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Primer on the Code's Minimum Distribution Rules: Post SECURE Act," 49 Tax Mgnt Comp. Plan. J. No. 6 (June 4, 2021)

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Primer on the Code's Required Minimum Distribution Rules: Post SECURE Act

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INTRODUCTION

In discussing how monies are distributed from a qualified retirement plan, employees generally fall into one of three camps – those that want distributions as quickly as possible; those that want the distributions during and for the sole purpose of retirement; and those that wish to defer having any distributions paid to them, so as to continue the tax shelter for as long as possible. This article is directed to the employees within the last camp. In a nutshell, the minimum distribution rules have been devised as a tax penalty provision to prevent employees and their beneficiaries from totally deferring benefits under a qualified retirement plan,[1] an IRA, a 403(b) plan, or a §457 eligible deferred compensation plan, and thereby transferring such monies income tax free to the next or subsequent generations.

These minimum distribution rules are set forth in §401(a)(9) applicable to qualified plans under §401(a); however, they are also incorporated by reference for IRAs,[2] 403(b) plans,[3] and §457 eligible deferred compensation plans.[4] As 401(k) plans are becoming the dominant plan for retirement savings, individuals should be aware that most employers prefer, for administrative simplicity, the lump sum distribution option for the employee or his/her named beneficiary, in lieu of installment and annuity options. Such choice negates the possibility of extending distributions from the plan.[5] Thus, an individual may have to roll over such distributions into an IRA to take advan-

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[1] Section 401(a)(9), added to the I.R.C. by Pub. L. No. 87-792, the Self-Employed Individuals Retirement Act of 1962, and was expanded to all qualified plans by Pub. L. No. 97-248, the Tax Equity and Fiscal Responsibility Act of 1982. All section references are to the Internal Revenue Code of 1986, as amended (the "Code"), and the regulations promulgated thereunder, unless otherwise indicated. Section 401(a)(9) is a qualification issue, such that failure to satisfy its rules may lead to the disqualification of the plan and trust under §401(a) and §501(a).

[2] Roth IRAs are not subject to the lifetime required minimum distribution rules since no distributions are required during the lifetime of the owner. However, Roth IRAs are subject to required minimum distributions rules after the death of the owner of the Roth IRA, with a 50% penalty if such distributions are not made.

[3] §403(b)(10). Plan sponsors of 403(b) plans should refer to Reg. §1.403(b)-6(e) for the specific minimum required distribution rules applicable to such plans. There are also special rules applicable for benefits accruing before December 31, 1986. *See* Reg. §1.403(b)-6(e)(6).

[4] §457(d)(2).

[5] In order to encourage employers to add annuity options to their plans, Congress enacted a number of "lifetime income" provisions under the SECURE Act of 2019. *See* Further Consolidated Appropriates Act, 2020, Pub. L. No. 116-94, Division O – Setting Every Community Up for Retirement Enhancement (SECURE Act). Historically, fiduciaries of defined contribution plans have been reluctant to offer annuities due to the risk of fiduciary lawsuits if the annuity provider later proves to be insolvent; as a result, there is a new fiduciary safe harbor for plan sponsors of defined contribution plans to use when selecting an annuity provider. *See* SECURE Act, §204. Likewise, fiduciaries of plans have been reluctant to offer annuities as a lifetime income investment in a defined contribution plan; as a result, the new SECURE Act's portability provisions attempt to solve this problem. *See* SECURE Act, §109. Finally, to assure that a plan participant understands

tage of these deferral rules.[6] Spouses of the deceased individuals may be able to roll such monies into an IRA in their own name or treat themselves as a beneficiary under the deceased's IRA. In contrast, other non-spouse beneficiaries may only be able to roll such monies into an inherited IRA, in the name of the deceased beneficiary. When a non-spouse inherits an IRA, he/she cannot make any contributions to the IRA, nor can he/she roll over any amounts into or out of the inherited IRA.

These minimum distribution rules require only that the benefits commence being paid upon the attainment of a certain age, not that they be made in a single lump sum. Also, the distribution time frame may extend beyond one year; however, there are limits to the time frame of payment, so as to prevent distributions over an excessive period of time. Since these rules produce different annual distribution amounts, benefits are generally paid as installments, not as annuities (e.g., benefits paid over the next 25 years, as opposed to over the employee's life). The regulations prescribe these limitations.[7] To further prolong distribution of benefits, the individual is permitted to designate a beneficiary for continued payment of benefits after the individual's death.[8]

As these rules permitted certain distributions over the *beneficiary's* life expectancy, they allowed employees to ''stretch'' the distribution over a long period time after the employee's death, prolonging the use of the tax shelter. Congress has intervened with the passage of the SECURE Act of 2019,[9] thereby limiting who can take advantage of these ''stretch'' distribution rules.

The SECURE Act, enacted into law on December 20, 2019, made two changes to these minimum distribution rules. First, it changed the employee's *age* at which these rules are triggered (i.e., thereby delaying the triggering event).[10] Second, it limited the distribution period for certain beneficiaries (i.e., thereby limiting the availability of the ''stretch'' payout period over a beneficiary's life expectancy).[11] The effective dates of the two changes are different, but they leave in place the prior rules for older taxpayers. As such, the author thought a primer on the new rules, as well as a refresher of the prior rules, was in order. The prior rules as described under the final regulations will also be instrumental in determining how the IRS will interpret the new rules. The rules discussed below are limited to those that are applicable to defined contribution plans and IRAs, not defined benefit plans, even though the minimum distribution rules are applicable to both types of plans.

BACKGROUND HISTORY

Under the federal income tax rules, there are several relevant points to consider in satisfying the required minimum distribution (RMD) rules. The **first** is determining the required beginning date (RBD) for the commencement of distributions (i.e., the age at which the rules are triggered). The **second** is ascertaining the distribution period if the employee dies prior to his/her required beginning date. If employee survives to his/her RBD, the **third** issue is to ascertain the annual amount of the minimum distribution to be payable to the employee. This determination requires an analysis of the applicable divisor and the

what amount of ''lifetime income stream'' can be derived from his/her account balance, the pension benefit statement will now be required to disclose the ''lifetime income stream'' which is equivalent for a given account balance. *See* SECURE Act, §203. Whether these three lifetime income provisions have their desired effect remains to been seen, but they do signal that plan sponsors are becoming more concerned about the deceleration of a participant's total account balance. For a discussion of the SECURE Act's lifetime income provisions, *see* Kennedy, *Lifetime Income Disclosures*, 48 Tax Mgmt. Comp. Plan. J. No. 9 (Sept. 4, 2020).

[6] While employers may prefer lump-sum distributions to make their recordkeeping simpler during an employee's retirement, asset managers of IRAs prefer not to distribute monies during an employee's retirement in order to keep the assets under their management.

[7] Reg. §1.401(a)(9)-0-§1.401(a)(9)-9, published in 67 Fed. Reg. 18,988 (Apr. 17, 2002).

[8] Reg. §1.401(a)(9)-4.

[9] SECURE Act, §114, §401, applicable to defined contribution plans which include IRAs, qualified defined contribution plans, 403(b) plans, and §457(b) eligible deferred compensation plans. *See* SECURE Act §401(a)(1), adding §401(a)(9)(H)(iv). The legislative history indicates the reason for the change in the distribution rules as follows: ''The tax subsidy for retirement savings is intended to encourage individuals and families to forgo some consumption during their working years in favor of savings to provide for consumption during retirement. Because of the uncertainty as to how much income will be needed during retirement, individuals may accumulate more than it turns out is actually needed during the individual's lifetime (and surviving spouse's lifetime, if applicable), leaving some amount to other surviving beneficiaries. Present law generally allows such other beneficiaries to withdraw inherited amounts from a tax-favored account or plan over the beneficiary's lifetime. The Committee believes that the tax subsidy for retirement savings should phase down after the lives of the individual and surviving spouse, except in the case of certain other beneficiaries.'' *See* Setting Every Community Up for Retirement Enhancement Act of 2019, Ways and Means Rept., H.R. Rep. No. 116-65 Part 1, at 108. The Joint Committee on Taxation estimated that the SECURE Act provision eliminating the stretch distribution rules would raise $15.7 billion in additional tax revenue through 2029. *See* Joint Committee on Taxation, JCX-23-19, Estimated Budget Effects of H.R. 1994, The ''Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019.

[10] SECURE Act, §114, amending §401(a)(9)(C)(i)(I), effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after such date.

[11] SECURE Act, §401, amending §401(a)(9) by adding a new subparagraph (H).

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relevant account balance to be used, in order to ascertain each year's RMD amount. The final 2002 regulations greatly simplified this latter analysis.[12] Once the employee begins to receive the annual minimum distributions, the regulations set forth the rules regarding the payment of benefits to the employee's beneficiary *after* the employee dies.

To say that the rules are quite complex is an understatement. The author will explain these rules in the context of *who* is getting the required distribution. The rules will be explained in the context of an employee participant under a qualified defined contribution; however, the rules apply likewise for an IRA owner even though the language in this article refers to "the employee." If we focus on the employee under the qualified plan, the employee will fixate on his/her RBD, as no distributions are required to him/her before that date. Once the employee dies, the rules vary depending on the following: if the beneficiary is the surviving spouse; if the beneficiary is an eligible designated beneficiary (a new term coined by the SECURE Act); if the beneficiary is an individual but not an eligible designated beneficiary (we will coin this individual as an "ineligible designated beneficiary"); if the beneficiary is not an individual (e.g., the owner's estate, certain trusts or a charity); and whether the owner died before his/her RBD *or* on or after his/her RBD. Hence, the rules will be explained as follows:

- If the owner dies before his/her RBD, how are distributions made and to whom; and
- If the owner survives until his/her RBD, how are amounts distributed to the employee during his/her lifetime, and once the employee dies, how are amounts distributed to his/her designated beneficiary. As the term "designated beneficiary" means an *individual* named as beneficiary by the employee, different rules apply if the named beneficiary is not an individual (e.g., the employee's estate or certain trusts).[13]

The 1987 proposed regulations under §401(a)(9) were extremely complex and confusing, and required irrevocable elections by the participant and/or spouse as of certain dates.[14] Due to the complexity of the rules, it was easy for a plan administrator or IRA sponsor to incorrectly calculate a given year's required minimum distributions. Sweeping proposed changes to the regulations were made in 2001,[15] simplifying the rules and permitting greater deferral periods. In early 2002, the IRS finalized the 2001 proposed regulations, with additional simplification features.[16] The finalized regulations were effective as of January 1, 2003. If distributions do not commence yearly according to the RMD calculation, Congress imposes an excise tax of 50% of the difference between what should have been distributed and what actually was distributed.[17] Due to the size of this penalty tax, most individuals choose to comply with these rules. Due to the simplification of the rules, the IRS assumed greater compliance and therefore, could invoke greater enforcement.

OUTLINE OF THE STATUTE

When introducing the RMD rules to my students, we begin with an analysis of the text of the statute. Since many of the rules under §401(a)(9) hinge on the employee's RBD, let's start with the I.R.C.'s determination of an employee's RBD and then analyze the remaining rules:

- RBD is defined in §401(a)(9)(C) as of April 1 of the calendar year in which the employee attains age 70½, or if later, the calendar year in which the employee *retires* (unless the employee is a 5% owner, in which case, the deferred date of retirement is not available).[18] *The SECURE Act struck age 70½ and replaced it with age 72, effective for distributions required to be made after December*

[12] Reg. §1.401(a)(9)-0-§1.401(a)(9)-9, above, Note 7.

[13] §401(a)(9)(E)(i), as amended by SECURE Act, §401(a)(2).

[14] Prop. Reg. §1.401(a)(9)-1, published in 52 Fed. Reg. 28,070 (July 27, 1987), supplemented in 62 Fed. Reg. 67,780 (Dec. 30, 1997).

[15] Prop. Reg. §1.401(a)(9)-0-§1.401(a)(9)-8, published in 66 Fed. Reg. 3928 (Jan. 17, 2001).

[16] *See* Note 7, above.

[17] §4974. *See also* Reg. §54.4974-2, Q&A-4 (noting that the excise tax applicable for the first distribution year is imposed in the calendar year in which the required beginning date occurs, whereas for all subsequent distribution years, the excise tax is imposed in the calendar year in which there is a shortfall). Note: the IRS may waive the excise tax if the failure to pay the appropriate amount is the result of a reasonable error and reasonable steps have been taken to rectify the defect. Request for a waiver of the excise tax must be reported on Form 5329, which should be filed in the appropriate tax year of the participant. *See* Reg. §54.4974-2, Q&A-7. The IRS has developed a correction program to assure continued and ongoing qualification for plan, known as the Employee Plans Compliance Resolution System (EPCRS), which is administered through the IRS's revenue procedures. Under the latest guidance, Rev. Proc. 2019-19, the IRS provides for correction of missed required minimum distributions and permits plan sponsors to request a waiver of the excise tax penalties under §4974. For a discussion of the latest version of EPCRS, *see* Kennedy, *A Current Update of EPCRS Through Rev. Proc. 2019-19*, 47 Tax Mgmt. Comp. Plan. J. No. 12 (Dec. 6, 2019).

[18] Pub. L. No. 99-514, the Tax Reform Act of 1986, amended §401(a)(9)(C), to add a new definition of the required beginning date, in the case of non-5% owners, to be the later of the calendar year in which the employee attains age 70½ or the of the calendar year in which the employee retires.

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31, 2019, with respect to individuals who attain age 70½ after such date.[19]

- Section 401(a)(9)(A) sets forth the general rule that the entire interest shall be distributed to the employee, either by his/her RBD (this is referred to as the (A)(i) date), or if the employee has attained his/her RBD, to be distributed not later than the RBD, in accordance with regulations, over the employee's life (or his/her life expectancy) or the lives of the employee and a designated beneficiary (or the joint life expectancy of the employee and beneficiary) (this is referred to as the (A)(ii) date). Distributions over the employee's life assume the benefit is a single life annuity, whereas distributions over the employee's life expectancy assume installment distributions.[20]

- Section 401(a)(9)(B) sets forth the rules regarding required distribution where the employee dies *before* his/her entire interest is distributed:

  o Under §401(a)(9)(B)(i), if distributions have already begun being paid to the employee (because the (A)(ii) date was triggered), the remaining portion of the interest is to be distributed ''at least as rapidly'' as under the method of distributions being used in accordance with (A)(ii) date (i.e., either for the employee's life or life expectancy, or the joint lives of the employee and a designated beneficiary or their joint life expectancy).[21]

  o In contrast, under §401(a)(9)(B)(ii), if the employee's interest has not yet begun to be distributed (because he/she didn't attain the RBD), then the entire interest must be distributed within 5 years from the death of the employee (referred to as the five-year rule).[22]

  o There is an exception to the five-year rule if any portion of the employee's interest is payable to a *designated beneficiary*. As we'll see below, a designated beneficiary is defined as an *individual* named as beneficiary by the employee. The exception to the five-year rule provides that payments to the beneficiary will be distributed, in accordance with regulations, over the life of the beneficiary (or his/her life expectancy, referred to as the life expectancy rule), and that such distributions must begin no later than one year after the date of the employee's death.[23]

  o The SECURE Act amends §401(a)(9)(B)(ii), solely in the context of defined contribution plans, to limit distributions to individuals who are **not** ''eligible designated beneficiaries'' (i.e., ineligible designated beneficiaries).

  o The life expectancy exception of §401(a)(9)(B)(ii) also provides special rules if the designated beneficiary is the employee's surviving spouse. First, the surviving spouse can defer commencement of benefits until December 31 of the calendar year in which the employee would have attained age 70½ (now age 72), per the rule of §401(a)(9)(B)(iv)(I). Second, the distribution period for the surviving spouse can be his/her life expectancy, *recalculated* each year during the distribution period per §401(a)(9)(D). Third, if the surviving spouse dies before distributions have begun to such spouse, the surviving spouse is treated as if he/she were the employee per §401(a)(9)(B)(iv)(II). This means if the spouse were to die before the December 31 of the calendar year in which the employee would have attained age 70½ (now age 72), distributions to the beneficiary are governed by the general rules for an employee who died prior to his/her RBD.

- Section 401(a)(9)(D) provides that (except in the case of a life annuity) the life expectancy of an employee and the employee's spouse that is used to determine the period over which payments must be made may be redetermined annually (i.e., may be recalculated).

- Section 401(A)(9)(E) defines a designated beneficiary is defined as an *individual* (i.e., a human being) named as beneficiary by the employee. Thus, if the employee designates his estate or a charity as the beneficiary, the regulations treat this as if the employee has no designated beneficiary as neither are individuals.

- Section 401(a)(9)(F) sets forth special rules applicable to payments made under a defined benefit plan or annuity contract to a surviving child. Such payments that are made to the employee's child until such child reaches the age of majority (or dies, if earlier) may be treated, for purposes of the RMD rules, as if such payments were made to the surviving spouse, to the extent they become payable to the surviving spouse upon cessation of the

[19] SECURE Act, §114.

[20] The distribution over the employee's life is consistent with an life annuity, whereby payments continue to be made while the employee is alive and then ceased upon his/her death. In contrast, distribution over the employee's life expectancy is an installment form of payment, whereby the length of the distribution period is based on the employee's life expectancy determined from a given mortality table.

[21] §401(a)(9)(B)(i)(I)-§401(a)(9)(B)(i)(II).

[22] §401(a)(9)(B)(ii).

[23] §401(a)(9)(B)(iii).

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payments to the child. The term "majority" is not defined in §401(a)(9)(F), but the attendant regulations state that a child may be treated as having not reached the age of majority if the child has not completed a "specified course of education" and is under the age of 26.[24]

- Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of §401(a) is deemed to be a required minimum distribution. This is relevant for qualified defined benefit plan purposes which is not the subject of this article.[25]
- Section 401(a)(9)(H) sets forth the new SECURE Act distribution rules, applicable when an employee dies before there has been a full distribution of his/her entire interest, effective for distributions with respect to employees who die after December 31, 2019.[26]
- Section 401(a)(9) has also been amended to permit a temporary waiver of the minimum distribution rules during the 2009 calendar year,[27] as well a temporary waiver of such rules during the 2020 calendar year.[28]

With this outline of the statute, let's review how the IRS interpreted those rules per the 2002 final regulations, as well as the legislative changes made by the SECURE Act.

Required Beginning Date

The minimum distribution rules are best understood by first determining the employee's RBD under §401(a)(9)(C) (i.e., the age at which the stream of minimum distributions must begin to the employee). Prior to changes made by the SECURE Act, the rules required the taxpayer to commence distributions by the employee's RBD, defined as the April 1stof the calendar year *following* the calendar year in which the employee attains age 70½.[29] An exception existed, and still exists, under a qualified plan for non-5% owners who retire in a *later* calendar year; thus, if a non-5% owner retired at age 72, the distribution rules were triggered as of the April 1 of the calendar year following the calendar year in which the employee retired.[30] Since the owner of an IRA is a 100% owner, the age 70½ rule was always applicable. It is interestingly to note that neither the statute nor the regulations defines the term "retires" for purposes of the delayed date.

The calendar year in which the individual attained age 70½ is referred to as the first distribution year.[31] While the minimum distribution rules require benefit payments for employees and for 5% owners to commence by age 70½, the *actual payment* of the first year's benefit amount need not be made until April 1 of the calendar year following the attainment of the employee's 70½ birthday (the first distribution year).[32] This April 1 date is known as the RBD.

A statute fixated on age 70½, as opposed to age 70, thereby resulting in different RBDs for individuals born in the same calendar year, but in different months during the same calendar year. For individuals, whose birthday occurs between January and June, he/she will attain age 70½ in the *same* calendar year and the RBD will be the next April 1. However, for individuals whose birthday occurs between July and December, he/she will attain age 70½ in the *following* calendar year (i.e., the year in which he/she attains age 71), and the RBD will be the subsequent April 1. The public policy reason for affording July through December birth dates an additional year of deferral is unknown to the author. (Maybe some Senator had a September birthdate!).

Once the RBD is calculated, distributions must commence for the first year and every year thereafter during the employee's life (referred to as the "distri-

[24] *See* Reg. §1.401(a)(9)-6, Q&A-15, published in 69 Fed. Reg. 33,288 (June 15, 2004). Under the regulations, a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26, in which case the minor child may use the life expectancy rule until 26 years of age.

[25] *But see* Reg. §1.403(b)-6(e)(6)(vi), which indicates these rules are applicable to pre-1987 contributions under a 403(b) plan.

[26] SECURE Act, §401, adding §401(a)(9)(H).

[27] Pub. L. No. 110-458, The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), §201, waived the 2009 required minimum distribution for those individuals who otherwise were to receive a required minimum distribution during 2009 and were already receiving benefits. *See* Notice 2009-82, for guidance and sample amendments for plan sponsors to use for 2009 for defined contribution plans and IRAs.

[28] Pub. L. No. 116-136, The Coronavirus Air, Relief, and Economic Security Act of 2020 (CARES), §2203, relaxed the minimum distribution rules for 2020 for defined contribution plans and IRAs.

[29] §401(a)(9)(C)(i)(I). The original rules required distributions to commence by age 70½. *See* Pub. L. No. 87-792, the Self-Employed Individuals Retirement Act of 1962, which added §401(a)(9) applicable for self-employed individuals who established a qualified plan. According to the legislative history, age 70½ (i.e., insurance age 70) was selected "to accord with usual insurance practice which treats the maturity date of an annuity, endowment, or life-insurance contract as falling on the anniversary date of the policy nearest to the insured's birthday." See Self-Employed Individuals' Retirement Act of 1958, *Ways and Means Rept.*, H.R. Rep. No. 85-2277, at 11 (1958).

[30] §401(a)(9)(C)(i)(II),§401(a)(9)(C)(ii)(I).

[31] Reg. §1.401(a)(9)-5, Q&A-1(b).

[32] §401(a)(9)(C)(i).

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bution calendar year'').[33] For the second and subsequent calendar years, the minimum required distributions must be made no later than December 31 of that distribution year.[34] So the only difference in the timing of the RMDs is between the first and subsequent years' distributions — the first year distribution may be delayed up to three months following the first distribution year, whereas the subsequent years' distributions must be made by the end of that distribution year. While the April 1 rule permits the actual payment to be deferred by three months, individuals are usually advised to receive payment in the calendar year in which they attain age 70½ to avoid the ''bunching'' effect of receiving two payments in a single calendar year and thus, having a higher tax due (due to the potential of a higher marginal tax rate).

The SECURE Act simply *changed age 70½ to age 72* for purposes of computing the RBD, effective for individuals who attain age 70½ after December 31, 2019.[35] Congress felt a change was warranted as the age 70½ was first applied to retirement plans in the early 1960s and has never been adjusted to take into account increases in life expectancy.[36]All other provisions relating to the determination of the RBD remain the same. Because it retained the distinction of age 70½ for purposes of the effective date, it will create a different RBD for those individuals who have a 1949 birth year or a subsequent birth year.

As part of understanding these rules, a series of examples will be used based on the following fact situations (that may be altered under some of the examples). I'll be using the names of my three siblings (Mark, Lee, Erin), their spouses, and children for purposes of the examples, as it helps me better assess how they each are affected differently under the prior rules as well as the new rules:

> **Example: [Remember the new RBD rule of age 72 is effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after such date.]**
>
> Mark was born Dec. 1948 and his wife, De, was born June 1948. Lee was born Oct. 1949 and his wife, Dana, was born May 1949. Rich was born Dec. 1950 and his wife, Erin, was born May 1950. All of my siblings are covered under qualified defined contribution plans and/or a SIMPLE IRA or IRA. Each family has children.
>
> Assuming Mark and De (with 1948 birth years) are alive, what are their RBDs? Mark turns 70 during 2018, but 70½ during 2019 due to his December birthday. De turns 70 and 70½ during 2018 due to her June birthday. Because Mark and De attain age 70½ before January 1, 2020, the prior rule for determining RBDs applies. As a result, Mark's RBD is April 1, 2020, whereas De's RBD is April 1, 2019.
>
> **Note:** Mark's first distribution year is 2019; second distribution year is 2020; etc. Only the first year's distribution of 2019 may be delayed until April 1, 2020; his second and subsequence years' of distribution will be due by December 31 of the respective year of distribution.
>
> Assuming Lee and Dana (with 1949 birth years) are alive, what are their RBDs? Lee turns 70 during 2019, but 70½ during 2020 due to his October birthday. Dana turns 70 and 70½ during 2019, due to her May birthday. As Lee turns 70½ during 2020, the new RBD rules apply to him; but since Dana turned 70½ during 2019, the prior RBD rules apply to her. As a result, Lee turns age 72 during 2021 and his RBD = April 1, 2022, whereas Dana turned age 70½ during 2019 and her RBD = April 1, 2020. Thus, individuals born during January through June of 1949 will be stuck with the prior RBD rules, whereas individuals born during July through December of 1949 will take advantage of the new RBD rules and get a 2-year deferral.
>
> Assuming Rich and Erin (with 1950 birth years) are alive, what are their RBDs? As Rich and Erin both turn age 70½ during 2021, the new RBD apply. They both turn age 72 during 2022, so their RBDs will be April 1, 2023, regardless of the fact that Erin has a May birthday and Rich has a December birthday.

Employee Dies Prior to the RBD

Once we have an employee's RBD, the rules divide into main two parts: how are the benefits distributed if the employee dies prior to his/her RBD, and if the employee survives to his/her RBD, how are annual distribution amounts determined while the employee is living, and once he/she dies, how are distributions made post-death.

According to the terms statute *pre-SECURE Act*, if distributions to the employee had not yet begun (because his/her RBD was not attained) and the employee dies, the employee's entire interest must be

[33] Reg. §1.401(a)(9)-5, Q&A-1(b).

[34] Reg. §1.401(a)(9)-5, Q&A-1(c). Congress most likely gave the initial three-month grace period for the first RMD realizing that most taxpayers would have been unaware of the timing of their first RMD as they do not complete their annual tax return forms until the first three months of the following tax year.

[35] SECURE Act, §114.

[36] *See* Ways and Means Report, above, Note 9, at 74.

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distributed in one of the three methods set forth in §401(A)(9)(B)(ii), (iii) or (iv):

- The first method (in accordance with §401(a)(9)(B)(ii)) is known as the five-year rule, whereby the entire interest must be distributed no later than the December 31st of the calendar year containing the fifth anniversary of the employee's death.[37] This rule applies regardless of who or what entity receives the distribution.[38] Such rule obviously negates the use of the plan's tax shelter after five years, as such minimum distributions may not be rolled over into an IRA.

  Example: Lee, with an RBD of April 1, 2022, dies during 2020 (prior to his RBD), naming his estate as the designated beneficiary. As an estate is not an individual, a designated beneficiary is deemed not to have been named and the five-year rule applies.[39] Under that rule, Lee's entire interest must be distributed no later than 5 years following the calendar year of Lee's death (i.e., by December 31, 2025). As the estate may wish to take the entire distribution in the calendar year following Lee's death, it would make the five-year deferral irrelevant. Poor tax planning!

- If a designated beneficiary is named (in accordance with §401(a)(9)(B)(iii)), the life expectancy rule requires distributions to the beneficiary to begin in the calendar year following the employee's calendar year of death, and be paid over the life of the beneficiary as an annuity (or in installments over his/her life expectancy).[40] As the statute states that the life expectancy of an employee or the employee's spouse may be redetermined per §401(a)(9)(D) (or recalculated) each year, the IRS has inferred that a non-spouse beneficiary's life expectancy is not to be recalculated each year, but instead is to be computed using the beneficiary's age in the calendar year following the calendar year of the employee's death, reduced by 1 year for each year thereafter (otherwise known as the nonrecalculation method).[41] For this purpose, the Single Life Table in the IRS regulation is used to determine life expectancy if the installment distribution form is being used.[42] Note: the life expectancy of the *employee* is irrelevant for purposes of this analysis.

  Example: Under the prior rules, assume Lee dies in 2010, naming his daughter, Christine, age 40 in 2011. The life expectancy rule would have applied, allowing distributions to be paid to Christine, beginning in 2011, based on her life expectancy of 43.6 years. In each year after 2011, her life expectancy will be reduced by one year for purposes of determining the remaining period of time for distribution. The result was great tax planning on Lee's part as it preserved the tax shelter for over 44 years! What if Lee had named daughters Nora (age 44 in 2011) and Christine (age 40 in 2011) as beneficiaries for benefits under his plan? Since there are two individuals named as a beneficiary, the regulations require that the shorter life expectancy of the two beneficiaries be used (i.e., the older daughter).[43] Hence distribution to them would have begun in 2011, using a divisor of 39.8 (Nora's shorter life expectancy), reduced by 1.0 for each subsequent year of distribution.

  Note: the non-recalculation method is not as advantageous as the recalculation method. **For example:** for a beneficiary who is age 60 in the first year of distribution, his/her life expectancy is 25.2 under the Single Life Expectancy Table. This is the divisor used in the first year to determine how much of the employee's entire interest should be distributed to the beneficiary. Under the nonrecalculation method, each subsequent divisor is determined by taking the prior year's divisor and reducing it by one year (e.g., 24.2 for the second year, 23.2 for the third year, 22.2 for the fourth year, etc.). By the end of 26 years, the divisor will

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37 Reg. §1.401(a)(9)-3, Q&A-2.

38 Reg. §1.401(a)(9)-3, Q&A-1(a).

39 Reg. §1.401(a)(9)-4, Q&A-3. According to the regulations, if an entity *other than* an individual is designated as the beneficiary of the employee's benefit, the employee will be treated as having no designated beneficiary for purposes of §401(a)(9), even if there are also other named individual designated beneficiaries. *But see* PLR 200027061, which involved a case in which the husband designated his estate as beneficiary of his IRA, but died before changing his will to reflect his recent marriage, and the wife elected against the will in order to receive one-half of the IRA under state intestacy law. The IRS held that the IRA proceeds were payable to the wife under state intestacy laws, rather than the husband's will, and thus, she could roll the proceeds into her own IRA.

40 Reg. §1.401(a)(9)-3, Q&A-1(a). Note: a plan may provide that employees or beneficiaries can elect whether the five year rule or the life expectancy rule applies to distributions after the death of an employee who has a designated beneficiary. Such election must be made before the earlier of: December 31 of the calendar year in which distributions would have commenced during the life expectancy rule or December 31 of the calendar year which contains the fifth anniversary of the employee's date of death. *See also* Reg. §1.401(a)(9)-3, Q&A-4(c).

41 Reg. §1.401(a)(9)-5, Q&A-5(c)(1).

42 Reg. §1.401(a)(9)-5, Q&A-6. If multiple beneficiaries are named, the regulations require that the shortest life expectancy of any of the beneficiaries is to be used. Reg. §1.401(a)(9)-5, Q&A-7. The Single Life Expectancy Table is found in Reg. §1.401(a)(9)-9, Q&A-1.

43 Reg. §1.401(a)(9)-5, Q&A-7(a).

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be 0, reflecting the fact that the employee's entire interest has been distributed. In contrast, if the recalculation method had been used, the divisor in the first year remains the same as 25.2; but the second year's divisor is 24.4 (reflecting the life expectancy of an age 61 year old), not [25.2-1=24.2]. While that difference does not appear to be significant in the second year of distribution, the recalculation method allows for a distribution until age 111 (e.g., 51 years), assuming the beneficiary lived that long, instead of 26 years. The life expectancy table reflects the fact that one's life expectancy actually improves the longer one is alive.

- There are four special rules applicable if the surviving spouse is the designated beneficiary, which allow for a delayed commencement date and possible longer distribution periods:

o If the surviving spouse is the designated beneficiary, the spouse can elect to defer commencement until December 31 of the calendar year in which the employee would have attained age 70½ (now 72).[44] This permits the spouse to step into the shoes of the employee for purposes of taking advantage of the RBD rules.

Example: Rich with a RBD of April 1, 2023, dies during 2020, naming Erin as his beneficiary. Erin can elect to defer commencement of benefits until December 31, 2022 (i.e., the calendar year in which Rich would have attained age 72). This provides Erin with an extra year of deferral, as she doesn't have to begin taking distributions in the calendar year following Rich's death (which is 2021).

o A surviving spouse beneficiary can roll any or all of the employee's interest into an IRA in his/her own name, thereby permitting postponement of commencement until the spouse reaches his/her RBD.[45] This would make sense to do if the age difference between the employee and surviving spouse was significant. As Erin's RBD is April 1, 2023, this rule provides Erin with an extra year of deferral, as she doesn't have to begin taking distributions in the calendar year following Rich's death (which is 2021).

o If the surviving spouse dies after the employee but before distributions must commence, the spouse is treated as the employee for purposes of the five-year rule and its exceptions. This means that the surviving spouse's date of death is substituted for the employee's date of death. The 2002 regulations added the requirement that the spouse be the sole beneficiary in order to be treated as the employee for purposes of the five-year rule and its exceptions.[46] Thus, distributions must be paid in full by December 31 of the calendar year containing the fifth anniversary of the spouse's death (unless a designated beneficiary has been named by the spouse). This rule does not extend to the surviving spouse of the *deceased* employee's surviving spouse.

o If the spouse is the sole designated beneficiary, distributions made over the surviving spouse's life expectancy are determined by the surviving spouse's life expectancy as of his/her birthday for each subsequent distribution calendar year (i.e., the recalculation method).[47]

Example: If Rich dies in 2020 and names Erin, his surviving spouse, as beneficiary, Erin has deferred payment until December 31, 2022. Erin's life expectancy in 2022 (at age 72) is 15.5 years; 14.8 years in 2023, 14.1 in 2024, etc., as opposed to reduce by one year for each year after 2022. This affords the employee with a greater deferral period for his/her surviving spouse, than for a non-spouse eligible designated beneficiary.

Employee Survives to the RBD

[1] Calculation of the Minimum Distribution Amount

The minimum distribution rules specify the minimum amount that must be distributed for the calendar year in which the individual attains age 70½ (now age 72) and each subsequent calendar year.[48] If the participant elects a lump sum distribution or an annuity payment, the amount payable in each year will be fixed by the form of distribution.[49] However, if the plan permits installment payments to be paid in accordance with the RMD rules, there will be different amounts distributed each and every year. Since the

[44] §401(a)(9)(B)(iv).

[45] §402(c)(9).

[46] Reg. §1.401(a)(9)-3, Q&A-3(b), Reg. §1.401(a)(4), Q&A-4(b).

[47] For purposes of determining the surviving spouse's life expectancy, it is recalculated each year using the Single Life Expectancy Table found in Reg. §1.401(a)(9)-9, Q&A-1. Hence, the SECURE Act didn't change the stretch rules for surviving spouses; it did, however, apply the new 10-year rule upon the surviving spouse's subsequent death on the next beneficiary. *See* SECURE Act, §401(a), adding §401(a)(9)(H)(iii).

[48] §401(a)(9)(A).

[49] Life annuities, life and certain period annuities, and joint and survivor annuities with a non-spouse beneficiary must satisfy the minimum incidental death benefit requirements. *See* Reg. §1.401(a)(9)-6T.

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goal is to distribute the minimum amount possible in order to prolong the use of the tax shelter, careful attention to these rules is required.

The intent of the minimum distribution requirements was to force an annual minimum distribution beginning with the individual's RBD (e.g., now age 72), to be continued over the individual's expected life expectancy or the joint life expectancy of the individual and his/her named beneficiary.[50] The MRD rules require that a fraction of the account balance be distributed each year over a specified period of time.[51] Spouses of participants are afforded special treatment under the minimum distribution rules; if the actual age difference between the employee and his/her spouse is greater than 10 years, then the *actual* joint life expectancy can be used.[52]

Example: Lee's RBD is April 1, 2022, and he attains age 72 in his first distribution year. The uniform table permits Lee to use a divisor of 25.6 years, instead of 15.5 years under the single life expectancy table, thereby permitting deferrals for an additional 11 years. For Lee's second distribution year, he will be 73 years old and may use a divisor of 24.7 from the uniform table, based on his attained age. This table is applicable during his lifetime, regardless of whom he names as his beneficiary (unless Dana was the designated beneficiary and was more than 10 years younger than him, which is not the case in our example).

Example: Let's now presume that De predeceases Mark (born December of 1948) and Mark remarries, with Alice as his new spouse, born May of 1960. Mark attains age 70½ during 2019 and his RBD is April 1, 2020. Mark's first distribution year is 2019 and he is age 71; however, Alice is age 59 in 2019, which is more than 10 years younger than Mark's age. Therefore, using Table 3 under the regulations, the actual joint life expectancy of an employee age 71 and a spouse age 59 is 27.9 (which is greater than the uniform table divisor of 26.5 for an age 71 employee). Thus, the first year's divisor is 27.9; the divisors for subsequent years will be determined using Table 3 based on the attained ages of Mark and Alice.

The statute under §401(a)(9)(A) envisioned that once the employee reached his/her RBD, distributions would commence over the employee's lifetime (or his/her life expectancy) or the joint lives of the employee and a beneficiary (or their joint life expectancies). Two of the goals of the 2002 final regulations were as follows: (1) to provide a simple, uniform table that all employees could use to determine the minimum required distribution during their lifetime that did not depend on who was named as beneficiary and (2) to permit the required minimum distributions during the employee's lifetime to be calculated without regard to the beneficiary's age (except in the context where the spouse was the beneficiary and was more than 10 years younger than the employee).[53]

According to the 2002 regulations, distributions were to be determined using a specified period of time, set forth in the new uniform table, which does not depend on whether a beneficiary had been named and does not depend on the age difference between the employee and the beneficiary (subject to the exception whereby the actual joint life expectancies' table can be used if the age difference between the employee and his/her spouse is more than 10 years).[54] The table uses a joint life expectancy of the employee and a designated beneficiary who is presumed to be 10 years younger (regardless of the actual age of the beneficiary).[55] For subsequent distribution years during the employee's lifetime, the rules make recalcula-

[50] If in any year more than the required minimum distribution is made, the excess amount may not be used to offset the required minimum distributions in any future years. *See* IRS, *Distributions from Individual Retirement Arrangements (IRAs): For use in preparing 2020 Returns*, Publication 590-B (Mar. 25, 2021), available at https://www.irs.gov/publications/p590b, p. 7.

[51] The application of the incidental death benefit rule limits an age differential no greater than 10 years as a joint life expectancy of the employee and the beneficiary.

[52] *See* the Joint and Last Survivor Table in Q&A-3 of Reg. §1.401(a)(9)-9. My students refer to this table as the Murdoch/Hall Table as most of them know of Jerry Hall, Mick Jagger's ex-spouse. In 2016, she married Rupert Murdoch, with a 25-year age difference between the two. As a result of the marriage, Rupert would have been entitled to a divisor of 26.5 (reflecting the age difference between an employee age 84 and his spouse age 59), instead of a divisor of 15.5 from the uniform table (for an employee age 84). In order to use the joint and last survivor table, the spouse must be the sole beneficiary of employee's account. For purposes of computing the required minimum distributions, marital status is determined as of January 1 of each year, and if the spouse of the employee is the beneficiary on January 1, he/she remains the beneficiary for the entire year even if the couple divorces or one of them dies during the year. *See* IRS Publication 590-B, above, Note 50, p. 8.

[53] *See* Preamble, Prop. Reg. §1.401(a)(9), above, Note 15.

[54] Reg. §1.401(a)(9)-5, Q&A-4(b). Note: the 2002 regulations updated the 2001 uniform table to reflect recent mortality rate changes. The uniform distribution period table is the required minimum distribution incidental benefit (MDIB) divisor table originally prescribed in Reg. §1.401(a)(9)-2 of the 1987 proposed regulations and is now included in Q&A-2 of Reg. §1.401(a)(9)-9 of the regulations. An exception applies if the employee's sole beneficiary is the employee's spouse, and the spouse is more than 10 years younger than the employee. In that case, the employee is permitted to use the actual joint life expectancy of the employee and his/her spouse.

[55] *See* Preamble to Reg. §1.401(a)(9)-0-§1.401(a)(9)-9. Pub. L. No. 107-16, Economic Growth and Tax Relief Reconciliation Act of 2001, (EGTRRA), §634, directed the IRS to update the life expectancy tables under the minimum distribution rules. In 2019, pursuant to Executive Order 13847, the IRS proposed updated uniform tables for use in the minimum distribution rules. *See* Prop. Reg. §1.401(a)(9)-9(a) (single life table), §1.401(a)(9)--9(b)

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tion the automatic method for the employee to determine life expectancy.[56] By presuming recalculation, the employee continues to use the uniform table at his/her age during the distribution year (until he/she dies), thereby maximizing the deferral period. Thus, as the employee ages, the uniform table simply uses the employee's attained age for the applicable distribution year and a presumed beneficiary who is 10years younger. The uniform table extends until the employee attains age 115, at which time the divisor becomes 1.9.

[2] Account Balance Used with Divisor to Determine the Minimum Distribution Amount

Once the divisor for the applicable distribution year has been determined, it must be applied to the employee's appropriate account balance (for defined contribution plans and IRAs) as defined by the regulations.[57] Normally if the plan year and the distribution year for the individual are the same calendar year, the account balance used to determine the current year's minimum is based on the last valuation date in the prior calendar year (which is generally December 31 for calendar plan years). Thus, for qualified plans and IRAs with calendar plan years, the employee will use the prior year-end's account balances; if the plan year is *not* the calendar year, the employee simply uses his/her account balance as of the end of the preceding plan year, which would ignore changes to the account balance that occurred after the end of the preceding plan year but still within the preceding calendar year.

If the prior year's account balance needs to be adjusted for changes after the end of the plan year but before the end of the calendar year, the regulations begin with the account balance as of the last valuation date in the calendar year immediately preceding the distribution year, then increase such value by contributions or forfeitures allocated to the account after the valuation date but before the end of the calendar year, and decrease it by distributions made after the valuation date but during the calendar year.[58] The 2002 final regulations permit contributions that are supposed to be allocated within the calendar year (but after the end of the valuation date) but were not actually made during the calendar year, to be excluded from the valuation.[59] Note that the regulations also require that rollover amounts or transfers from other plans after the valuation date but within the calendar year also be added to the account balance.[60] For situations in the second distribution year where the first minimum distribution was made after the end of the first distribution year but on or before April 1 of the second distribution year, the account balance used for the second distribution year may be decreased by the lesser of (1) distributions made between January 1, and April 1 of the second year or (2) the RMD for the first year.[61]

In summary, the regulations require that in determining the applicable account balance (for defined contribution plans and IRAs) for any distribution year, the employee's account balance as of the last valuation date in the calendar year immediately preceding the distribution year is to be used. Thus, for qualified plans and IRAs with calendar plan years, the participant will simply use the prior year's account balance; for qualified plans with fiscal plan years, the participant will need to use the prior fiscal year's account balance which may have to be revised.

Example: Dana is a participant in a SIMPLE IRA that operates on a calendar plan year basis. Since Dana's RBD = April 1, 2020, for her first distribution year of 2019, she will use her December 31, 2018, account balance in determining her 2019 minimum distribution amount. In subsequent years, she would use the prior calendar year's account balance to determine the minimum distribution amount for the current distribution year. Thus, if her SIMPLE IRA balance as of December 31, 2018, was $274,000 and her divisor for the 2019 year was 27.4, her first minimum distribution would be $10,000. Note that for the first year only, this payment may be delayed until April 1, 2020. In determining the second year's 2020 distribution, the prior account balance (December 31, 2019) may be reduced by the $10,000 first year distribution even though it was not actually made until April 1, 2020.

Example: For Lee's qualified plan which had an October 31 fiscal year, his first distribution year is 2021 and his divisor is 25.6 (as he has attained age 72). His account balance as of the last valuation date in the prior calendar year (which is October 31, 2020) is used, but it is increased for any contributions/forfeitures allocated to that account balance as of that valuation date but made afterwards (assuming he is working and eligible for future allocations) and decreased by any distributions made during 2020 after the October 31, 2020 valuation date. Assuming his

(uniform lifetime table), and §1.401(a)(9)9(c) (Joint and Last Survivor table), published in 84 Fed. Reg. 60,812. On November 12, 2020, the IRS published the new tables set forth in Updated Life Expectancy and Distribution Period Tables Used for Purposes of Determining Minimum Required Distributions, T.D. 9930, 85 Fed. Reg. 72,472 (Nov. 12, 2020). These new tables are effective for required minimum distributions beginning on January 1, 2022.

[56] Reg. §1.401(a)(9)-5, Q&A-4(a).

[57] Reg. §1.401(a)(9)-5, Q&A-3.

[58] Reg. §1.401(a)(9)-5, Q&A-3.

[59] Reg. §1.401(a)(9)-5, Q&A-3(b) (easing the calculation of the account balance as of the prior calendar year if the contributions have not yet been contributed).

[60] Reg. §1.401(a)(9)-5, Q&A-3(d).

[61] Reg. §1.401(a)(9)-5, Q&A-3(d).

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October 31, 2020 account balance was $100,000, increased later by a 2020 plan year employer contribution/forfeiture of $20,000, the account balance for the first distribution year would be $120,000, which is subject to a divisor of 25.6 for a first year minimum distribution of $4,687.50. There are no decreases to the 2020 account balance for any distributions as the first minimum distribution year begins in 2021 (unless of course actual distributions were made by Lee).

[3] Employee Dies After His/Her RBD

When the employee actually dies, the uniform table is still applicable in the year of death to determine the minimum payout for that distribution year.[62] For subsequent distribution years, the applicable divisor will depend upon whether and who was named as beneficiary. The rules of the statute state that where the employee begun distributions as of his/her RBD and then died, the remaining portion of the employee's interest must be distributed "at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death."[63] Note: the method of distribution being used under subparagraph (A)(ii) as the employee attained his/her RBD was the uniform table (with a presumed age difference between the employee and his presumed beneficiary to be 10 years) or the actual joint life expectancy if age difference between the employee and his named surviving spouse beneficiary was more than 10 years.

Another goal of the 2002 regulations was to permit the calculation of post-death minimum distributions to take into account an employee's remaining life expectancy at the time of death, thus allowing distributions *in all cases* to be spread over a number of years after death.[64] [Note: in the context where the employee dies prior to his/her RBD, his/her life expectancy was not considered in determining any post-death minimum distributions, as distributions had not yet commenced to the employee]. Prior to the SECURE Act, the uniform table was replaced with an appropriate single life expectancy table. The pre-SECURE Act rules worked as follows:

- If no beneficiary was named, the distribution period is to be the employee's life expectancy, calculated in the year of death, reduced by one for each subsequent year (i.e., the nonrecalculation method);[65]
- If a designated beneficiary was named but was not the spouse, the distribution period is the *longer* of:
  - o the beneficiary's remaining life expectancy, using the beneficiary's age in the year following the year of the employee's death, reduced by one for each subsequent year (i.e., the nonrecalculation method), or
  - o the employee's remaining life expectancy, calculated in the year of death, reduced by one for each subsequent year (i.e., the nonrecalculation method);[66]
- If the employee's spouse was the sole designated beneficiary, the distribution period is the *longer* of:
  - o the spouse's single life expectancy, calculated in the year following the employee's calendar year of death, to be *recalculated* each year while the spouse is alive, or
  - o the employee's remaining life expectancy, calculated in the year of death, reduced by one for each subsequent year (i.e., the nonrecalculation method), and
  - o for years after the spouse's death, the distribution period for the subsequent beneficiary is the spouse's life expectancy calculated in the year of death, reduced by one for each subsequent year.[67]

Example: De is born in June of 1948, which under the prior rules, gives her a RBD of April 1, 2019. Assume De dies in December of 2019, after her RBD of April 1, 2019, leaving her sister-in-law, Erin, as the sole beneficiary of De's IRA. The prior distribution rules apply as De died before January 1, 2020. De's age in 2019 is 71, and thus her life expectancy in the year of death is 16.3, reduced by one for each year thereafter (resulting in a 15.3 (16.3-1) divisor in the calendar year following De's death. Erin's date of birth is May 1950, and thus, she's 69 in 2019 and 70 in 2020 (with a life expectancy of 17.0, reduced by one for each year thereafter). Erin will use the longer of 15.3 or 17 in 2020, as the life expectancy divisor (non-recaluated).

Example: What if instead De named her daughter, Elyse, age 40 in 2019? Elyse may begin distributions in 2020, using her single life expectancy of 42.7 (for age 41), reduced by one year for each subsequent year. This allowed De to stretch distributions of her account balance for over 43 years. As an employee and his/her spouse are generally the same age or comparable age, the regulations permitted the employee to stretch out the distribution period by naming a much younger designated beneficiary (e.g., Elyse) and using that person's life expectancy (as it would be greater than the employee).

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[62] Reg. §1.401(a)(9)-5, Q&A-4(a).

[63] §401(a)(9)(B)(i).

[64] *See* Preamble, Prop. Reg. §1.401(a)(9)-0-§1.401(a)(9)-8, above, Note 15.

[65] Reg. §1.401(a)(9)-5, Q&A-5(a)(2).

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

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

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Example: What if instead De names her estate as beneficiary under the plan? Under the regulations, an *individual* must be named as designated beneficiary and thus an estate designation is treated as no designation, subjecting future distributions to the default rule. For employee who dies after their RBD, the default rule limits the remaining distribution period to De's single life expectancy, as of her birthday in the calendar year of death. During the year of death (2019), De was age 71 and the current life expectancy tables provide a divisor of 16.3 years. Thus, her estate must distribute 1/15.3 or 6.54% of her benefits beginning in 2020. For subsequent years, the divisor of 15.3 is reduced by one (the nonrecalculation method) (e.g., 14.3 for 2021, 13.3 for 2022, etc.).

Due to the loss of tax revenue that resulted from these stretch distributions, Congress reacted accordingly, thereby limiting the distribution period to 10 years (instead of the beneficiary's life expectancy) when an employee designates an individual beneficiary who is *not* an **eligible** designated beneficiary. Congress' goal was to limit the ability to stretch distributions over a designated beneficiary's lifetime except in the context of certain designated beneficiaries (known as ''eligible designated beneficiaries'') (e.g., the surviving spouse, a child who has not yet attained a majority,a disabled individual, a chronically ill individual, or a named beneficiary who is not more than 10 years younger than the employee).[68] One would have expected that Congress would have *amended* the distribution rules of §401(a)(9)(B)(i) as well (i.e., distributions to beneficiaries triggered by the employee's death *on or after* his/her RBD), as well as the distribution rules of §401(a)(9)(B)(ii), §401(a)(9)(B)(iii) (i.e., distributions to beneficiaries triggered by the employee's death *before* his/her RBD). *It did not,* making interpretation of its changes problematic.

SECURE ACT'S LEGISLATIVE CHANGES

The legislative changes made by the SECURE Act are not the model of statutory construction as they make the following changes in the context of defined contribution plans:

- First, Congress modifies §401(a)(9)(B)(ii) by retaining the five-year rule (which applies if the employee dies before his/her RBD), *but only* in the case where the beneficiary is not a designated beneficiary (i.e., the beneficiary named is not an individual (e.g., estate or charity)).[69] As the prior five-year rule had an exception under §401(a)(9)(B)(iii) for named designated beneficiaries, the question remains whether it continues to have such an exception or whether an exception no longer exists.
- Next, Congress creates a new 10-year rule under §401(a)(9)(B)(ii) in the case where a beneficiary has been designated; thus, the 10-year rule appears to apply to any individual named as beneficiary (whether or not they are an eligible designated beneficiary), leaving the five-year rule applicable only where there is no designated beneficiary.[70] As Congress simply substituted ''10'' for ''5'' for §401(a)(9)(B)(ii), one would assume it operates the same as the five-year rule (i.e., distributions in full after 10 years). At this stage, one would have assumed that the new 10-year rule would have an exception for ''eligible designated beneficiaries'' and that the five-year rule no longer had an exception.
- Next, Congress applies the new 10-year rule whether or not distributions have begun in accordance with §401(a)(9)(A) (i.e., whether the employee dies *before* his/her RBD or *on or after* his/her RBD).[71] But, it is not clear how the new 10-year rule affects distributions to a designated beneficiary once the employee dies *after* his/her RBD, as §401(a)(9)(B)(i) was not specifically *amended*.
  - Note: Under the 2002 final regulation, the IRS interpreted §401(a)(9)(B)(i) to permit distributions over the employee's remaining life expectancy even if no designated beneficiary was named; whereas, if a beneficiary were designated, distributions could be made over the *longer* of the employee's remaining life expectancy or the beneficiary's life expectancy.
- Then, Congress applies the exception of §401(a)(9)(B)(iii) (i.e., the life expectancy rule) only in the case of eligible designated beneficiaries.[72] The class of eligible designated beneficiaries includes: the surviving spouse; a child of the deceased employee who has not reached majority;

[68] SECURE Act, §401(a)(2), adding §401(a)(9)(E)(ii). Upon the death of a child who has not reached the age of majority, the 10-rule will apply as of the date of the child's death. *See* amended §401(a)(9)(E)(iii). The term ''majority'' in the context of a minor child is not defined by the Act. Presumably, it is to be determined in accordance with federal law. While grandchildren are excluded, it is not known whether stepchildren are included or children under the guardianship of the decedent. Disabled beneficiaries must meet the definition of §72(m)(7) (i.e., recipients of Social Security disability benefits). Chronically ill beneficiaries must meet the definition of §7702(B)(c)(2)(A) (i.e., an illness that is indefinite and one that is reasonable expected to be lengthy in nature).

[69] SECURE Act, §401(a)(1), adding §401(a)(9)(H)(i).

[70] SECURE Act, §401(a)(1), adding §401(a)(9)(H)(i).

[71] SECURE Act, §401(a)(1), adding §401(a)(9)(H)(i).

[72] SECURE Act, §401(a)(1), adding §401(a)(9)(H)(ii).

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beneficiaries who are disabled; beneficiaries who are chronically ill; and beneficiaries who are not more than 10 years younger than the deceased employee.[73] However, Congress does not amend the title of §401(a)(9)(B)(iii), which still states, ''Exception to 5-year rule for certain amounts payable over life of beneficiary.'' Thus, it is unclear whether distributions to eligible designated beneficiaries are an exception to the five-year rule or the new 10-year rule.

- The class of ''eligible designated beneficiaries'' will also need further guidance from the IRS.

  - §One of the members of this class is ''a child of the employee who has not reached majority (within the meaning of subparagraph (F)).''[74] The new legislation does not define the term ''majority,'' and neither does §401(a)(9)(F); however, the attendant regulations associated with §401(a)(9)(F) state that a child may be treated as having not reached majority if he/she has not completed a ''specified course of education'' and is under age 26.[75] Some practitioners regard the lack of the definition as to what is majority age to be a major flaw of the legislation. Generally, the age of majority is when a child becomes an adult in accordance with state or federal law. The age of majority is age 18 in most states, but Alabama and Nebraska have set the age of majority at age 19 and Mississippi sets it as age 21.[76] Some states also recognize age 23 as the age that governs for child support purposes.[77] One would have assumed that the I.R.C. as federal law would have contained a federal definition of the age of majority for minimum distribution purposes. Is it the same definition as used in determining a ''qualified child'' under §152(a)(1), which in turn determines one's deduction for personal exemptions? Such definition asks if the child has not yet attained age 19 as of the close of the calendar year in which the taxable year of the taxpayer begins, unless such child is also a student in which case the age extends to age 24.[78] Alternatively, should one use the age set forth under the Affordable Care Act, group health plans offered by large employers are required to offer coverage to an adult child of a plan participant until the child attains age 26, regardless of the child's marital status, full-time student status, or financial support by his/her parent.[79] Is age 26 the new definition of majority?

  - Another member of this class of ''eligible designated beneficiaries'' is a disabled person (within the meaning of §72(m)(7)) or a chronically ill individual (within the meaning of §7702B(c)(2)). The new legislation does not clarify *when* an individual is determined to be disabled or chronically ill.[80] For example, what if a minor child becomes disabled during his/her teenage years – does he/she become a disabled person for the remainder of his/her life, thereby allowing him/her to use the life expectancy rule?

Legislative History to the SECURE Act

Due to the ambiguities in the statute, one would next proceed to consult the Act's legislative history. The SECURE Act's legislative history, in the context of defined contribution plans, expands the five-year rule to a 10-year rule, which is to be applied for distributions to designated beneficiaries after death, regardless of whether the employee dies *before, on, or after* his/her RBD.[81] It describes the 10-year rule as requiring distribution of the employee's entire benefit by the end of the tenth calendar year following the

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[73] SECURE Act, §401(a)(2), adding §401(a)(9)(E)(ii). Upon the death of a child who has not reached the age of majority, the 10-rule will apply as of the date of the child's death. *See* the amended §401(a)(9)(E)(iii). The term ''majority'' in the context of a minor child is not defined by the Act. While grandchildren are excluded, it is not known whether stepchildren are included or children under the guardianship of the decedent. Disabled beneficiaries must meet the definition of §72(m)(7) (i.e., recipients of Social Security disability benefits). Chronically ill beneficiaries must meet the definition of §7702(B)(c)(2)(A) (i.e., an illness that is indefinite and one that is reasonable expected to be lengthy in nature).

[74] SECURE Act, §401(a)(2), modifying §401(a)(9)(E). The reference to a child in §401(a)(9)(F) refers to the treatment of certain payments made to a child as being treated as it they had been paid to the surviving spouse if such amounts will become payable to the surviving spouse upon such child reaching majority.

[75] See above, Note 24.

[76] *See* Elissa Suh, *The age of majority (and the UTMA account distribution age) in every state*, Policygenius (Dec. 20, 2020), available at Age of Majority by State as of 2021 (policygenius.com).

[77] See Elissa Suh, *The age of majority (and the UTMA account distribution age) in every state*, Policygenius, (Dec. 20, 2020), available at Age of Majority by State as of 2021 (policygenius.com).

[78] §152(c)(3)(A)(i)-§152(c)(3)(A)(ii).

[79] The Patient Protection and Affordable Care Act (PPACA) was originally enacted on March 23, 2010, as Pub. L. No. 111-148, as modified by the Health Care and Education Reconciliation Act of 2010 (HCRA) on March 30, 2010, as Pub. L. No. 111-152, and referred to as the Affordable Care Act (ACA), §1001 (adding PHSA §2714; HCRA §2301).

[80] Note under the attendant regulations for §401(a)(9)(F), a child who is disabled within the meaning of §72(m)(7) continues to be disabled even if he/she reaches the age a majority, provided the child continues to be disabled. *See* Reg. §1.401(a)(9)-6, Q&A-15.

[81] See Ways and Means Report, above, Note 9, at 108.

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year of the employee's death (which is consistent with the application of the five-year rule).[82]

Eligible designated beneficiaries are extended an *exceptionto the 10-year rule*, regardless of whether the employee dies before, on, or after his/her RBD, which allows distributions over life or life expectancy of the beneficiary, beginning in the year following the year of death; but the legislative history suggests that this exception is similar to the prior rule (which only existed for deaths *before* the RBD), when distributions were allowed over the life or life expectancy of an eligible beneficiary. The legislative history then goes on to describe who is an eligible designated beneficiary.

But nothing in the legislative history alludes to the present law, under the regulations, as to how distributions are to be modified in the context of the employee dying *on or after* his/her RBD. Thus, it appears that the 10-year rule applies to any designated beneficiary, regardless of whether the employee dies before, on, or after his/her RDB. The legislative history is silent if the employee dies after his/her RBD and doesn't name a designated beneficiary – should the present rule that begins distributions over the employee's remaining life expectancy continue? The legislative history is silent if the employee dies *on or after* his/her RBD and names an eligible designated beneficiary – should the present rule that affords the beneficiary the *longer* of the employee's remaining life expectancy or the beneficiary's life expectancy continue?[83]

Legislative History to the SECURE 2.0 Act

As a sequel to the SECURE Act, the House Committee on Ways and Means approved by voice vote on May 5, 2021, a new bill entitled "Securing a Strong Retirement Act of 2021 (referred by practitioners as SECURE 2.0)."[84] One of the provisions of that bill is to raise the triggering age for required minimum distributions from 72 to 75 over the course of a number of years. In the legislative history for that bill, the changes made to the distribution rules by the SECURE Act are summarized as follows:[85]

- If the individual does not have a designated beneficiary and dies before the RBD, distributions are to be made in accordance with the five-year rule; whereas if the individual dies on or after his/her RBD, distributions are to be made for the remaining life expectancy of the deceased individual;
- If the individual has an eligible designated beneficiary, distributions are to be made over the life or life expectancy of the beneficiary, regardless of whether the individual dies before *or* on or after his/her RBD. In the case of an ineligible designated beneficiary, distributions are to be made within 10 years after the individual's death, regardless of whether the individual dies before *or* on or after his/her RBD.

Hence, the staff of the Joint Committee of Taxation interprets the new distributions rules as preserving the goal of calculating post-death minimum distributions that take into account the employee's remaining life

[82] See Ways and Means Report, above, Note 9,at 108-09. *See also* Staff of the Joint Comm. On Tax'n, Description of H.R. 1994, The *Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019*, 116th Cong., 1st Sess. (2019), at 74-75.

[83] There is an interesting case out of the Eighth Circuit, *Mayo Clinic v. United States.,* No. 19-3189 (8th Cir. May 13, 2021), on the question of whether a tax regulation is a valid interpretation of the I.R.C., and thus entitled to deference by the courts. The Eighth Circuit begins its analysis of a regulation's validity with the following standards: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . .[T]he question . . . is always, simply, *whether the agency has stayed within the bounds of its statutory authority*," quoting from the case of *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (emphasis in original). The court then states that it is imperative to understand "the regulatory background against which a [tax statute] was enacted" to ascertain "the limited nature of the problem the provision was enacted to address," quoting from the case of *United States v. Quality Stores, Inc*., 572 U.S. 141, 151 (2014). Unlike other courts, the Eighth Circuit did not focus solely on the statutory language, but conducted an examination of the evolution of the statute from its inception to the present in order to determine its intent. As to the role of *legislative history* in interpreting the words of the statute, it quotes from the *Brundage v. Commissioner*decision, 54 T.C. 1468, 1473-74 (1970), stating that "the congressional committee reports . . . are not inconsistent with the [Commissioner's] regulation but offer no active support of it." Thus, the legislative history through the congressional committee reports, while they may not forbid the IRS' regulatory interpretation, they don't affirm such interpretation either, making them of limited usefulness.

[84] *Committee on Ways and Means*: On May 5, 2021, Full Committee held a markup on the Budget Views and Estimates Letter; and H.R. 2954, the *Securing a Strong Retirement Act of 2021*. The Budget Views and Estimates Letter was adopted, and H.R. 2954 was ordered reported, without amendment. That bill would raise the RBD age 72 to age 75 over a number of years. H.R. 2954, §105.

[85] *See* Staff of the Joint Comm. On Tax'n, Description of H.R. __, The "Securing a Strong Retirement Act of 2021," (referred to by practitioners as SECURE 2.0), Scheduled for Markup by the House Committee on Ways and Means on May 5, 2021), JCX-21-21 (May 3, 3021).

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expectancy at the time of death *but only* in the context where the individual dies on or after his/her RBD and does not name a designated beneficiary. It eliminates that rule when the employee has named a designated beneficiary, whether or not such beneficiary is an eligible designated beneficiary.

Possible Interpretations

At this point, the IRS and Treasury are going to have to the following choices:

- **Interpretation #1:**

Apply the existing five-year rule to cases where there is no designated beneficiary, *and* the employee dies before his/her RBD. Create an exception to the five-year rule for eligible designated beneficiaries only, as it applies when the employee dies *before* his/her RBD; such exception would allow the eligible designated beneficiaries to continue to use the life expectancy rule (that exists when the employee dies before his/her RBD), but would allow such beneficiary to use the longer of the [employee's remaining life expectancy, beneficiary's life expectancy] when the employee dies on or after his/her RBD. Ineligible designated beneficiaries would use the 10-year rule, regardless of when the employee dies; such rule would not require annual distributions, but instead distributions in full by the 10th year following the employee's death.

- **Interpretation #2:**

Retain the five-year rule for cases where there is no designated beneficiary, *and* the employee dies before his/her RBD. Apply the 10-year rule where there is a designated beneficiary, regardless of when the employee dies. Create an exception to the 10-year rule only for eligible designated beneficiaries, to be applied when the employee dies *either* before his/her RBD *or* on or after his/her RBD; such exception would require the eligible designated beneficiaries to use the life expectancy rule in *both* contexts — when the employee dies either before *or* on or after his RBD; but, it would not permit eligible designated beneficiaries to use the longer of the [employee's remaining life expectancy, beneficiary's life expectancy] when the employee dies *on or after* his/her RBD (which is the interpretation under the current regulations). Similar to the prior interpretation, ineligible designated beneficiaries would use the 10-year rule, regardless of when the employee dies; such rule would not require annual distributions, but instead distributions in full by the 10th year following the employee's death.

Both interpretations leave open the question as to the computation of the minimum distribution if **no designated beneficiary has been named** and the employee dies on or after his/her RBD. If the rules under the current regulations prevail, distributions should commence over the employee's remaining life expectancy (on a nonrecalculation basis). **For many of us, such interpretation is unsettling** as it permits a distribution *over* 10 years when no beneficiary is named (e.g., employee reaches RBD and dies at age 74, with a life expectancy of 14.1), as contrasted with naming an ineligible designated beneficiary, who would be limited to a 10-year payout period. Thus, at issue is whether the goals of the 2002 final regulations can be harmonized with the SECURE Act changes in the context of an ineligible designated beneficiary being named or no designated beneficiary is being named, when the employee dies *on or after* his/her RBD. The IRS must ask itself how Congress intended to change the post-death distribution rules as interpreted under the current regulations at Reg. §1.401(a)(9)-5, Q&A-5(a).

- **Interpretation #3:**

There is an alternate interpretation if the IRS concludes that Congress did not seek a total overhaul of the distribution rules under §401(a)(9)(B)(i), when benefits have already commenced as of the employee's RBD. Under this interpretation, if the employee dies before his/her RBD, the five-year rule prevails if no beneficiary has been made, and the 10-year rule prevails if a designated beneficiary has been made, with an exception to such rule if the beneficiary is an eligible designated beneficiary (in which case the life expectancy rule would apply). However, if the employee survives to his/her RBD and then dies, where distributions have already begun under §401(a)(9)(A)(ii), preserve the existing rules under the 2002 regulation, but caveat distributions to ineligible designated beneficiaries to be limited to the *longer* of [employee's remaining life expectancy, 10 years following the death of the employee] so as to honor the new requirement of a 10-year payout. An eligible designated beneficiary would have the benefit of a distribution period equal to the *longer* of the [employee's remaining life expectancy or the beneficiary's remaining life expectancy] (with the special rule for surviving spouses who can recalculate his/her remaining life expectancy).

This interpretation preserves the IRS' 2002 goal of treating all post-death distributions the same when the employee dies after his/her RBD, but subjects it to the new caveat that ineligible designated beneficiaries are limited to 10-year payouts. It avoids the dilemma of affording a distribution over the employee's remaining life expectancy if no beneficiary has been named, but providing ineligible designated beneficiaries a distribution over only 10 years (and not the employee's remaining life expectancy, if greater). Certainly, the scoring of the tax expenditure savings in using a lon-

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ger of the employee's remaining life expectancy or a 10-year payout for ineligible designated beneficiaries would not be significant as the maximum remaining life expectancy for an employee who attains RBD (under the new rule of age 72) is 15.5 years, as opposed to 10 years.[86] However, such an interpretation will undoubtedly need a technical revision to the SECURE Act to accomplish such result.

IRS Publication 590-B for 2020 Returns

While it's too soon to see proposed regulations under §401(a)(9) that reflect the SECURE Act changes, we have a glimpse of the IRS' thinking in its recently published Publication 590-B for 2020 Returns, applicable for distributions from IRAs.[87]

In the context of the IRA owner dying *before* his/her RBD, the Publication does the following:

- It affirms the use of the five-year rule when no individual designated beneficiary is named and describes that rule as requiring 100% of the IRA to be distributed by December 31 of the year containing the fifth anniversary of the owner's death (e.g., the IRA owner dies in 2019, the beneficiary would have to fully distribute the plan by December 31, 2024, and is not required to take distributions prior to that date).

- It confirms that an eligible designated beneficiary may take required minimum distribution using his/her life expectancy, unless he/she elects to take distributions using the five-year rule or the 10-year rule, whichever rule applies (noting that the five-year rule never applies if the owner dies on or after his RBD). However, the IRS suggests that the eligible designated beneficiary can only elect the 10-year rule if the owner died *before* reaching his/her RBD; such an interpretation precludes such beneficiary from electing the 10-year rule once distributions have already commenced to the IRA owner (i.e., the IRA attains his/her RBD and triggered minimum required distributions).[88] Such interpretation does not appear consistent with the statutory changes as the new 10-year rule is to apply "whether or not distributions of the employee's interests have begun in accordance with subparagraph (A)."[89]

- Publication 590-B, as initially drafted, suggests that an ineligible designated beneficiary must take annual minimum distributions using his/her life expectancy in years one through nine; however, because such beneficiaries are subject to the 10-year rule, the beneficiary is required to fully distribute monies from the IRA by the 10th anniversary of the owner's death. In the example of a non-spouse beneficiary (e.g., adult son is the beneficiary of the father's IRA), the son continues to take payments over his life expectancy after the father dies in 2020).[90] As a result, it would appear that the IRS is not interpreting the 10-year rule the same as the five-year rule, because annual distributions are not required under the current five-year rule.[91] The IRS must have realized its mistake and recently noted that the 2020 Publication 590-B is being revised to clarify the paragraph on the 10-year rule under the section entitled "Figuring the Beneficiary's Required Minimum Distribution."[92] Under the announcement, the IRS sets forth an alternative example in which case the owner of a traditional IRA dies in 2020 at age 74, naming his brother (age 65 in 2021) as the designated beneficiary. As the brother is an eligible designated beneficiary as he is less than 10 years younger than the owner, he will use Table I to produce a life expectancy of 21.0 in 2021 for purposes of computing his required minimum distribution. Elsewhere in Publication 590-B, the IRS does describe the 10-year rule as requiring the beneficiary to fully distribute the IRA by the 10th anniversary of the owner's death.

[86] Even under the new mortality tables applicable beginning in 2022 for determining required minimum distributions, the life expectancy of an age 72 employee is 17.2 years. *See* Reg. §1.401(a)(9)-9(b) Single Life Table, above, Note 52.

[87] IRS Publication 590-B, above, Note 50.

[88] *See* IRS Publication 590-B, above, Note 50, p. 11.

[89] SECURE Act, §401(a)(1), adding §401(a)(9)(H)(i)(II).

[90] *See* the first example on page 12 of the IRS Publication 590-B, above, Note 50, where the IRA owner dies in 2020 (hence, the new distribution rules are applicable) and the son, age 52 in the year of the owner's death, is designated beneficiary. In the example, the son is to use his life expectancy in 2021 (i.e., 31.4 at age 53) for purposes of computing his minimum distribution for 2021. The son is to reduce his life expectancy by one for each year thereafter; however, the entire account must be fully distributed within 10 years after the owner's death.

[91] Stephen Tackney, Deputy Associate Chief Counsel (Employee Benefits) (Employee Benefits, Exempt Organizations, and Employment Taxes), Office of Chief Counsel, IRS, at the ABA Section of Taxation May 2021 meeting cautioned practitioners not to read too much into the facts of the examples used in the Publication. The Publication was not intended to set policy on the question of how and when the 10-year rule applies. Treasury and the IRS are currently working on proposed regulations under §401(a)(9).

[92] *See* IRS, Revisions to the 2020 Publication 590-B (May 13, 2021).

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In the context of the IRA owner dying *on or after* his/her RBD, the Publication applies the ''at least as rapidly'' rule as follows:

- If the beneficiary is not an individual, retain the existing rule under the regulations to allow for distributions over the employee's life expectancy in the year of death, reduced by one for each year thereafter.[93]
- If the beneficiary is a designated beneficiary but not an eligible designated beneficiary, the Publication appears to deviate from the existing rule under the regulations and require the entire account balance to be fully distributed within 10 years after the owner's death, thereby prohibiting the beneficiary from using the *longer* of the employee's life expectancy in the year of death or 10 years.[94]
- If the beneficiary is an eligible designated beneficiary, the Publication retains the existing rule to allow for distributions over the *longer* of (1) the beneficiary's single life expectancy, determined in the year following the employee's death, reduced by one for each year thereafter or (2) the employee's life expectancy in the year of death, reduce by one-year for each year thereafter.[95] However, in the context of a surviving spouse as the sole designated beneficiary, the spouse may recalculate his/her life expectancy for each year thereafter.

The Publication does not explain why the IRS interpreted the SECURE Act changes in these manners. Under the initial example in the Publication, the IRS was not interpreting the 10-year rule, as it applies if the IRA owner dies before his/her RBD, consistent with the five-year rule, which does not require *annual* distributions. Nothing in the statute or the legislative history suggested that the 10-year rule is to operate differently than the five-year rule, other than substituting ''10'' for ''5.'' Likewise, there appears to be no policy reason for restricting distributions to ineligible designated beneficiaries to a 10-year payout, when the IRA owner dies *at or after* his/her RBD, while retaining the use of the employee's remaining life expectancy in the case where a beneficiary was not named. Congress' real ''bang for the buck'' was to limit the stretch in the distribution options for non-minor children, grandchildren, etc. of the employee over their life expectancies. While the IRA modified its example in the Publication in the context of an eligible designated beneficiary, it did not provide a new example in the context of a designated beneficiary that is not an eligible designated beneficiary. Thus, we'll have to wait and see the approach taken by Treasury and the IRS in the proposed regulations.

How and When the Beneficiary Designation Is Made

Our description of the RMD rules concludes with the issue of how and when the beneficiary designation is made. This portion of the rules was left unaffected by the recent legislative changes. The 2002 final regulations permit an underlying beneficiary of a trust to be an employee's designated beneficiary for purposes of determining RMDs when the trust is named as beneficiary of the retirement plan. To do so, the regulations require that the trust be valid under state law, be irrevocable by its terms or becomes irrevocable upon the death of the employee, name and identify the individuals who are beneficiaries of the trust, and provide certain documentation to the plan administrator.[96] The regulations allow a deadline of October 31st of the year following the calendar year of the employee's death for providing the necessary beneficiary documentation.[97]

The regulations also allow the determination of the beneficiary(ies) to be deferred until September 30 following the calendar year of the employee's death.[98] This flexibility in determining the beneficiary(ies) may be highly beneficial for estate planning purposes, as it permits the alteration of the beneficiary designation following the employee's death due to subsequent distributions, divisions of plan assets, or disclaimers (e.g., the so-called ''3-Ds permitted changes'' to the beneficiary designation).[99] Hence, a beneficiary may be eliminated from the beneficiary group due to subsequent distribution of benefits,

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[93] *See* the second example on page 12 of the IRS Publication 590-B, above, Note 50, where the owner dies in 2020 at age 80, leaving his IRA to his estate. The account balance at the end of 2020 was $100,000. In 2021, the RMD in the context of a beneficiary that has not been designated is the owner's life expectancy in the year of death (i.e., 10.2), reduced by one.

[94] Under the header *Owner Died On or After Required Beginning Date*, of page 10 of the IRS Publication 590-B, above, Note 50, the noneligible designated beneficiary is not eligible for the owner's life expectancy distribution stream, but instead must have distributions complete within 10 years of the death of the owner.

[95] See Note 94, above, stating that an eligible designated beneficiary must use the longer of his/her life expectancy or the owner's life expectancy, in the context when the owner died on or after the required beginning date.

[96] Reg. §1.401(a)(9)-4, Q&A-5. The documentation that must be presented to the plan administrator is described in A-6 of Reg. §1.401(a)(9)-4. This rule does not preclude a trust that fails the requirements from being named as a beneficiary. However, in such a case, the employee will be treated as having no designated beneficiary for purposes of §401(a)(9).

[97] Reg. §1.401(a)(9)-4, Q&A-6.

[98] Reg. §1.401(a)(9)-4, Q&A-4(a). This change was made in response to the commentator's concerns that adequate time be afforded to calculate and distribute the required minimum amount. *See* Preamble, Reg. §1.401(a)(9), above, Note 7.

[99] *See* Preamble, Reg. §1.401(a)(9)-0-§1.401(a)(9)-9, above,

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beneficiary designations may be divided in accordance with a division of plan assets, or a beneficiary may disclaim benefits under the plan, constricting the beneficiary group for subsequent distribution. This flexibility permits further extension of the remaining payout period based on post-death estate planning recommendations.

Example: Should Lee care about his beneficiary designation once minimum required distributions begin?

The beneficiary designation is highly relevant in determining the applicable payout period for the *beneficiary*, regardless of whether the participant dies prior to or after his/her RBD. To maximize the payout period for the designated beneficiary, the employee must specify the appropriate beneficiary or class of beneficiary; otherwise the regulations prescribe default rules in the case of no beneficiary designation. Once a beneficiary designation has been made, the following three ''Ds'' permit alteration by elimination (not addition) of the group of the beneficiaries between the calendar year of the participant's death and the subsequent September 30 by either distribution of benefits; disclaimer of benefits; and/or division of plan assets.

Example: What if Lee named Dana as his sole beneficiary, with Nora as a contingent beneficiary in the event Dana predeceases Lee, and Lee dies? If Lee names Dana as sole beneficiary upon his death, Dana may use her own life expectancy (recalculated) if Lee dies prior to his RBD, or Dana may use Lee's remaining life expectancy or her own (whichever is longer) if Lee dies on or after his RBD. (Note Nora need not be taken into account as a multiple beneficiary as she is entitled to benefits only if Dana were to predecease Lee.) However, if Dana decides to disclaim her interest after Lee's death, subsequent distributions to Nora would have been based on her life expectancy under the prior rules, which now are limited to 10 years if Lee dies in 2020 or later.

Normally the regulations prescribe that a designated beneficiary who dies during the period between the employee's date of death and the applicable September 30 date continues to be treated as a beneficiary for purposes of determining the distribution period.[100] However, if the designated beneficiary was the spouse who died during this intervening period, then the regulations use the beneficiary designated by the surviving spouse (upon his/her death) to determine the continued divisor. In effect, the regulations permit the spouse's death to be treated as the spouse's disclaimer during the intervening period, thereby using the other beneficiary(ies) for the determination of future divisors.

So in this example, should Dana die, Nora would be the beneficiary as of the September 30 following the calendar year of Lee's death in 2020, and her applicable divisor would be determined according to the beneficiary rules applicable to the employee dying on or after his/her RBD.

Example: Assume Lee named ''his children'' (*e.g.*, John, Nora, Christine and Brigid) as the designated beneficiaries as of the date of death, but Brigid died unexpectedly during 2021. Under the regulations, the determination of beneficiary(ies) does not have to be made until September 30th of the calendar year following Lee's date of death. Thus, if Lee's four children were alive on his date of death, but Brigid died unexpectedly before September 30, 2021, there are still four designated beneficiaries for the purposes of the minimum required distribution calculation (Brigid should have disclaimed in order to have been disregarded); under the prior rules, the shortest life expectancy of these four children would have been used as the divisor under the pre-SECURE Act rule, reduced by one year for each subsequent distribution year (the nonrecalculation method). Under the new SECURE Act changes, distributions to Lee's children (who are no longer minor) would be limited to 10 years.

Example: Instead, let's assume Lee named ''his living children and for any predeceased children, their descendants'' (*e.g.*, John, Nora, Christine, and Brigid's daughter who survives her) as the designated beneficiaries as of the date of death. The final regulations would require the use of the shortest life expectancy of the three children and Brigid's daughter in determining the distribution period, under the prior rules. Recommendations were made to the IRS to grant the trustee of the plan the power to split the plan assets or IRA into four separate accounts, so that distributions may be payable over each individual beneficiary's life expectancy for his/her account. The final regulations provided that separate accounts for various beneficiaries may be established; however, for purposes of the minimum required distribution rules, separate accounts would have to be established by the end of the calendar year following Lee's death.[101]

Example: Assume Lee names a charity and his daughter, Nora, as joint 50% beneficiaries of his IRA as of his date of death. Assume that the IRA distributes 50% of the account balance to the charity on or before the end of the calendar year following Lee's death (2010); Nora is the only remaining designated beneficiary as of September 30, 2011. Under the prior rules, distributions could be made over her life expectancy; however under the new rules, distributions to a non-minor child will be limited to 10 years.

The final regulations permit a beneficiary to be eliminated after the date of death but before the Sep-

Note 7.

[100] Reg. §1.401(a)(9)-4, Q&A-4.

[101] Reg. §1.401(a)(9)-8, Q&A-2.

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tember 30th of the following calendar year either through distribution, division of assets in separate shares, or disclaimer. Here the charity has been eliminated through distribution. Thus, Lee's daughter is the sole named beneficiary and may either use her actual life expectancy or Lee's remaining life expectancy under the prior rules.

Example: What if Lee dies in 2020 and designates his brother (with a date of birth of October 1959, hence age 61 during 2020)? Under the new distribution rules, because Lee's named beneficiary is not more than 10 years younger than Lee, distributions may be made over the brother's life expectancy, beginning in 2021. The brother's life expectancy at age 62 (2021) is 23.5 years, which provides a more generous distribution period than the 10 year rule.

Example: What if Lee had a former spouse (Alice) who had secured a qualified domestic relations order (QDRO), allowing her to attach some or all of Lee's benefits under the plan? Do the regulations recognize Alice as a former spouse?

The regulations permit a former spouse to be treated as a spouse (or surviving spouse) for purposes of the minimum distribution rules, regardless of whether the terms of the QDROs specify such treatment.[102] Thus payments from Lee's account balance will be determined as of his RBD, using the distribution period from the table (assuming joint expectancy of the employee and spouse) or the actual joint life expectancy of Lee and Alice (if their ages differed by more than 10 years). Treatment of this portion of his account will be the same as discussed above for a spouse's distribution either before or after Lee's RBD.

CONCLUSION

This article has attempted to guide the reader through the complex tax rules that affect distributions from qualified defined contribution plans and IRAs. Because the I.R.C. affords significant tax shelters to qualified plans and IRAs, it behooves the individual to maximize deferrals under these plans, provided they are consistent with his/her overall needs and goals. Knowing when to begin and cease distributions and who to name as beneficiary is of paramount importance when taking advantage of the minimum distribution rules. Due to the potential of a 50% excise tax penalty for failure to satisfy the minimum required distribution rules, clarification by the IRS regarding the impact of the changes made by the SECURE Act is clearly necessary. Undoubtedly, the IRS will issue proposed changes to its regulations, requesting comments from the practitioner community. In the meantime, the author cautions individuals to proceed carefully in applying the new rules, especially in computing any required minimum distributions beginning in 2021. This author certainly looks forward to reading the IRS's proposed regulations!

[102] Reg. §1.401(a)(9)-8, Q&A-6.

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