Distributions to Beneficiaries of Tax-Favored Retirement Plans, Before and After the SECURE Act

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Abstract

Individual beneficiaries of tax-favored retirement plans have long enjoyed substantial tax deferral by spreading required minimum distributions (RMDs) over their lifetimes or life expectancies. Often referred to as "stretch" distributions, these extended RMDs attracted the attention of reformers who questioned whether the deferrals served the needs of retirees, or were merely estate planning tools. The result of that concern was the enactment of the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) of 2019 that significantly changed the treatment of retirement plan distributions to beneficiaries.

The SECURE Act primarily targets non-annuity RMDs made to designated beneficiaries from tax-favored retirement plans that are defined contribution plans (but including IRAs). The SECURE Act eliminates life-expectancy RMDs for many if not most of these beneficiaries and instead requires distribution of the entire amount of the retirement benefit before the end of the calendar year containing the tenth anniversary of the participant's death (the ten-year rule).

The SECURE Act, however, preserves life-expectancy RMDs for "eligible designated beneficiaries" (EDBs). EDBs include only (1) the surviving spouse of the participant, (2) a minor child of the participant, (3) a disabled individual, (4) a chronically ill individual, or (5) an individual who is not more than ten years younger than the participant. The determination of whether a designated beneficiary is an EDB is made as of the date of death of the participant.

The SECURE Act also helpfully replaces the old five-year distribution rule with the ten-year rule, even for designated beneficiaries who are not EDBs (*i.e.*, for those who are "ineligible designated beneficiaries" (IDBs)). The ten-year rule also applies now to beneficiaries who succeed to plan benefits upon

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the death of an EDB. Unfortunately, though, beneficiaries who succeed to plan benefits upon the death of an IDB must still distribute all the remaining benefit within the same period that was applicable to the IDB.

Beneficiaries that are so-called "see-through" trusts have long been afforded special RMD treatment. Now, however, the possibility of making life-expectancy distributions to such a trust may be lost if any of the trust beneficiaries are IDBs. The SECURE Act partially addresses this problem by providing for "applicable multi-beneficiary trusts" that can allow a trust for a disabled or chronically ill beneficiary to still take RMDs over the beneficiary's life expectancy.

The SECURE Act also applies to commercial annuities purchased by tax-favored retirement plans that are defined contribution plans (including IRAs). These plans may now purchase lifetime and period certain annuities only for EDBs. Such annuities purchased for IDBs would normally conflict with the required application of the ten-year distribution rule.

Fortunately, the SECURE Act does not apply to traditional defined benefit plans. Stretch annuities are still available under such plans even for IDBs. These annuities may provide unreduced payments for a period certain and may allow significant increases over time in the amount of an annuity payment. Joint and survivor annuity payments may still be limited in amount for beneficiaries more than ten years younger than the deceased participant. Nevertheless, the payments may be as much as 52% of the payments to the participant for even the youngest of beneficiaries (with a higher percentage for older beneficiaries).

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I. Introduction

Individual beneficiaries of tax-favored retirement plans have long enjoyed substantial tax deferral by spreading required minimum distributions (RMDs) over their lifetimes or life expectancies. These distributions were particularly beneficial when the beneficiary was very young, with a correspondingly long life expectancy. Often referred to as "stretch" distributions, they attracted the attention of reformers in recent years who questioned whether the deferrals served the needs of retirees, or were merely estate planning tools. The result of that concern was the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) that significantly changed the treatment of retirement plan distributions to beneficiaries.[1]

This Article first describes the tax treatment of distributions to beneficiaries of tax-favored plans before the enactment of the SECURE Act. It then explains the changes wrought by the SECURE Act and evaluates the extent and significance of those changes. The Article uses the term "tax-favored plans" to refer to qualified retirement plans, section 403(b) plans (TSAs), section 457 government plans, traditional IRAs, and Roth IRAs.[2] The term "participant" includes both an employee participating in an employer retirement plan and an owner of a traditional IRA or Roth IRA.

The changes made by the SECURE Act apply only to defined contribution plans. Under the SECURE Act, defined contribution plans include all tax-favored plans except traditional defined benefit plans. For this purpose, "traditional defined benefit plans" mean defined benefit plans that include a section 401(a) qualified trust as part of the plan or that qualify as section 403(a)

[1] Pub. L. No. 116-94, Div. O, 133 Stat. 2534, 3137–82.

[2] This definition of tax-favored plans excludes section 457 exempt organization plans because those plans are not funded and the SECURE Act did not purport to change the treatment of beneficiaries under unfunded plans. References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (Code), unless otherwise indicated.

annuities or section 457 government plans.[3] "Defined benefit plans" are generally plans that do not provide individual accounts for participants (or do not properly account for them).[4]

Congress has eliminated most minimum distribution requirements for the year 2020.[5] The elimination does not, however, affect beneficiary distributions that are subject to the SECURE Act. The SECURE Act applies to beneficiaries of participants dying during or after 2020, and the earliest any of these beneficiaries can be required to take minimum distributions is the year 2021.[6]

After the death of a participant, the amount and timing of RMDs paid to beneficiaries have generally depended on the existence or nonexistence of so-called "designated beneficiaries." A designated beneficiary is, in brief, a beneficiary designated in the plan or, if the plan allows, designated by the participant.[7] The SECURE Act did not change the nature and definition of designated beneficiaries, and the existence or nonexistence of designated beneficiaries continues to be very important after enactment of the SECURE Act.

II. Non-Annuity Distributions to Beneficiaries

Tax-favored plans that are defined contribution plans under the SECURE Act normally make RMDs that are not annuity distributions (*i.e.*, that are "non-annuity distributions").[8] Nonetheless, such plans can, and sometimes do, purchase commercial annuities that instead make annuity distributions to beneficiaries.[9] Section III below discusses these annuity distributions.

A. *Non-Annuity Distributions to Beneficiaries Before the SECURE Act*

Before enactment of the SECURE Act, minimum distributions requirements for beneficiaries differed depending on whether a participant died before or on or after his or her "required beginning date" (RBD) for distributions. The RBD before enactment of the SECURE Act was normally April 1

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[3] I.R.C. § 401(a)(9)(H)(vi).

[4] I.R.C. § 414(i), (j); Reg. § 1.457-2(b)(3).

[5] Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 2203, 134 Stat. 281, 343–44 (2020).

[6] Reg. § 1.401(a)(9)-3, Q&A 3. If a participant dies in 2020, no minimum distribution is required for the year of the participant's death. CARES Act, § 2203, 134 Stat. at 343–44. If the participant's beneficiary is an eligible designated beneficiary (EDB), the beneficiary must receive his or her first distribution under the life expectancy rule before the end of 2021 (with a potentially later year for a surviving spouse).

[7] I.R.C. § 401(a)(9)(E)(i).

[8] As used in this Article, non-annuity distributions mean distributions that are not made by a defined benefit plan and that are not made under an annuity purchased by a defined contribution plan as defined by the SECURE Act. I.R.C. § 401(a)(9)(H)(vi).

[9] Reg. §§ 1.401(a)(9)-5, Q&A 1(e), 1.401(a)(9)-6, Q&A 4.

of the year following the calendar year the participant reached age 70½.[10] If the participant retired after age 70½, however, the participant's RBD was generally April 1 of the year following the calendar year of retirement (but only for a qualified retirement plan, a section 403(b) plan, or a section 457 government plan).[11]

Nevertheless, a qualified plan or a section 457 government plan could have by its terms eliminated the retirement alternative altogether (reverting to age 70½ in all events).[12] In addition, the retirement alternative did not apply if the participant was directly or indirectly a 5-percent owner of the employer.[13]

1. *Death of the Participant on or After the Required Beginning Date*

If a participant died on or after his or her RBD, plan distributions to beneficiaries were generally treated as a continuation of RMDs that were being made to the participant each year before his or her death. Those annual distributions were generally a specified fraction of the "adjusted account balance" of the plan for the prior year. For a qualified plan the adjusted account balance was the account balance on the plan's regular valuation date (often not the last day of the year), adjusted for most subsequent transactions occurring within the valuation year.[14] The adjusted account balance for an IRA or a section 403(b) plan generally equaled the account balance on the last day of the preceding year.[15]

a. *Payment of Deceased Participant's Unpaid Minimum Distribution*. For a participant who died on or after his or her RBD, a tax-favored plan had to pay the participant's beneficiaries any previously unpaid portion of the minimum non-annuity distribution required for the year of death.[16] Each year thereafter, the plan had to distribute a minimum amount equal to the adjusted account balance for the prior year divided by the applicable distribution period.[17] The applicable distribution period was different depending on whether the participant had a designated beneficiary and, if so, whether the participant's spouse was the *sole* designated beneficiary.

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[10] I.R.C. § 401(a)(9)(C)(i)(I); Reg. §§ 1.401(a)(9)-2, Q&A 2(a), 1.408-8, Q&A 3.

[11] I.R.C. § 401(a)(9)(C)(i)(II); Reg. §§ 1.401(a)(9)-2, Q&A 2(a), 1.403(b)-6(e)(3); 1.457-6(d).

[12] Reg. §§ 1.401(a)(9)-2, Q&A 2(e), 1.457-6(d).

[13] I.R.C. § 401(a)(9)(C)(ii), (a)(9)(C)(iv); Reg. §§ 1.401(a)(9)-2, Q&A 2, 1.408-8, Q&A 3. The definition of a "5-percent owner" is complex. I.R.C. § 416(i)(1)(B).

[14] Reg. § 1.401(a)(9)-5, Q&A 3. The adjusted account balance did not include the value of any qualifying longevity annuity contract (QLAC) purchased by the plan after July 2, 2014. Reg. § 1.401(a)(9)-5, Q&A 3(d). Special adjustments were required for rollovers and transfers between plans. Reg. §§ 1.401(a)(9)-5, Q&A 3(e), 1.401(a)(9)-7.

[15] Reg. §§ 1.408-8, Q&A 6, 1.403(b)-6(e)(2).

[16] Reg. § 1.401(a)(9)-5, Q&A 4(a).

[17] Reg. § 1.401(a)(9)-5, Q&A 1(a).

b. *No Designated Beneficiary.* If a participant had one or more nondesignated beneficiaries (NDBs), the "applicable distribution period" depended on the participant's age on his or her birthday in the calendar year of his or her death. For the first full calendar year following the participant's death, the applicable distribution period was the number of years found by reference to such age in the Single Life Table in the regulations, but reduced by one year. For each subsequent calendar year, the applicable distribution period was one year less than in the immediately preceding calendar year.[18]

c. *Spouse as Sole Designated Beneficiary.* If the participant's surviving spouse was the sole designated beneficiary, the applicable distribution period would have depended on the spouse's life expectancy. The applicable distribution period for each full calendar year after the participant's death was the longer of (1) the spouse's life expectancy in that year or (2) the period determined for a participant without a designated beneficiary (as described immediately above). For a particular calendar year, a tax-favored plan could find the spouse's life expectancy in the Single Life Table for the age the spouse attained in that year. In other words, for each post-death calendar year, the tax-favored plan had to determine the spouse's life expectancy anew based on the age the spouse attained in that year.[19]

d. *Other Designated Beneficiaries.* If a participant had only designated beneficiaries, at least one of whom was not his or her spouse, the applicable distribution period would have depended on the age of the oldest designated beneficiary (whether or not the spouse). That is, the applicable distribution period for each full calendar year after the participant's death was the longer of (1) the period determined for a participant without a designated beneficiary (as described above) or (2) an alternative period based on the age of the oldest designated beneficiary.

For the first full calendar year following the participant's death, the tax-favored plan would have found the alternative period in the Single Life Table for the age attained by the oldest beneficiary in that year. For each subsequent calendar year, the alternative period was one year less than in the immediately preceding calendar year.[20] Thus, if a plan had only one beneficiary and he or she was very young, the distributions could be "stretched" over the long life expectancy of the beneficiary.

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[18] Reg. § 1.401(a)(9)-5, Q&A 5(a)(2), Q&A 5(c)(3), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table.

[19] Reg. § 1.401(a)(9)-5, Q&A 5(a)(1), Q&A 5(c)(2), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table.

[20] Reg. § 1.401(a)(9)-5, Q&A 5(a)(1), Q&A 5(c)(1), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table.

2. *Death of the Participant Before the Required Beginning Date*

If the participant died before his or her RBD, the tax-favored plan had to meet minimum distribution requirements under one of two methods.[21] Those two methods also applied to minimum distributions from Roth IRAs (whether or not the participant died before the RBD).[22] Under one method, the tax-favored plan had to distribute the entire amount of the benefits before the end of the fifth full calendar year following the participant's death (the "five-year rule").[23] Under the other method, it had to distribute a minimum amount each calendar year based on the life expectancy of the oldest designated beneficiary (the "life-expectancy rule").[24] Again, with careful planning, the life-expectancy rule allowed a stretch distribution over the long life expectancy of a young individual beneficiary.

B. *Non-Annuity Distributions to Beneficiaries After the SECURE Act*

The SECURE Act substantially curtailed non-annuity distributions over the life expectancies of many beneficiaries.

1. *Different Distribution Requirements for Different Classes of Beneficiaries*

For participants dying during or after 2020, treatment of RMDs to beneficiaries now differ depending on the beneficiaries' classifications. For this purpose, a beneficiary of a tax-favored plan may be classified as an eligible designated beneficiary (EDB), an ineligible designated beneficiary (IDB), or a nondesignated beneficiary (NDB). EDBs receive the most favorable treatment under the SECURE Act.

2. *Definition of Eligible Designated Beneficiary*

An EDB is a designated beneficiary who is, as of the date of death of the participant:

1. the surviving spouse of the participant,
2. a minor child of the participant,
3. a disabled individual,
4. a chronically ill individual, or
5. an individual who is not more than ten years younger than the participant.[25]

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[21] I.R.C. § 401(a)(9)(B)(ii), (a)(9)(B)(iii); Reg. § 1.401(a)(9)-3, Q&A 1(a).
[22] Reg. § 1.408A-6, Q&A 14(b).
[23] I.R.C. § 401(a)(9)(B)(ii); Reg. § 1.401(a)(9)-3, Q&A 1(a).
[24] I.R.C. § 401(a)(9)(B)(iii); Reg. § 1.401(a)(9)-3, Q&A 1(a).
[25] I.R.C. § 401(a)(9)(E)(ii).

a. *Minor Child.* Under item 2 above, a child will cease to be an EDB upon his or her death. Otherwise, a child will cease to be an EDB upon the later of (1) reaching majority, (2) completing a specified course of education or reaching age 26 if earlier, or (3) recovering from a disability that existed when the child reached majority. Any benefit remaining undistributed when the child ceases to be an EDB must be distributed by the end of the tenth full calendar year following such cessation.[26] Nevertheless, payments to a minor child must be treated as payments to the surviving spouse, if the remaining benefit must be paid to the surviving spouse upon the cessation of payments to the child.[27] In such case, the surviving spouse will be the EDB.[28]

b. *Disabled Individual.* A taxpayer is disabled under item 3 above if he or she cannot do substantial work because of a physical or mental medical condition that will last for a long and indefinite period or from which the taxpayer will probably die.[29]

c. *Chronically Ill Individual.* A chronically ill individual (item 4 above) is someone certified within the preceding 12-month period (by a physician, registered nurse, or licensed social worker) as suffering from certain mental or physical impairments.[30] For physical impairments, the professional must certify that the individual is unable to perform two "activities of daily living" for 90 days without "substantial assistance."[31] At the time of the certification, the required 90-day period may be an already elapsed period, a future period, or a continuous combination of past and future periods.[32]

Activities of daily living include eating, toileting, transferring, bathing, dressing, and continence.[33] Substantial assistance with such activities includes either hands-on physical assistance or "standby assistance." Standby assistance is assistance provided by someone within arm's reach who can prevent injury during performance of the activity (*e.g.*, by physically catching a falling individual or dislodging food from a choking individual's throat).[34]

Alternatively, the licensed professional may certify that the individual requires "substantial supervision" to protect against threats to health and safety due to the individual's "severe cognitive impairment."[35] Severe cognitive im-

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[26] I.R.C. § 401(a)(9)(F), (E)(ii)(II), (E)(iii); Reg. § 1.401(a)(9)-6, Q&A 15.

[27] I.R.C. § 401(a)(9)(F).

[28] I.R.C. § 401(a)(9)(E)(ii)(I).

[29] I.R.C. §§ 72(m)(7), 401(a)(9)(E)(ii)(III).

[30] I.R.C. § 7702B(c)(2)(A).

[31] I.R.C. § 7702B(c)(2)(A)(i).

[32] *See* Notice 97-31, 1997-1 C.B. 417; H.R. REP. NO. 104-736, at 297 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 1990, 2110; STAFF OF THE JOINT COMM. ON TAX'N, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 335 (1996).

[33] I.R.C. § 7702B(c)(2)(B).

[34] Notice 97-31, 1997-1 C.B. at 417–18.

[35] I.R.C. § 7702B(c)(2)(A)(iii).

pairment means loss of intellectual capacity due to Alzheimer's disease or similar types of irreversible dementia, as determined from clinical evidence and standard tests measuring impairments of memory, orientation, and reasoning.[36] Substantial supervision includes continual physical or verbal supervision necessary to protect the health and safety of the individual.[37]

In any such case though, the certification by the professional must also state that the individual's disability is indefinite and reasonably expected to be lengthy in nature.[38]

d. *EDB Status Determined as of the Date of the Death of Participant.* The determination of whether a designated beneficiary is an EDB is determined as of the date of death of the participant.[39] This provision of the SECURE Act does not change the way designated beneficiaries are determined, however. The definition of designated beneficiary has not changed.[40] Rather, the SECURE Act merely provides that the condition that qualifies a designated beneficiary as "eligible" must exist on the date of death of the participant. Thus, a later disability or chronic illness will not retroactively qualify a designated beneficiary as an EDB.

3. *Distributions to Ineligible Designated Beneficiaries*

An IDB is a designated beneficiary who is not an EDB. Under the new rules, an IDB is not entitled to take distributions under the life-expectancy rule. Instead, the IDB must take distributions under the ten-year rule.[41] The ten-year rule provides that a plan must distribute the entire amount of a participant's benefits by the end of the calendar year containing the tenth anniversary of the participant's death.[42]

4. *Distributions to Eligible Designated Beneficiaries*

A beneficiary must now be an EDB to potentially enjoy the most generous tax deferral provisions under the SECURE Act.

a. *Distributions When the Only Beneficiaries of a Plan Are EDBs.* A tax-favored plan that has only EDBs may potentially make distributions under either the ten-year rule or the life-expectancy rule.[43] Under the life-expec-

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[36] *See* Notice 97-31, 1997-1 C.B. at 418; H.R. REP. NO. 104-736, at 297 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 1990, 2110; STAFF OF THE JOINT COMM. ON TAX'N, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 335 (1996).

[37] Notice 97-31, 1997-1 C.B. at 418.

[38] I.R.C. § 401(a)(9)(E)(ii)(IV).

[39] I.R.C. § 401(a)(9)(E)(ii) (flush language).

[40] I.R.C. § 401(a)(9)(E)(ii).

[41] I.R.C. § 401(a)(9)(H)(i)(I); Reg. § 1.401(a)(9)-3, Q&A 4(a)(2).

[42] Reg. § 1.401(a)(9)-3, Q&A 2.

[43] I.R.C. § 401(a)(9)(H). Reg. § 1.401(a)(9)-3, Q&A 4(a)(2).

tancy rule, the plan may make distributions to the EDBs over the life expectancy of the oldest EDB.[44] Under the ten-year rule, the plan must distribute the entire amount of a participant's benefits by the end of the calendar year containing the tenth anniversary of the participant's death.[45] These distribution options for the EDBs are identical to the distribution options that would have been available to them before enactment of the SECURE Act except that the five-year rule has become a ten-year rule.

b. *Distributions When a Plan Has Both EDBs and IDBs.* If a plan has both EDBs and IDBs, the plan may generally make distributions only under the ten-year rule. That is, a plan without separate accounts must make all distributions under the same minimum distribution method, (*i.e.*, under either the ten-year rule or the life-expectancy rule).[46] Logically then, a plan with both EDBs and IDBs may make distributions only under the ten-year rule. Distributions under the life-expectancy rule in such a case would allow IDBs to benefit from a life-expectancy distribution, to which they are not otherwise entitled under the provisions of the SECURE Act.[47]

Stated another way, if all the beneficiaries of a tax-favored plan are designated beneficiaries and one of them is an IDB, the participant will be treated as having no EDB. This is analogous to the statement in the regulations that if an NDB is one of the beneficiaries of a tax-favored plan, the participant will be treated as having no designated beneficiary.[48]

If a tax-favored plan is divided into separate accounts before the end of the year following the death of the participant, however, the life-expectancy rule may be used for distributions from any separate account benefiting only EDBs. The regulations have long allowed the timely creation of separate accounts to allow distributions under the life-expectancy rule or to allow a beneficiary to use his or her own life expectancy under the rule.[49]

c. *Distributions to EDBs under the Ten-Year Rule.* Under the ten-year rule, a tax-favored plan must distribute the entire amount of a participant's benefits by the end of the calendar year containing the tenth anniversary of the participant's death.[50] As noted above, the ten-year rule applies to all distributions to an EDB from a plan with only designated beneficiaries, one or more of which is an IDB, unless the beneficiaries have timely created separate accounts in the plan. The ten-year rule also applies to distributions from a plan with only EDBs if:

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[44] Reg. § 1.401(a)(9)-5, Q&A 7(a)(1).
[45] Reg. § 1.401(a)(9)-3, Q&A 2.
[46] Reg. § 1.401(a)(9)-8, Q&A 2(a)(1).
[47] I.R.C. § 401(a)(9)(H)(ii).
[48] Reg. § 1.401(a)(9)-4, Q&A 3.
[49] Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).
[50] Reg. § 1.401(a)(9)-3, Q&A 2.

1. the governing instrument for the tax-favored plan *requires* distribution under the ten-year rule,[51] or
2. the governing instrument allows the participant or EDB to choose either the ten-year rule or the life-expectancy rule, and the participant or EDB elects the ten-year rule.[52]

If the ten-year rule applies, an EDB may not roll over any funds remaining in the tax-favored plan in the tenth year, since the total amount of those funds is an RMD ineligible for rollover.[53] Consequently, a surviving spouse subject to the ten-year rule who wishes to roll over funds to his or her own IRA (with its own different RMD rules) should generally roll over the funds before the tenth year, when distributions are not "required."[54] The only exception applies if the surviving spouse is the sole beneficiary of the participant's IRA or Roth IRA. In that case, the spouse may become the owner of the IRA or Roth IRA in the tenth year by simply declining to take the minimum distribution.[55]

d. *Distributions to EDBs under the Life-Expectancy Rule.* The life-expectancy rule generally applies to distributions from a tax-favored plan to an EDB if the ten-year rule does not apply.[56] More specifically, the rule applies to distributions to an EDB if:

1. the governing instrument for a tax-favored plan does not specify the minimum distribution rule and does not provide an election,[57]
2. the governing instrument *requires* minimum distributions to an EDB under the life-expectancy rule,[58] or
3. the governing instrument allows the participant or EDB to choose either the ten-year rule or the life-expectancy rule, and the participant or EDB elects the life-expectancy rule.[59]

The life-expectancy rule also applies if (a) the participant and EDB fail to make an irrevocable election under item (3) above and (b) the governing instrument does not then require use of the ten-year rule.[60] If the life-expec-

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[51] Reg. § 1.401(a)(9)-3, Q&A 4(b).
[52] Reg. § 1.401(a)(9)-3, Q&A 4(c).
[53] I.R.C. § 402(c)(4)(B).
[54] *Cf.* Notice 2007-7, 2007-1 C.B. 395, Q&A 17(b).
[55] Reg. § 1.408-8, Q&A 5(b).
[56] Reg. § 1.401(a)(9)-3, Q&A 1(a).
[57] Reg. § 1.401(a)(9)-3, Q&A 4(a)(1).
[58] Reg. § 1.401(a)(9)-3, Q&A 4(b).
[59] Reg. § 1.401(a)(9)-3, Q&A 4(c).
[60] Reg. § 1.401(a)(9)-3, Q&A 4(c).

tancy rule applies, a tax-favored plan must generally begin making distributions by the end of the first full calendar year after the participant's death.[61] Nevertheless, if the surviving spouse is the sole designated beneficiary, it may instead begin making distributions as late as the end of the calendar year the participant would have reached age 72.[62]

A participant or EDB must generally make the life-expectancy election under item 3 above before the end of the first full calendar year following the participant's death. If the sole designated beneficiary is the participant's surviving spouse, however, the spouse may instead make the life-expectancy election by the end of the calendar year the participant would have reached age 72. In no event, though, may the spouse make the election later than the end of the year containing the tenth anniversary of the participant's death.[63] Unfortunately, a surviving spouse not aware of this election deadline may be trapped into the ten-year rule if the tax-favored plan requires use of that rule in the absence of an election.

Example 1. Assume that a participant dies in 2021 at age 51, and the participant's surviving spouse is the sole beneficiary of participant's profit-sharing plan. The plan allows the surviving spouse to elect either the ten-year rule or the life-expectancy rule (but the plan makes no provision for the spouse's failure to make an election). Under these facts, the spouse's election will be effective only if irrevocably made before December 31, 2031 (the earlier of the year the participant would have reached age 72 or the year containing the tenth anniversary of the participant's death). If the spouse fails to make a timely irrevocable election, the life-expectancy rule applies (in the absence of a plan provision requiring default use of the ten-year rule).

When the life-expectancy rule applies, failure to make timely required distributions will generally trigger the 50% penalty tax. That is, the tax law does not imply an election of the ten-year rule merely because the tax-favored plan fails to make timely life-expectancy payments.[64] Nevertheless, the Service will not apply the penalty if the tax-favored plan makes a distribution of its entire balance to a *sole designated beneficiary* (whether or not the surviving spouse) by the end of the tenth full calendar year following the participant's death.[65]

Each year, under the life-expectancy rule, a tax-favored plan must distribute an amount equal to the participant's adjusted account balance divided by

[61] I.R.C. § 401(a)(9)(B)(iii)(III); Reg. § 1.401(a)(9)-3, Q&A 3.
[62] I.R.C. § 401(a)(9)(B)(iv)(I); Reg. § 1.401(a)(9)-3, Q&A 3(b).
[63] Reg. § 1.401(a)(9)-3, Q&A 3, Q&A 4(c).
[64] I.R.C. § 4974(a); Reg. § 1.401(a)(9)-3, Q&A 3, 4(c); P.L.R. 2008-11-028 (Dec. 21, 2007).
[65] Reg. § 54.4974-2, Q&A 7(b).

the applicable distribution period.[66] Nevertheless, the applicable distribution period may differ depending on whether the surviving spouse is the *sole* designated beneficiary (as more fully explained below).[67]

e. *The Life Expectancy of the Oldest EDB.* If a tax-favored plan has more than one EDB (and no IDBs or NDBs), the plan may take into account only the oldest EDB to determine the distribution period under the life-expectancy rule.[68]

Example 2. Assume that a participant names his three children as equal beneficiaries of his IRA, but only if one or more of the children survives him. If none of the children survives him, the participant names his two brothers as the alternative beneficiaries. Assume that one of the participant's children predeceases him and that the two surviving children, ages 30 and 45, are disabled EDBs as of the death of the participant. The participant's brothers are then ages 65 and 70. Assume, further, that neither of the surviving children receives or disclaims any of his or her benefits before September 30 of the calendar year following the participant's death.

Then, distributions under the life-expectancy method may be made to the surviving disabled children over a period no longer than the life expectancy of the 45-year old child (the older EDB). The participant's brothers take nothing and thus are not considered to be beneficiaries for this purpose.[69] On the other hand, if none of the participant's children should survive him, the brothers, if they were EDBs, would generally be entitled to distributions over a period no longer than the life expectancy of the older brother, age 70.

Note though that a beneficiary will not be a designated beneficiary for this purpose if, in timely fashion, he or she receives all his or her benefits or disclaims his or her interest.[70]

Example 3. Assume the same facts as in Example 2, except that the child age 45 properly disclaimed his interest before September 30 of the calendar year following the participant's death. Under these facts, distributions under the life-expectancy method may be made to the

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[66] Reg. § 1.401(a)(9)-5, Q&A 1(a).

[67] Reg. § 1.401(a)(9)-5, Q&A 5(b), Q&A 5(c).

[68] Reg. § 1.401(a)(9)-5, Q&A 7(a)(1).

[69] Reg. § 1.401(a)(9)-5, Q&A 7(c)(1).

[70] Rev. Rul. 2005-36, 2005-1 C.B. 1368. It is important that a qualified disclaimer under section 2518(c)(3) also qualify under the disclaimer laws of the state of jurisdiction. The Service has specifically ruled that a disclaimer of property that qualifies under both federal and state law is effective for federal income tax purposes. G.C.M. 39,858 (Sept. 9, 1991).

only remaining EDB, the disabled child age 30, over a period no longer than that child's life expectancy.

Nevertheless, a named beneficiary who dies before the September 30 date without receiving or disclaiming his or her interest (which then passes to a successor beneficiary) will continue to qualify as a designated beneficiary who must be taken into account in determining the oldest designated beneficiary.[71]

Example 4. Assume that a participant dies on December 15, 2021, and the participant's IRA names her surviving spouse D, daughter A (age 40), and daughter B (age 35) as equal beneficiaries of the participant's IRA. Both daughter A and daughter B are disabled EDBs at the time of the participant's death. On July 10, 2022, the surviving spouse executes a qualified disclaimer of his entire interest in the IRA. Daughter A dies August 16, 2022, and her interest passes to a successor beneficiary. Under these facts, daughter A and daughter B will be the remaining designated beneficiaries as of September 30, 2022. Before the SECURE Act, minimum distributions had to be made to daughter B based on the life expectancy of daughter A, the older EDB, despite daughter A's earlier death. The SECURE Act may, however, require distribution of the entire IRA benefit under the successor ten-year rule.[72]

5. *When a Spouse Is the Sole Beneficiary*

A surviving spouse who is the sole beneficiary of a tax-favored plan is an EDB who generally has a choice of the ten-year rule or the life-expectancy rule for RMDs. The considerations governing this choice after the SECURE Act are the same as before the SECURE Act (except that the five-year rule has been supplanted by the ten-year rule). If the spouse is more interested in tax deferral than in current personal use of funds, he or she will want to choose the rule that delays the distribution of funds over the longer period. The degree of difficulty of that choice depends, strangely enough, on whether the participant reaches or would have reached age 62 in the year of the participant's death.

a. *Death in Calendar Year before Year Attaining Age 62.* A surviving spouse seeking deferral will almost always find it advantageous to choose the life-expectancy rule if the participant did not reach, and would not have reached, age 62 in the calendar year of the participant's death. In that case, annual distributions need not even begin under the life-expectancy rule until the last day of the year the participant would have reached age 72.[73] At the

[71] Reg. § 1.401(a)(9)-4, Q&A 4(c).
[72] I.R.C. § 401(a)(9)(H)(iii).
[73] I.R.C. § 401(a)(9)(B)(iv)(I); Reg. § 1.401(a)(9)-3, Q&A 3(b).

very earliest, that day would be the last day of the *eleventh* full calendar year after the participant's death. By contrast, under the ten-year rule, the tax-favored plan must distribute *all* its funds to the spouse on or before the last day of the *tenth* full calendar year after the participant's death.[74]

Example 5. Assume that a participant dies on December 15, 2021, on his 61st birthday. Had he lived, the participant would have reached age 72 on December 15, 2032. The participant's surviving spouse is the sole beneficiary of the inherited IRA and may choose distributions under either the ten-year rule or the life-expectancy rule. Thus, if the surviving spouse chooses the life-expectancy rule, the inherited IRA must begin distributions by the end of the year 2032 over the life of the spouse. By contrast, under the ten-year rule, the inherited IRA must distribute all its funds by the end of the year 2031.

b. *Death in Calendar Year Attaining Age 62 or Subsequent Years.* If a participant reached or would have reached age 62 during or before the calendar year of his or her death, the advantage of the life-expectancy rule may not be quite so clear-cut.

Under the life-expectancy rule, annual distributions to the surviving spouse must begin by the end of the *first* full calendar year following the participant's death (or the year the participant would have reached age 72, if later).[75] Under the ten-year rule, however, the surviving spouse may delay the first distribution until the end of the *tenth* full calendar year following the participant's death.[76] Thus, by choosing the ten-year rule, the spouse may be able to delay the first distribution for up to nine additional years.

On the other hand, the ten-year rule requires the distribution of *all* funds in the tax-favored plan by the end of the *tenth* full calendar year following the participant's death. In contrast, the life-expectancy rule allows the spouse to spread the distributions over a normally longer period of years at least equivalent to the spouse's life expectancy.[77]

Example 6. Assume that a participant dies on December 15, 2021, on her 67th birthday. Had she lived, the participant would have reached age 72 on December 15, 2026. The participant's surviving spouse is the sole beneficiary of the participant's qualified plan and under the terms of the plan may choose distributions under either the ten-year rule or the life-expectancy rule. Thus, if the surviving spouse chooses the life-expectancy rule, the IRA must begin distributions by the end of the year 2026 over the life expectancy of the spouse. By

[74] Reg. § 1.401(a)(9)-3, Q&A 2.
[75] I.R.C. § 401(a)(9)(B)(iii)(III), (a)(9)(B)(iv)(I); Reg. § 1.401(a)(9)-3, Q&A 3.
[76] Reg. § 1.401(a)(9)-3, Q&A 2.
[77] Reg. § 1.401(a)(9)-3, Q&A 2; Reg. § 1.401(a)(9)-5, Q&A 1(a), Q&A 5(b), Q&A 5(c).

contrast, under the ten-year rule, the plan may wait until the end of the year 2031 to make a distribution (delaying distributions for five more years) but then must distribute all its funds.

Thus, the ten-year rule becomes relatively more favorable the closer the participant is to age 72 in the year of his or her death. In many cases, the choice of the rule providing the more desirable tax deferral will be intuitively obvious. In other cases, the spouse may have to compare projections of respective tax deferrals under the two rules. The projections should take into account all relevant factors, including the respective ages of the participant and spouse, the anticipated (and possibly differing) tax brackets for the spouse over future years, and the time value of money.

c. *Distributions Computed by Annually Redetermining Life Expectancy.* If the surviving spouse is the sole designated beneficiary (*i.e.*, the only EDB) and is using the life-expectancy method, the spouse is entitled to a special method for computing the distribution period. The applicable distribution period is the spouse's life expectancy in each distribution year. Thus, for each distribution year after the participant's death, the tax-favored plan must determine the spouse's life expectancy anew based on the age the spouse attained in that year. The plan may find the spouse's life expectancy in the Single Life Table in the regulations.[78]

Example 7. Assume that a participant dies in the year 2021 at age 76 and the sole designated beneficiary is the participant's surviving spouse who reaches age 74 that year. Assume that the tax-favored plan does not provide an annuity and had an adjusted account balance of $400,000 for the year 2021. Assume further that the surviving spouse elects the life-expectancy rule, with payments to begin in 2022.

Then, for the year 2022, the tax-favored plan must make a minimum distribution to the spouse of $29,851. The spouse computes this amount by dividing the adjusted account balance of $400,000 by 13.4 years (the number of years specified in the Single Life Table for the spouse's age of 75 in the year after the participant's death).

For the following year 2023, assume that the prior year adjusted account balance is $390,000. Then, the tax-favored plan must make a minimum distribution to the spouse of $30,709. The spouse computes this amount by dividing the prior year adjusted account balance

[78] Reg. § 1.401(a)(9)-5, Q&A 5(c)(2), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table. The following example 7 in the text uses distribution periods drawn from the table in the current regulations. Note though that the Service has issued proposed regulations setting forth new tables that will provide more generous distribution periods. If made final, the new tables will become effective for 2021 and subsequent years. Prop. Reg. § 1.401(a)(9)-9, 84 Fed. Reg. 60,812 (Nov. 8, 2019).

of $390,000 by 12.7 years (the years specified in the Single Life Table for the one-year older spouse who is now age 76).

For the following year 2024, assume that the prior year adjusted account balance is $380,000. Then, the tax-favored plan must make a minimum distribution to the spouse of $31,405. The spouse computes this amount by dividing the prior year adjusted account balance of $380,000 by 12.1 years (the years specified in the Single Life Table for the one-year older spouse who is now age 77).

d. *The Surviving Spouse's IRA Ownership Option.* An additional factor comes into play if the tax-favored plan is an IRA. A surviving spouse may elect to become the owner of the participant's IRA if the spouse (1) is the sole beneficiary and (2) has an unlimited right to withdraw funds. After the election, the minimum distribution requirements will apply to the spouse as if he or she established the IRA or Roth IRA. For example, the spouse could then defer RMDs from a traditional IRA until he or she attains age 72 and could then take advantage of the favorable distribution periods provided by the Uniform Lifetime Table.[79]

Nevertheless, before deciding to take ownership of a traditional IRA, a surviving spouse who may elect either the ten-year distribution or the life-expectancy distribution should consider choosing the distribution method that defers the first year minimum distribution for the longest period. Not only will the electing spouse then avoid RMDs for that period, the spouse may alternatively take distributions free of the ten percent penalty on premature distributions if the financial need should arise.[80]

Then, in the year the first minimum distribution would be due, the spouse may instead elect ownership of the traditional IRA. By electing ownership, the spouse avoids RMDs under the ten-year rule or life-expectancy rule for the year of the election and for subsequent years. Instead, the spouse may take advantage of the favorable distribution periods for a spouse under the Uniform Lifetime Table and may even be able to further delay the initial RMD if the spouse is then younger than age 72.[81]

By electing to become the owner of a *Roth IRA*, a surviving spouse may completely avoid minimum distributions during his or her lifetime.[82] Of course, distributions to the spouse from a Roth IRA are normally not taxable anyway, provided certain conditions are met. Nevertheless, by making the ownership election and not taking any lifetime distributions, the spouse may

[79] Reg. § 1.408-8, Q&A 5(a).

[80] The ten percent premature distribution penalty does not apply due to the exception for payment to a beneficiary after the death of the participant. I.R.C. § 72(t)(2)(A)(ii).

[81] Reg. § 1.408-8, Q&A 5(a).

[82] I.R.C. § 408A(c)(5).

increase the amount of the tax-free accumulation of earnings that the Roth IRA may ultimately distribute tax-free to beneficiaries.[83]

Unfortunately, a surviving spouse cannot elect ownership of a participant's interest in a tax-favored *employer* plan. Similarly, a surviving spouse may simply not qualify to elect ownership of the participant's IRA because he or she is not the sole beneficiary or does not have an unlimited right to withdraw funds.[84] If so, the spouse may still become the owner of all or part of his or her interest in the funds tax-free to the extent he or she can obtain a distribution of the funds. The spouse may simply roll over the distributed funds into his or her own IRA.[85] Thereafter, the spouse will be able to take advantage of all the usual benefits of ownership.

A surviving spouse taking ownership by rollover may even be able to use a modified version of the strategy described above of choosing the most favorable of the ten-year rule or the life-expectancy rule for the participant's IRA and then rolling over the funds to the spouse's own IRA before the year of the first scheduled minimum distribution. The spouse must take care though that the distribution rolled over is an eligible rollover distribution (*e.g.*, is not the ineligible RMD it would be if rolled over in the year of the first scheduled minimum distribution).

e. *Spouse Dies Before Minimum Distributions Required.* A special rule may apply to minimum distributions to beneficiaries after the death of a participant's surviving spouse. This special rule applies if the surviving spouse is the sole designated beneficiary and dies before minimum distributions are required. In that case, the tax law applies the ten-year rule and the life-expectancy rule to the spouse's designated beneficiaries with the date of death of the spouse substituted for the date of the participant's death.[86]

Note that the special rule applies even though the tax-favored plan made non-annuity distributions to the surviving spouse before any minimum distributions were actually required. In no event, however, will the rule apply if the plan made annuity payments to the surviving spouse before his or her death.[87]

Example 8. Assume that a participant dies on December 15, 2021, on his 65th birthday. Had he lived, the participant would have reached age 72 on December 15, 2028. The participant's surviving spouse is the sole beneficiary of the participant's IRA and, under the terms of the IRA, may choose distributions under either the ten-year rule or the life-expectancy rule. Thus, if the surviving spouse chooses the life-expectancy rule, the IRA must begin distributions over the life

[83] I.R.C. § 408A(d)(1), (d)(2).
[84] Reg. § 1.408-8, Q&A 5(a).
[85] I.R.C. § 408(d)(3)(A), (d)(3)(B), (d)(3)(C)(i), (d)(3)(C)(ii)(II).
[86] I.R.C. § 401(a)(9)(B)(iv)(II); Reg. §§ 1.401(a)(9)-3, Q&A 5, 1.401(a)(9)-4, Q&A 4(b).
[87] Reg. §§ 1.401(a)(9)-3, Q&A 6, 1.401(a)(9)-6, Q&A 11.

of the spouse by the end of the year 2028, the year the participant would have reached age 72. By contrast, under the ten-year rule, the IRA must distribute all its funds by the end of the year 2031.

Assume that the surviving spouse dies in 2025, well before any distributions were required under either the life-expectancy rule or the ten-year rule. If the surviving spouse had the foresight to name her disabled son (an EDB) as the succeeding beneficiary and if the IRA so provides, the spouse's son may choose between the ten-year rule and the life-expectancy rule, determined as if the surviving spouse were the owner of the IRA. If instead the surviving spouse had remarried and, before she died, named her new husband as her beneficiary, the new husband may not be treated as her surviving spouse but must instead receive minimum distributions determined and paid as if he were merely a nonspousal beneficiary.[88]

Note that the special rule is available both before and after the SECURE Act for the beneficiary of a participant who dies before his RBD. The primary difference after the SECURE Act is that the special rule is available regardless of when the participant dies.[89] In addition, a designated beneficiary of the surviving spouse is subject to the new classification and treatment rules.[90] Unfortunately though, the spouse will often not have a designated beneficiary because the spouse did not provide for one. In that case, the five-year rule, applicable to NDBs, will apply to distributions after the spouse's death.[91]

f. *Qualifying the Surviving Spouse as the Sole Beneficiary.* To qualify as the sole beneficiary for minimum distribution purposes, a surviving spouse must be at least one of the beneficiaries at the participant's death. The spouse must also be the only beneficiary on September 30 of the first full calendar year following the participant's death. Thus, the surviving spouse may become the sole beneficiary by the September 30 date if other beneficiaries are eliminated by disclaimer or by distribution of their interests (but not by death).[92] In addition, if separate accounts are timely established, the spouse may become the sole beneficiary of one of the separate accounts.[93]

Example 9. Assume that a participant dies on December 15, 2021. The participant's spouse, Daughter A, and Daughter B are named as the beneficiaries of the participant's IRA, in equal shares. On June 15, 2022, Daughter A executes a qualified disclaimer of her entire interest in the IRA. On August 1, 2022, Daughter B receives distribution of

[88] Reg. §§ 1.401(a)(9)-3, Q&A 5.
[89] I.R.C. § 401(a)(9)(H)(i)(II).
[90] I.R.C. § 401(a)(9)(H).
[91] Reg. § 1.401(a)(9)-3, Q&A 4(a)(2); P.L.R. 2006-44-022 (Aug. 22, 2006).
[92] Reg. § 1.401(a)(9)-4, Q&A 4(a), Q&A 4(c).
[93] Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

her entire interest. Thus, the participant's surviving spouse is the sole designated beneficiary since she was a beneficiary as of the decedent's death and was the only beneficiary as of September 30, 2022.

6. *When the Spouse Is Not the Sole Beneficiary*

A participant's spouse may not be the participant's beneficiary (or may not be the sole beneficiary) under a tax-favored plan. If not, an EDB may still be able to choose between the ten-year rule and the life-expectancy rule for minimum distributions.[94] If the beneficiary is more interested in tax deferral than in current personal use of funds, he or she will want to choose the rule that delays the distribution of funds longer. In many cases, however, the choice will not be an obvious one.

a. *The Choice of Distribution Method.* Under the life-expectancy rule, annual distributions must begin by the end of the *first* full calendar year following a participant's death.[95] Under the ten-year rule, however, a tax-favored plan may delay the first distribution until the end of the *tenth* full calendar year following the participant's death.[96] Thus, by choosing the ten-year rule, a beneficiary can delay the first non-annuity distribution for nine additional years.

On the other hand, the ten-year rule requires the distribution of *all* funds in the tax-favored plan by the end of the tenth full calendar year following the participant's death. In contrast, the life-expectancy rule allows a beneficiary to spread the distributions over a normally longer period of years at least equivalent to the life expectancy of the oldest EDB.[97]

Example 10. Assume that a participant dies at age 63 on December 15, 2021. The participant's disabled daughter is an EDB and is the only beneficiary of the participant's IRA. She may choose distributions under either the ten-year rule or the life-expectancy rule. Thus, if the participant's daughter chooses the life-expectancy rule, the IRA must begin distributions by the end of the year 2022, over the life expectancy of the daughter. By contrast, under the ten-year rule, the IRA may wait until the end of the year 2031 to make a distribution (delaying distributions for nine years), but must then distribute all its funds.

In many cases, a beneficiary will want to compare projections of respective tax deferrals under the two rules. Again, the projections should take into account all relevant considerations, including the age of the oldest designated

[94] Reg. § 1.401(a)(9)-3, Q&A 4.
[95] I.R.C. § 401(a)(9)(B)(iii)(III); Reg. § 1.401(a)(9)-3, Q&A 3.
[96] Reg. § 1.401(a)(9)-3, Q&A 2.
[97] Reg. § 1.401(a)(9)-3, Q&A 2; Reg. § 1.401(a)(9)-5, Q&A 1(a), Q&A 5(b), Q&A 5(c).

beneficiary, the anticipated (and possibly changing) tax brackets of the beneficiaries over future years, and the time value of money.

b. *Distributions Based on Life Expectancy in the First Distribution Year.* If the beneficiaries include one or more nonspousal EDBs and they use the life-expectancy method, the applicable distribution period for the first full calendar year after the participant's death for all the EDBs is equal to the life expectancy of the oldest EDB (whether spouse or nonspouse). The tax-favored plan may find that life expectancy in the Single Life Table for the age the beneficiary attained in that first year. For each subsequent year, the applicable distribution period is one year less than in the immediately preceding year.[98]

Example 11. Assume that a participant dies in the year 2021 and was, or would have been, age 63 in that year. Assume that the participant has two EDBs who reach ages 50 and 54, respectively, in the year of the participant's death. Assume further that the tax-favored plan does not provide an annuity and had an adjusted account balance of $400,000 for the year 2021.

Then, for the year 2022, the tax-favored plan must make a minimum distribution of $13,514. The beneficiaries compute this amount by dividing the adjusted account balance of $400,000 by 29.6 years. The number of years used is the 29.6 years specified in the Single Life Table for an individual age 55 (the age reached by the older designated beneficiary in the year after the participant's death).

For the following year 2023, assume that the prior year adjusted account balance is $420,000. Then, the tax-favored plan must make a minimum distribution of $14,685. The beneficiaries compute this amount by dividing the adjusted account balance of $420,000 by 28.6 years (one year less than the 29.6 years used for the year 2022).

For the following year 2024, assume that the prior year adjusted account balance is $430,000. Then, the tax-favored plan must make a minimum distribution of $15,580. The beneficiaries compute this amount by dividing the adjusted account balance of $430,000 by 27.6 years (one year less than the 28.6 years used for the year 2023).

[98] Reg. § 1.401(a)(9)-5, Q&A 5(c)(1), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table. The following example 11 in the text uses distribution periods drawn from the table in the current regulations. Note though that the Service has issued proposed regulations setting forth new tables that will provide more generous distribution periods. If made final, the new tables will become effective for 2021 and subsequent years. Prop. Reg. § 1.401(a)(9)-9, 84 Fed. Reg. 60,812 (Nov. 8, 2019).

7. *Death of an Eligible Designated Beneficiary*

Upon the death of a plan's sole EDB who is receiving life-expectancy distributions, any benefit remaining in the plan must be distributed by the end of the calendar year containing the tenth anniversary of the EDB's death.[99]

> **Example 12.** Assume that a participant dies during 2021 and her only beneficiary is her disabled daughter. The participant's daughter elects to take minimum distributions over her life expectancy. Assume that the daughter dies young after having received distributions for several years, and the participant's grandson becomes the new beneficiary. Then, the IRA is required to distribute the remaining balance to the grandson by the end of the calendar year containing the tenth anniversary of the daughter's death.

A similar rule may apply to the designated beneficiary of a participant who dies before 2020. That is, if such a designated beneficiary is receiving life-expectancy distributions and dies after 2019, any benefit of the designated beneficiary remaining in the plan must be distributed by the end of the calendar year containing the tenth anniversary of the beneficiary's death.[100]

Unfortunately, though, it appears that the successor beneficiary of an EDB or IDB who was taking distributions under the ten-year rule must continue to take distributions that are within the original ten-year period applicable to the EDB or IDB. Before the SECURE Act, the rule was the same except that the beneficiary of a designated beneficiary had to take distributions that satisfied the original five-year period being used by the designated beneficiary.[101]

8. *Managing Distributions Under the Ten-Year Rule*

As explained above, a tax-favored plan that is a defined contribution plan must distribute its entire benefit to an IDB by the end of the calendar year containing the tenth anniversary of the participant's death.[102] Similarly, such a plan must distribute its entire benefit to the beneficiary of an EDB by the end of the calendar year containing the tenth anniversary of the EDB's death.[103] Although the recipient beneficiary may in each case take the entire benefit in the tenth year, a taxable distribution in that year could push the beneficiary into a very high marginal tax bracket. Thus, careful planning is required to spread the distributions over the ten-year period in such a way as to absorb the distributions in the lowest brackets possible.

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[99] I.R.C. § 401(a)(9)(H)(iii).

[100] The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b)(5), 133 Stat. at 3179.

[101] Reg. §§ 1.401(a)(9)-3, Q&A 2, 1.401(a)(9)-5, Q&A 7(c)(2).

[102] I.R.C. § 401(a)(9)(H)(i)(I); Reg. § 1.401(a)(9)-3, Q&A 2.

[103] I.R.C. § 401(a)(9)(H)(iii).

On the other hand, ten-year distributions from Roth IRAs and designated Roth accounts enjoy a tremendous advantage. The plans may distribute their entire benefit *tax-free* in the tenth year, after allowing the benefit to accumulate tax-free for the entire ten-year period.[104] Of course, from a pre-death planning standpoint, a participant or beneficiary must weigh these Roth advantages against the cost of the up-front income taxes that must be paid on the original contributions to the Roth IRA or designated Roth account. That planning may become even more complicated if the participant or beneficiary must factor in liability for federal estate taxes and state inheritance taxes.

9. *Special Rule for Beneficiary Rollover from Qualified Plan to IRA*

A designated beneficiary may roll over funds from a participant's qualified plan to an IRA (nontaxable transfer) or Roth IRA (taxable transfer). The rules governing such a rollover are, however, more restrictive for a designated beneficiary who is not the surviving spouse than for a surviving spouse.

a. *Rollover by Nonspouse Beneficiary from Qualified Plan to Inherited IRA.* A designated beneficiary who is not the surviving spouse may authorize a trustee-to-trustee transfer from a qualified plan to a newly established traditional IRA (nontaxable transfer) or Roth IRA (taxable transfer). A nonspouse beneficiary may also make a nontaxable trustee-to-trustee transfer from a designated Roth account to a newly established Roth IRA. The beneficiary may even be a trust if the beneficiaries of the trust all qualify as designated beneficiaries. In either case, the nonspouse beneficiary continues as a beneficiary (and not the owner) of the recipient traditional IRA or Roth IRA, which is treated as an inherited IRA or inherited Roth IRA.[105]

b. *Rollover by Surviving Spouse from Qualified Plan to an IRA.* A surviving spouse may roll over funds from the participant's qualified plan to an IRA or Roth IRA to the same extent the participant could have during his or her lifetime. The spouse may contribute the funds either (1) in his or her name as owner or (2) in the participant's name, as deceased, with the spouse as beneficiary.[106] Of course, as discussed above, the tax law applies the RMD rules differently depending on whether the surviving spouse becomes the owner of the IRA.

The surviving spouse may even be able to use a modified version of the strategy described above of choosing the most favorable of the ten-year rule or the life-expectancy rule and then rolling over the funds to his or her own IRA before the year of the first scheduled distribution. The spouse must take

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[104] I.R.C. § 402A(d).

[105] I.R.C. §§ 402(c)(11), 403(a)(4)(b), (b)(8)(b), 408(d)(3)(C)(ii)(II); Notice 2007-7, 2007-1 C.B. 395; Notice 2008-30, 2008-1 C.B. 638. Plans are required to allow nonspousal rollovers. Worker, Retiree, and Employer Recovery Act of 2008, Pub. L. No. 110-458, § 108(f), 122 Stat. 5092, 5109 (2008).

[106] I.R.C. §§ 402(c)(9), 408(d)(3)(C)(ii)(II); Reg. § 1.408-8, Q&A 6; Notice 2008-30, Q&A 7, 2008-1 C.B. at 639.

care though that the distribution is an eligible rollover distribution (*e.g.*, is not the ineligible RMD it would be if rolled over in the year of the first scheduled distribution).

c. *Special Rule Allowing an EDB to Switch to the Life-Expectancy Rule.* A nonspouse EDB for a participant dying after 2019 may be able to take distributions from an inherited IRA or inherited Roth IRA under the life-expectancy rule even though the transferor plan required distributions under the ten-year rule. To qualify for the longer distribution period, the transferor plan must make the first annual minimum distribution using the life-expectancy rule and consummate the transfer to the IRA or Roth IRA before the end of the first full calendar year following the participant's death.[107]

> **Example 13**. Assume that a participant dies at age 63 on December 15, 2021, with his disabled daughter as the only beneficiary under his qualified plan. The terms of the plan require distribution of benefits under the ten-year rule. Thus, the plan is required to distribute all the participant's benefits by the end of the year 2031. The beneficiary, however, wishes to receive the distributions over her life expectancy. To achieve this goal, she withdraws from the plan an amount equal to the first year distribution under the life-expectancy rule. Then, before the end of 2022, she rolls over the balance of the plan in a trustee-to-trustee transfer to an inherited IRA in the name of the participant and elects distributions from the IRA over her life expectancy.

This change of minimum distribution methods is also available to a surviving spouse who rolls over funds from a qualified retirement plan to an inherited IRA or inherited Roth IRA in the name of the participant with the spouse as beneficiary. Note, however, that the transferor plan must similarly make the first annual minimum distribution using the life-expectancy rule and consummate the transfer to the IRA or Roth IRA before the end of the first full calendar year following the participant's death.[108] Alternatively, the surviving spouse may simply roll over the qualified plan funds to the spouse's own IRA and apply the minimum distribution rules applicable to the spouse.[109]

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[107] I.R.C. §§ 402(c)(11), 403(a)(4)(b), (b)(8)(b), 408(d)(3)(C)(ii)(II), 457(e)(16)(B); Notice 2007-7, 2007-1 C.B. 395; Notice 2008-30, 2008-1 C.B. 638.

[108] I.R.C. §§ 402(c)(9), (11), 403(a)(4)(b), (b)(8)(b), 408(d)(3)(C)(ii)(II), 457(e)(16)(B); Notice 2007-7, 2007-1 C.B. 395; Notice 2008-30, 2008-1 C.B. 638.

[109] I.R.C. § 402(c)(9).

10. *Identifying Designated Beneficiaries*

As explained above, a beneficiary cannot be an EDB or an IDB unless he or she is first a designated beneficiary. A designated beneficiary is generally an individual entitled to benefits after the participant's death who is specifically designated as a beneficiary pursuant to the governing instrument of a tax-favored plan.[110] The governing instrument may designate beneficiaries by name or in some other identifiable way. For example, the governing instrument's designation of the spouse of each employee as a beneficiary is an identifiable designation.

Alternatively, and more commonly, the instrument will allow the participant (or the participant's surviving spouse) to choose designated beneficiaries. It may even allow them to choose a class of designated beneficiaries (*e.g.*, the participant's children). The regulations, however, treat members of a class capable of expansion or contraction as identifiable only if it is possible to determine the class member with the shortest life expectancy.[111]

> **Example 14.** Assume that a participant designates her "grandchildren" as her beneficiaries when the participant has only two grandchildren, ages 12 and 15. The 15-year old grandchild has the shortest life expectancy. If he should die before the participant, the 12-year old grandchild will have the shortest life expectancy. The birth of additional grandchildren will not change this result since they will necessarily be younger and thus have longer life expectancies. Nevertheless, the participant should specify that grandchildren who are adopted are excluded from the class unless they are younger than the oldest natural grandchild.

Although this Article has already touched on the requirement that a designated beneficiary must qualify as such both upon the death of the participant and on September 30 of the calendar year following the participant's death,[112] it will be useful to restate and more fully analyze this requirement here. Accordingly, a beneficiary ceases to be a designated beneficiary if he or she receives all his or her benefits, or disclaims his or her interest, before the

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[110] I.R.C. § 401(a)(9)(E)(i); Reg. § 1.401(a)(9)-4, Q&A 1.

[111] Reg. § 1.401(a)(9)-4, Q&A 1.

[112] *See also* P.L.R. 2013-34-046 (May 31, 2013) (concluding that when a personal representative completed the decedent's intended rollover to an IRA in the decedent's name, beneficiaries named by the personal representative could not be designated beneficiaries since they were not beneficiaries at the date of decedent's death); P.L.R. 2017-06-004 (Nov. 3, 2016) (concluding that when a nonexistent trust was named as the IRA beneficiary, the IRA did not have a designated beneficiary on the date of the owner's death even though a court later ruled that the surviving spouse was the beneficiary).

September 30 date.[113] Note, however, that a beneficiary who dies before the September 30 date without receiving or disclaiming all of his or her interest (which then passes to a successor beneficiary) will continue to qualify as a designated beneficiary.[114]

> **Example 15.** A participant dies on June 1, 2021, naming his four children (A, B, C, and D) as equal beneficiaries of his IRA. Child A signs a qualified disclaimer of her interest in January 2022. Child B receives a distribution of all his interest in February 2022, and Child C dies in March 2022 without receiving or disclaiming her interest, which passes to a successor beneficiary. As of September 30, 2022, Child D is alive and has neither received nor disclaimed his interest. Child C and Child D then are the only designated beneficiaries.

A beneficiary may make a timely disclaimer of his or her interest and thus cease to be a designated beneficiary, even if he or she retains the minimum distribution amount payable for the year of the participant's death. Nonetheless, the beneficiary must also accept any post-death income earned by the retained minimum distribution, and the disclaimer should meet the requirements applicable to "qualified" disclaimers. The tax-favored plan must also pay the disclaimed amount to the beneficiary or segregate the disclaimed amount in a separate account.[115]

Note that the Service has ruled that a beneficiary whose interest was conditioned on his survival for 60 days could be a designated beneficiary if he or she in fact survived for 60 days.[116] Presumably, the alternative beneficiary would be the designated beneficiary if the primary beneficiary did not survive for 60 days.

Note also that the Service allowed an individual to become a designated beneficiary by reason of a state court reformation of a beneficiary designation form, at least when convincing evidence indicated that was consistent with the participant's original intention.[117] In a later ruling, however, the Service

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[113] Reg. § 1.401(a)(9)-4, Q&A 4(a).

[114] Reg. § 1.401(a)(9)-4, Q&A 4(c).

[115] Rev. Rul. 2005-36, 2005-1 C.B. 1368. In a similar situation, the Service allowed a qualified disclaimer even though the distributions for the year of death exceeded the RMDs for that year. P.L.R. 2012-45-004 (July 18, 2012).

[116] P.L.R. 2006-10-026 (Dec. 13, 2005).

[117] P.L.R. 2006-16-039 (Jan. 25, 2006); *but see* P.L.R. 2007-42-026 (July 23, 2007) (involving less convincing evidence).

refused to recognize a trust reformation that attempted to eliminate non-individual NDBs of an IRA and thereby allow the postmortem "creation" of designated beneficiaries.[118]

The Service also refused to allow an executor to name a designated beneficiary.[119] Similarly, where a nonexistent trust was named as the IRA beneficiary, the IRA did not have a designated beneficiary on the date of the owner's death even though a court later ruled that the surviving spouse was the beneficiary.[120]

The Service has also ruled that a designated beneficiary as of the September 30 date remains a designated beneficiary even though he or she subsequently, and retroactively, ceases to be a beneficiary.[121] In the ruling, beneficiary A, the sole beneficiary of two IRAs was convicted of murdering the owner of the IRAs. Upon exhaustion of beneficiary A's unsuccessful appeals, the IRA retroactively passed under state law to the succeeding beneficiary B. Although the Service held that previous minimum distributions should have been made to beneficiary B *over the life expectancy of beneficiary A*, the Service waived imposition of the 50% penalty.

11. *Distributions to Nondesignated Beneficiaries (NDBs)*

A beneficiary is an NDB if the beneficiary is not a designated beneficiary (*i.e.*, not an EDB or IDB). If an entity that is not an individual (*e.g.*, the participant's estate) is one of the beneficiaries of a tax-favored plan, the entity is an NDB, and the tax law treats the tax-favored plan as having no designated beneficiary.[122] For example, if a participant names his two children and a charitable organization as the beneficiaries of his IRA, the tax law treats the IRA as having only NDBs. Nevertheless, before the end of the year following the death of the participant, the plan may create separate accounts for the beneficiaries. Then, the presence of NDBs in one or more separate accounts will not taint the EDBs and IDBs in other separate accounts.[123]

In any case though, the SECURE Act did not change minimum distribution requirements for NDBs. Those requirements depend on whether the participant dies before, or on or after, his or her RBD.

a. *Participant Dies on or After His or Her Required Beginning Date.* If the participant in a plan with NDBs dies on or after his RBD, minimum distributions must be made to the beneficiaries over a period depending on

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[118] P.L.R. 2010-21-038 (Mar. 4, 2010). The Service also refused to recognize a state court reformation of an IRA that attempted to eliminate the decedent's estate as the sole beneficiary and to substitute individual designated beneficiaries. P.L.R. 2016-28-006 (Mar. 30, 2016).

[119] P.L.R. 2001-26-036 (Apr. 4, 2001).

[120] P.L.R. 2017-06-004 (Nov. 3, 2016).

[121] P.L.R. 2010-08-049 (Dec. 12, 2009).

[122] Reg. § 1.401(a)(9)-4, Q&A 3.

[123] Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

the age of the participant on his or her birthday in the calendar year of his or her death. Starting with the first full calendar year following the participant's death, the applicable distribution period is the number of years found by reference to such age in the Single Life Table in the regulations, reduced by one year.[124]

Example 16. Assume that a participant dies in the year 2021 and the participant was, or would have been, age 83 in that year. Assume that the tax-favored plan does not provide an annuity and the participant does not have a designated beneficiary. Assume further that the tax-favored plan had an adjusted account balance of $400,000 for the year 2021.

Then, for the year 2022, the tax-favored plan must make a minimum distribution of $52,632. This amount is computed by dividing the adjusted account balance of $400,000 by 7.6 years (determined by using the Single Life Table to find the number of years corresponding to the participant's age of 83 in the year of his death, and then subtracting one year).

For the following year 2023, assume that the prior year adjusted account balance was $370,000. Then, the tax-favored plan must make a minimum non-annuity distribution of $56,061. This amount is computed by dividing the adjusted account balance of $370,000 by 6.6 years (one year less than the 7.6 years used for the year 2022).

For the following year 2024, assume that the prior year adjusted account balance was $330,000. Then, the tax-favored plan must make a minimum non-annuity distribution of $58,929. This amount is computed by dividing the adjusted account balance of $330,000 by 5.6 years (one year less than the 6.6 years used for the year 2023).

b. *Participant Dies Before His or Her Required Beginning Date.* If the participant dies before his RBD, the plan must as in past years make distributions to an NDB under the five-year rule.[125] Under the five-year rule, a tax-favored plan must distribute the entire amount of a participant's benefits by the end of the calendar year containing the fifth anniversary of the participant's death.[126]

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[124] I.R.C. § 401(a)(9)(B); Reg. § 1.401(a)(9)-5, Q&A 5(a)(2), Q&A 5(c)(3), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table. The following example 16 in the text, uses distribution periods drawn from the table in the current regulations. Note though that the Service has issued proposed regulations setting forth new tables that will provide more generous distribution periods. If made final, the new tables will become effective for 2021 and subsequent years. Prop. Reg. § 1.401(a)(9)-9, 84 Fed. Reg. 60,812 (Nov. 8, 2019).

[125] I.R.C. § 401(a)(9)(B); Reg. § 1.401(a)(9)-3, Q&A 4(a)(2).

[126] I.R.C. § 401(a)(9)(A)(ii); Reg. § 1.401(a)(9)-3, Q&A 2.

c. *The Required Beginning Date After the SECURE Act.* The SECURE Act changed the RBD to April 1 of the year following the calendar year the participant reaches age 72 (previously 70½).[127] If, however, the participant retires after age 72, the participant's RBD is generally still April 1 of the year following the calendar year of retirement (but only under a qualified retirement plan, a section 403(b) plan, or a section 457 government plan).[128] Nevertheless, a qualified plan or a section 457 government plan may by its terms eliminate this retirement alternative altogether (reverting to age 72 in all events).[129] In addition, the retirement alternative still does not apply if the participant was directly or indirectly a 5-percent owner of the employer.[130]

As previously noted, Congress has waived minimum distribution requirements for the year 2020.[131] The waiver does not, however, change the RBD for purposes of determining RMDs for years after 2020. Thus, an RBD of April 1, 2020, remains the RBD for this purpose even though the accompanying payment was waived.[132]

Note that, before the SECURE Act, special rules applied for RMDs to designated beneficiaries of participants who died after their RBDs.[133] Those provisions of the regulations are obsolete. The SECURE Act now treats distributions to designated beneficiaries of participants who die *after* their RBDs the same as distributions to designated beneficiaries of participants who die *before* their RBDs.[134]

12. *Transition Rules for Beneficiary Distributions Under the SECURE Act*

The SECURE Act generally applies to RMDs from defined contribution plans to beneficiaries of participants who die after 2019. The SECURE Act also provides various transition rules that may delay application of the new rules or grandfather the old rules, as follows:[135]

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[127] I.R.C. § 401(a)(9)(C)(i)(I); Reg. §§ 1.401(a)(9)-2, Q&A 2(a), 1.408-8, Q&A 3. The elimination of RMDs for 2020 does not change the RBD for purposes of determining RMDs for years after 2020. Thus, an RBD of April 1, 2020, remains the RBD for this purpose even though Congress waived the accompanying payment. I.R.C. § 401(a)(9)(I)(iii)(I)).

[128] I.R.C. § 401(a)(9)(C)(i)(II); Reg. §§ 1.401(a)(9)-2, Q&A 2(a), 1.403(b)-6(e)(3); 1.457-6(d).

[129] Reg. §§ 1.401(a)(9)-2, Q&A 2(e), 1.457-6(d).

[130] I.R.C. § 401(a)(9)(C)(ii), (a)(9)(C)(iv); Reg. §§ 1.401(a)(9)-2, Q&A 2, 1.408-8, Q&A 3. The definition of a "5-percent owner" is complex; it may be found at I.R.C. § 416(i)(1)(B).

[131] CARES Act § 2203, 134 Stat. at 343–44.

[132] I.R.C. § 401(a)(9)(I)(iii)(I)).

[133] Reg. § 1.401(a)(9)-5, Q&A 5(a)(1), Q&A 5(c), Q&A 6; Reg. § 1.401(a)(9)-9, Q&A 1, Single Life Table.

[134] I.R.C. § 401(a)(9)(H)(i)(II).

[135] The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b), 133 Stat. at 3179.

1. For governmental plans, the new rules will apply to distributions to beneficiaries of participants who die after 2021.[136]
2. For plans under a pre-existing collective bargaining agreement, the new rules will apply to distributions to beneficiaries of participants who die after the earlier of 2021 or termination of the agreement.
3. If the participant dies before the date the new rules apply to a plan and his or her designated beneficiary dies after that date, then any successor beneficiary of the designated beneficiary must receive his or her remaining benefit by the end of the calendar year containing the tenth anniversary of the death of the designated beneficiary (and not over either beneficiary's life expectancy).

For simplicity's sake, and unless otherwise indicated, this Article generally discusses the rules under the SECURE Act as if the SECURE Act applied to beneficiaries of all participants who die after 2019 without regard to the transition rules above that delay the effective date for some types of plans.

C. *Use of Trusts to Provide for Beneficiaries*

Making a trust the beneficiary of a participant's tax-favored plans may provide a number of advantages.

1. A trust may give the participant some assurance that the administration of the plan interest or arrangement will be in the hands of a competent trustee.
2. A trust may allow the participant or trustee to determine the amount and timing of distributions to trust beneficiaries of funds received from the tax-favored plan.
3. A trust may allow the participant to keep funds received from the tax-favored plan out of reach of the creditors of trust beneficiaries.
4. Distributions by a tax-favored plan to a trust may facilitate an overall estate plan designed to save federal estate taxes upon the participant's death.

Unfortunately, though, if a trust is one of the beneficiaries of a tax-favored plan, the tax law generally treats the tax-favored plan as having no designated beneficiary.[137] As discussed above, a tax-favored plan without a designated beneficiary must generally make larger minimum distributions after the participant's death, and thus may not defer taxes for as long a period. There are, however, significant exceptions for "applicable multi-beneficiary trusts" (AMBTs) and so-called "see-through" trusts, as explained below.

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[136] *See* I.R.C. § 414(d) (providing the definition of governmental plans).
[137] Reg. § 1.401(a)(9)-4, Q&A 3.

1. *Designated Beneficiary Exception for See-Through Trusts*

An exception to the rule that trusts and their beneficiaries are not designated beneficiaries involves irrevocable trusts with only identifiable individual beneficiaries. The regulations essentially ignore these trusts (sometimes referred to as "see-through" trusts) and treat the trust beneficiaries as if they were direct beneficiaries of the tax-favored plan provided the participant or trustee follows certain procedures.[138] The participant or the trustee generally can satisfy the procedural requirements by providing the trust instrument and any current or future trust amendments to the administrator of the tax-favored plan.[139]

The regulations provide that the interest of a see-through trust in a tax-favored plan is a single account. Furthermore, unlike direct beneficiaries of a tax-favored plan, a see-through trust and its beneficiaries may not divide the trust's account in the plan into separate accounts for each trust beneficiary.[140] Thus, a tax-favored plan may use only one method of distribution for the trust's account.[141]

The existing regulations were designed to apply to see-through trusts that were the beneficiaries of participants who died before 2020. These existing regulations go to great lengths to ensure that the minimum distribution method used for distributions to a see-through trust is not more favorable than the method any of the trust beneficiaries could have used if they had been direct beneficiaries of the plan.[142] For that reason and because the interest of the trust and its beneficiaries in the tax-favored plan is a single account, the plan could make distributions to the trust under the life-expectancy method only if all the beneficiaries were designated beneficiaries. For the same reason, the tax-favored plan could make life-expectancy distributions to the trust only over the life expectancy of the oldest trust beneficiary.[143]

For participants who die after 2019, the SECURE Act applies. Thus, only EDBs qualify for distributions under the life-expectancy rule (although they may alternatively use the new ten-year distribution rule).[144] Thus, it appears that if all the beneficiaries of a see-through trust are EDBs, the trust should be able to receive distributions over the life expectancy of the oldest EDB (consistent with the treatment of designated beneficiaries who were eligible

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[138] Reg. § 1.401(a)(9)-4, Q&A 5(a), Q&A 5(b).

[139] Reg. § 1.401(a)(9)-4, Q&A 6. In addition to delivery of the trust documents, the following must be true: (1) the trust is valid under state law or would be if it had corpus, (2) the trust is irrevocable or will be at the participant's death, and (3) the beneficiaries are identifiable solely from the trust instrument. Reg. § 1.401(a)(9)-4, Q&A 5(b).

[140] Reg. § 1.401(a)(9)-4, Q&A 5(c).

[141] Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

[142] Reg. § 1.401(a)(9)-4, Q&A 5(c).

[143] I.R.C. § 401(a)(9)(B)(ii), (iii); Reg. §§ 1.401(a)(9)-4, Q&A 5(c), 1.401(a)(9)-8, Q&A 2(a)(2).

[144] I.R.C. § 401(a)(9)(H)(i), (ii), (iii).

for the life-expectancy method in past years). The trust would be receiving the distributions for the benefit of its beneficiaries no less rapidly than the beneficiaries would have been required to receive the benefits if they had been direct beneficiaries of the tax-favored plan.

If the see-through trust has any IDBs, the trust should not qualify for distribution under the life-expectancy rule. If permitted, such a distribution would allow the trust to receive benefits attributable to the IDBs under a method the IDBs could not have used if they had been direct beneficiaries of the tax-favored plan. That would offend the rationale of the regulations. Instead, the trust must take distributions from the trust account under the ten-year rule since all the trust beneficiaries, whether EDBs or IDBs, could have qualified directly for distributions under the ten-year rule in the absence of a trust.[145]

Stated another way, if all the beneficiaries of a see-through trust are designated beneficiaries and one of them is an IDB, the trust will be treated as having no EDB. This is analogous to the statement in the regulations that if an NDB is one of the beneficiaries of a tax-favored plan, the participant will be treated as having no designated beneficiary.[146]

2. *Use of Conduit Trusts*

The requirement for identifiable beneficiaries is automatically met if a see-through trust must immediately distribute payments received from a tax-favored plan to the individual trust beneficiaries (a so-called "conduit trust").[147]

Example 17. Employee A participated in Plan X, his employer's qualified defined contribution plan. Employee A died at age 55 in the year 2021 survived by Spouse B, age 53. Employee A named irrevocable Trust T as the sole beneficiary of Plan X. Trust T provided a copy of its trust agreement to the trustee of Plan X before October 31, 2022.

Under the terms of Trust T, all trust income is payable annually to Spouse B, and no one has the power to appoint Trust T principal to any person other than Spouse B. Spouse B also has the power each year to compel Trust T to withdraw from Plan X the income earned that year in the plan account. The two children of Spouse B are entitled to the trust funds on the death of Spouse B.

Trust T also provides that Trust T must immediately pay over to Spouse B all amounts distributed from Plan X during Spouse B's lifetime. The trust must pay the distributed amounts over to Spouse B even if the distributions exceed the plan's income for the year. Thus, distributions from Plan X (including RMDs) cannot be accumulated in Trust T for the children (*i.e.*, Trust T is a "conduit trust").

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[145] I.R.C. § 401(a)(9)(H)(i)(I).

[146] Reg. § 1.401(a)(9)-4, Q&A 3.

[147] Reg. § 1.401(a)(9)-5, Q&A 7(c)(3), Ex. (2).

> Under these circumstances, plan distributions are not accumulated in trust for the children, and the children are consequently mere successor beneficiaries to the Plan X interest. They are not designated beneficiaries for purposes of (1) identifying the oldest designated beneficiary or (2) determining whether Spouse B is the sole beneficiary. Consequently, Spouse B is the sole EDB for these purposes and can elect distributions over her life expectancy beginning as late as the year Employee A would have reached age 72.[148]

Because Spouse B is the sole designated beneficiary, the result generally would have been the same under prior law if Employee A had died before 2020. That is, since Employee A would have reached age 70½ after 2019, distributions to the spouse could begin as late as the year the employee would have reached age 72. On the other hand, if Employee A had reached age 70½ before the year 2020, distributions to the spouse could have begun no later than the year the employee would have reached age 70½.[149]

3. *Use of Accumulation Trusts with Identifiable Beneficiaries*

An accumulation trust is one that retains distributions received from a tax-favored plan for eventual distribution to trust beneficiaries. Such a trust must be able to identify all current and contingent beneficiaries to qualify as a see-through trust. For this purpose, a beneficiary is a contingent beneficiary if during the lifetime of a predecessor beneficiary the trust could accumulate distributions from a tax-favored plan for ultimate distribution to the beneficiary.[150]

Both current beneficiaries and contingent beneficiaries must be taken into account to determine whether a trust has only designated beneficiaries. As discussed above, a trust with a current or contingent beneficiary that is an entity not an individual (and thus not a designated beneficiary) cannot qualify as a see-through trust. On the other hand, a mere successor beneficiary (whether or not an individual) is not taken into account unless the beneficiary is a contingent beneficiary.[151]

Identification of current and contingent beneficiaries may not be easy. The regulations, however, treat individual members of a class of beneficiaries capable of expansion or contraction as identifiable if it is possible to determine the class member with the shortest life expectancy.[152] Note though that, if the members of a class of beneficiaries are the children of a living person, it may not be possible to determine the child with the shortest life expectancy (*i.e.*,

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[148] This example is based on Regulation section 1.401(a)(9)-5, Q&A 7(c)(3), Ex. 2.

[149] The SECURE Act, Pub. L. No. 116-94, Div. O, Title I, § 114(b), (d), 133 Stat. at 3156.

[150] Reg. § 1.401(a)(9)-5, Q&A 7(b).

[151] *Id.*

[152] Reg. § 1.401(a)(9)-4, Q&A 1, Q&A 5(b)(3); Reg. § 1.401(a)(9)-5, Q&A 7(c)(3).

the oldest child) unless the class expressly excludes later-adopted children older than the oldest child.

> **Example 18.** The facts are the same as in Example 17 except that (1) Trust T is not required to pay over to Spouse B any amounts distributed by Plan X that are in excess of plan income for the year and (2) the two children are disabled adults who are entitled to outright distribution of the trust corpus at the death of Spouse B. Thus, if the amount distributed by Plan X (including any RMD) exceeds plan income, Trust T may accumulate the excess for eventual payment to the children. Consequently, the disabled children are contingent beneficiaries who are EDBs of Plan X for purposes of determining the factors governing minimum distributions, which in this case are (1) whether Spouse B is the sole designated beneficiary and (2) which of the spouse and two children is the oldest EDB.
>
> Thus, Plan X may make distributions to Trust T over the life expectancy of Spouse B, the EDB with the shortest life expectancy. Nonetheless, since Spouse B is not the sole designated beneficiary, Plan X must begin distributions before the end of the calendar year following the participant's death (and not during the year Employee A would have reached age 72). Note that, if the adult children had not been disabled, the plan could not have made distributions over the life expectancy of Spouse B (an EDB) since the trust beneficiaries would have included the adult children who would have been IDBs (not EDBs). Instead, the plan would have had to make distributions to the trust under the ten-year rule.[153]

It is irrelevant that the trust's accumulation of plan benefits would pass to the spouse's estate or to some other beneficiary if Spouse B should survive her children. The Service has ruled that, if an individual successor beneficiary who survives the plan participant is entitled to a distribution of all of the trust corpus at the death of a previous life beneficiary, it is irrelevant that the successor beneficiary might predecease the life beneficiary. The alternate beneficiaries who take the trust corpus in that event are "mere potential successors" and, thus, are not taken into account in determining designated beneficiaries (whether EDBs or IDBs).[154]

More expansively then, an accumulation trust may be a see-through trust if it provides for a chain of individual successor beneficiaries, the last of whom immediately takes all of the trust corpus outright.

For example, assume that an accumulation trust provides for individual beneficiaries A, B, C, and D, in succession, and that D immediately takes all

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[153] This example is based on Regulation section 1.401(a)(9)-5, Q&A 7(c)(3), Ex. 1. *See also* Rev. Rul. 2006-26, 2006-1 C.B. 939.

[154] P.L.R. 2004-38-044 (June 22, 2004); P.L.R. 2006-10-027 (Dec. 13, 2005).

of the trust corpus outright upon the death of the last of A, B, and C. In that case, all four beneficiaries will be designated beneficiaries. Minimum distributions may be based on the life expectancy of the oldest of them if they are all EDBs. It is irrelevant that a charity or some other entity or individual is entitled to the trust corpus if D does not survive A, B, and C.

This conclusion deserves some mathematical elaboration. Before the SECURE Act, the life-expectancy rule would have been available if A, B, C, and D were all within the "set" of possible designated beneficiaries, whether or not any of them were EDBs. After the SECURE Act, however, the life-expectancy method is no longer available for see-through trusts that have one or more beneficiaries drawn from the "subset" of designated beneficiaries who are not EDBs (*i.e.*, those who are IDBs).

On the other hand, if the beneficiaries were drawn only from the subset of EDBs, they would have been designated beneficiaries qualifying the trust for the life-expectancy rule before the SECURE Act, and as EDBs, they should continue to qualify the trust for the life-expectancy rule after the SECURE Act. That is, the SECURE Act did not purport to change the treatment of trusts with beneficiaries that are all drawn from the EDB subset that would have previously qualified the trust for the life-expectancy rule as mere designated beneficiaries.

4. *Use of Powers of Appointment*

A trust may grant a beneficiary the power to appoint trust corpus by will. If so, and if the trust is an accumulation trust, the trust instrument should limit the category of potential appointees to individuals younger than the oldest of the other beneficiaries. Such a limitation will provide assurance that the tax-favored plan can identify the beneficiary with the shortest life expectancy and that all the beneficiaries are designated beneficiaries.[155]

Example 19. Participant R died unmarried at the age of 60. Participant R named irrevocable Trust S as the sole beneficiary of his IRA. Trust S provided a copy of its trust agreement to the IRA administrator before October 31 of the first full calendar year following Participant R's death. The trustee of Trust S has discretion to pay income and principal of the trust for Individual V's health, maintenance, support, and education. Any income or IRA distributions that the trust does not pay to or for Individual V will accumulate in the trust for payment to a succeeding beneficiary. Individual V, however, has the power to appoint by will all or part of the trust corpus outright to any individual or individuals who are younger than V. Any trust corpus

[155] I.R.C. § 401(a)(9)(H); P.L.R. 2005-37-044 (Mar. 29, 2005). If the plan does not limit the category of potential appointees to individuals younger than the appointing beneficiary, the appointing beneficiary may execute a release that eliminates his or her right to appoint to anyone older than himself or herself. P.L.R. 2018-40-007 (July 9, 2018).

not so appointed passes outright to Individual W, who is also younger than V.

In this situation, Trust S may accumulate IRA distributions received during the life of V, for ultimate payment to Individual W or other individual appointees of Individual V. Thus, Individual V, Individual W, and the individual appointees of Individual V all qualify as designated beneficiaries of the IRA. Since, under the terms of the trust, Individual V must be the oldest of the designated beneficiaries, the IRA could have used the life expectancy of Individual V to make distributions under the life-expectancy rule if Participant R had died before 2020.[156]

If, however, Participant R dies after 2019, the life-expectancy rule will be available only in the unlikely event that all the beneficiaries are EDBs. Otherwise, since all the trust beneficiaries are designated beneficiaries under the see-through trust rules (*i.e.*, either EDBs or IDBs), the IRA may make distributions to the trust under the ten-year rule (and not the five-year rule applicable if one of the beneficiaries had been an NDB).

5. *Trust with Non-Individual Beneficiary*

The tax law will generally not treat any trust beneficiary as a designated beneficiary if any one or more of the trust beneficiaries is an entity (unless the entity or entities are themselves trusts that meet all the requirements for the see-through trust exception).[157] In applying this rule, the tax law generally takes into account successor entities that are contingent beneficiaries. As noted above, a beneficiary is a contingent beneficiary if during the lifetime of a predecessor beneficiary the trust could accumulate distributions from the tax-favored plan for potential ultimate distribution to the successor entity.[158]

Example 20. Employee C participated in Plan Y, his employer's qualified profit-sharing plan. Employee C died at age 60 in 2021, survived by Spouse D. Employee C named irrevocable Trust M as the sole beneficiary of his interest in Plan Y. Trust M provided a copy of its trust agreement to Plan Y before October 31, 2022. Under the terms of Trust M, all trust income is payable annually to Spouse D, and no one has the power to appoint Trust M principal to any person other than Spouse D during her lifetime. Nevertheless, the trustee, in its discretion, may pay principal to Spouse D for health and medical needs. Upon the death of Spouse D, the remaining principal of Trust M is distributable to named charitable organizations.

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[156] This example is based on the facts in Private Letter Ruling 2005-37-044 (Mar. 29, 2005).
[157] Reg. § 1.401(a)(9)-4, Q&A 5(c), Q&A 5(d).
[158] Reg. § 1.401(a)(9)-5, Q&A 7(c)(1).

The trust instrument also requires Trust M to withdraw from Plan Y the income earned each year in the plan account and immediately distribute the income to Spouse D during her lifetime. Thus, each year, the trustee must withdraw from Plan Y the greater of (1) the amount of income earned in the plan account or (2) the plan's RMD for the year. If the plan's RMD exceeds the income earned in the plan account, Trust M need distribute to Spouse D only the lesser amount of plan income. In that event, Trust M would accumulate the excess plan distribution in the trust for ultimate outright distribution to the charities.

In this situation, the charitable organizations are contingent beneficiaries of Plan Y (and not merely potential successors) since some plan distributions might accumulate in Trust M for ultimate distribution to them. Thus, the regulations treat Plan Y as having no designated beneficiaries since some of the beneficiaries are charitable entities that are not individuals and thus cannot be designated beneficiaries. Instead the plan's only beneficiary is a trust that is an NDB (and not a see-through trust). Consequently, Plan Y may use neither the life-expectancy rule nor the ten-year rule. Instead, the plan must use the five-year rule that is applicable to an NDB of a participant who died before his RBD. Note that the five-year rule would also have applied under old law if Employee C had died before 2020.

6. *Applicable Multi-Beneficiary Trust*

As previously noted, the interest of a see-through trust in a tax-favored plan is a single account that generally cannot be divided into separate accounts for beneficiaries.[159] Now, however, the SECURE Act provides a way to divide an applicable multi-beneficiary trust (AMBT) into separate trusts for beneficiaries. An AMBT is a trust with more than one beneficiary, all of whom are treated as designated beneficiaries and at least one of whom qualifies as an EDB because he or she is disabled or chronically ill.[160] If the terms of the trust provide that the AMBT is to be divided into separate trusts for each beneficiary immediately on the death of the participant, the minimum distribution rules are applied separately to each separated trust for an EDB who is disabled or chronically ill.[161]

Example 21. Participant R died in 2021, naming irrevocable Trust S, a conduit trust, as the sole beneficiary of his IRA. Trust S provided a copy of its trust agreement to the IRA administrator before October 31 of the first full calendar year following Participant R's death. The

[159] Reg. § 1.401(a)(9)-4, Q&A 5(c).
[160] I.R.C. § 401(a)(9)(H)(v).
[161] I.R.C. § 401(a)(9)(H)(iv).

beneficiaries of Trust S are Participant R's four adult daughters: disabled Daughter L, chronically ill Daughter M, Daughter N, and Daughter P. Thus, Trust S is an AMBT because all of its beneficiaries are designated beneficiaries and it has at least one EDB who is disabled or chronically ill.

Immediately upon the death of Participant R, and as required by the terms of Trust S, Trust S is divided into four trusts, one for each of the daughters. Daughter L and Daughter M qualify as EDBs because of their respective disability and chronic illness. Thus, the IRA may make distributions to the trust for Daughter L over Daughter L's life expectancy, and the IRA may make distributions to the trust for Daughter M over Daughter M's life expectancy. In contrast, Daughters N and P are IDBs since they do not have any of the attributes that would qualify them as EDBs. Consequently, the trusts for Daughters N and P must receive all their benefit from the IRA by the end of the calendar year containing the tenth anniversary of the participant's death.

If the subtrusts for the disabled and chronically ill daughters in the above example were instead accumulation trusts, it is not clear whether the contingent beneficiaries for those subtrusts would also need to be EDBs. If they were instead IDBs, the life-expectancy rule may not apply because of the deferred benefit that rule would confer upon IDBs who are contingent beneficiaries. Pending clarification by the Service, the best advice is to avoid IDBs as contingent beneficiaries in this situation.

Alternatively, if no beneficiary of an AMBT other than an EDB who is disabled or chronically ill has any right to the participant's plan benefit until the death of all the disabled or chronically ill EDBs, the plan benefit may be distributed to the trust under the life-expectancy rule. So long as all the beneficiaries are designated beneficiaries, it does not appear to matter whether the trust is an accumulation trust with IDBs as contingent beneficiaries.[162] Presumably though, the distribution period must be based on the age of the oldest disabled or chronically ill EDB. Upon the death of the last disabled or chronically ill EDB, the remaining plan benefit must be distributed by the end of the calendar year containing the tenth anniversary of the EDB's death.[163]

Example 22. Assume the same facts as in Example 21, except that the terms of Trust S do not require the separation of Trust S into separate trusts for each beneficiary. Assume further that distributions may be

[162] Section 401(a)(9) explicitly states that (unlike the alternative division of an AMBT into separate trusts) the life-expectancy rule "*shall apply* to the distribution of the employee's interest" to the disabled or chronically ill EDBs. I.R.C. § 401(a)(9)(H)(iv)(II) (emphasis added).

[163] I.R.C. § 401(a)(9)(H)(iv).

made only to disabled Daughter L or chronically ill Daughter M, and not to any other beneficiaries, so long as one of Daughters L and M is alive. Then, the trust is an AMBT and Daughters L and M are EDBs. Thus, distributions may be made over the life expectancy of the older of Daughter L or Daughter M. Upon the death of both Daughters L and M, the remaining benefit must be distributed to the trusts for Daughters N and P by the end of the calendar year containing the tenth anniversary of the last of Daughters L and M to die.

Additional considerations apply if the disabled or chronically ill beneficiary is receiving means-tested government assistance, such as Supplemental Security Income (SSI), Medicaid, HUD housing benefits, veteran's benefits, and in-home supportive services. In that case, a trust for the beneficiary should be carefully drafted so as not to endanger the governmental assistance. In addition, special tax treatment may be available if the AMBT is also a "qualified disability trust."[164]

An AMBT provides no relief for an EDB who is (1) the surviving spouse of the participant, (2) a minor child of the participant who is not disabled, or (3) an individual who is not more than ten years younger than the participant. Nor can a trust qualify as an AMBT if it has a beneficiary that is an NDB. Another type of division into separate trusts may, however, provide a solution for these situations, if the more rigorous requirements explained immediately below can be met.

7. *Separate Accounts, Separate Trusts, and Subtrusts*

With the limited exception of AMBTs discussed immediately above, a tax-favored plan may not treat as separate accounts the interests of two or more beneficiaries held indirectly through the same see-through trust. That is, the aggregate interests of the trust's beneficiaries may constitute no more than one account in the tax-favored plan. Thus, the plan may use only one method of distribution for the trust account, whether that method is the life-expectancy rule, the ten-year rule, the five-year rule, or any other required method. The plan may use the life-expectancy rule if all the trust beneficiaries are EDBs and may use the ten-year rule if all the beneficiaries are EDBs or IDBs (or a combination thereof). If one or more of the beneficiaries is an NDB, the plan must follow the minimum distributions rules applicable to NDBs.

Nevertheless, a participant may be able to circumvent these constraints by creating a separate trust or subtrust for each individual trust beneficiary. Methods of distribution to each beneficiary's separate trust will then depend

[164] I.R.C. §§ 1(g)(4)(C), 642(b)(2)(C)(ii).

on the status of the beneficiary as an EDB, IDB, or NDB without regard to the status of the beneficiaries of the other separate trusts.[165]

Example 23. Decedent A was age 65 and unmarried at the time of his death in 2021. During his lifetime, Decedent A created revocable inter vivos Trust Y. At Decedent A's death, Trust Y became irrevocable and was, by its terms, immediately divided into three equal shares that constituted separate Trusts J, K, and L for Decedent's three brothers. Brothers J, K, and L attained ages 50, 58, and 61, respectively, in the year of Decedent A's death. Upon the death of each of Brothers J, K, and L, all the funds in his or her trust pass outright to disabled Cousin P.

Also during his lifetime, Decedent A designated Trusts J, K, and L as equal beneficiaries of his IRA. Before the end of the first full calendar year following the death of Decedent A, the trustee transferred the IRA's funds in equal portions into three new inherited IRAs, each in the name of Decedent A. Trusts J, K, and L were the respective beneficiaries of the new inherited IRAs. These trusts are discretionary trusts that may accumulate distributions from IRAs for the ultimate benefit of disabled Cousin P, who is younger than Brothers J, K, and L.

Under these facts, Trusts J, K, and L qualify as separate "see-through" trusts with Brothers J, K, and L as their respective beneficiaries, and Cousin P as a contingent beneficiary. Each of the Brothers K and L and Cousin P are EDBs because the brothers are less than ten years younger than the participant and the cousin is disabled. Furthermore, each of the Brothers K and L is the oldest designated beneficiary of the separate IRA benefiting his respective trust.

Thus, Trusts K and L may each take RMDs over the life expectancy of Brothers K and L, respectively. Trust J must take distributions under the ten-year rule because Brother J is an IDB. He does not qualify as an EDB because he is more than ten years younger than the participant. Note though that none of the trusts could use the life-expectancy method if Cousin P were an IDB because Cousin P is a contingent beneficiary of each of the trusts.[166]

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[165] Reg. § 1.401(a)(9)-4, Q&A 5(c); P.L.R. 2005-37-044 (Mar. 29, 2005).

[166] This example is based on the facts of Private Letter Ruling 2005-37-044 (Mar. 29, 2005). In Private Letter Ruling 2019-23-016 (Mar. 5, 2019), a Marital Trust was one of several subtrusts derived from an inter vivos trust that became irrevocable upon the death of the participant. The Marital Trust was the only beneficiary of participant's Roth IRA and the surviving spouse was the only beneficiary of the Marital Trust. The Service treated the surviving spouse as the sole beneficiary of the Marital Trust, without regard to the beneficiaries of the other subtrusts.

By contrast, assume that Decedent A had named Trust Y as the beneficiary of his IRA, with J, K, and L as the beneficiaries of Trust Y. In that case, Brothers J, K, and L would have all been designated beneficiaries of a single trust account in the IRA. Because Brother L is an IDB, the plan would have had to use the ten-year method and not the life-expectancy method for the entire account. The result would be the same even if the trustee of Trust Y separated it into Trusts J, K, and L.

Thus, the essential requirements for successfully isolating IRA beneficiaries in separate subtrusts in order to maximize the tax deferral opportunities may be summarized as follows:

1. The trust instrument must mandate the separation of the original trust into separate subtrusts (*i.e.*, the separation is not merely left to the discretion of the trustee).
2. The named beneficiaries of the tax-favored plan must be the separated subtrusts (and not the original trust).
3. The participant or trustee must divide the IRA into separate accounts or separate IRAs for each subtrust before the end of the first full calendar year following the death of the participant.

In this connection, the Service has specifically ruled that the designated beneficiaries of a *single* see-through trust could not treat as separate accounts their indirect beneficial interests in an inherited IRA even if they divided the original IRA into separate inherited IRAs for each beneficiary's interest.[167] The Service has also ruled that individual trust beneficiaries did not have separate accounts in an IRA for purposes of determining minimum distributions in a situation in which the named beneficiary of the IRA was a single trust even though the trust immediately terminated and distributed separate IRAs to separate trusts for the individual beneficiaries.[168]

8. *A Spray Trust as the Beneficiary of a Tax-Favored Plan*

The division of a tax-favored plan and a see-through trust into separate accounts and trusts for multiple individual trust beneficiaries may not be desirable in some circumstances. For nontax reasons, a participant in a tax-favored plan may want his or her trustee to have the flexibility to make unequal discretionary distributions to individual beneficiaries from a single account even though it may be less advantageous from a tax standpoint. A compelling reason for such a trust (a "spray" trust) might be the differences in the per-

[167] P.L.R. 2008-09-042 (Dec. 7, 2007). *See also* P.L.R. 2006-34-068 (Apr. 5, 2006).
[168] P.L.R. 2003-17-044 (Dec. 19, 2002).

sonal characteristics of the beneficiaries. Among other things, some beneficiaries might be profligate, some financially responsible, some disabled or ill, some with high income, and some with low income.

Although it would be highly unlikely that all the beneficiaries of a trust are EDBs, if they were, RMDs could be paid to the trust over the life expectancy of the oldest of them.[169] More likely though, the beneficiaries would be IDBs or a mix of IDBs and EDBs. Thus, RMDs would have to be paid to the trust under the ten-year rule.[170] The trustee would then have at least ten years to exercise his or her discretion to allocate the plan distributions to the trust and among the trust beneficiaries while optimizing plan distributions for tax purposes and satisfying the differing needs of the beneficiaries.

Example 24. Participant R died a widow at the age of 60. Participant R named irrevocable Trust S as the sole beneficiary of her IRA. Trust S provided a copy of its trust agreement to the IRA administrator before October 31 of the first full calendar year following Participant R's death. The trustee of Trust S has discretion to pay income and principal of the trust to Participant R's four adult children, A, B, C, and D. Child A is a successful professional, Child B is financially irresponsible, Child C is disabled. Any income or IRA distributions that the trust does not pay to the children will accumulate in the trust. The trust corpus must be distributed outright to the last survivor of the children.

The trust is a see-through trust since all the children, including the one who will take final distributions, are designated beneficiaries. Disabled Child C is an EDB; the other children are IDBs. Thus, the plan must make distributions to the trust under the ten-year rule. The trustee could make disproportionately larger trust distributions to disabled Child C, make modest distributions to Child B until he shows some financial responsibility, and make no distributions to Child A until he shows a financial need. The trustee might nevertheless decide to accumulate only a relatively small amount of plan funds in the trust because of its high tax bracket.

9. *Identifying Trust Beneficiaries with an Interest in a Tax-Favored Plan*

Beneficiaries of a see-through trust with an interest in a tax-favored plan must be beneficiaries of the trust "with respect to the trust's interest" in the tax-favored plan.[171] Thus, the Service does not consider a trust beneficiary to be a beneficiary of the tax-favored plan if, under the terms of the trust, the

[169] I.R.C. § 401(a)(9)(H)(ii); Reg. § 1.401(a)(9)-5, Q&A 7(a)(1).
[170] I.R.C. § 401(a)(9)(H)(ii); Reg. § 1.401(a)(9)-8, Q&A 2(a)(1).
[171] Reg. § 1.401(a)(9)-4, Q&A 5.

trust beneficiary does not enjoy a direct or indirect interest in the tax-favored plan.[172]

> **Example 25.** Assume that a participant named trust T as the beneficiary of his IRA, and that the trust became irrevocable upon the participant's death. Assume that the terms of trust T require the division of the trust into two subtrusts, A and B, and require the allocation of the IRA to Subtrust B. Individuals D and E are the only beneficiaries of Subtrust A, and individuals F and G are the only beneficiaries of Subtrust B. Assume further that the terms of Subtrust B require the subtrust to distribute to F and G all amounts received from the IRA and that trust T qualifies as a "see-through" trust.
>
> Under these facts, only F and G, the beneficiaries of Subtrust B containing the IRA, are designated beneficiaries of the IRA. If both F and G are EDBs, distributions under the life-expectancy rule will be based on the life expectancy of the older of F and G (without regard to the life expectancies of D and E).

On the other hand, it seems unlikely that an executor or trustee could eliminate trust beneficiaries from consideration simply by making *discretionary* allocations of tax-favored plans between trust shares or subtrusts. In an analogous situation, the Service refused to recognize a trustee's postmortem use of subtrusts to segregate beneficiaries for purposes of determining the oldest beneficiary, even though state law required the segregation.[173] To the contrary though, in another private letter ruling, the Service recognized the trustee's allocation of an IRA to a subtrust when state law required such an allocation.[174] Given this uncertainty, the safest course of action is simply to name the subtrust as the direct beneficiary of the IRA and thereafter create a separate account in the IRA for the subtrust.[175]

10. *Payment by a Trust of the Estate's Expenses, Creditors, and Taxes*

Payment by a trust of an estate's expenses, creditors, or taxes could potentially make the estate an NDB of the trust. If so, the tax law could treat any tax-favored plan included in the trust as having no designated beneficiaries.[176]

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[172] P.L.R. 2006-20-026 (Feb. 21, 2006).

[173] P.L.R. 2005-28-035 (Apr. 18, 2005).

[174] P.L.R. 2007-08-084 (Nov. 27, 2006).

[175] For a discussion relating to the use of subtrusts and separate accounts in this kind of situation, see *supra* text accompanying notes 165–168.

[176] Reg. § 1.401(a)(9)-4, Q&A 3.

The trust can avoid this potential problem if the trust terms or state law prohibit the use of retirement benefits for payment of estate expenses, creditors, or taxes.[177]

The trust can also avoid this problem by distributing to the estate the funds necessary to pay such items before the final determination of designated beneficiaries on September 30 of the calendar year following the calendar year of the participant's death (to the extent such items are "then known").[178] Note though that funds distributed by a tax-favored plan to allow the trust to pay the estate's taxes, debts, or expenses will become immediately taxable to the trust. The alternative is to pay the taxes, debts, or expenses from non-retirement funds if feasible.

11. *A Trusteed IRA as an Alternative to Naming the Trust as a Beneficiary*

In most cases, a financial institution will administer an IRA as its *custodian*. Alternatively, a participant may appoint a financial institution as the *trustee* of an IRA that will qualify as a trust under state law.[179]

Such a trusteed IRA may have some of the favorable attributes enjoyed by a trust that is the mere beneficiary of a custodial IRA. For example, the trustee may provide smooth and continuing administration of the participant's wishes in the event of the participant's death or disability. Except for RMDs, a trusteed IRA might also expand or limit a trustee's discretionary power to make, or not make, distributions to or for the benefit of minors, disabled individuals, profligate beneficiaries, and others. That power could include discretionary but adequate provision for the surviving spouse and the participant's children (whether from the participant's last marriage or, more significantly, from a prior marriage). The terms of the IRA may also allow the owner of the IRA to name successor beneficiaries.

Fortunately, it is not necessary to qualify a trusteed IRA as a see-through trust (since it is not a beneficiary). Unlike a see-through trust that is the beneficiary of a custodial IRA, a trusteed IRA may not accumulate RMDs for later distribution to successor beneficiaries. Thus, successor beneficiaries are not taken into account in determining designated beneficiaries.

Example 26. Assume that a participant rolls over funds in her qualified plan to a trusteed IRA. The participant names her son as the beneficiary of the IRA, and she names her grandson as the successor beneficiary on the death of her son. The terms of the trusteed IRA give the trustee discretion to distribute amounts in excess of minimum distributions for the health and welfare of the current beneficiary.

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[177] P.L.R. 2006-20-028 (Feb. 21, 2006); P.L.R. 2005-38-034 (June 28, 2005).

[178] Reg. § 1.401(a)(9)-4, Q&A 4(a); P.L.R. 2004-32-028 (May 12, 2004); P.L.R. 2004-32-027 (May 12, 2004).

[179] I.R.C. § 408(a), (h).

Assume that the participant dies in 2021. Then, if the participant's son survives her, he will be the only designated beneficiary of the IRA. If her son is an EDB, the IRA may make minimum distributions over the life expectancy of the son. If her son dies before all of the plan benefit is distributed, the IRA must distribute the remaining IRA benefit by the end of the tenth calendar year following the death of the son. No minimum distributions may be accumulated in the trusteed IRA.

12. *Use of Charitable Remainder Trusts*

A charitable remainder trust allows a taxpayer to provide lifetime benefits to a beneficiary of the trust and leave the remainder to charity. If the participant in a tax-favored plan names a charitable remainder trust as the beneficiary of the plan, plan distributions to the trust will not be taxable to the trust, and the trust may distribute most of the trust funds (including the plan benefit) over a period that could be as long as the lifetime of the beneficiary.

Charitable remainder trusts are of two basic types. A charitable remainder annuity trust (CRAT) pays the beneficiary a level payment annuity over the beneficiary's lifetime (or a term of 20 years or less).[180] The total amount of the annuity payments each year must be at least five percent, but no more than 50%, of the initial fair market value of the trust's assets.[181] The value of the charitable remainder interest must be at least ten percent of the initial fair market value of the trust's assets.[182]

A charitable remainder unitrust (CRUT) generally pays the beneficiary unitrust amounts over the beneficiary's lifetime (or a term of 20 years or less). The total of the unitrust payments each year must be a fixed percentage of the value of the trust determined annually. The fixed percentage must be at least five percent (but no more than 50%). The CRUT may provide for the distribution of trust income if that is a lesser amount, with a make-up distribution if income exceeds the unitrust amount in a future year. The value of

[180] I.R.C. § 664(d)(1). Payments to the beneficiary may also be paid over the shorter of (or the longer of) the beneficiary's lifetime or a term of 20 years or less. Reg. § 1.664-2(a)(5)(ii)(b).

[181] I.R.C. § 664(d)(1).

[182] I.R.C. § 664(d)(1)(A). If the value of the remainder interest is set too low in relation to other factors, the trust may not qualify as a CRAT. It will not qualify if the probability is greater than five percent that the annuity payments will exhaust the trust corpus so that the charity will receive nothing. Rev. Rul. 70-452, 1970-2 C.B. 199; Rev. Rul. 77-374, 1977-2 C.B. 329. The probability is complicated to compute, but the Service has provided a safe harbor clause to put in the trust document that will eliminate the problem. The safe harbor requires that the CRAT terminate and distribute its corpus to the charitable remainder beneficiary immediately before the distribution of any annuity payment that would reduce the discounted value of the trust corpus below ten percent of the value of the initial trust corpus. Rev. Proc. 2016-42, 2016-34 I.R.B. 269.

the charitable remainder interest in each contribution to the trust must be at least ten percent of the then fair market value of the contribution.[183]

Although a charitable remainder trust is tax exempt,[184] distributions to the beneficiary will carry out trust income that is taxable to the beneficiary.[185] For this purpose, the tax law classifies accumulated income and property of the trust into cumulative tiers consisting of ordinary income, capital gain, tax-exempt income, and principal. The tax law treats payments to the beneficiary as consisting of the tiered items in the same order (*i.e.*, first cumulative ordinary income, last principal).[186]

Unfortunately, retirement benefits are ordinary income falling in the first tier and thus are among the first items distributed and taxed to the beneficiary. Nevertheless, a beneficiary should be able to achieve substantial tax deferral for the retirement benefits by spreading the distribution of such benefits over a significant period. In addition, any income tax benefit for portions of federal estate tax imposed on income in respect of a decedent (IRD) effectively reduces the ordinary income tier.[187] Perhaps more importantly though, the present value of the charitable remainder is deductible for estate tax purposes.[188]

D. *Application of Existing Regulations Governing Non-Annuity Distributions*

The foregoing analysis relies substantially on the language and rationale of the existing regulations even though those regulations pre-date the SECURE Act. Such reliance seems justified. The existing regulations do not appear to be obsolete. The Service generally considers regulations to be obsolete if the Code provisions being interpreted have been repealed or "significantly" revised.[189]

While it is undeniable that the SECURE Act has a significant impact on taxpayers, the effect of the SECURE Act on the interpretation and application of the existing regulations does not appear to be significant. The impact

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[183] I.R.C. § 664(d)(2), (d)(3). Payments to the beneficiary may also be paid over the shorter of (or the longer of) the beneficiary's lifetime or a term of 20 years or less. Reg. § 1.664-3(a)(5)(ii*)(b).*

[184] I.R.C. § 664(c)(1).

[185] I.R.C. § 664(b).

[186] I.R.C. § 664(b).

[187] I.R.C. § 691(c)(1)(A); P.L.R. 1999-01-023 (Oct. 8, 1998).

[188] I.R.C. § 2055(e)(2)(A); P.L.R. 92-37-020 (June 12, 1992).

[189] Press Release, U.S. Dep't of the Treasury, Treasury Proposes Repeal of Nearly 300 Outdated Tax Regulations (Feb. 13. 2018), https://home.treasury.gov/news/press-release/sm0287 [https://perma.cc/SJE5-VBNM]. *Cf.* Dingman v. Commissioner, 101 T.C.M. (CCH) 1562, 2011 T.C.M. (RIA) ¶ 2011-116 (holding that the revision of a Code provision was significant enough to render the underlying regulation obsolete).

on the regulations essentially boils down to four rather simple changes that can be easily accommodated in applying the regulations:

1. The distribution period for designated beneficiaries under the five-year rule is lengthened to ten years.[190] Thus, a taxpayer need only substitute ten years for five years in the regulations to apply the new ten-year rule to designated beneficiaries. The overall nature and operation of the rule is not compromised by that change.
2. Distributions over the life expectancy of a designated beneficiary are now limited to a subset of the designated beneficiaries who qualified before the SECURE Act, (*i.e.*, limited to those designated beneficiaries who now qualify as EDBs).[191] Thus, the taxpayer may simply substitute "eligible designated beneficiary" for "designated beneficiary" in those provisions of the regulations governing use of the life-expectancy rule. In short, after the SECURE Act, EDBs may use the life-expectancy method in exactly the same way and to the same extent as allowed by the regulations before the SECURE Act.
3. Distributions to designated beneficiaries of a participant who died on or after his RBD are now treated in the same manner as distributions to designated beneficiaries of a participant who died before his RBD.[192] Thus, the old provisions of the regulations, governing distributions to designated beneficiaries of a participant who died on or after his RBD, are no longer applicable to designated beneficiaries. Such distributions are now covered very clearly by the existing regulations governing distributions to designated beneficiaries of a participant who died before his RBD.
4. Upon the death of an EDB receiving life-expectancy distributions, a plan must distribute the entire remaining benefit by the end of the calendar year containing the tenth anniversary of the EDB's death.[193] Thus, the provisions in the regulations that govern distributions to successor beneficiaries simply no longer apply to beneficiaries who succeed EDBs who were receiving life-expectancy distributions (while continuing to apply to other beneficiaries).[194] Instead, the ten-year rule applies to such EDB successors.[195]

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[190] I.R.C. § 401(a)(9)(H)(i)(I).

[191] I.R.C. § 401(a)(9)(H)(ii).

[192] I.R.C. § 401(a)(9)(H)(i)(II).

[193] I.R.C. § 401(a)(9)(H)(iii).

[194] Before the SECURE Act, the amount and period of minimum distributions under the life expectancy method were generally the same for a succeeding beneficiary as they were for the original beneficiary. Reg. § 1.401(a)(9)-5, Q&A 7(c)(2).

[195] *See* item 1 above.

It seems probable that the Service will amend the existing regulations to be consistent with the SECURE Act in the manner suggested here and will not use the enactment of the SECURE Act as a mere excuse to completely revamp the regulations. There can, however, be no guarantee in that regard. The Service has the power under the *Chevron* doctrine to substantially rewrite regulations that interpret ambiguous statutory provisions. New regulations need only provide at least one of the possible "reasonable" interpretations of the statutory language.[196]

III. Annuity Distributions to Beneficiaries

Defined benefit plans are generally required to pay annuities directly or to purchase annuity contracts in order to satisfy RMD rules. Defined contribution plans may also purchase annuity contracts to satisfy minimum distribution requirements. Before the SECURE Act, the minimum distribution rules governing annuity distributions to beneficiaries were essentially the same whether the distributions were paid directly by the plan or were satisfied through the purchase of an annuity contract. It also made little difference whether a defined contribution plan or a defined benefit plan purchased the annuity contract.

The SECURE Act did not change the minimum distribution rules governing annuity distributions by traditional defined benefit plans, whether the annuity distributions were paid directly or through the purchase of an annuity contract. The SECURE Act did, however, change the rules for annuities purchased by defined contribution plans (as defined in the SECURE Act). To evaluate those changes and to evaluate the relative merits of making annuity or non-annuity distributions after the SECURE Act, a review of the minimum distribution rules governing annuity distributions before the SECURE Act, most of which continue to apply to annuity distributions after the SECURE Act, will be helpful.

A. *Annuity Distributions Before the SECURE Act*

Before the SECURE Act, an annuity meeting minimum distribution requirements generally had to be payable (1) over the participant's lifetime, (2) over the lifetimes of the participant and beneficiary, or (3) over a period certain that was no longer than a period determined under Service tables. The participant could change the payment period only in limited circumstances, and the regular interval between the annuity payments could not exceed one year.[197] An annuity generally satisfied minimum distribution requirements

[196] Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011) (extending *Chevron* deference to tax regulations).

[197] I.R.C. § 401(a)(9)(A)(ii); Reg. § 1.401(a)(9)-6, Q&A 1(a).

for *all* payment years if it met these requirements as well as the requirements discussed below.

1. *Meeting Initial Minimum Distribution Requirement for Annuities*

During a participant's lifetime, his or her tax-favored plan could generally meet initial minimum distribution requirements by making its first annuity payment on or before the participant's RBD. After the participant's death, the annuity payments had to continue without interruption to any named beneficiaries.[198] Note that minimum distribution requirements do not apply to Roth IRAs during the participant's lifetime, but only after the participant's death.[199]

If a participant died before his or her RBD (or at any time in the case of a Roth IRA), the tax-favored plan generally had to make its first annuity payment to beneficiaries no later than the end of the year following the calendar year of the participant's death.[200] If a surviving spouse was the sole beneficiary, however, the tax-favored plan could have elected to make the first annuity payment to the spouse in the calendar year that the participant would have reached age 70½ (age 72 after the SECURE Act).[201] In addition, if the plan purchased an annuity to satisfy its obligation to beneficiaries, the annuity starting date must have occurred on or before the purchase date, and the first annuity payment must have been timely made.[202]

2. *Purchased Annuity Beginning Too Late to Meet Initial Minimum Distribution Requirements*

An annuity purchased for a beneficiary under a defined contribution plan might have started too late to meet initial minimum distribution requirements. For example, a purchased annuity required to start no later than the end of the first year following the calendar year of the participant's death might not have started until the second year following the participant's death. If so, the annuity ordinarily would still have met minimum distribution requirements for years beginning after that second calendar year. For that second calendar year, however, and for the years prior to that second calendar year, the defined contribution plan had to meet the different minimum distribution rules applicable to non-annuity distributions (without regard to the annuity rules).

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[198] I.R.C. §§ 401(a)(9)(A)(ii), 408(a)(6), (b)(3); Reg. §§ 1.401(a)(9)-6, Q&A 1(c)(1), 1.401(a)(9)-5, Q&A 1(e), 1.408-8, Q&A 1(a).

[199] I.R.C. § 408A(c)(5).

[200] I.R.C. §§ 401(a)(9)(C)(iii)(III), 408A(c)(5); Reg. § 1.401(a)(9)-6, Q&A 1(c)(1); Reg. §§ 1.401(a)(9)-5, Q&A 1(e), 1.401(a)(9)-3, Q&A 3(a), 1.408A-6, Q&A 14.

[201] I.R.C. § 401(a)(9)(B)(iv)(I); Reg. § 1.401(a)(9)-6, Q&A 1(c)(1); Reg. §§ 1.401(a)(9)-5, Q&A 1(e), 1.401(a)(9)-3, Q&A 3(b).

[202] Reg. § 1.401(a)(9)-6, Q&A 4.

3. *Requirements Applicable to Lifetime Annuities*

Generally, the minimum distribution requirements could be met for annuities payable for a participant's lifetime and then for the lifetime of a beneficiary who was not more than ten years younger than the participant.[203] Further, the requirements were generally met for an annuity for the lifetime of a participant and spouse, regardless of the spouse's age, provided the spouse was the participant's sole beneficiary.[204]

4. *Payments to a Younger Nonspouse Beneficiary*

The minimum distribution requirements were generally more stringent for an annuity payable for a participant's lifetime and then for the lifetime of a nonspouse beneficiary who was more than ten years younger than the participant. For those annuities, minimum distribution requirements were generally not met unless each annuity payment to the nonspouse beneficiary was no greater than a percentage of each of the participant's own annuity payments as provided by the regulations and as shown in Table 1.[205] For purposes of this table, the excess of the age of the participant over the age of the beneficiary is based on their respective ages on their birthdays in a calendar year.[206]

Example 27. Assume that a participant was age 72 when she retired and began receiving lifetime annuity payments of $3,000 per month from her qualified plan. Assume that, after the participant's death, her son was to receive monthly annuity payments for his lifetime. Assume also that her son attained age 40 in the calendar year of her retirement, and that the consequent difference in their ages was 32 years.

Under these facts, minimum distribution requirements would be met only if the son's annuity payments were no more than $1,770 per month. The participant computed this amount by multiplying her own payment of $3,000 per month by 59% (the percentage from the above table that is applicable to an age difference of 32 years).

If a participant was younger than age 70 on his or her birthday in the year the annuity started, the participant could reduce the age difference used in the above table. The participant could reduce it by the number of years his or her age was less than 70.[207]

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[203] Reg. § 1.401(a)(9)-6, Q&A 2(a), Q&A 2(c).
[204] Reg. § 1.401(a)(9)-6, Q&A 2(b).
[205] Reg. § 1.401(a)(9)-6, Q&A 2(c)(1).
[206] Reg. § 1.401(a)(9)-6, Q&A 2(c)(2).
[207] Reg. § 1.401(a)(9)-6, Q&A 2(c)(1).

Table 1

Excess of participant age over age of beneficiary	Applicable percentage	Excess of participant age over age of beneficiary	Applicable percentage
10 years or less	100%	27	63%
11	96%	28	62%
12	93%	29	61%
13	90%	30	60%
14	87%	31	59%
15	84%	32	59%
16	82%	33	58%
17	79%	34	57%
18	77%	35	56%
19	75%	36	56%
20	73%	37	55%
21	72%	38	55%
22	70%	39	54%
23	68%	40	54%
24	67%	41	53%
25	66%	42	53%
26	64%	43	53%
		44 and greater	52%

Example 28. Assume that a participant was age 60 when she retired and began receiving lifetime annuity payments of $3,000 per month. Assume that, after the participant's death, her son was to receive monthly annuity payments for his lifetime. Assume also that her son attained age 24 in the calendar year of her retirement, and that the consequent difference in their ages was 36 years.

Under these facts, minimum distribution requirements would be met only if the son's annuity payments were no more than $1,920 per month. The participant computed this amount by multiplying her own payment of $3,000 per month by 64 percent, the percentage from the above table that is applicable to an age difference of 26 years (*i.e.*, actual age difference of 36 years less the ten-year period before the participant reached age 70).

5. *Minor or Disabled Child*

Annuity payments to a minor child had to be treated as payments to the surviving spouse if the remaining benefit was required to be paid to the surviving spouse when the child ceased to be a minor. Such payments were not subject to the rule requiring a percentage reduction in the amount of payments to beneficiaries who are more than ten years younger than the participant. A child ceased to be a minor for this purpose upon the later of (1) reaching majority, (2) completing a specified course of education or reaching age 26 if earlier, or (3) recovering from a disability that existed when the child reached majority. Death also terminated the child's status as a minor.[208]

6. *Life Annuity and a Period Certain*

A life annuity may have provided for distributions for a period certain. Alternatively, an annuity for a period certain might not have provided for a life contingency. In either event, the period certain generally could not exceed the applicable distribution period found in the Uniform Lifetime Table for the age of the participant in the calendar year containing the annuity starting date. A participant could, however, use the Joint and Last Survivor Table to lengthen the period certain if his or her spouse was the sole beneficiary.[209]

Each payment to a beneficiary that was for a period certain could equal 100% of the amount of each of the participant's lifetime annuity payments. After termination of the period certain, a joint and survivor annuity could provide only reduced payments for a nonspouse beneficiary who was ten years younger than the participant, as discussed above.[210]

If the annuity started after the death of the participant to be paid over the life of the beneficiary, the period certain could not exceed the applicable distribution period found in the Single Life Table for the age of the beneficiary in the calendar year containing the annuity starting date.[211]

7. *Exceptions Allowing Annuity Payments That Increase Over Time*

Minimum distribution requirements were generally not met if the amounts of the annuity payments increased during the term of the annuity.[212] Nevertheless, the tax law did permit the following types of fairly generous increases:

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[208] I.R.C. § 401(a)(9)(F), (E)(ii)(II), (E)(iii); Reg. § 1.401(a)(9)-6, Q&A 15.
[209] Reg. §§ 1.401(a)(9)-6, Q&A 3(a), 1.401(a)(9)-9, Q&A 3, Joint and Last Survivor Table.
[210] Reg. § 1.401(a)(9)-6, Q&A 2(d).
[211] Reg. §§ 1.401(a)(9)-6, Q&A 3(b), 1.401(a)(9)-9, Q&A 1, Single Life Table.
[212] Reg. § 1.401(a)(9)-6, Q&A 1(a).

1. An annual percentage increase not exceeding the increase in a cost of living index issued by the U.S. Bureau of Labor Statistics (including indices based on population segments or geographic areas).[213]
2. An annual percentage increase equal to the lesser of (a) a fixed percentage or (b) the increase in a cost of living index described in (1) above. (Any excess of the cost of living increase over the fixed percentage could be carried over and used to increase payments in certain subsequent years.)[214]
3. A percentage increase under a governmental plan based on an increase in the compensation paid to a participant's successors in the position the participant held at retirement. This rule also applied to any such provision in a nongovernmental plan in effect on April 17, 2002.[215]
4. Percentage increases determined at specified times (or ages) by reference to cumulative increases in a cost of living index described in items 1 through 3 above.[216]
5. An increase during a participant's lifetime due to the death of a beneficiary who was entitled to lifetime annuity payments after the participant's death.[217]
6. An increase during the participant's lifetime because a beneficiary is, under the terms of a qualified domestic relations order (QDRO), no longer the participant's beneficiary.[218]
7. A conversion of the survivor benefit under a participant's annuity to a lump sum payable at death.[219]
8. Increased benefits resulting from a plan amendment.[220]
9. Payments to a participant's surviving spouse that are a continuation of annuity payments previously made to the participant's minor or disabled child.[221]

a. *Additional Exceptions for Purchased Annuities.* For purchased annuities, the tax law allowed certain additional types of payment increases. However, these increases were available only if total expected payments under the annuity (without regard to future payment increases) exceeded the amount of benefits used to purchase the annuity.[222] For this purpose, a participant determined the amount of benefits used to acquire a deferred annuity

[213] Reg. § 1.401(a)(9)-6, Q&A 14(a)(1), Q&A 14(b)(2).
[214] Reg. § 1.401(a)(9)-6, Q&A 14(a)(1), Q&A 14(b)(3).
[215] Reg. § 1.401(a)(9)-6, Q&A 14(a)(1), Q&A 14(b)(4).
[216] Reg. § 1.401(a)(9)-6, Q&A 14(a)(2).
[217] Reg. § 1.401(a)(9)-6, Q&A 14(a)(3).
[218] Reg. § 1.401(a)(9)-6, Q&A 14(a)(3).
[219] Reg. § 1.401(a)(9)-6, Q&A 14(a)(5).
[220] Reg. § 1.401(a)(9)-6, Q&A 14(a)(4).
[221] Reg. § 1.401(a)(9)-6, Q&A 15.
[222] Reg. § 1.401(a)(9)-6, Q&A 14(c), Q&A 14(e)(1).

by valuing the benefits as of the date the annuity commenced.[223] For lifetime annuities, a participant determined the expected payments by reference to the Single Life Table or the Joint and Last Survivor Table set forth in the regulations. The determination had to take into account any guaranteed payments.[224]

If the condition described in the preceding paragraph were met, the tax law allowed the following additional types of increases for a purchased annuity:

1. A constant percentage increase applied each year.[225]
2. A payment at the participant's death no greater than the amount of the benefit used to purchase the annuity less the total annuity payments made prior to death.[226]
3. Dividends due to annual actuarial gains paid (a) in the year following the year of the gains or (b) as an additional annuity amount over the remaining annuity period.[227]
4. An acceleration of payments that decreased the total amount payable under the annuity.[228]

b. *Additional Exceptions for Certain Annuities Not Purchased.* If an annuity was not purchased from an insurance company but was payable by a defined benefit plan from a qualified trust, the tax law allowed the following additional types of payment increases:[229]

1. A constant percentage increase of less than five percent a year.[230]
2. A payment at the participant's death no greater than the actuarial value of the benefits when the annuity started (or the participant's total contributions, if greater) less the total annuity payments made prior to the participant's death.[231]
3. Dividend payments due to annual actuarial gains from investment experience, computed by using an assumed interest rate of at least three percent. The annuity could not, however, provide for any constant percentage increase under item 1 above, and the plan must have paid the

[223] Reg. § 1.401(a)(9)-6, Q&A 14(e)(1)(i).
[224] Reg. § 1.401(a)(9)-6, Q&A 14(e)(3); Reg. § 1.401(a)(9)-9, Q&A 2, Uniform Lifetime Table, Q&A 3, Joint and Last Survivor Table.
[225] Reg. § 1.401(a)(9)-6, Q&A 14(c)(1).
[226] Reg. § 1.401(a)(9)-6, Q&A 14(c)(2).
[227] Reg. § 1.401(a)(9)-6, Q&A 14(c)(3).
[228] Reg. § 1.401(a)(9)-6, Q&A 14(c)(4), Q&A 14(e)(4).
[229] Reg. § 1.401(a)(9)-6, Q&A 14(d).
[230] Reg. § 1.401(a)(9)-6, Q&A 14(d)(1).
[231] Reg. § 1.401(a)(9)-6, Q&A 14(d)(2).

dividends (a) in the year following the year of the gains or (b) as an additional annuity amount over the remaining annuity period.[232]

c. *Exceptions for Increased Annuity Payments to Beneficiaries.* The increases in payment amounts described above were allowed for both participants and beneficiaries unless it was clear from their nature and conditions that they applied only to participants. Such increases did not violate the rule requiring a percentage reduction in the amount of payments under joint and survivor annuities to nonspouse beneficiaries who were more than ten years younger than the participant. The increases must, however, have been "determined in the same manner for the [participant] and the beneficiary" and must have been computed for the beneficiary after taking into account the initial reduction in the amount of the payment to the beneficiary.[233]

8. *Changing the Annuity Payment Period*

A participant or beneficiary could change the annuity payment period to accommodate any of the allowed payment increases described immediately above.[234] The participant could also make other changes in the annuity payment period, some of which could affect payments to beneficiaries. Specifically, the participant could make changes in the period (1) at the time he or she retired or the plan terminated, (2) when the participant married if he or she changed to a joint and survivor annuity with the new spouse as the sole beneficiary, or (3) at any time for a fixed term annuity.[235] The following additional conditions had to be met as well:

1. The modified annuity had to satisfy minimum distribution rules applicable at the date of modification, ignoring previous benefit payments.[236]
2. The participant had to treat the remaining payments as a new annuity for purposes of determining spousal benefits and benefit limitations.[237]
3. The new annuity stream had to satisfy any statutory limitations of benefits determined as of the original annuity starting date.[238]
4. The new payment period could not end later than the end of a period available at the original annuity starting date.[239]

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[232] Reg. § 1.401(a)(9)-6, Q&A 14(d)(3).
[233] Reg. § 1.401(a)(9)-6, Q&A 2(c)(1).
[234] Reg. § 1.401(a)(9)-6, Q&A 13(a).
[235] Reg. § 1.401(a)(9)-6, Q&A 13(b).
[236] Reg. § 1.401(a)(9)-6, Q&A 13(c)(1).
[237] Reg. § 1.401(a)(9)-6, Q&A 13(c)(2).
[238] Reg. § 1.401(a)(9)-6, Q&A 13(c)(3).
[239] Reg. § 1.401(a)(9)-6, Q&A 13(c)(4).

9. *Purchased Insurance Company Annuity*

A tax-favored plan could purchase and distribute an annuity contract. The mere distribution of the contract itself did not usually satisfy minimum distribution requirements. Rather, for minimum distribution purposes, the participant or beneficiary generally had to take into account the actual annuity payments under the distributed contract.[240] Note though that the contract had to be nontransferable to avoid taxation at distribution.[241]

10. *Additional Benefits Accruing Under Defined Benefit Plans*

If additional benefits accrued under a defined benefit plan after an annuity had begun, payments based on the additional benefits had to begin relatively soon. They had to begin with the first payment interval (*e.g.*, month, quarter) ending in the following calendar year.[242] If there were administrative delays in paying the benefits, the plan nevertheless had to catch up on the payments by the end of that year.[243] For this purpose, unvested benefits did not accrue until they were vested (*i.e.*, until they were not subject to forfeiture).[244]

11. *Separate Shares for Two or More Beneficiaries*

If a defined benefit plan had more than one beneficiary, the participant or beneficiaries could divide the plan into separate shares, one for each beneficiary. For this purpose, separate shares of a defined benefit plan were "separate identifiable components which are separately distributed."[245]

If such a plan were divided into separate shares before the end of the year following the death of the participant, annuities paid by each such share could have been paid over the life expectancy of that share's beneficiary (ignoring the ages of beneficiaries of the other separated shares). If the surviving spouse were the sole beneficiary of such a separate share and the participant died before his or her RBD, the spouse could delay start of a lifetime annuity until the deceased participant would have reached age 70½ (now age 72).[246]

B. *Annuity Distributions After the SECURE Act*

As previously noted, the changes made by the SECURE Act apply to annuities purchased by defined contribution plans (as defined in the SECURE Act). The changes do not apply to annuities paid directly by defined benefit plans or paid under annuity contracts purchased by defined benefit plans

[240] Reg. § 1.401(a)(9)-8, Q&A 10.
[241] I.R.C. § 401(g); Reg. §§ 1.401-9(b), 1.402(a)-1(a)(2).
[242] Reg. § 1.401(a)(9)-6, Q&A 5(a).
[243] Reg. § 1.401(a)(9)-6, Q&A 5(b).
[244] Reg. § 1.401(a)(9)-6, Q&A 6.
[245] Reg. § 1.401(a)(9)-8, Q&A 2(b).
[246] I.R.C. § 401(a)(9)(B)(iv)(I); Reg. § 1.401(a)(9)-8, Q&A 2.

(herein collectively "traditional defined benefit plans").[247] In fact, after the SECURE Act, the tax treatment of distributions by traditional defined benefit plans are the same as described above for annuity payments before the SECURE Act except that the age element of the RBD has changed from age 70½ to age 72.

1. *Annuity Distributions by Traditional Defined Benefit Plans*

Traditional defined benefit plans continue to offer significant tax deferral for beneficiaries. If a participant in a traditional defined benefit plan dies before his or her RBD and before the annuity starting date, the participant's designated beneficiary may receive the plan benefit over the beneficiary's lifetime.[248] If the participant dies after his or her RBD or after the annuity starting date, payments may be made to a designated beneficiary over his or her lifetime under a joint and survivor annuity.[249] In neither case does it matter whether the beneficiary is or is not an EDB.[250]

Of course, as discussed above, tax deferral for nonspouse beneficiaries under joint and survivor annuities were significantly limited before the SECURE Act and continue to be so limited after the SECURE Act. They are limited by a mandatory percentage reduction of annuity payments under a joint and survivor annuity made to nonspouse beneficiaries who are more than ten years younger than the participant (unless the beneficiary is a minor or disabled child succeeded by a surviving spouse). The percentage reduction, however, cannot exceed 48% for even the youngest of beneficiaries, and the reduction may be far less for older beneficiaries.[251]

Lifetime annuities under traditional defined benefit plans then still offer substantial tax deferral opportunities for beneficiaries. Those tax deferral opportunities are enhanced by the rules that allow payments over a period certain.[252] The rules also allow significant increases over time in the amount of an annuity payment. As discussed above, those payment increases may be attributable to a cost of living index, dividends, or even a constant annual percentage increase.[253]

2. *Annuity Distributions by Defined Contribution Plans*

The SECURE Act applies to annuities purchased by tax-favored plans that are not traditional defined benefit plans. Thus, the SECURE Act applies to annuities purchased by traditional IRAs, Roth IRAs, qualified trusts that are

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[247] I.R.C. § 401(a)(9)(H)(vi).
[248] I.R.C. § 401(a)(9)(B)(iii).
[249] Reg. § 1.401(a)(9)-6, Q&A 1, Q&A 2.
[250] I.R.C. § 401(a)(9)(H)(vi).
[251] Reg. § 1.401(a)(9)-6, Q&A 2(c), Q&A 15.
[252] Reg. § 1.401(a)(9)-6, Q&A 3.
[253] Reg. § 1.401(a)(9)-6, Q&A 14.

not part of defined benefit plans, 403(b) plans, and 457 government plans (if not defined benefit plans).[254] Consequently, these plans may now provide lifetime annuities (or life-expectancy annuities) only to beneficiaries who qualify as EDBs.[255] If the beneficiaries of a plan include IDBs or NDBs, the trustee of the plan should timely create separate accounts for the beneficiaries so that the IDBs or NDBs do not taint the EDBs.

Example 29. Participant A, who owns IRA B, is unmarried and dies in 2021 at age 60. Before she died, Participant A divided IRA B into three separate but equal IRAs for her three adult children: Child A, Child B, and Child C. After Participant A died, the IRA for Child C, who is disabled, used the entire IRA benefit to purchase an annuity for the life of Child C.

Since Child C is disabled and an EDB, his life annuity satisfies minimum distribution requirements (provided it meets the other requirements in the regulations described above). Child A and Child B are IDBs, so their IRAs must distribute their entire benefit by the end of the calendar year containing the tenth anniversary of Participant A's death. If the interests of the children had not been put into separate IRAs or separate accounts before the end of the first calendar year following Participant A's death, Child C would not have qualified for life annuity payments and thus would have also had to take his full benefit within the ten-year period.

If a young EDB in a defined contribution plan receives a life annuity with a period certain based on his or her life expectancy and then dies long before the period certain has expired, the plan benefit must be distributed to the successor beneficiary under the ten-year rule.[256] If the period certain extends beyond the ten-year distribution period, the successor beneficiary may need to convert the annuity payments to cash to make a final distribution within the ten-year period. Fortunately, the regulations allow an annuity contract to provide for such an acceleration of payments if certain conditions are met.[257]

Of course, a plan administrator may simply mistakenly purchase a life annuity for an IDB or for an EDB's successor beneficiary. If so, the plans are still charged with making distributions to the beneficiaries under the ten-year rule. Although annuity distributions during the first nine years will not violate minimum distribution requirements, the plan must distribute the entire

[254] I.R.C. § 401(a)(9)(H)(vi).
[255] I.R.C. § 401(a)(9)(B)(iii), (H)(ii).
[256] I.R.C. § 401(a)(9)(H)(ii), (iii).
[257] Reg. § 1.401(a)(9)-6, Q&A 14(c)(4), Q&A 14(e)(4).

remaining benefit during the tenth year to avoid the penalty.[258] Unfortunately, mere distribution of the annuity contract may not constitute an RMD.[259]

Note that the SECURE Act grandfathers certain pre-existing irrevocable commercial annuities that were already providing benefits as of December 20, 2019, or were then irrevocably committed to providing benefits, for the lifetimes of the participant and his or her designated beneficiary.[260]

IV. Conclusion

Although the SECURE Act substantially curtailed tax deferrals for many retirement plan beneficiaries, a significant number of opportunities for long-term deferrals survived the SECURE Act. Lifetime or life-expectancy distributions are still available for surviving spouses, disabled beneficiaries, the chronically ill, children during their minorities, and beneficiaries less than ten years younger than the plan participant. A surviving spouse who is the sole beneficiary may still defer the start of distributions until the deceased participant would have attained age 72 or may enjoy generally more favorable RMD rules by assuming ownership of a decedent's IRA. Brothers and sisters of a deceased participant may still enjoy full lifetime or life-expectancy deferrals if they are not significantly younger than the participant.

The new provision allowing distributions over a ten-year period for IDBs, EDBs, and the beneficiaries of EDBs is a substantial improvement when compared to the old five-year rule (still applicable to certain NDBs). The ten-year rule is particularly beneficial for beneficiaries of Roth IRAs and Roth accounts in qualified plans. The beneficiaries may let funds accumulate tax-free in the Roth IRAs for ten years and then take a distribution of the accumulated funds tax-free.

The new provision for AMBTs makes it much easier to segregate EDBs from other beneficiaries so that the EDBs can qualify for lifetime or life-expectancy distributions. And that old workhorse, the charitable remainder trust, still offers substantial deferral for distributions received from tax-favored plans.

Also of significance, opportunities for long-term deferrals under traditional defined benefit plans remain untouched by the SECURE Act. Any designated beneficiary of such a plan may enjoy the tax deferral inherent in lifetime annuity payments. The deferral is not limited to special classes of designated beneficiaries. It is true that joint and survivor annuity payments may be limited in amount for beneficiaries more than ten years younger than the deceased participant. Nevertheless, the payments may be as much as 52% of the payments to the participant for even the youngest of beneficiaries (with

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[258] I.R.C. § 401(a)(9)(H)(iii).

[259] Reg. § 1.401(a)(9)-8, Q&A 10.

[260] The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b)(4), 133 Stat. at 3179.

a higher percentage for older beneficiaries). Furthermore, the rules provide for a period certain with unreduced payments and allow significant increases over time in the amount of an annuity payment.