defined benefit plans” do NOT have their 2020 RMDs suspended if they are § 401, § 403, or § 457 plans. An IRA that has been “annuitized” is subject to the “defined benefit” minimum distribution rules. Reg. § 1.401(a)(9)-6. Since with respect to IRAs CARES does not specify “defined contribution” only, are we to conclude that annuitized IRAs CAN skip the 2020 RMD? Or (more likely) that, being subject to the same rules as DB plans, annuitized RMDs can NOT skip the 2020 RMD?

The second thing to note is that 457 plans sponsored by non-government tax-exempt employers (*e.g.*, a credit union) do NOT have their RMDs suspended for 2020. This is a common occurrence in retirement plan rules—the government-employer-type 457 plans get more favorable deals than 457s sponsored by other tax-exempts.

D. Translation, Part 2: People whose RBD is April 1, 2020

A special provision is included to deal with the individual whose first “distribution year” was 2019 and whose “required beginning date” is therefore April 1, 2020:

> “(ii) SPECIAL RULE FOR REQUIRED BEGINNING DATES IN 2020.—Clause (i) **[i.e., the suspension of the RMD rules]** shall apply to any distribution which is required to be made in calendar year 2020 by reason of—
>
> “(I) a required beginning date occurring in such calendar year, and
>
> “(II) such distribution not having been made before January 1, 2020.”

To whom does this special rule apply and what does it mean? And is it a mistake? It is certainly unfair!

Minimum distributions from a retirement plan to the living individual owner of such plan (the “employee” or “participant”) start to accrue in a certain year. A year for which a minimum distribution is required is often called a “distribution year” and the first year in which such distributions accrue is the “first distribution year.” For that distribution year only, the individual is allowed to take the RMD either during such year or in the first three months of the following year, with the deadline for taking the first year’s RMD being called the “Required Beginning Date” (RBD). The RBD is April 1 of the year following the first distribution year.

CARES is saying that for any individual who has an RBD of April 1, 2020, and who has a distribution he must take by that date because the distribution was “not made before” 2020 (i.e.,

he/she did not take the 2019 RMD in 2019), the RMD waiver/suspension DOES apply to the RMD due April 1, 2020. In other words, apparently, a person whose first distribution year was 2019 and who took the 2019 RMD in 2019 does not get his 2019 RMD retroactively waived....but a person who postponed the 2019 RMD into 2020 gets a bonanza—he/she gets TWO YEARS' RMDs waived (the 2020 RMD AND the 2019 RMD that was postponed). That seems....rather unfair...but that does seem to be what CARES says.

No similar provision was included in WRERA, and this provision in CARES reverses the result the IRS reached in interpreting WRERA, as stated in IRS Notice 2009-9:

"The Act [WRERA] does not waive any 2008 RMDs, even for individuals who were eligible and chose to delay taking their 2008 RMD until April 1, 2009 (*e.g.*, retired employees and IRA owners who turned 70½ in 2008). These individuals must still take their full 2008 RMD by April 1, 2009."

It does not appear the IRS could (even if they wanted to) eliminate this CARES unfairness by regulation by allowing people who took their 2019 RMDs in 2019 to "roll them back in" to their IRAs and plans so they could then benefit by the RMD waiver applicable to 2019 RMDs postponed into 2020. Since the distributions were RMDs when taken in 2019 (and still are—CARES did not retroactively "delete" the RMD status of these distributions), they were/are not eligible rollover distributions.

Is it possible that Congress made a mistake here—is it possible they meant that 2019 RMDs postponed to April 1, 2020, would NOT benefit from the suspension? No use speculating on that at this point.

Here are the people whose RBD would be April 1, 2020:

- The owner of a traditional IRA who reached age 70½ in calendar year 2019.
- Any retirement plan participant who reached age 70½ in calendar year 2019 and retired in 2019 or earlier.
- Any retirement plan participant who reached age 70½ in calendar year 2019, and who was a "5% owner" of the plan sponsor on the applicable testing date (regardless of whether he/she is retired).
- Any retirement plan participant who reached age 70½ prior to calendar year 2019, and who was not a "5% owner" of the plan sponsor on the applicable testing date, and who retired in 2019.

For full details on how to determine an individual's required beginning date, see ¶ 1.4 of *Life and Death Planning for Retirement Benefits*.

Note that a person can have different RBDs for different retirement plans he/she owns:

Olga Example: Olga reached age 70½ in 2019. She owns a traditional IRA; 2019 was the first distribution year for her IRA, and her RBD for this IRA is April 1, 2020. She also owns a Roth IRA; since there are no RMDs for a Roth IRA during the owner's life there is no "RBD" for a Roth IRA. Finally, she works for Acme Widget Co., where she is not and never has been a 5% owner. She has never "retired" from Acme. Her RBD for the Acme Widget Co. 401(k) plan will be April 1 of the

year after the year she retires. So of her three retirement plans, only one (the traditional IRA) is affected by CARES. If she did not take her 2019 IRA RMD in 2019, she does not have to take it in 2020 either. She never has to take it!

Note also that there are many RMDs and retirement plan owners that are unaffected by this particular provision:

- **Inherited plans.** The concept of a required beginning date and postponed first year-RMD do not apply to inherited retirement accounts and plans. The "RBD" is a term that applies only to lifetime RMDs.

- **Individuals born after 6/30/1949.** Individuals born after 6/30/1949 did not attain age 70.5 prior to 2020 and accordingly their first distribution year will be the year they attain age 72 (earliest possible year for that being 2021). These individuals cannot have an RBD for any plan in 2020.

- **Missed RMDs from prior years.** An RMD that the participant or a beneficiary missed in a prior year remains an "RMD" for all later years until it is distributed. CARES does not provide a get out of jail free card for these situations:

Dimitri Example: Dimitri died in 2014 at age 68, leaving his IRA to his estate. The estate was subject to the 5-year rule, meaning that the entire account should have been distributed to the estate no later than December 31, 2019 (2019 being the year that contained the fifth anniversary of the date of death). The executor procrastinated and failed to take the distribution in 2019. Now he asks you whether he can postpone for another year since (under IRS regulations) the distribution now must be made in 2020....is he "exempted" from taking it this year because it is a "distribution which is required to be made in calendar year 2020 by reason of—...(II) such distribution not having been made before January 1, 2020?"

The answer for Dimitri's executor is: Sorry, no. CARES does not waive or postpone this mandatory 2020 distribution. It's true this has become a 2020 RMD because it was not taken in 2019 when it was supposed to be taken, BUT you can't ignore the other clause of § 401(a)(9)(I)(ii), a "distribution which is required to be made in calendar year 2020 *by reason of—(I) a required beginning date occurring in such calendar year...*" This special waiver provision applies only to distributions for which the "required beginning date" is in 2020. The term "required beginning date" does not apply to post-death RMDs ever...it only applies to lifetime distributions. But even if you could "analogize" the RBD concept to a post-death distribution, your "RBD" would have been December 31, 2019, and thus did not "occur" in 2020.

E. Translation, Part 3: The 2020 RBD remains the RBD for other purposes

The new § 401(a)(9)(I)(iii) provides:

"(iii) SPECIAL RULES REGARDING WAIVER PERIOD.—For purposes of this paragraph **[i.e., § 401(a)(9), all the minimum distribution rules. 401(a)(9) is the "paragraph" and the new (I) added by CARES is the subparagraph]**..." two "Special Rules" are provided.

The first of these special rules is:

> "(I) the required beginning date with respect to any individual shall be determined without regard to this subparagraph for purposes of applying this paragraph for calendar years after 2020, and..."

In other words, for a person whose RBD is April 1, 2020, and whose RMD otherwise payable on such RBD is "waived" by CARES, April 1, 2020, shall continue to be considered his/her RBD for all other purposes of the minimum distribution rules—such as whether such person's later death occurs before or after his/her RBD. The RBD is not "postponed" to the next year—it still occurs on April 1, 2020, so it's over and done with in 2020. There is just no RMD on that date.

F. Translation, Part 4: Effect on the 5-year Rule

Here is § 401(a)(9)(I)(iii)(II), containing the second of the two "Special Rules" included in § 401(a)(9)(I)(iii):

> "(II) if clause (ii) of subparagraph (B) **[i.e., § 401(a)(9)(B)(ii)]** applies, the 5-year period described in such clause shall be determined without regard to calendar year 2020."

Here is **what § 401(a)(9)(B)(ii)** (the clause referred to) says:

"(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."

This is the "5-year rule," which is the general rule for required distributions following the death of a retirement plan owner who dies before his/her "required beginning date." (The life expectancy payout and the "10-year rule" are exceptions to this general rule, applicable where the benefits are payable to a "designated beneficiary.")

The most common application of the 5-year rule is for an IRA or retirement plan owner who dies before his/her required beginning date without naming a designated beneficiary, as a result of which (most often) the benefits pass to the decedent's estate as default beneficiary; under IRS

regulations the participant's estate is not a designated beneficiary. This rule also applies if the participant names a beneficiary that does not qualify as a designated beneficiary, such as his/her own estate, a trust that does not qualify as a see-through trust, or any nonindividual such as a charity.

As applied under regulations, the 5-year rule means that the benefits must be distributed by the end of the year that contains the fifth anniversary of the participant's death.

CARES is saying that, in the case of an individual who died in the years 2015-2019 leaving benefits subject to the 5-year rule, the 5-year period is computed as if 2020 did not exist.

Sofia Example: Sofia died in 2017, leaving her Roth IRA to her estate. If CARES did not exist, the IRA would have to be distributed in full no later than December 31, 2022, the year that contains the fifth anniversary of her 2017 death. Because of CARES, 2020 "does not exist" in that 5-year count, so the deadline is extended to December 31, 2023.

This provision was not included in WRERA, but adopts the IRS's interpretation of WRERA as stated in IRS Notice 2009-9: "If a beneficiary is receiving distributions over a 5-year period, he or she can now waive the distribution for 2009, effectively taking distributions over a 6-year rather than a 5-year period."

If the decedent dies in 2020, is the beneficiary's 5-year-rule deadline 12/31/2025 or 12/31/2026? CARES refers only to "the 5-year period"'s being determined without regard to 2020...and in the case of a 2020 death, the "5-year period" does not include 2020 (the 5 years are 2021, 2022, 2023, 2024, and 2025). Accordingly this beneficiary's deadline is still 12/31/2025, unchanged by CARES. Beneficiaries who are subject to the 5-year rule will have the same final distribution deadline (12/31/2025) if the decedent died in either 2019 or 2020. This interpretation is confirmed by the fact that CARES says nothing about the effect of the suspension on beneficiaries who are subject to the 10-year rule. Since that rule only applies for deaths in 2020 or later, the calendar year 2020 is not part of the "10-year period"calculated under the 10-year rule, which begins in 2021 and runs through 2030 (for a death in 2020).

G. The Rest of Section 2203

The foregoing discussion covers the meat of CARES Section 2203, the suspension of required distributions for 2020. For completeness' sake, here's the rest of it:

The following (b) is strictly for qualified plan administrators and ERISA geeks: It has to do with the notices that plan administrators are required to provide to recipients of "eligible rollover distributions." These various notices (regarding, *e.g.*, rollover rights) are not required for RMDs. CARES section 2203 is saying that, for purposes of all these various notice requirements, a distribution that WOULD have been an RMD but for the suspension of RMDs in 2020 will not be treated as an "eligible rollover distribution"—even though of course it actually IS eligible for rollover.

"(b) ELIGIBLE ROLLOVER DISTRIBUTIONS.—Section 402(c)(4) of the Internal Revenue Code of 1986 is amended by striking '2009' each place it appears in the last sentence and inserting '2020.'"

...and (c) is self-explanatory:

"(c) EFFECTIVE DATES.—

"(1) IN GENERAL.—The amendments made by this section shall apply for calendar years beginning after December 31, 2019."

II. SUSPENSION OF RMDs: PLANNING AND COMPLIANCE MATTERS

A. How the Suspension Works: Do it this Way, Be Happier

For openers, here is a helpful way to work with the suspension. Your client Lulu is over age 70½ and taking annual RMDs. Let's say she is turning age 76 in the year 2020 and her only retirement plan is an IRA worth $1 million as of December 31, 2019. The beneficiary of this IRA is not her more-than-10-years-younger spouse. You figure out her 2020 RMD in the usual way: Divide the prior year-end account balance ($1 million) by the "divisor" or "Applicable Distribution Period" (ADP) obtained from the IRS's "Uniform Lifetime Table" [use the table that is applicable through calendar 2020; new tables will apply in 2021], which is 22. The quotient is $45,454.55. This is what would have been Lulu's 2020 RMD—except that her *actual* 2020 RMD is zero because of CARES.

What is the point of viewing it this way? Because it clears away cobwebs especially when you come to figure out *next year's* RMD. The 2021 RMD will be figured exactly as if 2020 had been a perfectly normal year. The 2020 RMD is not "postponed" to next year—it is simply skipped. The client's payout period or life expectancy is not "lengthened"—in 2021, you will not be figuring the RMD as if 2020 didn't exist or as if Lulu will be "turning age 76" in 2021 when she actually will be turning 77...her 2021 RMD will be based on her attainment of age 77 in 2021, just as if 2020 had been a *perfectly normal* RMD year. See IRS Publication 590, *IRAs* (2009), Examples 1 and 2 (p. 34).

B. People Who Did or Did Not Yet Take Their 2020 RMD

Here's who will be happiest in 2020: People who had not yet taken their RMD when CARES was enacted. If you hadn't yet taken your RMD, you have nothing to worry about. You now don't have to take the RMD in 2020 and can just go about your business!

Go Ahead and Do That Roth Conversion

Most importantly for some, you can now do Roth conversions immediately if that's your desire. IF 2020 were an RMD year, you would not be allowed to do a Roth conversion until AFTER you had taken your 2020 RMD. Why? Because of these three rules: (a) an RMD is not an eligible rollover distribution and (b) a Roth conversion is considered a rollover and therefor must (in most respects) qualify as an eligible rollover distributions and (c) the first money that comes out of a plan or IRA generally is considered the RMD for that year, until the RMD has been fully distributed. For explanation of these rules and citations, see Chapters 2 and 5 of *Life and Death Planning for Retirement Benefits*. For many clients, taking the RMD is not as simple as just writing a check, since it may involve deciding which account(s) to take the RMD from, deciding whether to distribute cash

or securities and if the latter which securities, and/or using "qualified charitable distributions" for all or part of the RMD...which in turns usually involves requesting checks from the IRA provider, receiving the checks, and mailing them to the various charities. After all that, the moment to make a Roth conversion may have passed.

But now that hurdle no longer exists—the IRA owner can make instant Roth conversions without the hassles of taking the RMD first because there is no RMD this year. That may or may not be a good thing—since Roth conversions are irrevocable and can be expensive!

Since CARES did not become law until the end of March 2020, there are obviously people who already took part or all of their 2020 RMDs before there was even a hint that RMDs might be suspended. What happens to them?

Some early birds can cure this "mistake" by rolling over the distribution to an IRA:

Angela Example: Angela, age 76, took the 2020 RMD from her 401(k) plan on March 15, 2020, in cash. An RMD, of course, cannot be rolled over. But because of the retroactive effect of CARES (retroactive for all of 2020), the distribution she already took is no longer an RMD....it has been magically retroactively transformed into an "eligible rollover distribution."

So anyone who already took his or her 2020 RMD can now just roll it right back in to an IRA or other suitable retirement plan and continue deferring taxes, right? Not quite....here are the bumps in that road....see also "C" below for special situations (noncash distributions; RMDs in monthly instalments).

(i) More than 60 days have passed?

For someone who took his or her RMD in January 2020, for example, the 60-day rollover deadline has already passed. It seems highly likely that the IRS will grant a blanket extension of the rollover deadline for these pre-CARES distributions. There was no exactly comparable situation under the 2009 suspension, as WRERA was enacted in 2008, before any 2009 RMD had accrued; nobody could have taken his 2009 RMD before WRERA's enactment...however, back in 2009 the IRS nevertheless did (in Notice 2009-82) grant blanket extensions of the rollover deadline for the following situations:

- ✓ In 2009, many qualified plans kept pumping out "minimum required distributions" to their retired plan participants, despite WRERA's suspension of RMDs, since the plan document required them to do so even though the law did not. The IRS issued a notice specifically allowing the recipients to roll over these "nonrequired required distributions" (called "2009 RMDs") with an extended rollover deadline.

- ✓ Even though WRERA was enacted in 2008, some people didn't find out about it in time to stop taking their 2009 RMDs.

On April 9, 2020, the IRS issued Notice 2020-23, which extends the 60-day rollover until July 15, 2020 if it would otherwise fall between April 1 and July 14. This will help someone who took his distribution on or after February 1, 2020, but it does not help those who took their 2020 RMDs before February 1, it does not eliminate the once-per-12-months limit on IRA-to-IRA rollovers (§ 408(d)(3)(B)), and it does not help nonspouse beneficiaries who withdrew from inherited retirement plans.

So, it is recommended that people who already took their 2020 RMDs, and whose "RMD" distributions would have been eligible rollover distributions but for the 60-day deadline [the 60-day deadline is not the only obstacle; see the rest of this section], and who did not get helped by Notice 2020-23, simply wait until the IRS issues waiver/guidance for 2020 similar to what it did in 2009.

Is there any other course available, if you don't like waiting on pins and needles? Here are "ideas" that have been floated; these are provided for your information:

- There is a provision allowing for a "hardship waiver" of the 60-day deadline. See ¶ 2.7.05 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019). The author does not see a path for certifying that the unanticipated law change created a hardship of the type that would allow self-certification for rollover purposes, but perhaps others do.

- If the "RMD" that you took can be classified as a "coronavirus related distribution" (CRD), late rollover is allowed—see later in this Outline.

(ii) Nonspouse beneficiaries can't do this.

If the surviving spouse of the deceased participant received a "2020 RMD" from an inherited IRA or plan she holds as beneficiary of the deceased participant, she can now roll that distribution over to her own IRA or retirement plan (or even back into an inherited plan or IRA), provided all other rollover requirements are met (see (i) above if the 60-day rollover deadline has passed; see below regarding the once-per-12-months rule).

No other beneficiary has this option. A nonspouse beneficiary who already took his, her, or its 2020 RMD from the inherited retirement plan will not benefit from the suspension. A distribution from an inherited plan cannot be rolled over even if it is not an RMD (unless the beneficiary is the surviving spouse of the deceased plan owner). CARES will help *only* those nonspouse beneficiaries who have not already taken out their 2020 RMDs.

For the record, the rollover deadline extension granted under WRERA specifically excluded benefits inherited by a nonspouse beneficiary.

(iii) Once-per-12-months rule still applies.

This rule is one of the most confusing and treacherous traps in the Internal Revenue Code. Generally a person who receives a distribution from his or her retirement plan or IRA can eliminate the tax on that distribution by contributing it ("rolling it over") to an IRA within 60 days (provided the distribution is not an RMD and not from an inherited plan). The once-per-12-months rule is an insidious exception to this general rule: It dictates that an individual who receives an IRA

distribution ("second distribution") cannot roll that distribution over into an IRA tax-free if within 12 months prior to the "second distribution" the individual received *another* IRA distribution ("first distribution") that he or she rolled over tax-free into an IRA. § 408(d)(3)(A); see complete explanation at ¶ 2.6.05 of *Life and Death Planning for Retirement Benefits*.

Suppose Angela, back in the summer of 2019, was dissatisfied with her IRA provider, so she moved her IRA to a different financial firm, and suppose she did this by means of a rollover: She closed out the IRA at Firm A, got a check payable to herself on August 1, 2019, and (within 60 days) deposited that check in a new IRA at Firm B. Since that was a "distribution" followed by a "rollover," she is barred from doing another IRA-to-IRA rollover for any IRA distributions she receives within 12 months after August 1, 2019 (the date of the "first distribution"). Thus she is barred by the Tax Code from rolling the "RMD" she took from her IRA in March 2020 back into the IRA she took it from (or any other IRA), even though it's no longer an RMD.

Angela could have avoided this problem by using an IRA-to-IRA transfer instead of a distribution-followed-by-rollover for her August 2019 transition from Firm A to Firm B. An IRA-to-IRA transfer is not considered a distribution (from the first IRA) or a contribution (to the recipient IRA) and there is no numerical limit on such transfers. It is strongly recommended that whenever money is being moved from one retirement plan to another, a plan-to-plan transfer (also called "IRA-to-IRA" transfer or "trustee-to-trustee" transfer) be used instead of a rollover!

For Angela, because she did not use the IRA-to-IRA transfer route for her August 2019 transaction, there is only one escape hatch from the once-per-12-months rule: If Angela is a participant in a qualified retirement plan (such as a 401(k) plan), she can roll her March 2020 "RMD" distribution into the qualified plan. There is no limit on the number of IRA-to-qualified plan rollovers (or qualified plan-to-IRA rollovers) a person can do within 12 months.

If Angela does not have a qualified plan she can roll her IRA distribution into, there is one other route to consider: She could contribute the March 2020 distribution to a Roth IRA. Such a "Roth conversion" is subject to the usual 60-day time limit for rollovers, but is not considered an IRA-to-IRA rollover for purposes of the once-per-12-months rule. She will have to pay income tax on the converted distribution, but she's going to have to pay tax on that distribution no matter what. At least this way she will get some benefit (future tax-free growth) from her taxable distribution.

Will the IRS be able to help people like Angela who incur the negative effect of the once-per-year rule because of the retroactivity of the CARES Act? See PART III!

C. Special Situation #1: RMD Taken in Monthly Instalments

Many retirees choose to have their RMDs distributed in monthly instalments throughout the year. Suppose Ronald was taking his $36,000 2020 IRA RMD in the form of $3,000 monthly instalments. When CARES is enacted, he has already received three instalments. As to the January payment, he has the 60-day deadline issue. But even if there is a blanket extension of that deadline, how can he roll over three payments when the once-per-12-months rule allows only one such rollover? (He does not have any nonIRA plans he can roll those payments into, and he does not want to do a Roth conversion.)

Answer: He can't under present law. Like the waiver of the 60-day deadline, this problem will require an IRS fix. But unlike with the 60-day rollover deadline, the Internal Revenue Code does

not directly grant the IRS the power to waive the once-per-12-months rule. Two possible avenues the IRS could consider if it seeks to remedy this unfairness are:

✓ The IRS can fix it by defining all "2020 RMDs" [i.e., payments received in 2020 that would have been RMDs if it were not for CARES] as a single distribution for purposes of the once-per-12-months rule. This would solve Ronald's problem (unless, like Angela, he also did *another* IRA-to-IRA rollover in the prior 12 months). What constitutes a "distribution" has never been defined in the Code or regulations. The Treasury has seen fit in at least one other situation to use definitions to sidestep this rule: When an IRA has incurred losses through malfeasance of an advisor or financial firm, and the IRA owner has recovered money from the advisor or firm via a lawsuit or settlement of a claim, the Treasury has allowed the recovered funds to be deposited in the IRA without regard to the once-per-12-months rule by defining such deposits as "restorative payments" rather than as "contributions" to the IRA. See ¶ 8.1.05 of *Life and Death Planning for Retirement Benefits* for analysis of the rulings stating this rule.

✓ The IRS could rule that the retroactive effect of the CARES suspension is an "other factor" allowing a taxpayer to assert he incurred an "adverse financial effect" by taking a distribution, prior to the enactment of CARES, that he would not have taken if he had known RMDs would not be required in 2020. This would allow the taxpayer to characterize the "2020 RMD" payment as a coronavirus related distribution (see PART III below), which can be rolled over without regard to the once-per-12-months rule.

D. Special Situation #2: 2020 RMD Distributed in Cash or Property?

For certain clients who already took their 2020 RMDs, there will be one more potential obstacle to consider: The requirement that the property "rolled over" into the recipient retirement plan must be the same property that was distributed from the original plan.

Roxie Example: Roxie received her IRA RMD of $80,000 in cash in March 2020 and used it to buy some shares in a hedge fund. Now that RMDs have been "cancelled," she would like to eliminate that $80,000 of taxable income by rolling the distribution back into her IRA. But she cannot roll the hedge fund shares into another plan or IRA—she must roll over cash if she wants to do a rollover. If she doesn't have $80,000 of cash lying around, she will either have to sell the hedge fund shares or some other asset to raise the cash, borrow the money, or give up on the rollover.

What if the original distribution was made in the form of property not cash?

First: If you get a distribution of property (say 100 shares of X Corp at $85/share = $8,500) you can effect your rollover by transferring those shares within 60 days into an IRA [subject to the once-per-12-months rule if applicable] or qualified plan [once-per-12-months rule doesn't apply]. For this conclusion, for a qualified plan, see § 402(c)(1). For IRAs, see § 408(d)(3)(A).

This is true EVEN IF the stock has appreciated when you contribute it....or DEPRECIATED. If the stock has depreciated, the distributing plan will report a distribution of $8,500 and your contribution amount will be a smaller amount—but there is no tax, so presumably there is someplace on your income tax return where you can explain this discrepancy. Ditto if the stock has appreciated...the contribution amount will appear larger than the distribution reported on 1099R and you'll have to explain that someplace presumably.

Here's what the instructions for IRS Form 5498 (2020 edition, p. 25) tell the IRA provider to do when property is contributed as an "indirect rollover:"

"For the rollover of property, enter the FMV of the property on the date you receive it. *This value may be different from the value of the property on the date it was distributed to the participant*. For more details, see Pub. 590-A." Emphasis added.

Second, if the distributed property is SOLD while it is outside the plan, if the distribution came from a QUALIFIED PLAN then the Code explicitly says that you can roll over the sales proceeds in place of the distributed property that was sold. § 402(c)(6)(A). However, there is no corresponding blessing for IRA distributions— nothing in the Code says you can substitute sales proceeds and roll those over instead of the distributed property. IRS Publication 590-A apparently agrees there is a difference....it mentions selling the property and rolling over the proceeds in connection with QRP rollovers [by the way the sale, even though it occurred while the property is "outside" the plan, is nonreportable...it's treated as if it occurred inside the plan]:

"The same property (or sales proceeds) must be rolled over. If you receive property in an eligible rollover distribution from a qualified retirement plan, you can't keep the property and contribute cash to a traditional IRA in place of the property. You must either roll over the property or sell it and roll over the proceeds, as explained next.

"Sale of property received in a distribution from a qualified plan. Instead of rolling over a distribution of property other than cash, you can sell all or part of the property and roll over the amount you receive from the sale (the proceeds) into a traditional IRA. You can't keep the property and substitute your own funds for property you received." P. 26.

....but Publication 590-A does NOT mention rolling over sales proceeds in connection with IRA rollovers:

"The same property must be rolled over. If property is distributed to you from an IRA and you complete the rollover by contributing property to an IRA, your rollover is tax free only if the property you contribute is the same property that was distributed to you. " p. 24.

Third, it's clear you cannot take a distribution of property then substitute cash for the rollover without actually selling the property, even for a qualified plan. See Rev. Rul. 87-77.

E. Special Situation #3: Income Tax Withheld

An individual who took his 2020 RMD prior to the suspension and now wants to roll it over, and who has cleared all the obstacles previously discussed, may have one more headache: If he had income taxes withheld from his distribution, he must find enough cash to carry out the rollover to replace the income taxes that were withheld! If he is trying to roll over a $50,000 distribution, he has to come up with $50,000 of cash even if the amount he actually received was only (say) $15,000 because he elected to have $35,000 withheld. If he doesn't have that much cash lying around he will have to either sell assets or borrow money to raise the cash or give up on the full rollover (he can of course roll over any amount less than $50,000, but then he will have to pay tax on the amount not rolled over). Either way, he may not get the $35,000 back from the government until he files his 2020 income tax return in 2021 (though he may effectively be able to recover it earlier by reducing his withholding on other income or reducing his estimated tax payments).

F. Effect on QCDs: Charitable Gifts in 2020

The qualified charitable distribution (QCD) allows an individual over age 70½ to transfer up to $100,000 per year directly from her IRA to an operating public charity, and have such distribution excluded from her gross income while still counting towards her RMD for the year of the gift. See § 408(d)(8) and extensive discussion in ¶ 7.6 of *Life and Death Planning for Retirement Benefits*. Should someone who typically used QCDs to fulfill all or part of her RMDs each year continue to make QCD gifts in 2020?

QCDs remain fully "legal" and do-able in 2020. They remain a viable and valuable way for the older IRA owner to make gifts to charity. However, since there is no legal requirement to take ANY distribution from the IRA at all in 2020, the IRA owner should also carefully examine other alternatives for charitable giving:

✓ § 62(a)(22), added by CARES, allows an "above the line" deduction for certain cash charitable gifts for individuals who do not itemize deductions...however since the maximum deduction so permitted is $300 it adds little to planning considerations.

✓ For an individual who has few medical expenses, no mortgage interest, and a state tax deduction capped at $10,000, the standard deduction may be a preferable route to take: charitable gifts from the taxable account may have little or no impact on the individual's 2020 income tax bill unless such gifts are substantial enough to cause itemized deductions to substantially exceed the standard deduction.

✓ Making charitable gifts via QCD in 2020 will presumably help reduce income taxes in *later* years by removing money from the IRA that would otherwise, sooner or later, have to come out in the form of a taxable distribution either to the IRA owner or his heirs.

✓ If the IRA owner's entire IRA is passing to charity anyway, a 2020 QCD will accelerate fulfilment of the charitable intent to that extent.

✓ On the other hand, gifts of appreciated assets, as a way of diversifying investments without incurring tax on a sale, will be more attractive in many cases.

Here is a planning idea from Larry Katzenstein, Esq., of St. Louis: Client's usual IRA RMD is just over $100,000. Client usually makes $50,000 of charitable gifts using QCDs and takes the rest of his RMD in cash. In 2020, the client will take no distributions and make no QCDs. In 2021, he will give $100,000 to his favorite charities using QCDs, thereby taking care of both his 2020 and 2021 gifts and "eliminating" his 2021 RMD as well as the 2020 RMD.

III. CARES ACT: CORONAVIRUS RELATED DISTRIBUTIONS (CRDs)

Section 2202 of CARES provides special tax treatment for "coronavirus-related distributions" (CRD). Unlike the abolition of RMDs for 2020 (CARES Section 2203), CARES Section 2202 does not directly amend the Internal Revenue Code, apparently. You have to find the CARES Act itself to find the rules for CRDs.

A. The Special Tax Breaks for CRDs

The 10% "extra tax" on distributions taken prior to age 59½ (imposed by § 72(t)) does not apply to a CRD, regardless of whether the CRD is rolled over. Section 2202(a)(1).

Various normal plan rules are overwritten for CRDs, allowing a plan to make such distributions when normally it could not. For example, a 401(k) plan is normally prohibited from distributing to an employee prior to his attainment of age 59½, termination of employment, plan termination, or "hardship." § 401(k)(2(B)(i). 403(b) and 457(d) plans have similar restrictions. A CRD distribution overrides these rules—it can be made prior to age 59½ (etc.), but it is not considered a "hardship distribution" (so is unaffected by restrictions applicable to hardship distributions).

The glitch: There is no requirement that plans MUST offer CRDs. With an IRA, the IRA owner can take a distribution anytime (and bear the resulting tax consequences), but with employer plans, the plan dictates when distributions can be made...except for the minimum distribution requirements, there is no law saying when they MUST distribute money. Plans will presumably have to be amended to permit CRDs, so the benefit of CRDs may be illusory for many...the employee can't get that tax-favored relief distribution unless his company's plan is amended to allow for it!

The recipient of a CRD has a choice: He can either contribute the money back into a retirement plan or he can keep it. He doesn't have to make the same choice for all the dollars. For example, he could withdraw $35,000, recontribute (roll over) $15,000 of it, and keep out $20,000.

He has three years to make that decision. He can roll over the distribution at any time within three years starting the day after the distribution.

For the dollars he does NOT recontribute/roll over, the tax can be spread over three taxable years (2020-2022), at the election of the taxpayer.

Before getting into deep details of these options, it is already apparent that this will be messy to administer (a feature we will find with each element of CRDs). For example:

- If the individual takes his CRDs on four different dates in 2020, there will be four different 3-year rollover deadlines.

- Suppose the individual takes his CRD on 12/30/2020. He must either roll it back into a traditional retirement plan by 12/30/2023 or pay tax on it. Unless he rolls it all over before the due date of his 2020 income tax return, he will have to pay tax on at least one-third of it (by electing the three-year spread) on his 2020 return....and on another third of it if he hasn't rolled it all back by the due date of his tax return for 2021...and on the rest of it if he hasn't rolled it all back by the due date of his 2022 return....and then file amended returns for those years if he rolls it all over in late 2023 after the due date of his already-filed 2022 return.

The IRS has wrestled with this same situation in connection with "Qualified 2016 disaster distributions" and "Qualified 2017 disaster distributions"; see *** below.

B. Income-spreading over three years

"In the case of any coronavirus-related distribution, unless the taxpayer elects not to have this paragraph apply *for any taxable year*, any amount required to be included in gross income for such taxable year shall be so included ratably over the 3-taxable year period beginning with such taxable year." 2202(a)(5); emphasis added.

Initially this appears clear: The taxable portion is included ratably over three years, unless the taxpayer opts out of that treatment and pays the tax in 2020.

Theo Example: Theo, who has tested positive for the virus, takes $90,000 out of her IRA on June 1, 2020, as a CRD. One percent of this distribution ($900) is deemed to come from the after-tax money in her IRA. Assuming she does not roll it back into a retirement plan by June 1, 2023, the taxable portion ($89,100) is includible in her income in three instalments of $29,700 in 2020, 2021, and 2022—unless she elects not to have this provision apply "for any taxable year."

Somewhat puzzling: There is only one "taxable year" in which a CRD can be received—2020. So what does the phrase "in any taxable year" refer to? I believe the phrase "in any taxable year" was included in CARES by mistake as Congress copied verbatim the language it used for qualified 2016 and 2017 disaster distributions. Qualified 2016 disaster distributions could have been received in either 2016 or 2017; qualified 2017 disaster distributions could have been received in either 2017 or 2018, i.e., in each case, more than one taxable year.

For qualified 2016-2017 disaster distributions, the IRS explained the choices as follows in IRS Publication 974, *Disaster Distributions* (Feb. 2018 ed.): "However, if you elect, you can include the entire qualified 2016 disaster distribution or the entire qualified 2017 disaster distribution in your income in the year it was received." P. 12.

If the taxpayer withdraws more than $100,000 in 2020, in multiple distributions, who decides which distributions are CRDs? Is it first-out = CRD? Or taxpayer chooses? For the rule regarding distributions from *multiple plans* in connection with qualified 2016 and 2017 disasters, see "E" below. CARES 2202(a)(5)(B) specifies that, in establishing the rules for CARES income averaging,

the IRS shall look to the rules that applied for two-year averaging of income resulting from certain Roth conversions (§ 408A(d)(3)(E) allowed income resulting from a 2010 Roth conversion to be spread over the taxable years 2011-2012).

C. The real gold: The roll-back provision

As explained above, CARES 2202 allows the virus-affected individual to use her retirement plan as a financial safety net with less-than-the-usual tax consequences of doing so. Eliminating the 10% § 72(t) tax should be a real help to younger retirement plan owners (don't get me started on whether this tax should even exist in the first place). The three-year tax spread can be helpful too. This is like borrowing your own money: All you are giving up is the potential earnings/growth on that money, as long as you pay it back within three years. If you don't/can't pay it back, you will have to pay income tax on it—potentially a steep price for your "loan," but maybe not so steep if your income is very low as a result of the virus's economic effects. So it's not exactly "free money from the government" but CARES 2202 presumably will, as intended, provide some financial assistance to those who tap their retirement plans to counter financial harms caused by the virus.

The real gold here is the provision allowing the withdrawn retirement benefits to be rolled back within three years (rather than the usual 60 days) "to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), of the Internal Revenue Code of 1986...." Eligible retirement plans include 401(a) qualified plans, IRAs and Roth IRAs (though a distribution from any Roth plan cannot be rolled into a "traditional" type plan).

Because such a rollover of a CRD is treated as a plan-to-plan transfer, many of the usual rollover and plan-contribution rules are waived for these rollbacks of CRDs—starting with the 60-day rollover deadline.

- **Qualified plan distributions.** If a CRD is received from a qualified retirement plan (QRP), such as for example a 401(k) plan, and the recipient contributes that money to another retirement plan (including several contributions aggregating the amount of his total CRD or less) the individual will be treated as having received the distribution "in an eligible rollover distribution (as defined in section 402(c)(4) of such Code) and as having transferred the amount to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution." Thus, any amount that could have been transferred directly from the individual's account in the QRP to another QRP or an IRA can be "rolled back" into a QRP or IRA. 2202(a)(3)(B).

- **IRA distributions.** If a CRD taken from an IRA is rolled into any eligible retirement plan, then "to the extent of the amount of the contribution, the coronavirus-related distribution shall be treated as a distribution described in section 408(d)(3) of such Code [*i.e.*, as an eligible rollover distribution from an IRA] and as having been transferred to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution." Thus, CRDs from IRAs can be rolled into other IRAs without regard to the once-per-12-months limit on IRA-to-IRA rollovers of § 408(d)(3)(B). 2202(a)(3)(C). This CARES clause also

seems to over-ride the usual rule that after-tax money cannot be rolled from an IRA into a qualified plan.

Why is this option so valuable? For one thing it enables the taxpayer to retroactively eliminate (i.e., continue deferring) the income tax on his retirement distribution, by putting it back into the plan or an IRA. For another, it enables taxpayers to sidestep normally vexing rollover rules, such as the once-per-12-months limit on IRA-to-IRA rollovers and the rule that "hardship distributions" from a 401(k) plan are not eligible rollover distributions (a CRD is not a "hardship distribution").

What about the rule that after-tax money cannot be rolled over from an IRA to a qualified plan? Answer not determined—ask again later.

60-day Rule vs. Plan-to-Plan Transfer

Here is a language quibble. CARES says that the rollover of a CRD into an eligible retirement plan shall be treated as if it were a "trustee to trustee transfer within 60 days" of the original distribution. The wording implies that the 60-day rule applies to transfers. Most practitioners would state that the 60-day rule applies only to "rollovers" from one plan to another (distribution to the taxpayer, following by contributing the distributed amount to the same or another plan within 60 days) and has no relevance to a direct transfer of assets from one retirement plan to another. The IRS's own forms state that there is no "distribution" involved when assets are transferred directly from (*e.g.*) one IRA to another. See Instructions for IRS Forms 5498 and 1099-R. If there is no distribution, there is no 60-day deadline within which the distribution must be paid back.

Nevertheless, confusion arises. What if a plan to plan transfer takes longer than 60 days? For example, Plan #1 issues a check payable to the trustee of Plan #2, to initiate a plan-to-plan transfer, but gives the check to the employee who sits on it for 65 days....or the check gets lost in the mail for more than 60 days...Is this delay a problem? Even the IRS doesn't seem to know the answer: They have ruled emphatically both ways. See PLRs 2004-24009 and 2004-39049 (60-day deadline DOES apply to transfers), 2010-05057 and 2010-35044 (no, 60-day deadline does NOT apply to transfers), and 2013-11041 (yes, 60-day deadline DOES apply to transfers).

In my opinion, Congress adopted the belt and suspenders approach by including the "within 60-days" language in the CRD-rollover clause in order to eliminate this metaphysical debate as it might apply to CRDs.

D. Definition of CRD

A CRD is, first of all, a distribution from an "eligible retirement plan" that is taken on or after January 1, 2020, and before December 31, 2020. NOTE: A distribution ON December 31, 2020, cannot qualify as a CRD. 2202(a)(4)(A)(i).

The "eligible retirement plans" from which CRDs can be taken are IRAs (including Roth IRAs), individual retirement annuities, qualified retirement plans (which includes 401(k) plans), 403(a) and (b) plans and annuities, and government-employer-type 457 plans. See § 402(c)(8)(B).

"The aggregate amount of distributions received by an individual which may be treated as coronavirus-related distributions for any taxable year shall not exceed $100,000." 2202(a)(2)(A).

Note this would mean his total distributions from all his plans. He could take out as much as he wants of course. If he takes out, say, $250,000, only $100,000 of it "may be treated" as a CRD. The messy bit: Who gets to decide which dollars of the total distribution constitute CRDs? See *** below for the answer to that question with respect to qualified 2016 and 2017 disaster distributions.

The recipient of the distribution must meet one of these descriptions:

...Either: The individual "is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention." NOTE: it is not clear from this description whether the diagnosis must occur before the distribution. In other words, if X receives a distribution in 2020, and LATER is diagnosed with the virus, can the pre-diagnosis distribution qualify as a CRD?

...Or: The individual's "spouse or dependent (as defined in section 152 of the Internal Revenue Code of 1986) is diagnosed with such virus or disease by such a test..." [same question],

...Or: The individual "experiences adverse financial consequences as a result of..."

"being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease,

"being unable to work due to lack of child care due to such virus or disease,

"closing or reducing hours of a business owned or operated by the individual due to such virus or disease, **or**

"other factors as determined by the Secretary of the Treasury (or the Secretary's delegate)."

Note that one path to CRD qualification is strict and objective: Either the individual (or his spouse or dependant) is diagnosed with the applicable virus by the approved test or he/she/they are not so diagnosed.

The other path is the opposite—it is loose and subjective. "Adverse financial consequences" are not defined. Clearly someone who loses his entire family income as a result of a virus-triggered business closing has suffered substantial "adverse financial consequences." But the statute does not require "substantial" consequences....any adverse financial consequences will do. And of course if the individual (or spouse or dependent) received the specified virus diagnosis, NO financial hardship need have been incurred.

The retirement plans charged with administering these rules do not have to worry—they can rely on the employee's self-certification that he or she passes the above tests. It is apparently up to the IRS to audit and verify every individual's claim that his or her distribution qualifies as a CRD.

It does not appear that the "adverse financial consequences" must occur prior to the date of the distribution. This makes sense. If a person takes $30,000 out of a retirement plan in early 2020 because she's planning to use it to buy a house, and then loses her job and all her income because of the virus-triggered shutdown, the pre-virus distribution appears to be, and should be, entitled to the benefits of a CRD. However, Treasury guidance will be needed to confirm this conclusion.

The "other factors as determined by" the Treasury gives the IRS some leeway to cover matters overlooked by Congress in its rush to pass the bailout/stimulus bill of which CARES is a

part. Whether the IRS would be willing to use that leeway to help retirees who took 2020 RMDs before 2020 RMDs were suspended remains to be seen.

E. Qualified 2016 and 2017 disaster distributions provide insight

Special retirement plan-related tax treatments were enacted in response to disasters that occurred in 2016 and 2017. Because the retirement-plan related tax relief allowed for victims of those disasters is similarly worded to that in the CARES Act, the definitions and tax treatment of these prior "qualified disaster distributions" may preview what we can expect with CRDs. The following quotes are taken from IRS Publication 974, *Disaster Relief* (Feb. 2018), to which the page references apply.

"Qualified 2016 disaster distribution treatment" applied to any distribution in either 2016 or 2017 made to an individual who was a resident of specified locations and "sustained an economic loss" as a result of over 40 specific federally-declared disasters (see list at IRS Publication 974, *Disaster Relief* (Feb. 2018), p. 18). "Qualified 2017 disaster distributions," in contrast, were narrower; the definition required that the distribution be made after a specific date (different date for each disaster) and before 2019, and there were only four enumerated disasters (storms Harvey, Irma and Maria, and the California wildfires). However, in both cases the standard for allowing the special tax relief was apparently (in addition to living in the required location) "You sustained an economic loss because of" the applicable disaster.

It appears that for both the 2016 and 2017 disaster distributions, the retirement plan-related relief was the same (though *other* relief benefits were extended to 2017 disaster victims that did not apply to 2016 disaster distributions). Their retirement plan-related relief provisions were apparently virtually identical and are very closely tracked by the CARES Act's language for CRDs.

Here is the Code's definition of a qualified 2016 disaster distribution::

"(D) Definitions. For purposes of this paragraph—

"(i) Qualified 2016 disaster distribution. Except as provided in subparagraph (B), the term 'qualified 2016 disaster distribution' means any distribution from an eligible retirement plan made on or after January 1, 2016, and before January 1, 2018, to an individual whose principal place of abode at any time during calendar year 2016 was located in a disaster area described in subsection (a) **and who has sustained an economic loss** by reason of the events giving rise to the Presidential declaration described in subsection (a) which was applicable to such area.

"(ii) Eligible retirement plan. The term 'eligible retirement plan' shall have the meaning given such term by section 402(c)(8)(B) of the Internal Revenue Code of 1986.

"(E) Income inclusion spread over 3-year period.

"(i) In general. In the case of any qualified 2016 disaster distribution, unless the taxpayer elects not to have this subparagraph apply for any taxable year, any amount required to be included in gross

income for such taxable year shall be so included ratably over the 3-taxable-year period beginning with such taxable year.

"(ii) Special rule. For purposes of clause (i), rules similar to the rules of subparagraph (E) of section 408A(d)(3) of the Internal Revenue Code of 1986 shall apply.

"(F) Special rules.

"(i) Exemption of distributions from trustee to trustee transfer and withholding rules. For purposes of sections 401(a)(31), 402(f), and 3405 of the Internal Revenue Code of 1986, qualified 2016 disaster distribution shall not be treated as eligible rollover distributions.

"(ii) Qualified 2016 disaster distributions treated as meeting plan distribution requirements. For purposes of the Internal Revenue Code of 1986, a qualified 2016 disaster distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(ii), 403(b)(11), and 457(d)(1)(A) of the Internal Revenue Code of 1986.

Here is how the Treasury interpreted the requirement that the individual had "sustained an economic loss" as a result of the applicable disaster event with respect to qualified 2016-2017 disaster distributions:

Does the distribution have to be related to the disaster, either in amount or cause?

<u>Qualified 2016 disaster distribution (p. 11):</u>

"If the previous sentence applies to you, you can generally designate any distribution (including a periodic payment or a required minimum distribution) from an eligible retirement plan as a qualified 2016 disaster distribution, *regardless of whether the distribution was made on account of a federally declared disaster in calendar year 2016*. Qualified 2016 disaster distributions are permitted *without regard to your need or the actual amount of your economic loss*, described later.
"Economic loss. Qualified disaster distributions are permitted *without regard to your need or the actual amount of your economic loss*. Examples of an economic loss include, but are not limited to: Loss, damage to, or destruction of real or personal property from fire, flooding, looting, vandalism, theft, wind, or other cause; Loss related to displacement from your home; or Loss of livelihood." Emphasis added.

<u>Qualified 2017 disaster distribution (p. 12):</u>
"If 1 through 3 above apply, you can generally designate any distribution (including a periodic payment or a required minimum distribution) from an eligible retirement plan as a qualified 2017 disaster distribution, *regardless of whether the distribution was made on account of* Hurricane Harvey or Tropical Storm Harvey, Hurricane Irma, Hurricane Maria, or the California wildfires. Qualified 2017 disaster distributions are permitted *without regard to your need or the actual amount of your economic loss*, described later."

These same standards presumably apply with respect to CRDs: The distribution does not have to be in any way "tied" to the disaster (*e.g.*, you don't have to show you used the distribution to replace property destroyed by the disaster), nor is there any requirement that you must demonstrate that you needed to take the distribution (*e.g.*, you don't have to show your bank balance was so low you couldn't pay your bills without taking this distribution), nor does the amount of the distribution have to be the same as the amount of your "economic loss."

If your total distributions exceed $100,000, how do you know which distribution is a CRD?

Although IRS Publication 974 does not address the timing issue, it does address the question of distributions from multiple retirement plans. The following sentence was included for both 2016 and 2017 qualified disaster distributions: "If you have distributions from more than one type of plan, such as a 401(k) plan and an IRA, and the total exceeds $100,000, you may allocate the $100,000 limit among the plans by any reasonable method."

F. Gaming the CRD rules

The CRD rules and dispensations for better or worse are not limited to be used only by those who suffered serious consequences from the COVID-19 virus. Sadly, the people who need to use these dispensations and will hopefully benefit from them in the manner intended by Congress are probably not the ones who can afford to hire planners to help them "milk" these provisions for the greatest financial benefit. And those whose wealth is unimpaired and who suffered little may take the time to work with their advisors to use CARES Section 2202 for financial gain that incidentally flows to them from these provisions:

Casper Example: Casper was diagnosed with the applicable virus, but luckily for him suffered few symptoms and quickly recovered. With his diagnosis certificate in hand, he withdraws $100,000 in cash from his IRA on May 15, 2020, and within 60 days contributes it to a Roth IRA, an eligible retirement plan (indirect Roth conversion). (A Roth IRA is an "eligible retirement plan" for the purpose of receiving rollovers; see, *e.g.*, IRS Notice 2008-30, 2008-1 CB 638, A-6.) The $100,000 of income resulting from this conversion will be taxed over three years instead of all in one year. Note: He withdrew the funds from the traditional IRA and then deposited them into the Roth IRA, rather than doing his Roth conversion by means of the (normally recommended) IRA-to-IRA transfer to assure that he had received a "distribution" to which the CRD label could attach.

Will this and other CRD-Roth conversion gaming strategies work? My personal expectation is that, if this becomes a widely publicized idea, Washington will stomp on it by decreeing that the income-inclusion cannot be postponed past the date of rollover of the distribution to a Roth IRA and/or that Roth IRAs are not eligible retirement plans for purposes of CRD rollovers.

New Development #2: December 2019: SECURE
Life Expectancy Payout Replaced by 10-Year Rule for Most Beneficiaries
Four Minor Changes to Lifetime Rules

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, and (as of April 14, 2020) still no authoritative guidance on many questions arising under the new law, planners are 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 was 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. 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.

✓ 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 the client to accept the tax hit.

✓ Investigate whether any of the people the client wants to benefit with his estate are in one of the categories that still qualifies for (some version of) 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 human beneficiaries 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' plans 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' plans will be SIGNIFICANTLY 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 scrap the plan and start over.

Any client whose current estate plan leaves retirement benefits to a "conduit trust" should review his plan immediately. The conduit trust MIGHT still work fine–*e.g.*, a conduit trust for the spouse or 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 was signing up for.

Some clients will be able to salvage their estate plan with a few changes, or no changes; but all must 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"), plus additional distributions if needed for his health or support. All distributions from the plan must be distributed forthwith to Chuck. Since as her surviving spouse he is an EDB, this conduit 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 (see "***," below).

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 faced 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 (such as 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 are "winners" and "losers" as a result of SECURE. The loss: One major selling point of the trusteed IRA (you can stretch payouts to your grandchildren over their lifetimes, so they will enjoy tax deferral, professional management, and creditor protections without the complications of writing a separate trust instrument) has vanished. Any client who wants long-term creditor protection for his beneficiaries now must draft a separate trust to be named as beneficiary of his retirement benefits. The gain: For clients willing to have their beneficiaries receive outright control of the retirement benefit proceeds within the shorter SECURE timetable (10 years in most cases), the trusteed IRA offers still appeals. Estate planning lawyers may decide to give up the struggle to create valid "see-through trusts" when such a trust will last only 10 years instead of several decades. A trusteed IRA is guaranteed to provide the longest payout period the law allows (because it's an IRS-approved prototype IRA), whether that period is the 10-year rule or a life expectancy payout, and the expert IRA trustee should have the knowledge, will, and skill to manage payouts over the applicable distribution period in a way to maximize the benefit to the beneficiaries and minimize taxes.

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 under the paragraph #2 method if longer, 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 two exceptions) 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-THROUGH 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 three categories of beneficiaries:

- **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 (with life expectancy not recalculated annually), with annual distributions beginning the year after the year of the participant's death (or to use the non-DB rules if more favorable).

- **Surviving spouse-designated beneficiary** (the participant's surviving spouse or a conduit trust for the participant's surviving spouse): If the participant's sole designated beneficiary was his/her surviving spouse (or a conduit trust for the surviving spouse), the designated beneficiary was entitled to the life expectancy payout (with life expectancy recalculated annually), with annual distributions beginning the later of the year after the year of the participant's death or the year the participant would have reached age 70½ (or to use the non-DB rules if more favorable).

With SECURE, there are still 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. The minimum distribution rules have not changed 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 with the same special rules as before (life expectancy recalculated annually, with annual distributions beginning the later of the year after the year of the participant's death or the year the participant would have

reached age 70½). 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 Beneficiaries" 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.

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.

So 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 Planning 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. Accordingly, 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 considered beneficiaries of the retirement plan 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). Unfortunately, it is not always clear which beneficiaries can be disregarded as "mere potential successor"; see lengthy discussion at ¶ 6.3 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019).

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 designated 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 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 for beneficiaries who are not disabled or chronically ill, 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.

- ♦ **Bad news for drafters:** HOWEVER: it is still required that the oldest trust beneficiary be "identifiable" because this is one of the requirements a trust must meet in order for the trust beneficiaries to be considered "designated beneficiaries." See ¶ 6.2.03 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019). If the trust does not qualify as a see-through trust there is no "designated beneficiary" and the 10-year rule is not available.

- ♦ 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 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 no-DB 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 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: "[The retirement plan must provide]...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. If Rita died on 12/31/20, Julie realistically has only 10 taxable years over which to spread the distributions.

✓ 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.

§ 401(a)(9)(B)(iii) itself hasn't changed. Where the general rule was that, in case of death before the lifetime distributions had begun, benefits had to be paid out within 5 years after the employee's death, 401(a)(9)(B)(iii) provided and still provides that there is an exception to the 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 and in effect says, yeah, but this "exception" allowing the 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 providing that, in the case of the employee's death after his required beginning date, leaving the retirement benefits to a designated beneficiary (DB), the Applicable Distribution Period would be the longer of the life expectancy of the DB or the life expectancy of the deceased employee. This prevented the absurd situation that would arise if the designated beneficiary was older than the deceased participant, where the DB would get a shorter payout period (DB's life expectancy) than the nonDB (decedent's life expectancy. 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 "longer of" rule still apply?

Why this is important: Under new IRS actuarial tables that will 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 "longer of" 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. Since they corrected this absurdity before SECURE presumably they will do the same post-SECURE. It can be done in the same way it was done pre-SECURE, by interpreting the Code section known as the "at least as rapidly" rule (§ 401(a)(9)(B)(i)).

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. Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. 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. Note: Prior to SECURE, there were three tax-favored methods to leave benefits to the surviving spouse:

- Outright to the spouse (spouse gets spousal rollover; very tax-favored and still open);

- Conduit trust for spouse (see above advantages; this door is still open); and

- "QTIP"-type trust for the spouse where the spouse would receive the income of the trust (with or without additional payouts of principal such as "for health or support") but the principal was all or mostly reserved for the remainder beneficiaries (such as children from a prior marriage). The trust did NOT require that all plan distributions paid to the trust be passed out to the spouse. As an "accumulation trust," this type of trust does not qualify for the special spouse-is-sole-beneficiary benefits the other two options have. It can qualify for the 10-year payout at best. In other words, this door is now "closed."

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.

One category of EDB is "a child of the employee who has not reached majority (within the meaning of subparagraph (F))." § 401(a)(9)(E)(ii)(II). "Subject to subparagraph (F)," such child "shall cease to be an eligible designated beneficiary as of the date the individual reaches majority," at which time the 10-year rule will kick in. § 401(a)(9)(E)(iii).

Example: Agnes dies in 2020 leaving her IRA to her minor child Don. Don's guardian must withdraw benefits annually from the IRA, starting in 2021 (the year after Agnes's death) using the old pre-SECURE "life expectancy payout method," computed based on the age Don will attain on his 2021 birthday, not recalculated annually. Assume Don reaches majority on August 17, 2028. That is the final year the RMD will be based on the "life expectancy payout." Don will have to withdraw the rest of the IRA using the 10-year rule, meaning the IRA must be entirely distributed to him no later than December 31, 2038. If Don dies after attaining majority but before the end of the 10-year period, his successor beneficiary will have to withdraw over what is left of Don's 10-year period. If Don dies before attaining majority, the 10-year payout to his successor beneficiary will begin the year after Don's death (and the successor beneficiary must also withdraw the RMD for the year of Don's death, if it was not withdrawn prior to Don's death).

So the child's initial status as an EDB and continued status as such are dependent upon not having "reached majority" and we are to look at "subparagraph (F)" for what reaching majority means. § 401(a)(9)(F) is an otherwise unrelated provision that deals with payments made from a defined benefit plan to a minor child of a deceased employee, and provides that such payments will be treated as having been paid to the employee's surviving spouse for some obscure statutory purpose not otherwise relevant to estate planners. Here is (F) in its entirety:

"(F) Under regulations prescribed by the Secretary, for purposes of this paragraph, any amount paid to a child shall be treated as if it had been paid to the surviving spouse if such amount will become payable to the surviving spouse upon such child reaching majority (or other designated event permitted under regulations)."

So SECURE is apparently just borrowing a definition from this unrelated section. Two things are apparent: First, the Treasury has wide latitude to decide what "reaching majority" will mean, both for purposes of subparagraph (F) and by extension for purposes of termination of EDB status under SECURE. Second, any such regulations already issued (for the original purposes of subparagraph (F)) are by extension applicable to subparagraph (E).

The only existing regulation under (F) provides as follows: "... 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 "has not completed a specified course of education" means.

This is all we have to work with so far: The child reaches majority when the state law applicable to such child says he/she does (typically upon attaining age 18 or 21), or, if he/she is disabled at that time, upon the termination of such disability (if that ever occurs), or if he/she is not disabled at such time, but "has not completed a specified course of education," then upon such completion or upon attaining age 26 whichever occurs first.

Clearly that definition is too subjective and variable to serve as a guide for millions of parents, estate planners, and plan administrators. It is to be hoped that the Treasury will issue a clear bright line universally applicable definition of reaching majority such as "attainment of age 26, or, if disabled at that time, upon later termination of such disability."

In the meantime, here are the planning options:

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 [until "majority"], because, as conduit beneficiary, the child is considered the "sole designated beneficiary" of the retirement plan. Benefits left outright to the child would be entitled to the same treatment (see Agnes example above). Based on all we know now, this will result in the child's receiving outright control of all the money somewhere from age 28 to age 36: i.e., no later than age 28 (10 years after age 18), 31 (10 years after age 21), or possibly 36 (10 years after age 26, under the "specified course of education" rule) (unless disabled at that point).

This 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 other important points 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.

- 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.

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 accumulation trust 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)(3), Example 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.

For complete explanation of the requirements of the "disabled" or "chronically ill" EDB status, and the issues involved in determining eligibility, the author strongly recommends the article "Security for Disabled and Chronically Ill Beneficiaries" by Nancy H. Welber, Esq., *Trusts & Estates* magazine, April 2020, p. 40 (www.trustsandestates.com).

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 are structured as being applicable 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). In other words, before a trust can qualify for the special breaks giving to an applicable multi-beneficiary trust, the trust must qualify as a see-through trust under the pre-SECURE IRS minimum distribution trust rules.

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

Special break #1: 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).

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.

SECURE 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 paragraph).

Special Break #2: 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). In other words, an accumulation trust can qualify for the life expectancy payout based on the disabled or chronically ill beneficiary's EDB status, provided no one other than such disabled or chronically ill individual can receive any distributions from the trust until after the death of the disabled or chronically ill beneficiary.

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. 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 confirming that no such grace can be granted to subtrusts or nonconduit life trusts for the benefit of other EDBs.

This Special Break, 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.

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, 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; SECURE FAQs

A number of practitioners have voiced disagreement with the above interpretation of the EDB rules, and certain questions come up again and again.

What if both life and remainder beneficiaries are EDBs?

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").

Can conduit treatment convert to accumulation at some point?

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.

The question Zelda raises is the most FA of SECURE's FAQs (Frequently Asked Questions) in my experience: "Can we leave the IRA to a conduit trust for the minor child, that converts to an accumulation trust when the child reaches majority?" Answer: NO! The definition of a conduit trust

is that all distributions from the retirement plan to the trust RECEIVED DURING THE LIFE OF THE CONDUIT BENEFICIARY must be distributed forthwith to (or for the benefit of) the conduit beneficiary. A conduit trust that "flips" (or "decants" or "converts") to an accumulation trust when the child attains majority, or at the end of the 10 years, IS NOT A CONDUIT TRUST.

Why can't an accumulation trust qualify?

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 bluntly and forcefully expressed its dislike of long post-death payout periods for retirement benefits, 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 retirement plan-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 later in 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 beneficiary"), 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.

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 only two years old when she dies? 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 (and most likely 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?

Finally, what is the applicable distribution period for an IRA left to an applicable multi-beneficiary trust that is an accumulation trust for the sole life benefit of a disabled or chronically individual? SECURE says only that such trust is entitled to the life expectancy payout...it doesn't say WHOSE life expectancy. While most assume Congress intended that the disabled or chronically ill beneficiary's life expectancy would apply, under existing regulations the Applicable Distribution Period for a see-through accumulation trust is the life expectancy of the OLDEST countable trust beneficiary, who could in this case be a remainder beneficiary.

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 December 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

SECURE also makes some changes to lifetime minimum distribution 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-excludible QCD with the same dollars. SECURE prevents this "double dipping" by modifying the income exclusion for QCDs.

A QCD is normally excludible 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 excludible 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 excludible 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-excludible 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 excludible 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-excludible (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.

IX. SECURE'S "Effective Date" Sections Also Contain Substantive Rules

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.

New Development #3: New Life Expectancy Tables for Computing RMDs
Prop. Reg. 1.401(a)(9)-9

In November 2019, the IRS published new actuarial/life expectancy tables to be used for determining required minimum distributions for 2021 and later years. See Prop. Reg. 1.401(a)(9)-9, published in the Federal Register Vol. 84, No. 217, 11/8/19, pp. 60812-60833.

Good news! The IRS is giving us all a little more life expectancy. Apparently Americans are living longer, and the new tables reflect that fact. That means more deferral of your client's IRA and 401(k) distributions—for both retirees and beneficiaries.

The background: The Treasure promulgated the current actuarial tables we use for computing RMDs in 2003. Unlike the life expectancy tables used for gift and estate tax valuations (which must, by statute, be updated every 10 years), there is no required timetable for updating the retirement-related life expectancy tables. The IRS just does it once in a while, and that time has come.

The new tables (see Appendix A of this Outline) are in the form of a proposed regulation issued in November 2019. Public hearings were to be held in January 2020, and if the proposed regulation goes into effect as currently written the new tables will be effective starting January 1, 2021.

Three tables are affected: Reg. 1.401(a)(9)-9 contains the "Single Life Table" (used for determining payouts to beneficiaries from inherited retirement plans), "Uniform Lifetime Table" (used for determining lifetime RMDs to participants over age 70½), and the "Joint and Last Survivor Table" (for lifetime payouts to any over-age-70½ participant whose sole beneficiary is his more-than-10-years-younger spouse). Each of those will be replaced by an updated version, based on the fact that people are living, on average, almost two years longer than they did in 2003.

The impact on retirees and beneficiaries will be a measurable though usually modest reduction in RMDs. The larger the client's retirement plan, the greater the dollar reduction in RMDs will be under the new tables. Of course, the income taxes on any amounts not distributed are still only deferred, not (for most people) eliminated, but clients like a lower immediate tax bill nevertheless.

Retiree Example: Alfred will turn 75 in 2020. The December 31, 2019, value of his IRA is $2 million. Under the current Uniform Lifetime Table, which still applies through 2020, the divisor for age 75 is 22.9, so his 2020 RMD is $87,336 (though actually it is zero because of the CARES Act). If the new tables were in effect, his divisor would be 24.6, and his RMD would be only $81,301. The $6,000 reduction could save (defer) over $2,000 of federal income tax for a 75-year-old with a $2 million IRA.

Beneficiary Example: Betty's mother dies in 2020, leaving her $1 million IRA to Betty as "designated beneficiary." Betty will turn 57 in 2021, the year after the year of her mother's death. Under the new single life table effective that year, her life expectancy ("divisor") will be 29.7 years, resulting in a $33,670 2021 RMD from the inherited IRA. Under the old tables (in use through 2020), her life expectancy would have been only 27.9 years, triggering an RMD of $35,842. Again,

the new tables will produce a measurable though modest decrease in the RMD and current income tax.

The changeover to the new tables will be easy and painless for most people. Life expectancies that are recalculated annually (all lifetime payouts; post-death payouts to a surviving spouse who was sole beneficiary) are easy as pie: Just recalculate using the new tables starting in 2021.

For beneficiaries of pre-2020 decedents who are taking RMDs using the fixed term method over their single life expectancy, the switch in 2021 will be only slightly more complicated: There will be a one-time reset of the life expectancy that year. The designated beneficiary will go back to the year after the year of the participant's death and find his (the beneficiary's) single life expectancy as of his age in that year using the new table. Then, one year will be deducted from that new life expectancy for each year elapsed since the first distribution year to arrive at the divisor for the applicable post-2020 year.

Presumably many participants and beneficiaries will get confused, use the wrong table, miscalculate the reset, etc. But any such errors are likely to result in taking too much money out of the retirement plan rather than too little, so at least there will be no penalties triggered by the mistake.

Though the new tables are pretty easy for retirees and beneficiaries to adapt to, there are classes of people for whom this change means a mountain of work, such as financial planners and plan administrators. Any financial plan done heretofore for a retirement plan owner or beneficiary will have to be re-done to reflect the new tables...projections will change for RMDs, income taxes, liquidity needs, even potentially Medicare premiums. And plan administrators will have to reprogram all their computers to recalculate RMD payouts and projections starting in 2021.

But most to be pitied are tax-book writers who will have to replace the tables, revise chapters, and rewrite every RMD example in their books. Some will probably decide to, instead, retire, leave all that work to others, and start collecting their own newly-reduced RMDs.

New RMD Tables for 2021 and Later

1. Uniform Lifetime Table

Table for Determining Applicable Distribution Period (Divisor)			
Age	**Distribution period**	**Age**	**Distribution period**
70	29.1	95	8.9
71	28.2	96	8.3
72	27.3	97	7.8
73	26.4	98	7.3
74	25.5	99	6.8
75	24.6	100	6.4
76	23.7	101	5.9
77	22.8	102	5.6
78	21.9	103	5.2
79	21.0	104	4.9
80	20.2	105	4.6
81	19.3	106	4.3
82	18.4	107	4.1
83	17.6	108	3.9
84	16.8	109	3.7
85	16.0	110	3.5
86	15.2	111	3.4
87	14.4	112	3.2
88	13.6	113	3.1
89	12.9	114	3.0
90	12.1	115	2.9
91	11.4	116	2.8
92	10.8	117	2.7
93	10.1	118	2.5
94	9.5	119	2.3
		120+	2.0

This table must be used by all taxpayers to compute lifetime required distributions after 2020, unless the sole beneficiary is the participant's more-than-10-years-younger spouse. See ¶ 1.3.01. This table may not be used: by beneficiaries of a deceased participant (except in the year of the participant's death); or for years prior to 2021.

For each Distribution Year, determine: (A) the account balance as of the prior calendar year end (see ¶ 1.2.05–¶ 1.2.08); (B) the participant's age at the end of the Distribution Year (¶ 1.2.04); and (C) the Applicable Distribution Period (divisor) for that age from the above table. "A" divided by "C" equals the minimum required distribution for the Distribution Year.

2. Single Life Expectancy Table. **FOR 2021 AND LATER YEARS ONLY**

For computing RMDs after the participant's death.

Ages 0 to 59

Age	Life Expectancy	Age	Life Expectancy
0	84.5	30	55.3
1	83.7	31	54.3
2	82.7	32	53.4
3	81.7	33	52.4
4	80.8	34	51.4
5	79.8	35	50.5
6	78.8	36	49.5
7	77.8	37	48.6
8	76.8	38	47.6
9	75.8	39	46.6
10	74.8	40	45.7
11	73.8	41	44.7
12	72.8	42	43.8
13	71.9	43	42.8
14	70.9	44	41.8
15	69.9	45	40.9
16	68.9	46	39.9
17	67.9	47	39.0
18	66.9	48	38.0
19	66.0	49	37.1
20	65.0	50	36.1
21	64.0	51	35.2
22	63.0	52	34.3
23	62.0	53	33.3
24	61.1	54	32.4
25	60.1	55	31.5
26	59.1	56	30.6
27	58.2	57	29.7
28	57.2	58	28.8
29	56.2	59	27.9

Single Life Table, cont. **FOR 2021 AND LATER YEARS ONLY**

Ages 60 to 120

Age	Life Expectancy	Age	Life Expectancy
60	27.1	95	3.9
61	26.2	96	3.7
62	25.3	97	3.4
63	24.5	98	3.2
64	23.6	99	3.0
65	22.8	100	2.8
66	22.0	101	2.6
67	21.2	102	2.5
68	20.4	103	2.3
69	19.5	104	2.2
70	18.7	105	2.1
71	17.9	106	2.1
72	17.1	107	2.1
73	16.3	108	2.0
74	15.6	109	2.0
75	14.8	110	2.0
76	14.0	111	2.0
77	13.3	112	2.0
78	12.6	113	1.9
79	11.9	114	1.9
80	11.2	115	1.8
81	10.5	116	1.8
82	9.9	117	1.6
83	9.2	118	1.4
84	8.6	119	1.1
85	8.1	120+	1.0
86	7.5		
87	7.0		
88	6.6		
89	6.1		
90	5.7		
91	5.3		
92	4.9		
93	4.6		
94	4.2		