

# The SECURE Act: Retirement Plan Distributions After the Death of a Beneficiary

VORRIS J. BLANKENSHIP\*

## Abstract

The Setting Every Community Up for Retirement Enhancement Act (SECURE Act) of 2019 made very significant changes to required minimum distributions (RMDs) paid to beneficiaries of defined contribution retirement plans, including IRAs. The SECURE Act generally applies to beneficiaries of a defined contribution plan if the plan participant dies after 2019.

The most significant provisions of the SECURE Act limit RMDs that are life or life-expectancy distributions. Life and life-expectancy RMDs are now available only for eligible designated beneficiaries (EDBs) of defined contribution plans. EDBs are defined as (1) the surviving spouse of a plan 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 SECURE Act also replaced the alternative five-year distribution rule with a comparable ten-year rule. Under the new ten-year rule, a plan is required to distribute the participant's entire benefit before the end of the tenth calendar year after the participant's death.

The SECURE Act also generally requires a plan to distribute all of the plan's remaining benefit before the end of the tenth calendar year following the death of an EDB who was receiving distributions over his or her life expectancy. The SECURE Act imposes a similar rule on the post-2019 death of a designated beneficiary in a plan that otherwise would not be subject to the SECURE Act because the participant died before 2020. Distributions required after the death of an EDB (or a designated beneficiary in a pre-2020 plan) are referred to as successor ten-year distributions and are the focus of this Article.

A major problem may occur on the death of an EDB in a plan with multiple EDBs. In addition to applying the successor ten-year rule to the benefit

---

\*Retired Attorney and CPA; University of Illinois, B.S., 1959; Indiana University, J.D., 1965. This Article is based in part on material from Chapter 8, *Minimum Distributions from Tax-Favored Retirement Plans*, VORRIS J. BLANKENSHIP, TAX PLANNING FOR RETIREES (2009), published by LexisNexis.

of the deceased EDB, the SECURE Act will generally apply the rule to the interests of the other living EDBs. The underlying rationale is that a plan is allowed only one method for payment of RMDs, and the SECURE Act imposes that method upon the death of an EDB.

Solutions to the problem of multi-beneficiary plans lie in the ability of a participant or trustee to divide a plan into separate accounts for each beneficiary. If such a separation is timely, the death of an EDB in one separate account should not affect the method or period under which RMDs are being made from the separate accounts of other EDBs.

Unfortunately, the separate account solution generally does not work for multiple EDBs who are beneficiaries in a “see-through” trust. The interest of a see-through trust in a plan cannot be divided into separate accounts for trust beneficiaries. Instead, the solution lies in the proper creation of separate sub-trusts for each beneficiary that insulate the plan interests of living EDBs from the successor ten-year rule applicable to the interest of a deceased EDB. Note though that, in some unique circumstances, an applicable multi-beneficiary trust, a special type of trust allowed by the SECURE Act, may provide a more convenient way to divide a trust into separate subtrusts.

Similar solutions that limit the effect of the successor ten-year rule may also be available for designated beneficiaries in a pre-2020 plan that is otherwise not subject to the SECURE Act.

## Table of Contents

I. Introduction .....	631
A. Required Minimum Distributions to Beneficiaries Before the SECURE Act .....	632
B. Required Minimum Distributions to Beneficiaries After the SECURE Act .....	633
II. Minimum Distributions Required After Death of a Designated Beneficiary .....	636
A. Death of an Eligible Designated Beneficiary in a Plan with Multiple Beneficiaries. ....	638
B. Distributions to a See-Through Trust After Death of an Eligible Designated Beneficiary .....	641
1. Separate Subtrusts May Protect Nondeceased Eligible Designated Beneficiaries .....	643
2. Applicable Multi-Beneficiary Trusts May Protect Eligible Designated Beneficiaries .....	645
C. Method of Distribution Unchanged by Death of an Ineligible Designated Beneficiary .....	646

D. Deceased Designated Beneficiary of Participant Dying Before 2020 .....	647
1. Separate Plan Accounts for Multiple Designated Beneficiaries .....	649
2. See-Through Trusts Receiving Life-Expectancy Distributions.....	650
E. Application of the Successor Ten-Year Rule to Minors.....	654
F. Surviving Spouse Dies Before Minimum Distributions Required .....	655
G. Application of Existing Regulations Governing Non-Annuity Distributions.....	656
III. Conclusion.....	656

## I. Introduction

The Setting Every Community Up for Retirement Enhancement Act (SECURE Act) of 2019<sup>1</sup> made very significant changes to required minimum distributions (RMDs)<sup>2</sup> paid to beneficiaries of certain tax-favored retirement plans. Those changes included somewhat murky changes to minimum distributions required after the death of a beneficiary. Although this Article focuses on the latter changes, a brief review of the overall impact of the SECURE Act on RMD's payable to beneficiaries will be helpful in understanding the changes involving minimum distributions required after the death of a beneficiary.<sup>3</sup>

The changes made by the SECURE Act apply only to RMDs payable to beneficiaries by tax-favored retirement plans that are defined contribution plans. For purposes of the SECURE Act, defined contribution plans are defined broadly. They include all funded tax-favored plans (including IRAs) except for traditional defined benefit plans. For this purpose, “traditional defined benefit plans” mean defined benefit plans that include a section 401(a)

<sup>1</sup> Pub. L. No. 116-94, Div. O, 133 Stat. 2534, 3137–82.

<sup>2</sup> This Article uses the following acronyms:

AMBT – applicable multi-beneficiary trust  
 EDB – eligible designated beneficiary  
 IDB – ineligible designated beneficiary  
 NDB – nondesignated beneficiary  
 RBD – required beginning date  
 RMD – required minimum distribution

<sup>3</sup> For a detailed discussion of the treatment of RMDs paid to beneficiaries under the SECURE Act, see Vorriss J, Blankenship, *Distributions to Beneficiaries of Tax-Favored Retirement Plans, Before and After the SECURE Act*, 74 TAX LAW. 43 (2020).

qualified trust as part of the plan or that qualify as either section 403(a) annuities or section 457 government plans.<sup>4</sup> “Defined benefit plans” are generally plans that do not provide individual accounts for participants (or do not properly account for them).<sup>5</sup> This Article refers to a defined contribution plan subject to the SECURE Act as simply “the plan.”

After the death of a participant, the amount and timing of RMDs paid to beneficiaries have in the past depended on the existence or nonexistence of so-called “designated beneficiaries.” A designated beneficiary is, in brief, an identifiable individual beneficiary designated in the plan or, if the plan allows, designated by the participant.<sup>6</sup> Entities that are not individuals (*e.g.*, trusts, estates, and corporations) generally cannot be designated beneficiaries. 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 in determining RMDs to beneficiaries after enactment of the SECURE Act.

#### *A. Required Minimum Distributions to Beneficiaries Before the SECURE Act*

Before enactment of the SECURE Act, minimum distribution requirements for beneficiaries differed depending on whether a participant died before, or on or after, his or her “required beginning date” (RBD) for distributions.<sup>7</sup> The RBD for a participant before enactment of the SECURE Act was normally April 1 of the year following the calendar year the participant reached age 70½.<sup>8</sup> 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 (with some exceptions).<sup>9</sup>

Before the SECURE Act, a joint and survivor annuity benefiting a designated beneficiary could meet a plan’s minimum distribution requirements if it were a purchased commercial annuity with a beginning date on or before the participant’s RBD.<sup>10</sup> It also had to be payable (1) over the participant’s lifetime, (2) over the lifetimes of the participant and beneficiary, or (3) over

<sup>4</sup> I.R.C. §§ 401(a)(9)(H)(vi), 402(c)(8)(B). References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (Code), unless otherwise indicated.

<sup>5</sup> I.R.C. § 414(i)–(j).

<sup>6</sup> I.R.C. § 401(a)(9)(E)(i)–(ii).

<sup>7</sup> See *Retirement Plan and IRA Required Minimum Distributions FAQs*, INTERNAL REVENUE SERV., last accessed Mar. 22, 2021, <https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-required-minimum-distributions> [<https://perma.cc/P3QZ-XZDH>] (“The new 10-year rule applies regardless of whether the participant dies before, on, or after, the required beginning date . . .”).

<sup>8</sup> See *id.* (“If you reached the age of 70½ in 2019 the prior rule applies, and you must take your first RMD by April 1, 2020.”).

<sup>9</sup> I.R.C. § 401(a)(9)(C)(i); Reg. §§ 1.401(a)(9)-2, Q&A 2(a); 1.408-8, Q&A 3.

<sup>10</sup> I.R.C. § 401(a)(9)(A)(ii) (“[B]eginning not later than the required beginning date . . .”).

a period certain that was no longer than the participant's life expectancy or the joint and survivor life expectancies of the participant and beneficiary.<sup>11</sup> A lifetime or life-expectancy annuity for a designated beneficiary that began after the death of a participant had to start before the end of the year following the death of the participant (or potentially later for a spousal beneficiary).<sup>12</sup> In addition, the annuities had to meet certain other requirements in the regulations.<sup>13</sup>

If the plan did not purchase an annuity, the minimum distribution requirements were somewhat different. For a participant who died *on or after* his or her RBD, a plan generally had to pay the participant's beneficiaries each year thereafter a minimum amount equal to the adjusted account balance for the prior year divided by the "applicable distribution period."<sup>14</sup> The applicable distribution period was generally based on the participant's life expectancy on his or her birthday in the calendar year of his or her death.<sup>15</sup> If the participant had a designated beneficiary, however, the applicable distribution period could be based instead on the life expectancy of the designated beneficiary.<sup>16</sup>

If a participant died *before* his or her RBD, the plan had to meet minimum distribution requirements under one of two methods.<sup>17</sup> Under one method, the 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").<sup>18</sup> 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").<sup>19</sup>

### *B. Required Minimum Distributions to Beneficiaries After the SECURE Act*

The SECURE Act did little to change minimum distribution requirements for participants in *defined benefit plans* other than to change the RBD age from 70½ to 72.<sup>20</sup> The SECURE Act did, however, substantially limit the availability of distributions from *defined contribution plans* that are made over the lifetimes or life expectancies of beneficiaries. For such plans whose

---

<sup>11</sup> I.R.C. § 401(a)(9)(A)(ii).

<sup>12</sup> I.R.C. § 401(a)(9)(A)(ii); Reg. § 1.401(a)(9)-6, Q&A 1(a).

<sup>13</sup> See generally Reg. § 1.401(a)(9)-6.

<sup>14</sup> Reg. § 1.401(a)(9)-5, Q&A 1(a), 4(a).

<sup>15</sup> See Reg. § 1.401(a)(9)-9(f).

<sup>16</sup> Reg. § 1.401(a)(9)-5, Q&A 5(a), 5(c), 6; Reg. § 1.401(a)(9)-9, Q&A 1(b) tbl.1.

<sup>17</sup> I.R.C. § 401(a)(9)(B)(ii)-(iii); Reg. § 1.401(a)(9)-3, Q&A 1(a)-(c).

<sup>18</sup> I.R.C. § 401(a)(9)(B)(ii); Reg. § 1.401(a)(9)-3, Q&A 1(a).

<sup>19</sup> I.R.C. § 401(a)(9)(B)(iii); Reg. § 1.401(a)(9)-3, Q&A 1(a).

<sup>20</sup> 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.

participants die after 2019, the availability of lifetime or life-expectancy distributions to a beneficiary now differs depending on the classification of the beneficiary. For this purpose, a beneficiary 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. 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.<sup>21</sup>

An IDB is a designated beneficiary who is not an EDB. Under the new rules, an IDB is not entitled to take distributions for his or her lifetime or life expectancy.<sup>22</sup> Instead, the IDB must take distributions under the ten-year rule.<sup>23</sup> 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.<sup>24</sup>

On the other hand, a plan that has not purchased an annuity contract and that has only EDBs may potentially make distribution under either the ten-year rule or the life-expectancy rule.<sup>25</sup> Under the life-expectancy rule, the plan may make distributions to the EDBs over the life expectancy of the oldest EDB.<sup>26</sup> The distribution methods for the EDBs are identical to the distribution methods 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.

If a plan has both EDBs and IDBs, the plan is treated as if it has only IDBs and thus may make distributions only under the ten-year rule.<sup>27</sup> If, however, a plan that has not purchased an annuity is divided into separate accounts before the end of the year following the death of the participant, the life-expectancy rule may be used for distributions from any separate account benefiting only EDBs.<sup>28</sup> The regulations have long allowed this type of 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.<sup>29</sup>

---

<sup>21</sup> I.R.C. § 401(a)(9)(E)(ii).

<sup>22</sup> Reg. § 1.401(a)(9)-3, Q&A 4(a)(2).

<sup>23</sup> I.R.C. § 401(a)(9)(H)(i)(I).

<sup>24</sup> I.R.C. § 401(a)(9)(H)(i)(I); Reg. § 1.401(a)(9)-3, Q&A 2.

<sup>25</sup> I.R.C. § 401(a)(9)(B), (H); Reg. § 1.401(a)(9)-3, Q&A 4(a)(1).

<sup>26</sup> See Reg. § 1.401(a)(9)-5, Q&A 7(a)(1) (requiring the designated beneficiary "with the shortest life expectancy").

<sup>27</sup> See Reg. § 1.401(a)(9)-8, Q&A 2(a)(1) (aggregating separate accounts under a defined contribution plan "for purposes of satisfying the rules in section 401(a)(9)"); I.R.C. § 401(a)(9)(H)(i)(I).

<sup>28</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

<sup>29</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

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.<sup>30</sup> In any case, the SECURE Act did not change minimum distribution requirements for NDBs. The requirements still depend on whether the participant dies before, or on or after, his or her RBD. The RMD rules applicable to annuities purchased by plans also remain largely the same as before the SECURE Act except that annuity payments made by defined contribution plans may no longer be made to IDBs over their lifetimes or life expectancies.<sup>31</sup>

The SECURE Act generally applies to RMDs paid by plans to beneficiaries of participants who die after 2019. The SECURE Act also provides various transition rules that may grandfather the old rules or delay application of the new rules for plans of certain employers.<sup>32</sup> 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 that delay the effective date for some types of plans.

There is an exception to the rule that entities cannot be designated beneficiaries. The exception involves irrevocable trusts with only identifiable individual beneficiaries.<sup>33</sup> The regulations essentially ignore these trusts (usually referred to as "see-through" trusts) and treat the individual trust beneficiaries as if they were direct beneficiaries of a plan, provided the participant or trustee follows certain procedures.<sup>34</sup> The regulations, however, provide that the interest of a see-through trust in a plan may not be divided into separate accounts for the individual trust beneficiaries.<sup>35</sup> Thus, a plan may use only one method of distribution for the entire trust account.<sup>36</sup>

For participants who die after 2019, only EDBs qualify for distributions under the life-expectancy rule (although they may alternatively use the new ten-year distribution rule).<sup>37</sup> Thus, 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 for the life-expectancy method in past years).

---

<sup>30</sup> Reg. § 1.401(a)(9)-4, Q&A 3.

<sup>31</sup> I.R.C. § 401(a)(9)(H)(ii).

<sup>32</sup> The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b), 133 Stat. at 3178-79.

<sup>33</sup> Reg. § 1.401(a)(9)-4, Q&A 3.

<sup>34</sup> Reg. § 1.401(a)(9)-4, Q&A 5(a)-(b), 6.

<sup>35</sup> Reg. § 1.401(a)(9)-4, Q&A 5(c).

<sup>36</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

<sup>37</sup> I.R.C. § 401(a)(9)(H)(i)-(iii).

If the see-through trust has any beneficiaries who are IDBs or NDBs, however, the trust cannot qualify for distribution under the life-expectancy rule.<sup>38</sup>

The determination of whether a see-through trust has only EDBs (and not IDBs or NDBs) depends in part on whether the see-through trust is a conduit trust or an accumulation trust. A conduit trust is a trust that must immediately distribute any amount it receives from a plan.<sup>39</sup> An accumulation trust is a trust that may accumulate amounts it receives from a plan for later potential distribution to trust beneficiaries. In determining whether all the beneficiaries of the trust are EDBs, an accumulation trust must take into account successor beneficiaries who may eventually receive accumulated plan funds.<sup>40</sup> A conduit trust, however, need not consider successor beneficiaries in determining whether all the beneficiaries of the trust are EDBs.<sup>41</sup>

## II. Minimum Distributions Required After Death of a Designated Beneficiary

As previously noted, the present Article focuses on the SECURE Act's changes to the treatment of RMDs made after the death of a designated beneficiary (whether an EDB or an IDB). To eliminate potential confusion, the remainder of the Article uses the term "primary beneficiary" to refer to a designated beneficiary entitled to distributions triggered by the death of a participant and refers to beneficiaries who succeed to the interest of a deceased primary beneficiary as "successor beneficiaries." Similarly, the Article refers to the ten-year rule applicable to primary beneficiaries as the "primary ten-year rule" and refers to the ten-year rule applicable to successor beneficiaries as the "successor ten-year rule."

When enacting the SECURE Act, Congress was intent not only on eliminating the life-expectancy rule for primary beneficiaries who do not qualify as EDBs but also on denying life-expectancy distributions to beneficiaries who succeed to the plan benefit of deceased EDBs. That is, before the SECURE Act, successor beneficiaries could continue payment of RMDs under the same life-expectancy method that was being used before a designated beneficiary's death. Now, however, a plan cannot continue life-expectancy distributions for successor beneficiaries.

Instead, for an EDB receiving life-expectancy distributions who is the sole beneficiary under a plan, the entire plan benefit must be distributed by the end of the tenth calendar year following the EDB's death.<sup>42</sup>

---

<sup>38</sup> Reg. § 1.401(a)(9)-4, Q&A 3.

<sup>39</sup> Reg. § 1.401(a)(9)-5, Q&A 7(c)(1), Q&A 7(c)(3), Ex. 2.

<sup>40</sup> Reg. § 1.401(a)(9)-5, Q&A 7(b), (c)(1), Q&A 7(c)(3), Ex. 1. *See also* Rev. Rul. 2006-26, 2006-1 C.B. 939 (providing analysis of a marital trust being designated as a beneficiary).

<sup>41</sup> Reg. § 1.401(a)(9)-5, Q&A 7(c)(3), Ex. 2.

<sup>42</sup> I.R.C. § 401(a)(9)(H)(iii).



**Example 1.** Assume an IRA participant died in 2021 at age 75. The participant's 73-year-old surviving spouse was the sole beneficiary. The spouse received RMDs over the spouse's life expectancy. The surviving spouse died in 2026 at age 78 before the balance of the IRA had been entirely distributed. The participant's daughter succeeded to the spouse's beneficial interest in the IRA.

Despite the fact that the surviving spouse is an EDB, the entire remaining balance of the IRA at the spouse's death must be distributed by the end of the year 2036 (the tenth full calendar year after the death of the spouse). It is irrelevant whether the daughter would have been an EDB if she had been a primary beneficiary of the participant.

Before the SECURE Act, the participant's daughter in Example 1 would have continued to receive RMDs over the life expectancy of the spouse, determined as of the participant's death without regard to the spouse's subsequent death.<sup>43</sup> By substituting the successor ten-year rule, the SECURE Act cut off the normally longer life-expectancy period of deferral for an EDB. Nevertheless, it should be noted that the successor ten-year rule might very well have the effect of lengthening the deferral period if the spouse were old enough to have a short remaining life expectancy.

If the surviving spouse in Example 1 had been receiving RMDs under the primary ten-year rule instead of the life-expectancy rule, it is reasonably clear that the successor ten-year rule will not supplant the primary ten-year rule upon the death of the spouse. Upon the death of an EDB, the SECURE Act merely provides that (1) the life-expectancy method being used by the EDB will not apply to any succeeding beneficiary and (2) the remaining interest must be distributed under the successor ten-year rule.<sup>44</sup> Phrase (1) rules out continued use of the life-expectancy method, but does not foreclose continued use of the primary ten-year rule.<sup>45</sup>

Phrase (2) above, standing on its own, appears to say that the successor ten-year rule will supplant both the life-expectancy rule and the primary ten-year rule.<sup>46</sup> Such a broad reading of the second phrase would, however, make the first phrase unnecessary, and it is a cardinal rule of statutory construction

---

<sup>43</sup> Reg. §§ 1.401(a)(9)-3, Q&A 2, Q&A 4(a); 1.401(a)(9)-4, Q&A 4(c); 1.401(a)(9)-5, Q&A 5(c)(2), Q&A 7(c)(2).

<sup>44</sup> I.R.C. § 401(a)(9)(H)(iii). A successor beneficiary to an EDB is referred to in this provision as the "beneficiary of such eligible designated beneficiary . . ." This phrase is admittedly awkward and ambiguous. It is nevertheless inconceivable that Congress intended denial of the life-expectancy method to be confined to only the small subset of successor beneficiaries who are specifically named as beneficiaries by a predecessor EDB.

<sup>45</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>46</sup> I.R.C. § 401(a)(9)(H)(iii).

that a statute should not be interpreted in a way that renders statutory language superfluous.<sup>47</sup> Thus, the statutory language should be interpreted as a whole to mean that the successor ten-year rule supplants the life-expectancy rule (which is expressly mentioned in phrase 1) but does not supplant the primary ten-year rule (not mentioned).

Such an interpretation also appears to be consistent with legislative intent. Congress was primarily concerned about long life-expectancy payouts to beneficiaries. Nothing suggests that Congress was intent on extending deferrals under the primary ten-year by substituting instead the successor ten-year rule with its later ending date.

### *A. Death of an Eligible Designated Beneficiary in a Plan with Multiple Beneficiaries.*

The death of an EDB who is receiving life-expectancy payments can also affect subsequent RMDs made to other nondeceased EDBs in the plan. More particularly, the Code provides that, upon the death of an EDB, any portion of the participant's interest to which subparagraph 401(a)(9)(H) of the Code applies must be distributed by the end of the tenth calendar year after the death of the EDB.<sup>48</sup> Subparagraph 401(a)(9)(H) applies to any portion of the participant's interest in a plan that was being distributed under the life-expectancy rule, without regard to the identity of the recipient.<sup>49</sup>

Consequently, on the death of an EDB receiving life-expectancy payments, it is not only the interest of the deceased EDB that the plan must distribute by the end of the tenth calendar year following the death of the EDB. Within the same period, the plan must also distribute the entire interests of all other EDBs, all of whom would have also been receiving minimum distributions under the life-expectancy rule.<sup>50</sup> This requirement of the SECURE Act is consistent with the regulatory rule that different methods of making RMDs to different beneficiaries may be used only if the plan is timely divided into separate accounts for each beneficiary.<sup>51</sup>

**Example 2.** Assume the same facts as in Example 1, except that the participant names his surviving spouse, age 73, and his brother, age 70, as equal beneficiaries. Both the surviving spouse and the brother are

---

<sup>47</sup> Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (“[C]ourts should disfavor interpretations of statutes that render language superfluous . . .”). See also Griffith v. United States, 206 F.3d 1389, 1393 (11th Cir. 2000) (en banc); United States v. Voigt, 89 F.3d 1050, 1087 (3rd Cir. 1996); H & H Trim & Upholstery Co., Inc. v. Commissioner, 85 T.C.M. (CCH) 747, 749, 2003 T.C.M. (RIA) ¶ 2003-009, at 28.

<sup>48</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>49</sup> I.R.C. § 401(a)(9)(H)(i)–(iii).

<sup>50</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>51</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

EDBs, the brother because he is only five years younger than the participant. RMDs are being paid to the spouse and brother under the life-expectancy rule. The participant's daughter is the successor beneficiary for the spouse's beneficial interest in the IRA, and the brother's son is the successor beneficiary for the brother's beneficial interest in the IRA. The IRA is *not* divided into separate accounts for the spouse and brother.

Under these facts, the entire balance of the IRA, including both the brother's benefit and the spouse's benefit, must be distributed by the end of the year 2036, the tenth year after the death of the spouse. It does not matter that the brother's share is not distributable to the participant's daughter, who is the successor to the deceased spouse's interest.

The outcome for the beneficiaries can, however, be quite different if the participant or the plan trustee forms separate accounts for each beneficiary in the plan before the end of the calendar year following the death of the participant. If so, the RMD rules apply separately to each beneficiary's account, without regard to the separate accounts of other beneficiaries. Thus, if the successor ten-year rule is applicable on the death of an EDB, it applies only to the separate account of the deceased EDB. The separate accounts of other beneficiaries are not affected.<sup>52</sup>

**Example 3.** Assume the same facts as in Example 2, except that, before his death, the participant divided the IRA into separate accounts for his spouse and brother. The separate accounts became effective as of the calendar year following the participant's death.<sup>53</sup> Under these facts, the balance in the separate account of the spouse must be distributed by the end of the year 2036, the tenth year after the death of the spouse.

The brother's separate account is unaffected by the death of the spouse. The IRA may continue to distribute the balance of the brother's account under the life-expectancy rule or the primary ten-year rule, whichever method originally applied to the brother's account. Note though that if the method applicable to the brother were the primary ten-year rule, the ten-year period under that rule continues to date from the year after the death of the participant, not from the year after the death of the spouse.

Unfortunately, a late division of a plan into separate accounts for beneficiaries cannot protect nondeceased EDBs from application of the successor ten-year rule. The regulations clearly provide that the distribution period for

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

a separate account will be determined separately from other accounts only if the plan is divided into separate accounts for beneficiaries before the end of the calendar year following the death of the participant.<sup>54</sup> The regulations go on to expressly state that different accounts may use different RMD methods (e.g., the life-expectancy method and the ten-year method) only if the account separation is timely.<sup>55</sup> Thus, if an EDB receiving life-expectancy payments dies after a late division of the plan, the successor ten-year rule mandated by the SECURE Act applies to all the separate accounts.

**Example 4.** Assume the same facts as in Example 3, except that the IRA trustee divided the IRA into separate accounts in 2023, the second calendar year after the death of the participant in 2021. Formation of the separate accounts was too late to allow the spouse and brother to use their own RMD method and period for their respective accounts. Instead, RMDs for the entire IRA were being paid over the life expectancy of the spouse, the older beneficiary. After the death of the surviving spouse in 2026, the entire balances of both the spouse's separate account and the brother's separate account must be distributed by the end of the year 2036 (the tenth year after the death of the spouse).

When the separate account rules under the existing regulations were drafted, plans necessarily had to determine minimum distribution methods and periods before making the first potential RMD payment to beneficiaries (i.e., before the end of the first calendar year following the participant's death).<sup>56</sup> Thereafter, the distribution method and period did not change, even upon the death of a beneficiary.<sup>57</sup> Now though, under the SECURE Act, the death of an EDB can change distribution methods and periods long after they were initially established.<sup>58</sup> The drafters of the existing regulations could not, of course, have anticipated this aspect of the SECURE Act.

Consequently, it is unfair to saddle EDBs with a separate account deadline not designed to cover the current situation created by the SECURE Act. The Treasury Department ("Treasury") should allow the later effective creation of separate accounts to ameliorate the negative impact of the successor ten-year rule on nondeceased EDBs. That is, Treasury could provide by regulation that the death of an EDB will not affect the interests of the surviving EDBs if the plan is divided into separate accounts for beneficiaries before the end of the calendar year following the death of an EDB.

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> I.R.C. § 401(a)(9)(B)(iii)(III).

<sup>57</sup> Reg. §§ 1.401(a)(9)-3, Q&A 2, Q&A 4(a)(2); 1.401(a)(9)-4, Q&A 4(c); 1.401(a)(9)-5, Q&A 5(c), Q&A 7(c)(2).

<sup>58</sup> I.R.C. § 401(a)(9)(H)(iii).

Since, however, the time of death of an EDB normally cannot be predicted, the only prudent course of action for participants and plan trustees (unless the regulations are changed) is to make every effort to divide plans into separate accounts for beneficiaries before expiration of the time allowed for division under the existing regulations. Otherwise, the division may be too late to protect nondeceased EDBs on the subsequent death of one of the EDBs.

*B. Distributions to a See-Through Trust After Death of an Eligible Designated Beneficiary*

An EDB will often be the sole beneficiary of a see-through trust that is in turn the sole beneficiary of a plan. If an EDB dies while the trust is receiving life-expectancy distributions, minimum distribution requirements cannot continue to be met by distributing the plan benefit to the trust over the remaining life expectancy of either the deceased EDB or the successor beneficiary. Instead, the plan must distribute the entire remaining benefit to the trust by the end of the tenth calendar year following the death of the EDB.<sup>59</sup>

**Example 5.** Assume an IRA participant names an inter vivos trust as the sole beneficiary of his IRA. The trust becomes irrevocable when the participant dies in 2021 at age 75. Assume the trust is a conduit trust that qualifies as a see-through trust. The participant's 73-year-old surviving spouse is an EDB and the sole beneficiary of the trust. The trust is receiving RMDs over the life expectancy of the spouse. In addition to RMDs, the trustee may withdraw amounts from the plan in excess of the RMDs and distribute the amounts to the spouse. The spouse, however, may not compel plan distributions in excess of the RMDs.

Assume the surviving spouse dies in 2026 at age 78 before the balance of the IRA has been entirely distributed to the trust under the life-expectancy method. Under these facts, the entire balance of the IRA must be distributed to the trust by the end of the year 2036 (the tenth year after the death of the spouse).

Even more unfortunate consequences may occur upon the death of an EDB who is not the sole beneficiary of a see-through trust. Upon the death of an EDB who is one of the beneficiaries of a trust receiving life-expectancy payments, the participant's entire remaining interest must be distributed to the trust by the end of the tenth calendar year after the death of the EDB.<sup>60</sup> Thus, even the portion of the participant's interest that is for the benefit of EDBs other than the deceased EDB must be distributed to the trust under

---

<sup>59</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>60</sup> I.R.C. § 401(a)(9)(H)(iii).

the successor ten-year rule.<sup>61</sup> Unfortunately, this problem cannot be solved by establishing separate accounts for the beneficiaries; beneficiaries of trusts are not allowed to establish separate accounts in plans.<sup>62</sup>

**Example 6.** Assume the same facts as in Example 5, except that the participant names his spouse and his brother as equal beneficiaries of the conduit trust. Both the surviving spouse and the brother are EDBs. The brother qualifies because, at age 70, he is only five years younger than the participant. Neither the spouse nor the brother may compel plan distributions in excess of the life-expectancy RMDs. Unfortunately, the see-through trust's interest in the IRA cannot be divided into separate accounts for the spouse and brother. Thus, the entire balance of the IRA, including the brother's share, must be distributed by the end of the year 2036 (the tenth year after the death of the spouse).

The inability to divide a plan account for a see-through trust into separate accounts for trust beneficiaries has been a problem creating unfair results for many years. With the advent of the additional problems created by the SECURE Act, perhaps it is time for Treasury to eliminate the rule and allow the division of a trust account into separate accounts for trust beneficiaries, which would not be unprecedented. The 2001 proposed regulations allowed such a division,<sup>63</sup> but they were reversed by the final regulations.<sup>64</sup>

Note that the unfortunate result in Example 6 involved plan distributions to a multi-beneficiary conduit trust (a see-through trust that must immediately distribute all amounts received from the plan). Even more serious problems are presented by a see-through trust that may *accumulate* plan distributions (an accumulation trust).

A plan may not make life-expectancy distributions to an accumulation trust unless all the beneficiaries are EDBs,<sup>65</sup> including a successor beneficiary who may potentially receive plan distributions accumulated by the trust (a contingent beneficiary).<sup>66</sup> Such a contingent beneficiary clearly has an interest in plan funds that may be accumulated by the trust.<sup>67</sup> Thus, since the con-

---

<sup>61</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>62</sup> Reg. § 1.401(a)(9)-4, Q&A 5(c) (“[T]he separate account rules . . . are not available to beneficiaries of a trust with respect to the trust’s interest in the employee’s benefit.”).

<sup>63</sup> See Prop. Reg. § 1.401(a)(9)-4, Q&A 5, 66 Fed. Reg. 3928 (Jan. 17, 2001) (missing the language limiting use of separate accounts for trusts).

<sup>64</sup> Reg. § 1.401(a)(9)-4, Q&A 5(c).

<sup>65</sup> I.R.C. § 401(a)(9)(H)(i); Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

<sup>66</sup> Reg. § 1.401(a)(9)-5, Q&A 7(b).

<sup>67</sup> See Blankenship, *supra* note 3, at 76–78 (discussing contingent beneficiaries in the context of accumulation trusts).

tingent beneficiary is an EDB who may benefit from accumulated life-expectancy distributions, the successor ten-year rule will apply to the trust's entire indivisible account in the plan on the death of the contingent beneficiary.<sup>68</sup>

**Example 7.** Assume an IRA participant names an accumulation trust that is a see-through trust as the beneficiary of his IRA. The trust becomes irrevocable when the participant dies in 2021 at age 75. The participant's 73-year-old surviving spouse is an EDB and the sole beneficiary of the trust. The trust receives RMDs over the life expectancy of the spouse. The participant's disabled nephew is an EDB and the contingent beneficiary who takes the entire balance of the trust outright on the death of the spouse, including any IRA distributions accumulated by the trust. (That of course does not mean that the contingent beneficiary or the trust is taking outright distribution of the balance of the IRA.)

Assume the spouse survives the disabled nephew, who dies in 2026 before the balance of the IRA has been entirely distributed to the trust under the life-expectancy method. Under these facts, the entire balance of the IRA must be distributed to the trust by the end of the year 2036 (the tenth year after the death of the nephew).

The unfortunate result in Example 7 is consistent with the congressional intent not to allow a successor beneficiary to enjoy the benefit of the life-expectancy method. This is apparently the result even though, as in Example 7, the interest of the successor beneficiary is only a contingent interest in a trust accumulation. It does help somewhat, though, that a contingent beneficiary will generally be somewhat younger than the other beneficiaries and thus less likely to be the first EDB to die.

The result in Example 7 would not be different even if the trust had not accumulated any plan distributions as of the date of death of the contingent beneficiary. The trust might still accumulate such distributions after the death of the contingent beneficiary for the benefit of a beneficiary who succeeded to the interest of the contingent beneficiary.

### *1. Separate Subtrusts May Protect Nondeceased Eligible Designated Beneficiaries*

Although separate accounts in plans cannot be established for beneficiaries of see-through trusts, the problem of separating beneficiaries for RMD purposes may generally be solved with careful pre-planning. The participant may

---

<sup>68</sup>I.R.C. § 401(a)(9)(H)(iii).

solve the problem by drafting the trust instrument to require the trust to establish separate subtrusts for each trust beneficiary.<sup>69</sup> The participant must then divide the plan into separate accounts and name the subtrusts of the beneficiaries as the respective beneficiaries of the separate accounts in the plan.

**Example 8.** Assume that the participant in an IRA dies in 2021 at age 75 and names his 73-year-old spouse and his 70-year-old brother as equal beneficiaries of a see-through trust that is an accumulation trust. Assume that, upon the death of the participant, the trust terms require that the trust establish separate subtrusts for the spouse and brother. Assume further that the participant divides his IRA into two separate accounts, with the subtrust for the spouse as the beneficiary of one of the accounts and the subtrust for the brother as the beneficiary of the other account.

The participant's disabled nephew is the contingent beneficiary who takes outright the entire balance of the separate subtrusts of the brother and sister upon their respective deaths. The spouse, brother, and nephew are all EDBs, the nephew because he is disabled and the brother because, at age 70, he is only five years younger than the participant. The surviving spouse and the brother take distributions from their separate subtrusts over their respective life expectancies.

When the spouse subsequently dies in 2026, the balance in the separate IRA account for the spouse's subtrust must be distributed to the subtrust by the end of the year 2036 (the tenth year after the death of the spouse). The balance in the separate IRA account for the brother's subtrust is unaffected by the death of the spouse. The IRA may continue to distribute the balance of the IRA account for the brother's subtrust over the life expectancy of the brother.

Nevertheless, a properly executed division of a see-through trust into separate subtrusts for each beneficiary does not solve all problems. For example, the death of the nephew, the contingent EDB of both subtrusts in Example 8, would trigger distributions under the successor ten-year rule for both subtrusts. The damage might be limited, though, by naming different EDBs as contingent beneficiaries of the two subtrusts.

---

<sup>69</sup> 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. *See also* P.L.R. 2005-37-044 (Mar. 29, 2005) (addressing the beneficiary designation of nine separate trusts established under a trust which was the primary beneficiary of an IRA).



## *2. Applicable Multi-Beneficiary Trusts May Protect Eligible Designated Beneficiaries*

The SECURE Act now provides an additional way to separate beneficiaries for RMD purposes. A participant in a plan may provide for the division of 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.<sup>70</sup> 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 life-expectancy distribution rules are applied separately to each separated trust for a beneficiary who is disabled or chronically ill.<sup>71</sup>

**Example 9.** Assume the participant in a plan died in 2021 after naming an irrevocable trust as the sole beneficiary of his IRA. The beneficiaries of the trust are the participant’s four sisters: disabled sister L, chronically ill sister M, and sisters N and P. Thus, the trust is an AMBT because all of its beneficiaries are designated beneficiaries and it has at least one EDB who is disabled or chronically ill. Assume the trust is also a conduit trust because it is required to immediately distribute any amounts received from the plan.

Immediately upon the death of the participant, and as required by the terms of the trust, the trust is divided into four subtrusts, one for each of the sisters. Sisters L and M qualify as EDBs because of their respective disability and chronic illness. Thus, the IRA may make distributions to the subtrusts for sisters L and M over their respective life expectancies. Upon the death of either sister L or M, the remaining interest of her trust in the plan must be distributed under the successor ten-year rule. The RMDs from the interests in the plan of the other subtrusts should be unaffected by the death of sister L or M.

There is no indication in the SECURE Act that a plan with an AMBT beneficiary must be divided into separate accounts to protect nondeceased primary beneficiaries from the successor ten-year rule. Nor does there seem to be any requirement that the plan name the subtrusts, rather than the trust, as beneficiaries of the plan.

Note that if the subtrusts for the disabled and chronically ill sisters in Example 9 were accumulation trusts, it is not clear whether the successor beneficiaries potentially entitled to accumulation distributions would also need to be EDBs. If they were instead IDBs, the life-expectancy rule may not apply

---

<sup>70</sup> I.R.C. § 401(a)(9)(H)(v).

<sup>71</sup> I.R.C. § 401(a)(9)(H)(iv).

because the accumulation of plan funds could potentially confer a life-expectancy deferral benefit on them that they are not otherwise entitled to receive. Pending clarification by Treasury, the best advice is to avoid IDBs as contingent beneficiaries in ABMTs that are accumulation trusts divided into separate subtrusts.

Alternatively, if no beneficiary of an ABMT 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.<sup>72</sup> 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.<sup>73</sup>

**Example 10.** Assume the same facts as in Example 9, except that the terms of the trust do not require the separation of the trust into separate trusts for each beneficiary. Assume further that distributions may be made only to disabled sister L or chronically ill sister M, and not to any other beneficiaries, so long as one of sisters L and M is alive. Then, the trust is an ABMT and sisters L and M are EDBs. Distributions may be made over the life expectancy of the older of sisters L or M. Upon the death of both sisters L and M, the remaining benefit must be distributed to the trust by the end of the calendar year containing the tenth anniversary of the last of sisters L and M to die.

### *C. Method of Distribution Unchanged by Death of an Ineligible Designated Beneficiary*

The primary ten-year rule applies to all IDBs; thus, an IDB's share of the participant's benefit must be distributed by the end of the tenth year after the death of the participant.<sup>74</sup> The death of the IDB before all the benefit is distributed does not affect the distribution period. The entire benefit must still be distributed by the end of the tenth year after the death of the participant.<sup>75</sup>

---

<sup>72</sup> Section 401(a)(9)(H)(iv) explicitly states that (unlike the alternative division of an ABMT 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).

<sup>73</sup> I.R.C. § 401(a)(9)(H)(iii)-(iv)(II).

<sup>74</sup> I.R.C. § 401(a)(9)(B)(ii), (H)(i)-(ii).

<sup>75</sup> Reg. §§ 1.401(a)(9)-3, Q&A 2, Q&A 4(a)(2); 1.401(a)(9)-4, Q&A 4(c); 1.401(a)(9)-5, Q&A 5(c)(2), Q&A 7(c)(2).

**Example 11.** Assume an IRA participant dies in 2021. The participant's sister is the sole beneficiary. The sister dies in 2026 before the balance of the IRA has been entirely distributed. Assume the sister is an IDB and not an EDB. Under these facts, the entire balance of the IRA at the participant's death must be distributed by the end of the year 2031 (the tenth year after the death of the participant). The death of the sister before the entire benefit has been distributed does not initiate a new successor ten-year period. Instead, the original primary ten-year distribution period ending in 2031 continues to apply to the entire benefit.

Even if the IRA is timely divided into separate accounts for multiple beneficiaries who are IDBs, the entire benefit of the IRA must still be distributed by the end of the tenth year after the death of the participant. The primary ten-year distribution rule applies to the benefit of each IDB whether or not the IDB has a separate account.<sup>76</sup> The death of the IDB does not change the distribution period.<sup>77</sup>

The primary ten-year rule also applies to all IDBs who are the beneficiaries of a see-through trust. Thus, the participant's benefit must be distributed to the trust by the end of the tenth year after the death of the participant.<sup>78</sup> The death of an IDB before all the benefit is distributed does not affect the distribution period. The entire benefit must still be distributed to the trust by the end of the tenth year after the death of the participant.<sup>79</sup> The result would be the same even if the participant arranged for separate plan accounts and separate subtrusts for the respective trust beneficiaries.<sup>80</sup>

#### *D. Deceased Designated Beneficiary of Participant Dying Before 2020*

As noted above, the SECURE Act generally does not apply to the interest in a plan of a participant who dies before 2020. Congress was still, however, concerned about the potential continuation of life-expectancy distributions after the post-2019 death of a designated beneficiary in such a plan (a pre-2020 plan). By contrast, if a participant in a plan dies after 2019 (a post-2019 plan), one of the central provisions of the SECURE Act requires that life-expectancy distributions for an EDB in the plan terminate on the death of the EDB and subsequent distributions must be made under the successor ten-year rule.

---

<sup>76</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

<sup>77</sup> Reg. §§ 1.401(a)(9)-3, Q&A 2, Q&A 4(a)(2); 1.401(a)(9)-4, Q&A 4(c); 1.401(a)(9)-5, Q&A 5(c)(2), Q&A 7(c)(2).

<sup>78</sup> I.R.C. § 401(a)(9)(B)(ii), (H)(i)-(ii); Reg. § 1.401(a)(9)-4, Q&A 5(a).

<sup>79</sup> Reg. §§ 1.401(a)(9)-3, Q&A 2, Q&A 4(a)(2); 1.401(a)(9)-4, Q&A 4(c); 1.401(a)(9)-5, Q&A 5(c)(2), Q&A 7(c)(2).

<sup>80</sup> I.R.C. § 401(a)(9)(B)(ii), (H)(i)(I), (H)(i)(II), (H)(ii); Reg. §§ 1.401(a)(9)-3, Q&A 2; 1.401(a)(9)-4, Q&A 5(a); 1.401(a)(9)-5, Q&A 7(c)(2).

Thus, the outcome for a successor to a designated beneficiary in a pre-2020 plan who dies after 2019 might have been much more favorable (continued life-expectancy distributions) than the outcome for a successor to a deceased EDB in a post-2019 plan (successor ten-year distributions). The result would have been more favorable under the pre-2020 plan even if the primary beneficiaries in the two plans had died at the same time.

Consequently, Congress provided special rules that apply upon the post-2019 death of a designated beneficiary in a pre-2020 plan. Those rules require that the plan benefit be distributed after the death of the designated beneficiary as if the deceased beneficiary were an EDB in a post-2019 plan.

Specifically, the statute provides that if a plan participant dies before 2020, for purposes of applying the provisions of the SECURE Act to a designated beneficiary under the plan who dies after 2019, the relevant provisions of the SECURE Act will apply to the successor beneficiary of the deceased designated beneficiary. The statute further provides that, within the context of the SECURE Act, “the [deceased] designated beneficiary [but not the successor beneficiary] shall be treated as an eligible designated beneficiary for purposes of applying” the successor ten-year rule to the successor beneficiary.<sup>81</sup>

The first statutory phrase ensures that the successor beneficiary will be treated as such only in the context of all the relevant provisions of the SECURE Act. For example, it eliminates any implication that the provision could be applied to a successor beneficiary in a defined benefit plan to which the SECURE Act does not otherwise apply.<sup>82</sup> The second statutory phrase simply applies the successor ten-year rule under the SECURE Act in the normal way.

This provision puts successor beneficiaries of designated beneficiaries in pre-2020 plans on the same footing as successor beneficiaries of EDBs in post-2019 plans. Thus, if a designated beneficiary receiving life-expectancy RMDs was the sole beneficiary in a pre-2020 plan, the entire remaining plan benefit must be distributed by the end of the tenth year following the post-2019 death of the beneficiary.<sup>83</sup>

**Example 12.** Assume an IRA participant dies in 2018. Assume the participant’s sister is a designated beneficiary and the sole beneficiary. The sister is receiving life-expectancy RMDs. She dies in 2023 before the balance of the IRA has been entirely distributed. Upon her death, the sister is deemed to have been an EDB and thus the entire balance of the IRA at the spouse’s death must be distributed by the end of the year 2033 (the tenth year after the death of the sister). It does not matter that the sister would not have qualified as an EDB if the plan had been a post-2019 plan.

---

<sup>81</sup> The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b)(5), 133 Stat. at 3179.

<sup>82</sup> I.R.C. § 401(a)(9)(H)(vi).

<sup>83</sup> I.R.C. § 401(a)(9)(H)(iii).

### 1. *Separate Plan Accounts for Multiple Designated Beneficiaries*

If separate accounts were timely established for multiple designated beneficiaries in a pre-2020 plan, the post-2019 death of a designated beneficiary who was receiving life-expectancy RMDs will not change the distribution methods and periods applicable to the other designated beneficiaries.<sup>84</sup>

**Example 13.** Assume the same facts as in Example 12, except that the participant named his sister and brother as equal beneficiaries. Assume the sister and brother are both designated beneficiaries and that, before his death in 2018, the participant divided the IRA into two separate accounts, one for each of the sister and brother. The sister is receiving life-expectancy RMDs from her separate account, and the brother is receiving distributions from his separate account under the old five-year rule.

Under these facts, the sister is deemed to be an EDB when she dies in 2023, and the remaining balance in her separate account must be distributed by the end of the year 2033 (the tenth year after her death). The brother's separate account is unaffected by the death of the sister. The IRA must continue to distribute the balance of the brother's account under the five-year rule.

As discussed above, the regulations clearly provide that the distribution period for a separate account will be determined separately from other accounts only if the plan is divided into separate accounts for beneficiaries before the end of the calendar year following the death of the participant.<sup>85</sup> The regulations go on to expressly state that different accounts may use different RMD methods (e.g., the ten-year method and the life-expectancy method) only if the account division is timely.<sup>86</sup>

**Example 14.** Assume the same facts as in Example 13, except that, the IRA trustee divided the IRA into separate accounts in 2020, the second calendar year after the death of the participant. Formation of the separate accounts was too late to allow the sister and brother to use their own RMD method and period for their respective accounts. The plan is instead making RMDs only under the life-expectancy method, using the life expectancy of the older sister. After the death of the sister in 2023, the entire balances of both the sister's separate account and the brother's separate account must be distributed by the end of the year 2033 (the tenth year after the death of the sister).

---

<sup>84</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

<sup>85</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2). See *supra* text accompanying notes 53–55.

<sup>86</sup> Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

As noted above, when the separate account rules under the existing regulations were drafted, it was important that plans determine distribution methods and periods before making the first potential RMD payment to beneficiaries (*i.e.*, before the end of the first calendar year following the participant's death).<sup>87</sup> Thereafter, the distribution method and period did not change, even upon the death of a beneficiary.<sup>88</sup> Now though, under the SECURE Act, the death of a designated beneficiary in a pre-2020 plan can change distribution methods and periods long after they were initially established.<sup>89</sup> The drafters of the existing regulations could not, of course have anticipated this aspect of the SECURE Act. Nor could most participants and trustees in pre-2020 plans.

It is grossly unfair then to saddle designated beneficiaries in pre-2020 plans with a separate account deadline not designed to cover their current situation. It is particularly unfair to apply such a deadline to pre-2020 plans when participants and trustees in such plans had little or no time to create timely separate accounts after becoming aware of the provisions of the SECURE Act.

Again, Treasury should allow the later effective creation of separate accounts to ameliorate the negative impact of the successor ten-year rule on nondeceased designated beneficiaries in pre-2020 plans. Treasury could provide by regulation that the death of a designated beneficiary in a pre-2020 plan will not affect the interests of other designated beneficiaries if the plan is divided into separate accounts for beneficiaries before the end of the calendar year following the death of a designated beneficiary.

## 2. *See-Through Trusts Receiving Life-Expectancy Distributions*

The sole beneficiary of a pre-2020 plan may be a see-through trust that itself has a sole beneficiary who qualifies as a designated beneficiary. If so, and if the trust is receiving RMDs under the life-expectancy method, the designated beneficiary will become a deemed EDB when and if the beneficiary dies after 2019. After the beneficiary's death, RMDs cannot continue to be met by distributing the plan benefit to the trust over the remaining life expectancy of either the deemed EDB or the successor trust beneficiary. Instead, the plan must distribute its entire remaining benefit to the trust by the end of the tenth calendar year following the death of the deemed EDB.<sup>90</sup>

**Example 15.** Assume an IRA participant named an inter vivos trust as the beneficiary of his IRA. The trust became irrevocable when the participant died in 2018. Assume the trust is a conduit trust that qual-

---

<sup>87</sup> I.R.C. § 401(a)(9)(B)(iii)(III). See *supra* text accompanying notes 56–58.

<sup>88</sup> Reg. §§ 1.401(a)(9)-3, Q&A 2, Q&A 4(a)(2); 1.401(a)(9)-4, Q&A 4(c); 1.401(a)(9)-5, Q&A 5(c)(2), Q&A 7(c)(2).

<sup>89</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>90</sup> I.R.C. § 401(a)(9)(H)(iii).

ifies as a see-through trust. The participant's sister is a designated beneficiary who is the sole beneficiary of the trust. The trust is receiving RMDs based on the life expectancy of the sister. The sister dies in 2023 before the balance of the IRA has been entirely distributed to the trust. Under these facts, the sister is a designated beneficiary who is treated as an EDB at her death, and thus the entire balance of the IRA must be distributed to the trust by the end of the year 2033 (the tenth year after the death of the sister).

A see-through trust that is the sole beneficiary of a plan whose participant died before 2020 cannot establish separate accounts for multiple trust beneficiaries who are designated beneficiaries.<sup>91</sup> Thus, if the trust is receiving RMDs under the life-expectancy method, the death of one of the designated beneficiaries after 2019 will require distribution of all the benefit in the plan by the end of the tenth year following the death of the beneficiary.<sup>92</sup>

**Example 16.** Assume the same facts as in Example 15, except that the participant named his sister and brother as equal beneficiaries of the see-through trust. Under these facts, the sister and brother are designated beneficiaries. Assume the trust is receiving RMDs based on the life expectancy of the older sister. At the sister's death in 2023, she is treated as an EDB. The see-through trust's interest in the IRA unfortunately could not have been divided into separate accounts for the sister and brother. Thus, the entire balance of the IRA, including the brother's share, must be distributed by the end of the year 2033 (the tenth year after the death of the sister).

Example 16 involves a conduit trust. More serious problems are presented by a see-through trust that may accumulate plan distributions (an accumulation trust).

A pre-2020 plan could not make life-expectancy distributions to an accumulation trust unless all the beneficiaries were designated beneficiaries,<sup>93</sup> including a successor beneficiary who could potentially receive plan distributions accumulated by the trust (a contingent beneficiary).<sup>94</sup> Such a contingent beneficiary clearly has an interest in plan funds that may be accumulated by the trust.<sup>95</sup> Since the contingent beneficiary is a designated beneficiary who

---

<sup>91</sup> Reg. § 1.401(a)(9)-4, Q&A 5(c).

<sup>92</sup> I.R.C. § 401(a)(9)(H)(iii); the SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b)(5), 133 Stat. at 3179.

<sup>93</sup> I.R.C. § 401(a)(9)(H)(i); Reg. § 1.401(a)(9)-8, Q&A 2(a)(2).

<sup>94</sup> Reg. § 1.401(a)(9)-5, Q&A 7(b). *See supra* text accompanying notes 66–68.

<sup>95</sup> Reg. §§ 1.401(a)(9)-4, Q&A 3, Q&A 5(c); 1.401(a)(9)-5, Q&A 7(b). *See also* Blankenship, *supra* note 3, at 76 (discussing contingent beneficiaries in the context of accumulation trusts).

may benefit from the trust's accumulation of life-expectancy distributions from the plan, the contingent beneficiary will be treated as an EDB when he or she dies.<sup>96</sup> Thus, the successor ten-year rule will apply to the trust's entire indivisible account in the plan on the death of the contingent beneficiary.<sup>97</sup>

**Example 17.** Assume an IRA participant named an accumulation trust that was a see-through trust as the beneficiary of his IRA. The trust became irrevocable when the participant died in 2018 at age 75. The participant's then 73-year-old surviving spouse is a designated beneficiary and the primary beneficiary of the trust. The trust receives RMDs over the life expectancy of the spouse. The participant's nephew, who takes the entire balance of the trust outright on the death of the spouse, is a designated beneficiary and a contingent beneficiary since trust accumulations of plan distributions may eventually be distributed to the nephew.

Assume the spouse survives the nephew, who dies in 2023 before the balance of the IRA has been entirely distributed to the trust under the life-expectancy method. Under these facts, the entire balance of the IRA must be distributed to the trust by the end of the year 2033 (the tenth year after the death of the nephew).

The unfortunate result in Example 17 is consistent with congressional intent not to allow a successor beneficiary to enjoy the benefit of the life-expectancy method, even though in this case the interest received by the successor beneficiary is only a contingent interest in a trust accumulation. As noted above, it does help somewhat that a contingent beneficiary will generally be somewhat younger than the other beneficiaries and thus is less likely to be the first designated beneficiary to die.

A participant in a plan who died before 2020 may have executed a see-through trust instrument requiring the trust to establish separate subtrusts for each one of multiple trust beneficiaries, all of whom qualify as designated beneficiaries.<sup>98</sup> The participant may then have divided the plan into separate accounts and named the subtrusts of the beneficiaries as the respective beneficiaries of the separate accounts. If so, then the separate subtrusts will be

---

<sup>96</sup>The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b)(5), 133 Stat. at 3179.

<sup>97</sup>I.R.C. § 401(a)(9)(H)(iii).

<sup>98</sup>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. *See also* P.L.R. 2005-37-044 (Mar. 29, 2005) (addressing the beneficiary designation of nine separate trusts established under a trust which was the primary beneficiary of an IRA).



recognized for RMD purposes. Thus, upon the post-2019 death of a designated beneficiary receiving life-expectancy RMDs, only the separate subtrust of the deceased beneficiary must distribute its benefit by the end of the tenth year following the death of the deceased beneficiary.<sup>99</sup> Distributions being made by the other subtrusts are unaffected.

**Example 18.** Assume that the participant in an IRA died in 2018 and named his sister and brother as equal beneficiaries of a see-through trust that is an accumulation trust. Upon the death of the participant in 2018, the trust terms required that the trust form separate subtrusts for the sister and brother. Assume further that, the participant divided his IRA into two separate accounts before his death in 2018, with the subtrust for the sister as the beneficiary of one of the accounts and the subtrust for the brother as the beneficiary of the other account.

The participant's nephew is the contingent beneficiary who takes outright the entire balance of the separate subtrusts of the brother and sister upon their respective deaths. The sister, brother, and nephew are all designated beneficiaries. The sister and the brother take distributions from their separate subtrusts over their respective life expectancies. The sister dies in 2023.

Under these facts, the balance in the separate IRA account for the sister's subtrust must be distributed by the end of the year 2033 (the tenth year after the death of the sister). The balance in the separate IRA account for the brother's trust is unaffected by the death of the sister. The IRA may continue to distribute the balance of the IRA account for the brother's trust over the brother's life expectancy. Unfortunately though, it is too late for a participant dying before 2020 to implement this subtrust strategy, unless the strategy has already been implemented for other reasons (*e.g.*, to allow designated beneficiaries to use their own life expectancies).

Note also that a properly executed division of a see-through trust into separate subtrusts for each beneficiary does not solve all problems. For example, the death of the nephew, the contingent beneficiary of both subtrusts in Example 18, would trigger distributions under the successor ten-year rule for both subtrusts. The damage might be limited though by naming different contingent beneficiaries for the two subtrusts.

The use of an AMBT to protect nondeceased designated beneficiaries from application of the successor ten-year rule is discussed above for post-2019 plans.<sup>100</sup> Unfortunately, the SECURE Act's recognition of AMBTs does not appear to extend to pre-2020 plans.

---

<sup>99</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>100</sup> See *supra* Part II.B.2.

### E. *Application of the Successor Ten-Year Rule to Minors*

If a minor child is the beneficiary of amounts in a plan but the remaining benefit must be paid to the participant's surviving spouse when the child reaches majority, payments to the child will be treated as made to the surviving spouse.<sup>101</sup> In effect, then, the surviving spouse, and not the minor child, is the plan beneficiary and an EDB.

If, however, the surviving spouse does not succeed to the minor child's beneficial interest, the successor ten-year rule applies on the death of the minor child.<sup>102</sup> The successor ten-year rule also applies in those circumstances if the minor child is receiving distributions under the life-expectancy method and the child lives long enough to reach majority. In that case, the remaining benefit must be distributed by the end of the tenth year following the date the child reached majority.<sup>103</sup> For this purpose, a child reaches majority upon the later of (1) reaching majority under state law, (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.<sup>104</sup>

**Example 19.** Assume an IRA participant dies in 2021 and names his sixteen-year old son as the sole beneficiary of his IRA. The son is a minor and therefore an EDB. The IRA commences distribution of the IRA funds over the 68.9-year life expectancy of the son.<sup>105</sup> Assume the son is not a student or disabled in 2026 when the son attains age 21 (the age of majority in his state). Under these facts, the 63.9 years of the original life-expectancy period still remaining in 2026 is no longer applicable for RMD purposes. The plan must instead distribute the remaining IRA funds before the end of 2036, the tenth calendar year following the year of majority.

For the reasons discussed above, a participant would be well-advised to use a properly structured separate see-through trust to receive plan benefits for a trust beneficiary who is a minor. If such a trust had multiple beneficiaries, the entire plan benefit, including the benefit of other beneficiaries, could suddenly become subject to the successor ten-year rule when the minor reaches majority or dies.

---

<sup>101</sup> I.R.C. § 401(a)(9)(F).

<sup>102</sup> I.R.C. § 401(a)(9)(H)(iii).

<sup>103</sup> I.R.C. § 401(a)(9)(E)(iii).

<sup>104</sup> I.R.C. § 401(a)(9)(F), (E)(ii)(II), (E)(iii); Reg. § 1.401(a)(9)-6, Q&A 15.

<sup>105</sup> Reg. § 1.401(a)(9)-9(b) tbl.1.

### F. *Surviving Spouse Dies Before Minimum Distributions Required*

A special RMD rule generally applies if the surviving spouse is the sole beneficiary of a plan and dies before minimum distributions are required. In that case, the tax law generally applies the primary ten-year rule and the life-expectancy rule to the spouse's beneficiaries as if the spouse were the participant, with the date of death of the spouse substituted for the date of death of the participant.<sup>106</sup>

**Example 20.** Assume that a participant dies on July 15, 2018, on his 69th birthday. Had he lived, the participant would have reached age 70½ on January 15, 2020, and would have reached age 72 on July 15, 2021. The participant's surviving spouse is the sole beneficiary of the participant's IRA and elects to receive RMDs under the life-expectancy rule. Thus, the IRA must begin distributions over the life of the spouse by the end of the year 2021, the year the participant would have reached age 72.

Assume that the surviving spouse dies in 2020, before distributions were required to begin in 2021. Assume also that the surviving spouse had the foresight to name her disabled son as her sole beneficiary. Under these facts, the surviving spouse is treated as the participant in the IRA and her disabled son qualifies as an EDB. Assume the disabled son elects distributions under the life-expectancy rule but dies five years later in 2025. Then, the remaining benefit in the IRA must be distributed by the end of 2035, the tenth calendar year following the death of the disabled son.

The age-72-spousal-distribution requirement applies in Example 20 because the original deceased participant would not have reached age 70½ before 2020.<sup>107</sup> Thus, as illustrated by the example, the surviving spouse could delay distributions under the life-expectancy rule until the year the participant would have reached age 72.<sup>108</sup>

Note also that, upon the death of the spouse after 2019, the plan becomes a post-2019 plan and the SECURE Act applies to the plan in its entirety thereafter. On the other hand, if the surviving spouse had died before 2020, the plan would have been a pre-2020 plan and application of the SECURE Act would have been more limited.<sup>109</sup> That is, the spouse's son would have only had to be a designated beneficiary (and not an EDB) to qualify for the

---

<sup>106</sup> 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).

<sup>107</sup> The SECURE Act, Pub. L. No. 116-94, Div. O, Title I, § 114(b), (d), 133 Stat. at 3156.

<sup>108</sup> I.R.C. § 401(a)(9)(B)(iv)(I).

<sup>109</sup> The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b), 133 Stat. at 3179; Reg. § 1.401(a)(9)-3, Q&A 5.

life-expectancy method. Upon the son's death after 2019, however, the IRA's entire benefit would still have had to be distributed under the successor ten-year rule.<sup>110</sup>

### G. 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. Treasury generally considers regulations to be obsolete if the Code provisions being interpreted have been repealed or "significantly" revised.<sup>111</sup> 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.<sup>112</sup>

Treasury will likely amend the existing regulations to be consistent with the SECURE Act in the manner suggested herein and will not use the enactment of the SECURE Act as a justification to completely revamp the regulations. There can, however, be no guarantee in that regard. Treasury 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.<sup>113</sup>

## III. Conclusion

With the SECURE Act, Congress was intent not only on eliminating the life-expectancy rule for primary beneficiaries who do not qualify as EDBs but also on denying life-expectancy distributions to beneficiaries who succeed to the plan benefit of deceased EDBs. That is, before the SECURE Act, successor beneficiaries could continue payment of RMDs under a life-expectancy method that was being used before the EDB's death. Now, however, a plan cannot continue these life-expectancy distributions. Instead, the plan must distribute the benefit under the successor ten-year rule.

---

<sup>110</sup> The SECURE Act, Pub. L. No. 116-94, Div. O, Title IV, § 401(b)(5), 133 Stat. at 3179.

<sup>111</sup> 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).

<sup>112</sup> For a more detailed discussion of this issue, see Blankenship, *supra* note 3, at 89-91.

<sup>113</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 58 (2011) (extending *Chevron* deference to tax regulations) (quoting *Chevron*, 467 U.S. at 844).

Unfortunately though, Congress inflicted some collateral damage on innocent bystanders when it curtailed the continued use of life-expectancy distributions by successor beneficiaries. Under the SECURE Act, it is not enough that a plan distribute the interest of a deceased EDB by the end of the tenth calendar year following the death of an EDB. Within the same period, the plan must also distribute the entire interests of all other EDBs, all of whom would also have been receiving minimum distributions under the life-expectancy rule.

The outcome for the beneficiaries can, however, be quite different if the participant or trustee forms separate accounts for each beneficiary in the plan before the end of the calendar year following the death of the participant. If so, the RMD rules apply separately to each beneficiary's account, without regard to the separate accounts of other beneficiaries. Thus, the successor ten-year rule applicable on the death of an EDB applies only to the separate account of the deceased EDB. The separate accounts of other beneficiaries are not affected.

When the separate account rules under the existing regulations were drafted, plans necessarily had to determine minimum distribution methods and periods before making the first potential RMD payment to beneficiaries (*i.e.*, before the end of the first calendar year following the participant's death). Thereafter, the distribution method and period did not change, even upon the death of a beneficiary. Now though, under the SECURE Act, the death of an EDB (or a designated beneficiary in a pre-2020 plan) can change distribution methods and periods long after they were initially established. The drafters of the existing regulations could not, of course have anticipated this aspect of the SECURE Act. Nor could most participants and trustees in pre-2020 plans.

Consequently, EDBs (and designated beneficiaries in pre-2020 plans) are unfairly saddled with a deadline for separate accounts not designed to cover the current situation created by the SECURE Act. Moreover, the application of such a deadline to pre-2020 plans is particularly unfair because participants and trustees in such plans had little or no time left to create separate accounts after becoming aware of the provisions of the SECURE Act.

Treasury should allow the later effective creation of separate accounts to ameliorate the negative impact of the successor ten-year rule on nondeceased EDBs (and nondeceased designated beneficiaries in pre-2020 plans). Treasury could do so by amendment of the regulations or by other pronouncement. Most desirably, Treasury could provide that the death of an EDB (or a designated beneficiary in pre-2020 plan) will not affect the interests of other EDBs (or other designated beneficiaries) if the plan is divided into separate accounts for beneficiaries before the end of the calendar year following the death of an EDB (or designated beneficiary).

In the meantime, since the death of an EDB (or designated beneficiary in a pre-2020 plan) cannot typically be predicted, the only prudent course of

action for participants and trustees is to make every effort to divide plans into separate accounts for beneficiaries within the time allowed by the existing regulations.

Although separate accounts in plans cannot be established for beneficiaries of see-through trusts, the problem of separating beneficiaries for RMD purposes may be solved with timely planning. The participant may solve the problem by drafting the trust instrument to require that the trust establish separate subtrusts for each trust beneficiary. The participant must then divide the plan into separate accounts and name the subtrusts as the respective beneficiaries of the separate accounts. Alternatively, in some situations, the use of ABMTs may provide a solution.