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Kathryn J. Kennedy

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The IRS's Proposed Regulations on the Minimum Distribution Rules: Post-SECURE Act

By Kathryn J. Kennedy[*]
University of Illinois Chicago School of Law
Chicago, IL

INTRODUCTION

The required minimum distribution (RMD) rules applicable to employer-provided defined contribution plans qualified under §401(a)[1] and Individual Retirement Accounts (IRAs) under §408 were radically altered by the SECURE Act of 2019.[2] Such minimum distribution rules force distributions from these plans, so that Congress can begin to collect the income tax on such distributions. These rules have been devised as a tax penalty provision to prevent employees and their beneficiaries from totally deferring benefits under a qualified retirement plan, 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.[3] These RMD rules are set forth in §401(a)(9) applicable to qualified plans under §401(a);[4] however, they are also incorporated by reference for IRAs,[5] 403(b) plans,[6] and §457

[*] Kathryn J. Kennedy is a professor of law and Director of the Center for Tax Law and Employee Benefits at the University of Illinois Chicago School of Law, Chicago, IL. The author would like to thank Barry Salkin of The Wagner Law Group for his thoughtful and insightful comments, as well as school's Instructional & Student Services Librarian, Philip Johnson, for his assistance in researching materials used in this article. Portions of this article originally appeared in Kathryn Kennedy, *Primer of the Code's Required Minimum Distribution Rules: Post-SECURE Act,* 49 Tax Mgmt. Comp. Plan. J. No. 6 (June 4, 2021).

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[1] All section references herein are to the Internal Revenue Code of 1986, as amended (the Code), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[2] *See* §114 and §401 of Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), 2019, as Division O of the Further Consolidated Appropriations Act, Pub. L. No. 116-94.

[3] Section 401(a)(9) was added to the Code by Pub. L. No. 87-792, the Self-Employed Individuals Retirement Act of 1962. It was expanded to all qualified plans by Pub. L. No. 97-248, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), effective in 1984. The amendments made by Pub. L. No. 98-369, the Deficit Reduction Act of 1984 (DEFRA), repealed §401(a)(9) legislation enacted by TEFRA. The next significant legislation affecting §401(a)(9) was Pub. L. No. 99-514, the Tax Reform Act of 1986 (TRA '86) and proposed regulations were published in the Federal Register on July 27, 1987. Pub. L. No. 104-188, Small Business Job Protection Act of 1996 (SBJPA) added the new required beginning date to allow non-5% owners to defer distribution until the later of the April 1 of the calendar year following the calendar year in which the employee attains age 70½ or the calendar year of retirement. 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).

[4] If an employee is a participant in more than one qualified plan, the plans in which the employee participates are not permitted to be aggregated for purposes of satisfying the minimum distribution rules. Thus, the distribution of the benefit of the employee under each plan must separately meet the requirements of §401(a)(9). *See* Prop. Reg. §1.401(a)(9)-1(a)(2), REG-105954-20, RIN 1545-BP82, Required Minimum Distributions, 87 Fed. Reg. 10,504 (Feb. 24, 2022).

[5] 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 distribution rules after the death of the owner of the Roth IRA, with a 50% penalty if such distributions are not made. Changes to the Roth IRA's distribution rules are also proposed in these regulations. *See* Prop. Reg. §1.401(a)(9)-1(a), 87 Fed. Reg. 10,504, 10,523. Reg. §1.408A-6 governs the minimum distribution rules applicable to Roth IRAs under §408A.

[6] §403(b)(10). Plan sponsors of 403(b) plans should refer to Prop. Reg. §1.403(b)-6(e) for the specific minimum required distribution rules applicable to such plans. The IRS specifically requested comments regarding required minimum distributions from §403(b) plans. *See* Preamble, 87 Fed. Reg. 10,504, 10,519. There are also special rules applicable for benefits accruing before De-

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eligible deferred compensation plans.[7] The rules have very effective ''teeth'' as they subject the amount that should have been distributed but wasn't to a 50% excise tax.[8]

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 their employees and/or his/her named beneficiary, in lieu of installment and annuity options. Such choice negates the possibility of extending distributions from the plan under an installment or annuity form of payment.[9] Thus, an individual may have to roll over a lump sum distributions into an IRA to take advantage of these deferral rules. 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 nonspouse beneficiaries may only be able to roll such monies into an inherited IRA, in the name of the deceased beneficiary. When a nonspouse 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.[10]

The RMD rules allow the individual to make distributions over a period of years (i.e., installment payouts) and upon the individual's death, to continue to make distributions to a designated beneficiary. The IRS made sweeping changes to the final regulations under the RMD rules in 2002, simplifying the rules and permitting greater deferral periods.[11] Prior to the SECURE Act, these rules permitted certain distributions over the *beneficiary's* life expectancy, thereby allowing individuals to ''stretch'' the distribution over a longer period of time after the individual's death (for example, the employee names his daughter, who is age 46 as of the calendar year of the employee's death; the daughter was able to use her actual life expectancy of 37.9 years for purposes of subsequent distributions to her). In order to raise much needed tax revenue, the SECURE Act limits those beneficiaries who can take advantage of these ''stretch'' distribution rules.

The SECURE Act made two significant changes to the RMD rules:

- First, it changed the employee's *age* at which it defines the required beginning date (RBD), from age 70½ to 72, thereby delaying the triggering event.[12]
- Second, it eliminated the distribution period for certain beneficiaries (i.e., thereby limiting the availability of the ''stretch'' payout period over a beneficiary's life expectancy), especially if the beneficiary was young.[13] The new distribution rules preserve the ''stretch'' payout period only for ''eligible designated beneficiaries,'' and they impose a new 10-year payout period for designated beneficiaries who are not eligible designated beneficiaries (referred to in this article as ineligible designated beneficiaries).

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cember 31, 1986. *See* Reg. §1.403(b)-6(e)(6),

[7] §457(d)(2).

[8] §4974(a)–§4974(b). The determination of an employee's required minimum distribution is relevant for purposes of the related excise tax under §4974. Section 4974(d) permits the IRS to waive the excise tax if the failure to distribute the appropriate amount was due to reasonable error and reasonable steps were taken to remedy the shortfall. It is interesting to note that the House of Representatives has passed H.R. 2954, Securing a Strong Retirement Act of 2022 (referred to as the SECURE Act 2.0) on March 29, 2022, with a vote of 414 to five. Section 302 of the SECURE Act 2.0 would reduce the excise tax applicable for individuals if the amount distributed was less than the RMD from the plan for the current tax year from the current 50% penalty on the shortfall to 25%, with a further reduction to 10% if the individual corrects the shortfall within a two-year window, effective to tax years beginning after December 31, 2021. In contrast, on the Senate side, Senators Cardin and Portman have introduced S. 1770, Retirement Security & Savings Act. Section 309 and §318 of that bill would reduce the excise tax applicable for individuals if the amount distributed was less than the RMD in a similar fashion as H.R. 2954. Section 316 of that bill would also waive RMDs for individuals with aggregate retirement savings of less than $100,000, with a phase out for employees with balances near $100,000. Such a waiver would not apply to defined benefit plans.

[9] 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. Historically, fiduciaries of 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 portability provisions attempt to solve this problem. *See* SECURE Act, §109. Finally, to assure that a plan participant understands what amount of ''lifetime income stream'' can be derived from his/her account balances, 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 Kathryn J. Kennedy, *Lifetime Income Disclosures*'' 48 Tax Mgmt. Comp. Plan. J. No. 9 (Sept. 4, 2020).

[10] §408(d)(3)(C)(ii).

[11] Reg. §1.401(a)(9)-0-§1.401(a)(9)-9, published in T.D. 8987, RIN 1545-AY69, 1545-AY70, 67 Fed. Reg. 18,988 (Apr. 17, 2002).

[12] 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.

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

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The SECURE Act changes leave in place the prior rules for older taxpayers. The rules discussed below are limited to those that are applicable to defined contribution plans and IRAs, not defined benefit plans, even though the RMD rules are applicable to both types of plans.[14] Such 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."

In a prior article, the author outlined the changes made to the minimum distribution rules by the SECURE Act and opined as to how the IRS would interpret those changes in the context of any proposed regulations.[15] As the IRS just published proposed regulations on February 24, 2022, implementing the SECURE Act changes to the minimum distribution rules,[16] the author now explains the IRS's proposals and critiques whether practitioners will respond with comments to such proposals. The most controversial part of the proposal involves distributions after the employee has attained his/her RBD and then names an ineligible designated beneficiary to continue distributions after his/her death. The statute requires that distributions, once an employee attains his/her RBD, and dies, to continue "at least as rapidly" as under the method of distribution as of the date of death; however, the SECURE Act mandates distributions to ineligible designated beneficiaries to be distributed in accordance with a new 10-year rule (similar to the existing five-year rule which requires no distributions until the end of the fifth calendar year following the calendar year of the employee's death). Eligible designated beneficiaries include the surviving spouse, a minor child, a disabled individual, a chronically ill individual, or an individual who is not more than 10 years younger than the employee. The statute leaves open the following interpretation: upon the employee's death and the naming of an ineligible designated beneficiary, do distributions continue over the beneficiary's life expectancy until the expiration of the 10-year window or does the beneficiary have the flexibility to delay receipt of any benefits until the expiration of the 10-year window? The proposed regulations answer this question by continuing to apply the 2002 regulations' "at least as rapidly" rules to distributions upon the death of the employee after his/her RBD, even for ineligible designated beneficiaries. As such, the proposed regulations will meet with considerable push-back from recordkeepers as they greatly increase the complexity of the payout periods for ineligible designated beneficiaries.

The rules are further complicated by the fact that there are new tables set forth in Updated Life Expectancy and Distribution Period Tables Used for Purposes of Determining Minimum Required Distributions,[17] for use in computing the RMD amounts. These tables are applicable for computing RMDs for 2022 and beyond; the existing tables set forth in the 2002 regulations remain applicable for RMDs in 2021.

OUTLINE OF THE STATUTE

For purposes of understanding the proposed regulations, it is necessary to first analyze the text of the statute under §401(a)(9) (as revised by the SECURE Act). We begin with the determination of an employee's RBD and then analyze the remaining rules:

- RBD is now defined in §401(a)(9)(C) as April 1 of the calendar year in which an employee attains age 72, or if later, the calendar year in which the employee retires (unless the employee is a 5% owner or IRA owner, in which case, the deferred date of retirement is not available).[18] *The SECURE Act struck the prior age 70½ and replaced*

[14] The proposed rules under Prop. Reg. §1.408-8, would indicate minor differences in applying the new rules to IRAs. For example, if an individual has multiple IRAs, the minimum distributions from each of them can be aggregated and distributed from a single IRA. Section 401(a)(9) is a qualification requirement and thus, applicable to each qualified retirement plan maintained by an employer.

[15] Kathryn J. Kennedy, *Primer on the Code's Require Minimum Distribution Rules: Post SECURE Act,* 49 Tax Mgmt. Comp. Plan. J. No. 6 (June 4, 2021).

[16] Prop. Reg. §1.401(a)(9)-0–§1.401(a)(9)-9, published in 87 Fed. Reg. 10,504. Comments on such proposed regulations are due by May 25, 2022. The proposed regulations replace the question-and-answer format of the existing regulations with a standard format.

[17] 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 EO 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), Prop. Reg. §1.401(a)(9)-9(b) (uniform lifetime table), and Prop. Reg. §1.401(a)(9)-9(c) (Joint and Last Survivor table), published in REG-132210-18, RIN 1545-BP11, 84 Fed. Reg. 60,812 (Nov. 8, 2019). 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, RIN 1545-BP11, 85 Fed. Reg. 72,472 (Nov. 12, 2020). These new tables are effective for required minimum distributions beginning on January 1, 2022. When the IRS posted the new life expectancy and distribution period tables in 2020, it restructured the tables to be labeled in lettered subsections rather than in Q&A format (e.g., table set forth in Reg. §1.401(a)(9)-9, Q&A-2 was relabeled Reg. §1.401(a)(9)-9(c)).

[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 calendar years in which the employee retires.

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it with age 72, effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after such date (referred to in this article as the new RBD effective date).[19]

- Section 401(a)(9)(A) sets forth the general rule that the entire interest shall be distributed to the employee, either by the RBD (this is referred to in this article 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 the 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 in this article 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 distributions 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 the (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 expectancies).[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 his/her RBD), then the entire interest must be distributed within five 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*. A designated beneficiary is defined in §401(a)(9)(E)(i) 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 over his/her life expectancy (referred to as the life expectancy rule) and that such distributions must being no later than one year after the date of the employee's death.[23]

  o Section §401(a)(9)(H) of the SECURE Act limits such distribution rules, in the context of defined contribution plans, to individuals who are not "eligible designated beneficiaries" (i.e., ineligible designated beneficiaries).[24] In that case, "10 years" is substituted for "5 years" in subparagraph (B)(ii) and is to be applied whether or not distribution of the employee's interest have begun in accordance with subparagraph (A) (which appears to mandate distributions under the 10-year rule in the context of ineligible designated beneficiaries).

  o The SECURE Act continues to allow the life expectancy exception of §401(a)(9)(B)(ii) to be applied to eligible designated beneficiaries.

    - But it imposes a 10-year limit on the number of payouts once the eligible designated beneficiary dies or the minor child reaches the age of majority.

    - The SECURE Act did not disturb the special rules that existed 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 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

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[19] SECURE Act, §114. As stated in Note 8, above, §105 of H.R. 2954 (SECURE Act 2.0) would gradually boost the RBD from age 72 to age 75, effective for distributions required to be made after December 31, 2022, with respect to an individual who attains age 72 after that date. For individuals who attain age 72 after December 31, 2022, and age 73 before January 1, 2030, the applicable age would be 73; for individuals who attain age 73 after December 31, 2029, and age 74 before January 1, 2033, the applicable age would be 74; and for individuals who attain age 74 after December 31, 2032, the applicable age would be 75. As the legislation is based on the date an individual attains a given age, the IRS would undoubtedly interpret such date in a similar fashion as under these proposed regulations (i.e., the date that an employee would have attained such age based upon his/her death of birth, without regard to his/her survival to that date). Section 108 of S. 1770 would revise the required beginning date to trigger upon attainment of age 75, beginning in 2032, without intervening steps at ages 73 or 74.

[20] The distribution over the employee's life is consistent with a life annuity, whereby payments continue to be made while the employee is alive and then ceased upon his/her death. In contrast, distributions 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)(i)(II) (emphasis added).

[22] §401(a)(9)(B)(ii).

[23] §401(a)(9)(B)(iii).

[24] SECURE Act, §401.

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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 December 31 of the calendar year in which the employee would have attained 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).[25]
- Section 401(a)(9)(E) defines a designated beneficiary 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)(E)(ii) defines the new term eligible designated beneficiary.
- 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 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.[26]
- 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 RMD. This is relevant for qualified defined benefit plan purposes which is not the subject of this article.[27]
- Section 401(a)(9)(H) sets forth the new SECURE Act distribution rules in §401(a)(9)(E) and §401(a)(9)(H), applicable to distributions with respect to an employee who dies after December 31, 2019 (referred to in this article as the new distribution effective date).[28]
- Section 401(a)(9) has also been amended to permit a temporary waiver of the minimum distribution rules during the 2009 calendar year,[29] as well a temporary waiver of such rules during the 2020 calendar year.[30]

With this outline of the statute, we may now review how the IRS is interpreting such rules per the 2022 proposed regulations. The author uses a series of examples to illustrate the IRS's interpretation of the new SECURE Act rules.[31]

PROPOSED REGULATIONS

Effective Date: Prop. Reg. §1.401(a)(9)-1

As noted above, the new distribution rules of the SECURE Act apply to distributions with respect to an employee who dies on or after January 1, 2020.[32] The proposed regulations would provide that if an em-

[25] The recalculation method affords a longer distribution period (as compared to the nonrecalculation method) as an individual life expectancy does not reduce by one year under the Single Life Expectancy Table. For example, under the 2022 Single Life Table, the life expectancy for a 60-year old is 27.1 years, whereas the life expectancy for a 61-year old is 26.2 (not 27.1-1-26.1). Thus, the recalculation method would allow the 60-year old to continue to use the table until age 120 (if he/she were still alive); whereas the nonrecalculation method would have the remaining life expectancy on a 60-year old become .1 after 27 years.

[26] *See* Reg. §1.401(a)(9)-6, Q&A-15. For purposes of §401(a)(9)(F), the 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, in which case the minor child may use the life expectancy rule until 26 years of age. Note: §401(a)(9)(F) does not apply for purposes of determining when a minor child ceases to be an eligible designated beneficiary; *see* §401(a)(9)(E)(ii)(II).

[27] *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.

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

[29] 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.

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

[31] As a professor, I find the use of examples particularly helpful in explaining complex tax rules to students. In this article, the author has used the names of her siblings and their extended families in the examples as an easy way to describe how employees would make beneficiary designations.

[32] There is a later effective date for certain collectively bar-

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ployee dies before the new distribution effective date, naming only one designated beneficiary, and that beneficiary *dies on or after* the new distribution effective date, the new rules would apply to any *beneficiary* of that designated beneficiary.[33] In such case, the new distribution rules would apply with respect to the employee's designated beneficiary, requiring full distribution of the employee's interest within 10 years after the death of the designated beneficiary.

> **Example**: Joe dies in 2017, at the age of 68, naming as sole beneficiary, his adult son, Bill (age 40 and who is not disabled nor chronically ill), of his interest in his employer's qualified defined contribution plan. Upon Joe's death, Bill began to take distributions over his life expectancy until he dies in 2024 (after the new distribution effective date). Because §401(b)(5) of the SECURE Act treats Bill as an eligible designated beneficiary for purposes of the new 10-year payout, the new distribution rules apply to his beneficiaries. Thus, Joe's remaining interest must be distributed by the end of 2034 (the 10th year following the calendar year of Bill's death).[34] What if instead Bill died in 2019, before the new distribution effective date? In that case, the new distribution rules do not apply to Bill's beneficiaries.[35]

The proposed regulations would provide that if the employee dies before the new distribution effective date and has *more than one* designated beneficiary, whether the SECURE Act changes apply depends on when the oldest of those beneficiaries dies.[36] The SECURE Act changes will apply upon the death of the oldest of the designated beneficiaries if that designated beneficiary is still alive on or after the new distribution effective date.[37] But if the oldest beneficiary dies before such effective date, then the SECURE Act distribution rules will not apply with respect to future distributions.

> **Example**: Joe dies in 2017, at the age of 68, naming a valid see-through trust as sole beneficiary of his interest in his employer's qualified defined contribution plan. His two designated beneficiaries under the trust are alive as of January 1, 2020, Charlie (age 50) and Claudia (age 49). The older of the designated beneficiaries, Charlie, now dies in 2022 (which is after the new distribution effective date). Because §401(b)(5) of the SECURE Act treats Charlie as an eligible designated beneficiary, the new distribution rules apply to the other named beneficiary. Thus, Joe's remaining interest must be distributed by the end of 2032 (within 10 years of Charlie's death).[38] What if instead Charlie dies in 2019? Because the oldest designated beneficiary died before January 1, 2020, the new distribution rules do not apply to the other beneficiary, Claudia.[39]

The proposed regulations state that if the employee dies before his/her RBD and the surviving spouse delays commencement of distributions until the end of the calendar year for which the employee would have been first required to take distributions, then the surviving spouse is to be treated as the employee.[40] For example, assume an employee with a RBD of April 1, 2025, names his/her surviving spouse as the sole beneficiary, and both the employee and the employee's surviving spouse die before the new distribution effective date. If the spouse dies before January 1, 2020, but the spouse's designated beneficiary dies after new distribution effective date, then the new distribution rules apply to the surviving spouse's designated beneficiary upon the death of that designated beneficiary.[41]

> **Example:** Joe has a RBD of April 1, 2025, and names his surviving spouse, Connie, as the sole designated beneficiary. Joe dies in 2017. Although Connie wished to defer commencement of benefits until 2024, she dies in 2019. Connie's named designated beneficiary is Brigid, who dies in 2030. As both Joe and Connie die before the new distribution effective date and Brigid dies after the new distribution effective date, the SECURE Act's new distribution rules apply to Brigid upon her death.

The proposed amendments to Reg. §1.401(a)(9)-1–§1.401(a)(9)-9 would be effective for purposes of computing the RMDs for calendar years beginning on

gained plans or governmental plans. Section 401(b)(4) of the SECURE Act provides that amendments do not apply to a qualified annuity that is a binding annuity contract in effect on December 20, 2019, and at all times thereafter.

[33] Prop. Reg. §1.401(a)(9)-1(b)(2)(iii) and Preamble, 87 Fed. Reg. 10,054, 10,507.

[34] Prop. Reg. §1.401(a)(9)-1(b)(3)(i), *Ex.* 1. *See also* Preamble, 87 Fed. Reg. 10,504, 10,507.

[35] Prop. Reg. §1.401(a)(9)-1(b)(3)(ii), *Ex.* 2. *See also* Preamble, 87 Fed. Reg. 10,504, 10,507.

[36] Prop. Reg. §1.401(a)(9)-1(b)(2)(iii)(B). *See also* Preamble, 87 Fed. Reg. 10,504, 10,507.

[37] Prop. Reg. §1.401(a)(9)-1(b)(2)(iii)(B). *See also* Preamble, 87 Fed. Reg. 10,504, 10,507.

[38] Prop. Reg. §1.401(a)(9)-1(b)(3)(iv), *Ex.* 4. *See also* Preamble, 87 Fed. Reg. 10,504, 10,507.

[39] Prop. Reg. §1.401(a)(9)-1(b)(3)(v), *Ex.* 5.

[40] Prop. Reg. §1.401(a)(9)-1(b)(2)(iii)(C). *See also* Preamble, 87 Fed. Reg. 10,504, 10,507–10,508.

[41] Prop. Reg. §1.401(a)(9)-1(b)(2)(iii)(C). *See also* Preamble, 87 Fed. Reg. 10,504, 10,507–10,508.

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or after January 1, 2022.[42] Taxpayer must use the 2002 existing regulations for purposes of computing his/her 2021 distributions, but may take into account a reasonable, good faith interpretation of the amendments made by the SECURE Act.[43] Written or electronic comments to the proposals are to be received May 25, 2022. A public hearing is scheduled for June 15, 2022, at 10 a.m.

Distribution Commencing During an Employee's Lifetime: Prop. Reg. §1.401(a)(9)-2

Under the new age 72 RBD rules, the RMD rules specify the minimum amount that must be distributed for the calendar year in which the employee attains age 72 and each subsequent calendar year.[44] The intent behind such rules was to force an annual minimum distribution beginning with the employee's RBD, to be continued annually, using the uniform lifetime tables in the regulations.[45] While the RMD rules require benefit payments for employees and for 5% owners to commence by age 72, 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 72nd birthday. The calendar year in which the employee attains age 72 is referred to as the first distribution year.[46] For the second and subsequent calendar years, the minimum required distributions must be made no later than the December 31 of the applicable distribution year. In the case of a non-5% owner who continues to work for the employer after attaining age 72, the employee's RBD is April 1 of the calendar year following the calendar year in which he/she retires.[47]

The proposed regulations leave intact the method used under the existing regulations by which an RMD is determined in any calendar year in which the employee dies on or after his/her RBD or in which the employee's eligible designated beneficiary is taking life expectancy payments because the employee dies on or after the RBD. As such, the RMD for a given calendar year is determined by dividing the employee's account balance as of the end of the prior year by an applicable divisor. But in light of the changes made by the SECURE Act, the proposed regulations now refer to the divisor as the ''applicable denominator.''[48] In addition to making annual RMDs, the proposed regulations would implement the SECURE Act changes and would require that a full distribution of the employee's remaining interests be taken in certain specific circumstances.

The proposed regulations preserve the existing rules for determining the RBD, but substitute age 72 for age 70½ in the case of employees born on or after July 1, 1949.[49] For employees born before July 1, 1949, the prior law rules continue to be effective.[50] 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.

> **Example**: Lee was born October, 1949 and his wife, Dana, was born May, 1949. Lee turns 70 during 2019, but 70½ during 2020 due to his October birthday. As Lee turns 70½ during 2020, the new RBD rules apply to him. Hence, Lee turns age 72 during 2021 and his RBD = April 1, 2022. In contrast, as Dana turns 70 during 2019 and 70½ during 2019, due to her May birthday. Hence, the prior RBD rule apply to her. Dana turns 70½ during 2019 and thus, her RBD = April 1, 2020. Lee enjoys the full two-year delay in the commencement of his benefits, whereas Dana does not.

> **Commentary**: What if in the above example Lee died in December, 2019? Arguably the statutory language could have been interpreted as providing that if Lee died prior to January 1, 2020 and before

[42] Prop. Reg. §1.401(a)(9)-1(d). For earlier calendar years, the rules of Reg. §1.401(a)(9)-1-§1.401(a)(9)-9 (revised as of April 1, 2021) apply.

[43] As will be discussed later, the IRS came out with guidance in its Publication 590-B for RMDs due in 2020, but later modified such guidance. It's doubtful that the IRS's position in Publication 590-B for distributions for 2020 may be relied upon as reasonably good faith interpretation of the SECURE Act. The 2002 regulations have been revised to reflect new table. See Note 17, above.

[44] Prop. Reg. §1.401(a)(9)-5(a)(1). If an employee is a participant in multiple qualified defined contribution plans, the plans in which the employee participates are not permitted to be aggregated for purposes of testing whether the distribution requirements of §401(a)(9) are met. Hence, the distribution of the benefit of the employee under each plan must separately meeting the requirements of §401(a)(9).

[45] Reg. §1.401(a)(9)-9(c), specifying the uniform lifetime table that sets for the lifetime distributions to an employee and his/her designated beneficiary who is presumed to be 10 years younger than the employee. If the employee's spouse is the sole designed beneficiary and is more than 10 years younger than the employee, the actual, joint life expectancy table may be used.

[46] Prop. Reg. §1.401(a)(9)-5(a)(2)(ii).

[47] Prop. Reg. §1.401(a)(9)-5(a)(2). That employee's first distribution calendar year is the calendar year in which he/she retires. The proposed regulations would not provide any guidance as to what constitutes retirement for purposes of the RBD determination.

[48] Prop. Reg. §1.401(a)(9)-5(a).

[49] Prop. Reg. §1.401(a)(9)-2(b)(1). *See also* Preamble, 87 Fed. Reg. 10,504, 10,508.

[50] Prop. Reg. §1.401(a)(9)-2(b)(2). *See also* Preamble, 87 Fed. Reg. 10,504, 10,508.

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attaining age 70½, the prior rules should apply. In this fact pattern, Lee doesn't actually attain age 70½ in 2020 because he died in 2019. However, the Treasury has interpreted the new SECURE rules to apply to any individual who would have attained age 72 on or after January 1, 2020, had he/she survived, which includes those born on or after July 1, 1949. Practitioners will undoubtedly provide comments on this interpretation.

Under the statute, 5% owners cannot take advantage of a delayed RBD if they continue to work for the employer. Hence, for 5% owners who are born on or after July 1, 1949, the new RBD rules apply and his/her RBD is the April 1st of the calendar year following the calendar year in which he/she attains age 72.[51] And for 5% owners who were born before July 1, 1949, the prior RBD rules apply and his/her RBD is April 1of the calendar year following the calendar year in which he/she attains age 70½.[52] For non-5% owners, they can delay their RBD by continuing to work for their employer until retirement.

Example: Mark was born May, 1949, and Lee was born in October, 1949. Both are non-5% owners of their employer who maintains a qualified defined contribution plan. Mark retires from his employer in 2020 at age 71. As a result, Mark's RBD = April 1 of the calendar year following the later of (1) the calendar year in which he attains age 70½ (i.e., 2019) or (2) the calendar year in which he retires (i.e., 2020). Thus, Mark's RBD = April 1, 2021. In contrast, Lee retires from his employer in 2020 at age 71. As a result, Lee's RBD = April 1 of the calendar year following the later of (1) the calendar year in which he attains age 72 (i.e., 2021) or (2) the calendar year in which he retires (i.e., 2020). Thus, Lee's RBD = April 1, 2022.[53]

Death Before RBD: Prop. Reg. §1.401(a)(9)-3

Once we have an employee's RBD, the rules divide into two main 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? The SECURE Act amendments to §401(a)(9)(E) and §401(a)(9)(H) apply to distributions with respect to employees who die on or after January 1, 2020.[54]

The original five-year rule provided that if the employee dies before his/her RBD and had not designated a beneficiary (e.g., beneficiary was not named or the beneficiary named was not an individual), distributions must be complete by the fifth calendar year following the calendar year of the employee's death.

Example: An employee dies at age 50 in 2022 (before his/her RBD) and does not designate a beneficiary, distributions must be complete by the end of 2027.[55] Such result negates the use of the plan's tax shelter after five years, as minimum distributions may not be rolled over into an IRA.

Under the pre-SECURE Act changes, the five-year rule had an exception if a designated beneficiary was named, in which case the designated beneficiary's life expectancy would become the distribution period. The question remained after the SECURE Act is whether the five-year rule prevails **only if** there is no designated beneficiary. The proposed regulations would confirm that the five-year rule applies to a defined contribution plan if the new distribution effective date does not apply to the employee (which could occur if the employee does not have a designated beneficiary or if the employee died before the new distribution effective date and the employee's designated beneficiary elected the five-year rule).[56] Thus, if no beneficiary is designated, the five-year rule prevails and the entire interest must be distributed no later than December 31 of the calendar year containing the fifth anniversary of the employee's death.[57]

If a beneficiary is designated but he/she is an ineligible designated beneficiary, a new 10-year rule applies and the entire interest must be distributed no later than December 31 of the calendar year containing the 10th anniversary of the employee death.[58] Thus, the proposed regulations would invoke the new 10-year rule whereby an ineligible designated beneficiary has been named and require distributions no later than the 10th calendar year following the calendar year of the employee's death. In this regard, the

[51] Prop. Reg. §1.401(a)(9)-2(b)(3). For purposes of §401(a)(9), a 5% owner is an employee who is a 5% owner as defined in §416 with respect to the plan year ending in the applicable calendar year.

[52] Prop. Reg. §1.401(a)(9)-2(b)(2).

[53] *See* Preamble, 87 Fed. Reg. 10,504, 10,508.

[54] SECURE Act, §401(a)(3)(A), which shall apply to distributions with respect to employees who die after December 31, 2019.

[55] Prop. Reg. §1.401(a)(9)-3(c)(2). The 2020 calendar year in which the employee dies is disregarded when determining the calendar year that includes the fifth anniversary of the date of the employee's death.

[56] Preamble, 87 Fed. Reg. 10,504, 10,508.

[57] Prop. Reg. §1.401(a)(9)-3(c)(2).

[58] Prop. Reg. §1.401(a)(9)-3(c)(3). *See also* Preamble, 87 Fed. Reg. 10,504, 10,508.

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new 10-year rule works the same as the existing five-year rule.

Example: Lee, with an RBD of April 1, 2022, dies during 2021 (prior to his RBD), naming his adult daughter, Christine (age 50 during 2021, and who is not disabled or chronically ill), as the designated beneficiary. The new distribution rules are applicable as Lee died on or after January 1, 2020. Since Christine is an adult child, she is an ineligible designated beneficiary. Under the new 10-year rule, Lee's entire interest must be distributed to Christine no later than 10 years following the calendar year of Lee's death (i.e., December 31, 2031). But no distributions are required during the intervening years between 2022 and 2030 to Christine.

Commentary: The IRS in the proposed regulations implement the changes of the SECURE Act to state that a new ''10-year rule'' applies if an ineligible designated beneficiary is named and it interprets such rule similarly to the ''five-year rule,'' i.e., no annual distributions are required upon the employee's death, but the entire interest must be distributed no later than the 10th calendar year following the calendar year of the employee's death.

If an *eligible* beneficiary is designated, the existing life expectancy rule prevails, beginning in the calendar year following the calendar year of the employee's death (with an exception for a delay in commencement by the surviving spouse).

Example: Lee, with a RBD of April 1, 2022, dies during 2020 (prior to his RBD), naming his adult disabled child, John (age 48 during 2021), as the designated beneficiary. As of the date of Lee's death, John is disabled.[59] Since John is an eligible designated beneficiary, distributions would normally begin to him during 2021 (when he is age 48), over his life expectancy (i.e., 36.0, the single life expectancy table in use prior to 2022).[60]

The proposed regulations allow a defined contribution plan to include a plan provision, applicable to an employee who dies before his/her RBD and who has an eligible designated beneficiary which provides either (1) that the 10-year rule applies or (2) the life expectancy rule applies, with respect to some or all of the employees.[61] The plan may also include a provision whereby the employee or the eligible designated beneficiary may elect as to whether to apply the 10-year rule or the life expectancy rule.[62] If the plan provision allows for an election, it must specify the method of distribution if neither the employee nor the eligible designated beneficiary makes the election; such election must be made no later than the end of the *earlier* of the calendar year by which distributions must be made under the 10-year rule or the calendar year in which distributions would be required to begin under the life expectancy rule; as of the last date the election may be made, it must be irrevocable with respect to the beneficiary (and all subsequent beneficiaries) and must apply to all subsequent year years.[63]

If the defined contribution does not have an optional provision as described above, then distributions must be made: under the five-year rule is the employee does not have a designated beneficiary; under the 10-year rule if the designated beneficiary is not an eligible designated beneficiary and the employee dies on or after the new distribution effective date; or under the life expectancy rule if the employee has an eligible designated beneficiary.[64]

The SECURE Act did not change the rules regarding a delayed commencement of benefits for surviving spouse beneficiaries. Thus, if the employee's surviving spouse is the sole beneficiary, the commencement of benefits to the surviving spouse may be delayed until the end of the calendar year in which the employee would have attained age 72.[65] This permits the spouse to step into the shoes of the employee for purposes of taking advantage of the RMD rules. Also, the date of death of the surviving spouse is substituted for the date of death of the employee.[66] The proposed regulations disallow such treatment if the surviving spouse remarries before the date distributions should have commenced.[67]

Example: Lee, with a RBD of April 1, 2025, dies during 2021 (prior to his RBD), naming his surviving spouse, Brigid (age 62 during 2022), as the sole designated beneficiary. Since Brigid is an eligible designated beneficiary, distributions would have normally begun to her during 2022 (when she is age 62), over her life expectancy (i.e., 25.4, the

[59] Prop. Reg. §1.401(a)(9)-4(e)(4)(ii).

[60] Reg. §1.401(a)(9)-9(b) (effective for distribution calendar years beginning on or after January 1, 2003, through January 1, 2021). For distribution calendar years beginning on or after January 1, 2022, see Reg. §1.401(a)(9)-9 (life expectancy and distribution period tables).

[61] Prop. Reg. §1.401(a)(9)-3(c)(5)(ii). *See also* Preamble, 87 Fed. Reg. 10,504, 10,508.

[62] Prop. Reg. §1.401(a)(9)-3(c)(5)(iii).

[63] Prop. Reg. §1.401(a)(9)-3(c)(5)(iii)(A)–§1.401(a)(9)-3(c)(5)(iii)(C).

[64] Prop. Reg. §1.401(a)(9)-3(c)(5)(i)(A)–§1.401(a)(9)-3(c)(5)(i)(C).

[65] §401(a)(9)(B)(iv).

[66] Prop. Reg. §1.401(a)(9)-3(e)(1).

[67] Prop. Reg. §1.401(a)(9)-3(e)(2).

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single life expectancy table in use for 2022).[68] The proposed regulations allow Brigid to delay commencement of benefits until the end of the calendar year in which the employee would have attained age 72 (i.e., 2024). In this example, Brigid can delay distribution of benefits for two years. She will wish to take advantage of this in order to prolong distribution of benefits until they commence during 2024. Alternatively, Brigid may roll over any or all of Lee's account balance into an IRA in her name, thereby postponing of distributions until she attains age 72 (a 10-year deferral).[69]

Determination of the Designated Beneficiary: Prop. Reg. §1.401(a)(9)-4

This part of the proposed regulations would clarify and simplify who is a beneficiary of the employee's interest in the plan for purposes of the RMD rules. A designated beneficiary is an *individual* who is a beneficiary designated under the plan.[70] Thus, naming the employee's estate or a charity is not a designated beneficiary. Although, as will be discussed later in this article, certain beneficiaries of a *trust* may be treated as the employee's beneficiaries under the plan rather than the trust, and an employee's benefit may be divided into separate accounts, each with a different beneficiary under that account.

If a person other than an individual (e.g., the employee's estate) is a beneficiary under the plan, the employee will be treated as having no designated beneficiary, even if individuals are also designated as other beneficiaries.[71] However, the proposed regulations state that a beneficiary need not be specified by name in order to be a designated beneficiary, as long as such individual is *identifiable* pursuant to the designation.[72] For example, a designation of the employee's children as beneficiaries of equal shares of the employee's interest is sufficient, even if the children are not specified by name. But the fact that an employee's interest passes to a certain person under a will or applicable state law does not make that person a designated beneficiary under the plan absent a designation under the plan.[73] A beneficiary designated under the plan may be designated by a default election under the terms of the plan, or if the plan so provides, by an affirmative election of the employee (or the employee's surviving spouse).[74]

The proposed regulations preserve the 2002 rule that a person is a beneficiary for purposes of §401(a)(9) if that person is a beneficiary designated under the plan as of the date of the employee's death and none of the events listed below has occurred with respect to that person by September 30 of the calendar year following the calendar year of the employee's death.[75] If any of the following events occurs by the applicable September 30 date, the beneficiary is not treated as a beneficiary:

- The beneficiary predeceases the employee or is treated as having predeceased the employee under an applicable simultaneous death provision under state law;
- The beneficiary disclaims the entire interest to which he/she is entitled; or
- The beneficiary receives the entire benefit to which the beneficiary is entitled.[76]

Example: Lee dies in 2022 having designated his three children — Bob, Charlie, and David — as beneficiaries, each with a one-third share of Lee's interest in a plan. Each of the children is alive as of Lee's death. Bob executes a valid disclaimer within 9 months of Lee's death, which satisfies the requirements under §2518. As a result, Bob is disregarded as a beneficiary.[77] What if Charlie were to die before September 30, 2023? As he was alive as of Lee's death, he is still a beneficiary.[78]

The 2002 regulations provide such flexibility as it is highly beneficial for estate planning purposes, as it permits the alteration of the beneficiary designation following the employee's death due to subsequent distributions, disclaimers, or death.[79] The proposed regulations provide that if the employee's spouse is the sole beneficiary as of September 30 of the calendar

[68] Reg. §1.401(a)(9)-9.

[69] §402(c)(9); Reg. §1.401(a)(9)-1

[70] Prop. Reg. §1.401(a)(9)-4(a)(1).

[71] Prop. Reg. §1.401(a)(9)-4(b). But see Prop. Reg. §1.401(a)(9)-4(f)(1), §1.401(a)(9)-4(f)(3) for a rule whereby certain beneficiaries of a see-through trust that is designated as the employee's beneficiary under the plan are treated as the employee's beneficiaries under the plan rather than the trust. This special rule also does not apply to the extent separate account treatment applies according to Prop. Reg. §1.401(a)(9)-8(a). *See also* Preamble, 87 Fed. Reg. 10,504, 10,509.

[72] Prop. Reg. §1.401(a)(9)-4(a)(3).

[73] *Id.*

[74] Prop. Reg. §1.401(a)(9)-4(a)(4).

[75] Prop. Reg. §1.401(a)(9)-4(c)(1).

[76] Prop. Reg. §1.401(a)(9)-4(c)(2). The beneficiary will be treated as having predeceased the employee pursuant to a simultaneous death provision under applicable state law or pursuant to a qualified disclaimer that satisfies §2518 that applies to the entire interest to which the beneficiary is entitled.

[77] Prop. Reg. §1.401(a)(9)-4(c)(3)(i), *Ex.* 1.

[78] Prop. Reg. §1.401(a)(9)-4(c)(3)(vi), *Ex.* 6.

[79] *See* Preamble to Reg. §1.401(a)(9)-0-§1.401(a)(9)-9, published in 67 Fed. Reg. 18,988, 18,990.

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year following the calendar year of the employee's death and the surviving spouse dies before distributions have begun, then the determination of whether a person is a beneficiary of the surviving spouse is made using the usual rules, except that the date of the surviving spouse's death is substituted for the date of the employee's death.[80] As a result, a person is a beneficiary if he/she is a beneficiary designated under the plan as of the date of the surviving spouse's death and remains a beneficiary as of the September 30 of the calendar year following the calendar year of the surviving spouse's death.[81]

As the SECURE Act defined a new class of "eligible designated beneficiaries," the proposed regulations note that an eligible designated beneficiary is an individual who, *as of the date of the employee's death,* is (1) the surviving spouse of the employee; (2) a child of the employee who has not attained the age of majority; (3) a disabled individual; (4) a chronically ill individual; or (5) an individual not more than 10 years younger than the employee.[82] As the SECURE Act did not define many of these terms, the proposed regulations set forth new definitions.

The SECURE Act does not define who is a "child of the employee." Each state has varying laws as to whether an individual is a child or not. For example, state may define a child as an adopted child, or step-child, or a child conceived through artificial reproductive techniques involving the employee. Under the new rules, a child of the employee who has not reach the age of majority may continue to use the life expectancy rule, but only until the child reaches the age of majority.[83] Once the majority age is reached, distributions must be made in full by the end of the 10th calendar year following the attainment of majority. In the Preamble, the IRS discusses why it decided to deviate from the existing regulations that used a majority age of 26.[84] As more plans are expected to use an age of majority definition and such definition will be applied to all of an individual's accounts within his/her defined contribution plans (as there may multiple qualified plans and IRAs), the IRS has concluded that the definition of the age of majority should not be a plan design choice.[85] Hence, the proposed regulations use the age of 21 as the majority age (which accommodates the age of majority definition in all of the States). Hence, the individual reaches the age of majority on his/her 21st birthday.[86]

> **Commentary**: While the proposed regulations refer to a child of an employee as an individual who has not yet reached his/her 21st birthday, there was no discussion as to whether adopted children or step-children are included in the meaning of "child." Also there was no discussion as to how the rules would apply if a guardian of a minor child was named as the designated beneficiary solely for purposes of receiving distributions on the minor child's behalf. As most plan documents have a governing state law clause, the Treasury could have adopted that state law's definition of a child, but such result would not have resulted in an uniform definition of age for majority purposes.

The SECURE Act defined a disabled individual by reference to §72(m)(7), which includes an individual who is unable to engage in substantial gainful employment by reason of any medically determinable physical or mental impairment expected to result in death or to be of long-continued and indefinite duration.[87] As a result, such standard is difficult to apply when the beneficiary is younger than age 18. Thus,

[80] Prop. Reg. §1.401(a)(9)-4(d).

[81] *Id.* For example, a child of the surviving spouse would be an eligible designated beneficiary of the surviving spouse if the child has not yet reached the age of majority as of the date of the surviving spouse's death. *See also* Preamble, 87 Fed. Reg. 10,504, 10,510.

[82] Prop. Reg. §1.401(a)(9)-4(e)(1). The reason that an individual who is not more than 10 years younger than the employee is an eligible designated beneficiary traces back to the Uniform Lifetime Table under Reg. §1.401(a)(9)-9(c). If the employee reaches his/her RBD, annual distributions begin to the employee, during his/her lifetime, using the divisors from the Uniform Lifetime Table. The table was constructed assuming that the employee named a beneficiary, who was 10 years younger than he/she, and thus, permits annual distributions based on the joint life expectancy of the employee and a beneficiary who is 10 years younger. Once the employee dies, the 2002 regulations permitted continued annual distributions to the actual named designated beneficiary based on the *greater* of (1) the remaining life expectancy of the designated beneficiary or (2) the remaining life expectancy for the employee; both determined using the Single Life Tables in the regulations. Thus, under the SECURE Act changes, the distribution rules are assumed to continue, as is, if the actual designated beneficiary was 10 years younger than the employee, without the need to impose a 10-year limit on the payout to the beneficiary.

[83] SECURE Act, §401 (adding §401(a)(9)(E)(ii)(II)(adding subparagraph (E)(ii)(II)).

[84] Preamble, 87 Fed. Reg. 10,504, 10,509. The IRS discusses why it decided to deviate from the existing regulations that use a majority age of 26. As more plans are expected to use an age of majority definition and such definition will be applied to all of an individual's accounts in defined contribution plans, which may be in multiple qualified plans and IRAs, the IRS has concluded that the definition of the age of majority should not be a plan design choice. Hence, the proposed regulations would use the age of 21 as the majority age as it accommodates the age of majority definition in all of the States.

[85] Preamble, 87 Fed. Reg. 10,504, 10,509.

[86] Prop. Reg. §1.401(a)(9)-4(e)(3).

[87] Prop. Reg. §1.401(a)(9)-4(e)(4)(ii), which would define disability for individuals *who are age 18 or older* as being unable to engage in any substantial gainful activity by reason of any medi-

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the proposed regulations would define disability for individuals who are not age 18 or older to be an individual, who as of the date of the employee's death, has a medically determinable physical or mental impairment that results in marked and severe functional limitations, and that can be expected to result in death or to be of long-continued and indefinite duration.[88] The proposed regulations also provide a safe harbor for the determination of whether a beneficiary is disabled. If the Commissioner of Social Security has determined that the individual is disabled for purposes of Social Security benefits, then such individual will be deemed to be disabled for purposes of §401(a)(9).[89] The proposed regulations would impose a documentation requirement for an individual claiming to be disabled by October 31 of the calendar year following the calendar year of the employee's death.[90]

> **Example:** Lee designates Christine, a minor child, as sole beneficiary. Christine does not reach the age of majority until 2024. Lee dies in 2022, after his RBD. As of Lee's death, Christine is disabled, and the proper documentation was given to the plan administrator in a timely fashion. Due to her disability, she remains an eligible designated beneficiary even after reaching the age of majority in 2024 and the plan is not required to distribute Lee's remaining interest within the required 10-year limit following attainment of age 21.[91] What if the documentation requirements of the regulations were not satisfied as of October 31, 2023? Then Christine ceases to be an eligible designated beneficiary upon reaching her age of majority in 2024.[92]

> **Example**: Same original example as above, but now Christine becomes disabled in 2023 (after Lee's death in 2022). Because she was not disabled as of Lee's death, she ceases to be an eligible designated beneficiary upon reaching the age of majority in 2024 and the plan is now required to distribute Lee's remaining interest by the end of 10th calendar year following 2024 (i.e. 2034).[93] The IRS has attempted to provide prioritization as to which category a designated beneficiary could qualify under as an eligible designated beneficiary.

The SECURE Act defined a chronically ill individual by reference to §7702B(c)(2), which includes an individual who is unable to perform (without substantial assistance from another individual) at least two activities of daily living for a period of at least 90 days due to a loss of functional capacity.[94] The regulations caveat the reference to the 90 day period and replace it with ''an indefinite period that is reasonably expected to be lengthy in nature (not merely for 90 days).''[95] As §7702B(c)(2) requires that an individual to have been certified by a licensed health care practitioner as chronically ill, the proposed regulations prescribe the same documentation requirement such that a licensed health care practitioner must certify that the individual meets such definition of being chronically ill.[96]

The proposed regulations would require documentation to the plan administrator that the designated beneficiary meets the definition of disability or chronically ill no later than October 31st of the calendar years following the calendar year of the employee's death.[97] However, the proposal does not clarify what requirements that a plan administrator would need in order to verify the beneficiary's status as a disabled individual.

> **Commentary**: Practitioners will undoubtedly request guidance from the Treasury as to what documentation is necessary to determine whether a designated beneficiary is disabled for purposes of the RMD rules. As the regulations adopted a safe harbor if the individual is disabled for Social Security purposes, it may look to the documentation required under the rules of Social Security for purposes of that determination. Also practitioners will question whether the Treasury can require an individual to meet the definition of chronically ill for a

cally determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration. See also §72(m)(7), which includes a requirement to furnish proof of such disability as determined by the Secretary.

[88] Prop. Reg. §1.401(a)(9)-4(e)(4)(iii). *See also* Preamble, 87 Fed. Reg. 10,504, 10,510.

[89] Prop. Reg. §1.401(a)(9)-4(e)(4)(iv). *See also* Preamble, 87 Fed. Reg. 10,504, 10,509. The safe harbor requires that the Commissioner of Social Security to determine that the individual is disabled within the meaning of 42 U.S.C. §1382c(a)(3).

[90] Prop. Reg. §1.401(a)(9)-4(e)(7).

[91] Prop. Reg. §1.401(a)(9)-4(e)(9)(i), *Ex.* 1.

[92] Prop. Reg. §1.401(a)(9)-4(e)(9)(ii), *Ex.* 2. *See also* Preamble, 87 Fed. Reg. 10,504, 10,510. Similarly, if the employee's surviving spouse is also disabled or chronically ill at the time of the employee's death, then the surviving spouse will be treated as disabled or chronically ill for purposes of the applicable multi-beneficiary trust rules only if the documentation requirements are timely met with respect to the surviving spouse.

[93] Prop. Reg. §1.401(a)(9)-4(e)(9)(iii), *Ex.* 3. *See also* Preamble, 87 Fed. Reg. 10,504, 10,509.

[94] Prop. Reg. §1.401(a)(9)-4(e)(5). The proposed regulations would replace the required ''90 day'' period under §7702B(c)(2) with a period that is ''reasonably expected to be lengthy in nature'' and thus, could be longer than an 90-day period.

[95] Prop. Reg. §1.401(a)(9)-4(e)(5).

[96] Prop. Reg. §1.401(a)(9)-4(e)(5). A licensed health care practitioner is defined to be an individual who meets the requirements of §7702B(c)(4). *See also* Preamble, 87 Fed. Reg. 10,504, 10,509–10,510.

[97] Prop. Reg. §1.401(a)(9)-4(e)(7).

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longer period of time than 90 days if §7702B(c)(2) specifically requires a period of at least 90 days.

For purposes of an individual who is not more than 10 years younger than the employee (who is deemed to be an eligible designated beneficiary), this determination is based on the *actual* respective birthdates of the employee and the beneficiary. For example, if an employee's date of birth is October 1, 1953, then the employee's beneficiary is not more than 10 years younger than the employee only if the beneficiary was born on or before October. 1, 1963.[98]

Commentary: The IRS's proposed definition of an individual who is not more than 10 years younger takes a narrow view of what is means to be ''not more than 10 years younger.'' Generally, if one were to refer to one's younger sister, one would say that she is five years younger, not five years and two months younger. Thus, the proposal uses a stricter ''10 years younger'' determination, rather than a simpler more than 10-year difference. For example, if the deceased employee was born in 1952, the beneficiary would not be more than 10 years younger if she was born in 1962 or earlier. Practitioners will undoubtedly comment on this definition and request the simpler more-than-ten-year difference.

As an alternative, the IRS could make this determination using the method set forth in Reg. §1.401(a)(9)-5, Q&A-4(b)(1). That method is used to decide whether the difference in the employee's age and his/her spouse's age is more than 10 years, in which case they may use the actual Joint Life and Last Survivor Expectancy Table (joint life table) in lieu of the Uniform Lifetime Table.[99]

If an employee has more than one designated beneficiary and at least one of them is not an eligible designated beneficiary, then the employee is treated as not having an eligible designated beneficiary.[100] Hence, naming more than one designated beneficiary can lose the preferred distribution status if one of the beneficiaries was an eligible designated beneficiary. There are two exceptions to this general rule:

- A special rule for children: if any of the employee's designated beneficiaries is an eligible designated beneficiary because he/she is a minor child at the time of the employee's death, then the employee will be treated has having an eligible designated beneficiary even if the employee has other beneficiaries who are not eligible designated beneficiaries.[101] This allows payments to continue until 10 years after the child reaches majority even if there are other designated beneficiaries who are ineligible designated beneficiaries.

  Example: Lee names a see-through trust as the sole beneficiary of his plan interest and the trust beneficiaries are his spouse and his adult son, who is neither disabled nor chronically ill. As a result, the employee is treated as not having an eligible designated beneficiary as the adult son does not qualify as an eligible designated beneficiary. Hence, Lee's entire interest must be distributed no later than 10 years after Lee's death.

  If, however, if Lee were to name another designated beneficiary who is his minor child and who, as of the date of Lee's death, has not yet reached the age of majority, then Lee will be treated as having an eligible designated beneficiary.[102] In such case, if the trust is receiving annual distributions using the son's life expectancy rule, then a full distribution from the plan would not be required until 10 years after the minor child reaches the age of majority.[103]

- There is a special rule for a type II applicable multi-beneficiary trust. As will be discussed under the multi-beneficiary trust rules below, there is an exception for a type II applicable multi-beneficiary trust, where one or more of the beneficiaries is either disabled or chronically ill.

Special Rules for Trusts

Trusts are not individuals and thus, have no life expectancy. Hence, naming a trust as beneficiary would result in having no designated beneficiary, which then would invoke the five-year rule if the employee dies before his/her RBD. However, the proposed regulations preserve the rules of the existing 2002 regulations that permit a trust (referred to as a ''see-through'' trust) to be named as beneficiary if is satisfies the following four requirements: it must be a valid trust under state law (or would be but for the fact that there is no corpus); it must be irrevocable or will, by its terms, it must become irrevocable upon the employee's death; the beneficiaries of the trust must be identifiable (as defined in the regulations); and the re-

98 Prop. Reg. §1.401(a)(9)-4(e)(6).

99 Reg. §1.401(a)(9)-5, Q&A-4(b).

100 Prop. Reg. §1.401(a)(9)-4(e)(2).

101 Prop. Reg. §1.401(a)(9)-4(e)(2)(ii). *See also* Preamble, 87 Fed. Reg. 10,504, 10,512.

102 Preamble, 87 Fed. Reg. 10,504, 10,512–10,513.

103 *Id.*

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quired documentation has been satisfied.[104] There are a variety of reasons for using a trust in lieu of naming individuals as beneficiaries: concern that the trust beneficiary is too young; protection from creditors; a trust for disabled or chronically ill persons; and managing tax consequences for the beneficiaries.

The determination of *which* beneficiaries of a see-through trust are treated as ''designated beneficiaries'' of the employee depends on whether such trust is a conduit trust or an accumulation trust (the latter sometimes being referred to as a discretionary trust).[105] Note: this terminology is new under the proposed regulations, as it was not used in the 2002 regulations. A conduit trust is a see-through trust that requires any and all distributions to be passed out (i.e., the trust is merely a ''conduit'') to the trust beneficiary as they are received by the trustee after the employee's death and during the lifetime of the trust beneficiary.[106] Thus, the trustee has no power to accumulate funds within the trust for the benefit of any *other* trust beneficiary. The IRS considers the conduit beneficiary as the sole beneficiary of the trust, and thus, all other beneficiaries are deemed to be mere potential successors and thus, disregarded, as designated beneficiaries.[107] A see-through trust will not fail to be a conduit trust merely because its terms do not require an immediate distribution after the death of all of the specified beneficiaries.[108]

An accumulation trust is a see-through trust that does not meet the conduit requirements; as such, this type of trust provides the trustee with discretion as to how and when the trust income, including any RMDs, is to be distributed.[109] Such discretion may permit the trustee to defer distributions until the trust beneficiaries attain a certain age; it may also limit distributions for certain purposes, (such as life or health support payments). Under an accumulation trust, there are potentially many more beneficiaries due to the trustee's discretion, and thus, potentially other beneficiaries (e.g., remainder beneficiaries) that cannot be disregarded for purposes of the see-through trust's identifiability requirement.

To have invoked the life expectancy rules in the context of a trust, a beneficiary designated under the trust has to be an *individual* who is entitled to a portion or all of the employee's benefit, contingent on the employee's death or another specified event (e.g., attaining a certain age). If a person *other than* an individual (e.g., a charity) is designated as a beneficiary under the trust, the employee will be treated as having no designated beneficiary for purposes of the RMD rules, even if there are also individuals designated as beneficiaries.[110] Under the current 2002 regulations, it was important to determine who is a contingent beneficiary as opposed to a successor beneficiary, in order to ascertain whether the designated beneficiary is an individual and to be counted as the employee's beneficiaries in determining the applicable distribution period.[111] Under those rules, a contingent beneficiary was considered in determining whether the designated beneficiary was an individual and to be counted, whereas a ''mere potential successor'' to the interest of one of the employee's beneficiaries upon that beneficiary's death was not.[112]

Example: Albert names a valid trust as beneficiary of all amounts payable from his defined contribu-

[104] Prop. Reg. §1.401(a)(9)-4(f)(2)(i)–§1.401(a)(9)-4(f)(2)(iv). There are certain documentation requirements that also have to be met. These proposed regulations are consistent with the examples that are in the current 2002 regulations under Reg. §1.401(a)(9)-5, Q&A-7(c), but they provide additional guidance in determining which beneficiaries of the see-through trust are treated as the employee's beneficiaries due to the number of private letter ruling requests and comments submitted to the IRS and to the Treasury. As such, they provide for the determination of trust beneficiaries that are treated as the employee's beneficiaries in Prop. Reg. §1.401(a)(9)-4(f); in the existing regulation, these rules appeared in Reg. §1.401(a)(9)-5. These detailed rules should minimize the need for taxpayers to request private letter rulings in the future. *See* Preamble, 87 Fed. Reg. 10,504, 10,510.

[105] Prop. Reg. §1.401(a)(9)-4(f)(1)(ii).

[106] Prop. Reg. §1.401(a)(9)-4(f)(1)(ii)(A). *See also* Preamble, 87 Fed. Reg. 10,504, 10,510. The IRS interprets the conduit beneficiary to be the sole beneficiary of the trust and thus, all other beneficiaries are mere potential successors to the employee's interest. *See* Reg. §1.401(a)(9)-5, Q&A-7(c)(3) *Ex.* 2, under the trust terms ''. . . B [the contingent beneficiary] is the sole designated beneficiary of A's account in Plan X for purposes of determining the designated beneficiary under section 401(a)(9)(B)(iii) and (iv) . . . Therefore, the residuary beneficiaries of Trust P are mere potential successors to B's interest in Plan X.''

[107] Reg. §1.401(a)(9)-5, Q&A-7(c)(3), *Ex.* 2. The beneficiary who receives amounts from employee A's account to the trust is a contingent beneficiary, whereas the residuary beneficiaries of the trust are mere potential successors to B's interest. Hence, remainder and contingent beneficiaries are disregarded and therefore, need not be individuals.

[108] *See* Preamble, 87 Fed. Reg. 10,504, 10,510.

[109] Prop. Reg. §1.401(a)(9)-4(f)(1)(ii)(B).

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

[111] Reg. §1.401(a)(9)-5, Q&A-7(c)(3), *Ex.* 2. Under this example, an employee had established a conduit trust which was beneficiary of his account under his employer's defined contribution plan when he died. Under the terms of the trust, all amounts distributed from the plan to the trust were to be distributed to the beneficiary, B, who was alive and no amounts were to be accumulated in the trust during B's lifetime for the benefit of any other beneficiary. B was the contingent beneficiary as his/her was entitled to the employee's benefits upon the employee's death (i.e., a contingent event). The residuary beneficiaries of the trust were ''mere potential successors to B's interest'' in the plan. Thus, B was the sole beneficiary of the trust's interest in the employee's plan account.

[112] Reg. §1.401(a)(9)-5, Q&A-7(b)–(c).

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tion account after his death. Albert dies in 2015 at the age of 55, survived by his spouse, Barb, who was age 50. The trust provides that all amounts distributed from Albert's defined contribution account to the trustee must be paid directly to Barb while she is alive; no amounts distributed from his account to the trust are accumulated during Barb's lifetime for the benefit of any other beneficiaries. If Barb dies before Albert's entire interest is distributed, their children are named as beneficiaries. As the trust is a conduit trust, Barb is the sole beneficiary for purposes of the RMD rules; the residuary beneficiaries (i.e., the children) are mere potential successors to Barb's interest in the plan, because their interests were not meaningful so as to be counted.[113] Hence, the children as designated beneficiaries may be disregarded.

In contrast, if the terms of the trust required the trustee to pay specified amounts from the trust to Bar, and those specified amounts did not include the immediate payment of plan distributions made to the trust, this is an accumulation trust and both Barb and the children are beneficiaries because the children have a residual interest in the see-through trust (i.e., they could receive amounts in the trust representing Albert's interest in the plan that were not distributed to Barb). Then, under the terms of the 2002 regulations, the designated beneficiary with the shortest life expectancy was used for purposes of determining the distribution period.[114]

Commentary: Practitioners will applaud the expanded interpretation of the use of see-through trusts as beneficiaries in these proposed regulations as they may negate the need to solicit a private letter ruling from the Treasury in the future. The number of examples set forth in the proposed regulations provide helpful guidance in interpreting the new rules. While the RMD rules are themselves complex, use of a trust as beneficiary to an employee's account in a covered defined contribution plan add further complications as it layers estate planning concerns in determining the trust's distribution rules.

Under the proposed regulations, the following beneficiaries of a see-through trust will be regarded as *designated beneficiaries* of the employee under the plan in two contexts:

- Any beneficiary who could receive amounts in the trust that are neither contingent upon, nor delayed until, the death of *another* trust beneficiary who did not predecease the employee (and is not treated as having predeceased the employee).[115] This beneficiary is referred to in this article as a (f)(3)(i)(A) beneficiary.[116] The Treasury has clarified that if a conduit trust is the beneficiary of the employee's account and the trust names the employee's surviving spouse as the sole current beneficiary, then the trust may use the life expectancy method and would recalculate the spouse's life expectancy each year through the year of the spouse's death.[117]

  Example: Lee names a valid conduit trust as beneficiary of his interest in a plan and the trust directs all distributions received from the plan to be paid directly to his sibling, David, who is five years older than Lee. Under the trust, if David dies before Lee's entire account has been distributed, Ellen will become the beneficiary of Lee's account. Lee dies in 2022 at age 30. David is alive in 2022 and is an eligible designated beneficiary because he is not more than 10 years younger than Lee. Under the IRS's interpretation, as Lee is age 30 as of his death, anyone who is age 21 or older as of his death would be "not more than 10 years younger." Hence, David as an older sibling fits within this last category of an eligible designated beneficiary. As a result, David is treated as a (f)(3)(i)(A) beneficiary of Lee because he could receive the amounts that are neither contingent upon nor delayed until the death of *another* beneficiary. Ellen is disregarded as Lee's beneficiary because her ability to receive amounts from the trust was contingent upon the death of David. As David is an eligible designated beneficiary, distributions will be determined using his life expectancy for purposes of determining annual distributions, nonrecalculated as David is not Lee's surviving spouse. If David dies before Lee's entire interest is distributed to him, his life expectancy continues to be used in determining the applicable denominator; however, a full distribution of Lee's entire interest to Ellen will be required no later than 10 years after the calendar year in which David dies.[118]

- Any beneficiary of an *accumulation trust* that could receive amounts in the trust of the employ-

[113] Reg. §1.401(a)(9)-4, Q&A-7(c), *Ex.* 2. *See also* Preamble, 87 Fed. Reg. 10,504, 10,510.

[114] Reg. §1.401(a)(9)-4, Q&A-7(c), *Ex.* 1.

[115] Prop. Reg. §1.401(a)(9)-4(f)(3)(i)(A). This rule is a carryover from the existing regulations. *See* Reg. §1.401(a)(9)-5, Q&A-7(c)(3), *Ex.* 2.

[116] The author refers to an individual as a Prop. Reg. §1.401(a)(9)-4(f)(3)(i)(A) beneficiary for ease of reference; this is not a new term of art under the proposed regulations.

[117] *See* Preamble, 87 Fed. Reg. 10,504, 10,510.

[118] Prop. Reg. §1.401(a)(9)-4(f)(6)(i), *Ex.* 1. *See also* Preamble, 87 Fed. Reg. 10,504, 10,510.

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ee's interest that were not distributed to the beneficiaries described in the rule above (i.e., (f)(3)(i)(A) beneficiaries).[119] As a result of this distinction, any income beneficiaries and potential future beneficiaries must be considered in the context of an accumulation trust, thereby resulting in using the least favorable distribution schedule that would apply to any single beneficiary had he/she been named directly.[120]

Example: Lee names a valid accumulation trust as the sole beneficiary of his plan interest upon his death. The terms of the trust require the trustee to pay all trust income to Lee's surviving spouse, Erin. Lee's brother, David who is less than 10 years younger than Lee (and thus an eligible designated beneficiary) and is younger than Erin, is the sole residual beneficiary of the trust (i.e., he will receive any amounts from the trust that were not distributed to Erin). Lee dies in 2022 at the age of 55, survived by his spouse, Erin, who is age 50. Erin is treated as a (f)(3)(i)(A) beneficiary because she could receive amounts in the see-through trust that are neither contingent upon nor delayed until the death of another trust beneficiary. Because not all distributions from the plan to the trust are immediately distributed to Erin (a (f)(3)(i)(A) beneficiary), the trust is an accumulation trust.[121] As a result, David is treated as the beneficiary of Lee because he has a residual interest in the trust (representing Lee's interest in the plan that were not distributed to Erin). Hence, both Erin and David are regarded as Lee's eligible designated beneficiaries for purposes of the RMD rules. As Lee died before his RBD, the applicable denominator used to determine payments under the life expectancy rule will based on the oldest of the two designated beneficiaries (which is Erin, age 56 in 2023).[122]

Example: Assume in the above example that David was more than 10 years younger than Lee, meaning that at least one of the beneficiaries of Lee's trust is not an eligible designated beneficiary. As a result, Lee is treated as not having an eligible designated beneficiary. As such, the trustee is not permitted to make an election to take annual life expectancy distributions and the 10-year rule would apply. As Lee dies in 2022 before his RBD, the entire interest must be distributed by the end of 2032.[123]

The proposed regulations would set forth *new* types of accumulation trust *beneficiaries* that can be *disregarded* for purpose of determining whether a beneficiary under the trust is a designated beneficiary. These exceptions were provided because the disregarded beneficiaries are deemed to have only minimal or remote interests.

- Entitlement conditioned on the death of the secondary beneficiary: Any beneficiary of an accumulation trust may be disregarded if that beneficiary could receive payments from the trust that represent the employee's plan interest solely because of the death of *another* trust beneficiary described in (f)(3)(i)(B).[124]

Example: Using the above example, assume the see-through trust also provides that if David survives Lee but predeceases Erin, then the amounts remaining in the trust after the death of Erin are to be paid to a charity. Assume Erin (a primary beneficiary) and David (a secondary beneficiary) both survive Lee. Because the charity's entitlement is based on death of David (who is a (f)(3)(i)(B) beneficiary), it is disregarded as a beneficiary of Lee, as it could receive amounts in the trust that are contingent upon the death of David (another secondary beneficiary who survived Lee). Thus, only Erin and David are regarded as Lee's designated beneficiaries.[125]

In contrast, the charity would have been treated as Lee's beneficiary if David could receive amounts

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[119] Prop. Reg. §1.401(a)(9)-4(f)(3)(i)(B).

[120] Reg. §1.401(a)(9)-5, A-7(c)(3), *Ex.* 1. This rule is a carryover from the existing regulations.

[121] Prop. Reg. 1.401(a)(9)-4(f)(6)(ii), *Ex.* 2. Under the terms of the trust, Erin has the power to appoint trust principal to any person other than herself. She also has the power, exercisable annually, to compel the trustee to withdraw from Lee's account balance an amount equal to the trust income and to distribute such amount. The plan includes no prohibition on withdrawal from Lee's account of amounts in excess of the annual RMD. The trustee elected to take annual life expectancy payments (in lieu of a five-year payout). If Erin exercised her withdrawal power, the trustee must withdraw form Lee's plan account the greater of the amount of income year during the year or the RMD. However, under the terms of the trust and applicable state law, only the portion of the plan distribution received by the trustee equal to the income earned by Lee's account was required to be distributed to Erin (along with any other trust income).

[122] *See* Preamble, 87 Fed. Reg. 10,504, 10,510–10,511. The author refers to an individual as a Prop. Reg. §1.401(a)(9)-4(f)(3)(i)(B) beneficiary for ease of reference; this is not a new term of art under the proposed regulations. Note: as Erin is not the sole beneficiary of Lee's account, her life expectancy (recalculated) is not used to determine the annual minimum required distributions.

[123] Prop. Reg. §1.401(a)(9)-4(f)(6)(iii), *Ex.* 3.

[124] Prop. Reg. §1.401(a)(9)-4(f)(3)(ii)(A). This other trust beneficiary is a (f)(3)(i)(B) beneficiary because his/her sole interest is a residual interest in the trust, and he/she did not predecease the employee. The rule set forth in Prop. Reg. §1.401(a)(9)-4(f)(3)(ii)(A) does not apply if the other (f)(3)(i)(B) beneficiary predeceased (or is treated as having predeceased) the employee or is described as an (f)(3)(i)(A) beneficiary.

[125] *See* Note 119, above.

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in the trust not subject to any contingencies or contingent upon an event other than the death of Erin (e.g., such as Erin's remarriage).[126] If this were the case, one of the beneficiaries would not be an individual (i.e., the charity), and the least favorable distribution rules would apply.

- Entitlement conditioned on death of a young individual: If any beneficiary of a see-through trust is an individual who is treated as a (f)(3)(i)(A) beneficiary and the terms of the trust require full distribution of amounts in the trust representing the employee's plan interest to that individual by the later of the end of the calendar year following the calendar year of the employee's death and the end of the 10th calendar year following the calendar year in which that individual attains the age of majority, then any other beneficiary of the trust who could receive amounts in the trust representing the employee's plan interest (if that individual dies before full distribution to that individual is made) is not treated as having been designated as the employee's beneficiary. But the preceding sentence does not apply if the beneficiary who could receive amounts in the trust conditioned on the death of that individual is also a (f)(3)(i)(A) beneficiary.[127]

Example: Lee names a see-through trust as the sole beneficiary of his plan account and the trust permits specified amounts to be paid to Lee's niece, Clare, until she reaches age 31 (the age of majority plus 10 years). Those specified amounts are not required to include the immediate payment of plan distributions made to the trust. The trust is scheduled to terminate with a full distribution of assets to Clare when she reaches 31; but if she dies before this scheduled termination date, then the amounts remaining in the trust will be paid to Lee's sibling, Mark. Under this exception, the only beneficiary designated for purposes of the RMD rules is Clare, because Mark is disregarded as his sole entitlement to distributions is conditioned upon the unlikely event that Clare dies before full distribution. However, if the trust does not require a full distribution of amounts representing Lee's interest in the plan until Clare reaches age 35, then the exception does not apply, and Clare and Mark are treated as designated beneficiaries.[128]

The proposed regulations would keep the existing rule that the employee's beneficiaries (including beneficiaries of a see-through trust) must be *identifiable*; however, they alter the definition of identifiability in light of the SECURE Act changes.[129] Trust beneficiaries are said to be identifiable if it is possible to identify each person eligible to receive a portion of the employee's interest in the plan through the trust.[130] For example, if an employee names a class of individuals as the beneficiary (e.g., the employee's grandchildren), the addition of another member of that class will not cause the trust to fail to meet this rule.

For estate planning reasons, the employee may wish to give the current beneficiary of the trust a testamentary power of appointment (as such, the current beneficiary is referred to as the powerholder). Such power may be "general" or "limited" depending on whether the current beneficiary's creditors, estate, or creditors of the estate are permissible appointees. Prior to these proposed regulations, there was little guidance from the Service as to whether permissible appointees of the power were considered trust beneficiaries, and thus counted.[131] The issue was whether permissible appointees were identifiable as required by the see-through trust requirements. The proposed regulations provide new examples whereby a trust will not fail to meet the identifiability requirement because of the existence of a power of appointment. If the power to appoint is exercised by the applicable September 30 date in favor or one or more beneficiaries who are all identifiable, then all of those identifiable beneficiaries are treated as designated beneficiaries. The preceding sentence also applies if the individual restricts the power so that it can be exercised at a later time in favor of only two or more identifiable beneficiaries, then those identified beneficiaries will be treated as designated beneficiaries. However, if such power of appointment has neither been exercised nor restricted by the applicable September 30 date, the proposed regulations state that each taker in default (i.e., each person who would be entitled to the portion subject to the power if that power is not exercised) is treated as a beneficiary of the employee.[132]

Example: Lee names a trust as beneficiary of his interest in the plan. Under the trust, Christine has a general power of appointment and can name who

[126] *See* Preamble, 87 Fed. Reg. 10,504, 10,511.

[127] Prop. Reg. §1.401(a)(9)-4(f)(3)(ii)(B).

[128] *See* Preamble, 87 Fed. Reg. 10,504, 10,511.

[129] Prop. Reg. §1.401(a)(9)-4(f)(5). *See also* Preamble, 87 Fed. Reg. 10,504, 10,511.

[130] Prop. Reg. §1.401(a)(9)-4(f)(5)(i).

[131] The following private letter rulings examined see-through trusts that provided the current beneficiary with a testamentary power of appointment, but did not give specific guidance with respect to the power of appointment. *See* PLR 199903050, PLR 200438044 (where the power of appointment was disclaimed); and PLR 200620026 (with a conduit trust).

[132] Prop. Reg. §1.401(a)(9)-4(f)(5)(ii)(A)–§1.401(a)(9)-4(f)(5)(ii)(B). *See also* Preamble, 87 Fed. Reg. 10,504, 10,511.

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receives Lee's plan interest. Christine is considering appointing her son, Jonathan, who is age 30 and disabled, as beneficiary of the trust. Lee dies in 2022.

o If Ellen exercises her power by September 30, 2023, in favor of Jonathan, then only Jonathan will be treated as a designated beneficiary. As Jonathan is disabled, the trust can stretch distributions over his life expectancy.

o If Ellen does not exercise the power by September 30, 2023, then Christine is considered the designated beneficiary and as an adult child, she will be subject to the 10-year rule.

Example: Lee names a trust as beneficiary of his interest in the plan, whereby all amounts in his plan account will be distributed to the trust after Lee's death. Under the terms of the trust, all trust income is payable to Lee's surviving spouse, Erin, and Erin has a power of appointment to name the beneficiaries of the residual of the trust. The power of appointment provides that if she doesn't exercise such power, then upon her death, Lee's descendants are entitled to the remainder interest in the trust, per stirpes. Lee dies in 2022 at age 60. As of the date of Lee's death, Lee has two children, Karen and Lydia, who are not disabled nor chronically ill and who are both older than age 21. Before September 30, 2023, Erin irrevocably restricts her power to appointment so that she may exercise her power only in favor of her siblings (who are all less than 10 years younger than Lee and thus, are eligible designated beneficiaries).[133]

Because Erin timely restricted the power of appointment so that she may exercise the power to appoint the residual interest in the trust only in favor of her siblings, the designated beneficiaries are Erin and her siblings. Because all of them are eligible designated beneficiaries, annual life expectancy payments are permitted, and the applicable denominator is based on the age of the oldest of them. However, distribution of the remaining interest is required no later than 10 years after the calendar year in which the oldest of them dies.

Example: What if in the above example Erin does not restrict the power by September 30, 2023? Then, Erin, Karen, and Lydia are treated as Lee's beneficiaries. Because Karen and Lydia are not eligible designated beneficiaries, the trustee is not permitted to make an election to take annual life expectancy distributions and the 10-year rule applies.[134] Because Lee dies in 2022 before his RBD, the entire interest must be distributed by the end of 2032.

Commentary: As estate planning is not my field of expertise, I rely upon my fellow trust and estates lawyers who tell me that the Service has relaxed, in these proposed regulations, its historical view that if a trust beneficiary held a general power of appointment on the date of death, such power could cause the trust to fail the identifiability requirement. As a result, the trust was considered a non-designated beneficiary, and thus, subject to the less favorable post-death distribution rules. Practitioners will undoubtedly applaud the IRS's new interpretation if it increases estate planners' use of general powers of appointment in the hands of see-through trust beneficiaries.

The proposed regulations would provide that when a beneficiary is added who was not initially taken into account in determining an employee's beneficiaries, if the beneficiary is added after September 30 of the calendar year following the calendar year of the employee's death, then the usual rules (e.g., whether the beneficiary is an individual or whether there are multiple beneficiaries) must take into account the new beneficiary.[135]

Example: Lee names a see-through trust as beneficiary of his plan interest. Under the trust, the trustee is to pay specified amounts to Erin, his surviving spouse, and those amounts do not require the immediate payment of plan distributions made to the trust; hence, the trust is an accumulation trust. The trust terms give Erin a power of appointment to name any portion of Lee's interest that has not be distributed before her death. In absence of the appointment, Lee's only child, Christine, is entitled to the residual trust. Lee dies in 2022. If the power is not exercised by September 30, 2023, both Erin and Christine are treated as Lee's designated beneficiaries. If, after September 30, 2023, Erin exercises the power by naming her brother, Mark, as beneficiary of the residual interest, then Erin, Christine, and Mark are all taken into account when applying the rules for multiple designated beneficiary for each calendar after the year during which Mark was added as a beneficiary.[136]

The proposed regulations also state that a see-through trust will not fail the identifiability require-

[133] Prop. Reg. §1.401(a)(9)-4(f)(6)(iv), *Ex.* 4.

[134] Prop. Reg. §1.401(a)(9)-4(f)(6)(v), *Ex.* 5.

[135] Prop. Reg. §1.401(a)(9)-4(f)(5)(iv).

[136] Prop. Reg. §1.401(a)(9)-5(iv). *See also* Preamble, 87 Fed. Reg. 10,504, 10,512.

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ment merely because the trust is subject to state law that permits the trust terms to be modified after the death of the employee (e.g., court reformation, through a decanting), thus permitting a change in beneficiaries of the trust.[137] A designated beneficiary may be *removed* due to modification of the trust terms (e.g., court reformation) by September 30 of the calendar year following the calendar year of the employee's death, in which case such individual is disregarded.[138] Similarly, a designated beneficiary may be *added* due to modification of the trust terms due to state law by the applicable September 30 date, but the rules that apply to a beneficiary that is added pursuant to a power of appointment will also apply to a beneficiary being added due to this type of modification.[139]

Special Rules for Multi-beneficiary Trusts

SECURE Act adopted new rules for multi-beneficiary trusts (referred to as applicable multi-beneficiary trust (AMBTs)), which are trusts that have multiple beneficiaries (all of whom are individuals) and at least one of the trust beneficiaries is disabled or chronically ill, as such terms are defined by the SECURE Act.[140] Such trusts were created by the SECURE Act to assist beneficiaries in maintaining their eligibility in certain means-tested programs such as Supplemental Security Income and Medicare. Under the SECURE Act, the AMBT can be formed in one of two ways: (1) the terms of the trust provide that it is to be immediately divided upon the death of the employee into separate trusts for each beneficiary (referred to in the proposed regulations as a Type I AMBT) or (2) the terms of the trust provide that no beneficiary, other than an eligible designated beneficiary (who is either disabled or chronically ill), has a right to the employee's interest until the death of all of the eligible designated beneficiaries, referred to in the proposed regulations as a Type II AMBT.[141]

With respect to Type I AMBT, the separate trusts applicable to the disabled or chronically ill individuals can take advantage of the life expectancy rule, as such beneficiaries are eligible designated beneficiaries. With respect to Type II AMBT, the proposed regulations set forth a special rule (set forth below) whereby the beneficiaries of such trust are treated as eligible designated beneficiaries without regard as to whether any of the other trust beneficiaries are not eligible designated beneficiaries.[142] As such, the stretch rules can continue to apply to the disabled/chronically ill beneficiary (and would be based on the oldest beneficiary if there are multiple disabled/chronically ill beneficiaries).

As discussed earlier, if the employee has more than one designated beneficiary and at least one of them is not an eligible designated beneficiary, then the employee is treated as not having an eligible designated beneficiary.[143] As a result, the employee's interest must be distributed no later than the end of the 10th calendar year following the calendar year of the employee's death. The SECURE Act provides an exception to such rule in the context of a Type II AMBT.[144] In this case, the ages of the other designated beneficiaries will be disregarded in determining the applicable denominator, and the death of the last of the disabled or chronically ill trust beneficiary of the trust will trigger the 10-year payout limit.[145]

Employee Survives to His/Her RBD: Prop. Reg. §1.401(a)(9)-5

Section 401(a)(9)(B) sets forth the rules regarding required distributions where the employee dies before his/her entire interest is distributed (which would be the case if the employee were receiving installment payments of his/her account during his/her lifetime). Under §401(a)(9)(B)(i), if distributions have already begun being paid to the employee (because his/her RBD was triggered), the remaining portion of the interest is to be distributed **"at least as rapidly"** as under the method of distribution being used as of the RBD (i.e., either the employee's life or life expectancy of the joint lives of the employee and a designated beneficiary or their joint life expectancy).[146] Given that the SECURE Act mandates that distributions to ineligible designated beneficiaries be made within a new 10-year rule, it was unclear whether the IRS would leave in place its prior "at least as rapidly" rules under the regulations or replace such rules with a 10-year rule (interpreted the same as the five-year rule), whereby distributions are not mandated until the end of the 10th calendar year following the employee's death. As the explanations below will show, the IRS has decided to leave in place its prior "at least as rapidly" rules, thereby complicating how distributions are to be made to ineligible designated beneficiaries. Thus, the proposed regulations would affirm the use of the same calculations for the annual RBDs

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[137] Prop. Reg. §1.401(a)(9)-4(f)(5)(iii). *See also* Preamble, 87 Fed. Reg. 10,504, 10,512.

[138] Prop. Reg. §1.401(a)(9)-4(f)(5)(iii)(B).

[139] Prop. Reg. §1.401(a)(9)-4(f)(5)(iii)(C). *See also* Preamble, 87 Fed. Reg. 10,054, 10,512.

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

[141] §401(a)(9)(H)(iv)(I)–§401(a)(9)(H)(iv)(II). *See also* Prop. Reg. §1.401(a)(9)-4(g)(2)–(3). *See also* Preamble, 87 Fed. Reg. 10,504, 10,512.

[142] Prop. Reg. §1.401(a)(9)-4(g)(3)(ii).

[143] Prop. Reg. §1.401(a)(9)-4(e)(2)(i).

[144] Prop. Reg. §1.401(a)(9)-4(g)(3)(ii).

[145] Prop. Reg. §1.401(a)(9)-5(f)(1).

[146] §401(a)(9)(B)(i)(I)–§401(a)(9)(B)(i)(II) (emphasis added).

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(as determined before), but impose a new requirement that full distribution of the employee's interest must be made upon the occurrence of certain specified events.

Commentary: While recordkeepers will complain vigorously about the IRS's interpretation of the new SECURE Act distribution rules in the context of the 10-year rule, such interpretation is not arbitrary nor capricious as it retains its view under the 2002 final regulations. The legislative history is not particularly helpful, and it is unclear whether the drafters of the SECURE Act legislation even thought about the "at least as rapidly" rules. Thus, the Treasury may decide to retain this interpretation in its final regulations, allowing the courts to determine whether such interpretation is worthy of the *Chevron* deference standard of review.[147] While legislative initiatives before the 117th Congress in the area of retirement plans make changes to the definition of the Code's RBD and to the excise taxes applicable when the RMD rules are not followed, they are presently silent regarding the IRS' interpretation of the new 10-year rule, as they were drafted prior to the issuance of these proposed regulations. Query if such proposed legislation may be changed during 2022 to rebut the IRS's present interpretation.

When the employee dies on or after his/her RBD, a RMD is due for the calendar year of the employee's death.[148] If that amount had not yet been distributed to the employee, it must be distributed to the employee in the year of death and, for subsequent years, distributions must now satisfy the requirements of *either* §401(a)(9)(B)(ii) (i.e., the new 10-year rule for ineligible designated beneficiaries) or §401(a)(9)(B)(iii) (i.e., the life expectancy rule, applicable for eligible designated beneficiaries).[149] In addition, the distributions must now satisfy the applicable requirements set forth in Prop. Reg. §1.401(a)(9)-5(e)(2), Prop Reg. §1.401(a)(9)-5(e)(3), Prop. Reg. §1.401(a)(9)-5(e)(4), or Prop. Reg. §1.401(a)(9)-5(e)(5) (which refer to the new 10-year limits and a life expectancy limit for older eligible designated beneficiaries).[150] These new limitations require that the entire interest of the employee must be distributed by the end of the *earliest* of the calendar year described in Prop. Reg. §1.401(a)(9)-5(e)(2), Prop. Reg. §1.401(a)(9)-5(e)(3), Prop. Reg. §1.401(a)(9)-5(e)(4), or Prop. Reg. §1.401(a)(9)-5(e)(5), which are as follows:

- (e)(2) requires the full distribution of the employee's interest upon the death of an ineligible designated beneficiary by the 10th calendar year following the calendar year of the employee's death, which is now imposed by the SECURE Act;
- (e)(3) requires the full distribution of the employee's interest upon the death of an eligible designated beneficiary by the 10th calendar year following the calendar year of the beneficiary's death, which is now imposed by the SECURE Act;
- (e)(4) requires full distribution of the employee's interest upon the death of a minor child by the 10th calendar year following the calendar year of the minor child's attainment of age 21, which is now imposed by the SECURE Act; and
- (e)(5) which imposes a new life expectancy rule if the eligible designated beneficiary was older than the employee as of the date of the employee's death.[151]

To understand the new rules, a series of examples will be used, applicable when the employee dies on or after his/her RBD and either (1) has no designated beneficiary (2) has designated an ineligible beneficiary or (3) has designated an eligible beneficiary (e.g., surviving spouse, minor child, disabled or chronically ill individual, or an individual who is not more than 10 years younger than the employee).

No Designated Beneficiary Has Been Named

If the employee dies on or after his/her RBD and has no designated beneficiary, the applicable denominator to be used (for distributions commencing in the calendar year following the employee's calendar year of death) is the employee's remaining life expectancy, using the life expectancy under the Single Life Table (determined on a nonrecalculated basis).[152] This follows the "at least as rapidly" rule that the IRS promulgated under its 2002 regulations.

Example: Lee's RBD is April 1, 2022, and thus, he attains age 72 in his first distribution year (i.e., 2021). Lee dies during 2030 and designates a charity as the beneficiary. In 2030 (the year of death), Lee's annual minimum distribution must be computed using the uniform lifetime table; as Lee is age 81 in 2030, his uniform lifetime table divisor

[147] *See* Kathryn J. Kennedy, *Primer on the Code's Required Minimum Distribution Rules: Post SECURE Act*, 49 Tax Mgmt. Comp. Plan. J. No. 6 (June 4, 2021).

[148] Prop. Reg. §1.401(a)(9)-5(d)(1)(i).

[149] *Id.*

[150] Prop. Reg. §1.401(a)(9)-5(d)(1)(ii).

[151] Prop. Reg. §1.401(a)(9)-5(e)(1)–§1.401(a)(9)-5(e)(5). *See also* Preamble, 87 Fed. Reg. 10,504, 10,517.

[152] Prop. Reg. §1.401(a)(9)-5(d)(3)(ii).

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is 19.4.[153] Beginning in 2031, the minimum distribution must be made using Lee's single life expectancy (i.e., for an employee age 82, the single life expectancy number is 9.9). In subsequent calendar years (e.g., 2032 and beyond), the remaining life expectancy is determined by reducing the original 9.0 by one for each subsequent calendar year (i.e., the nonrecalculation method). Thus, for distributions in 2032, the applicable divisor is 8.9 (9.9-1).[154]

Commentary: One of the goals of the 2002 regulations was 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.[155] Given the changes made by the SECURE Act to reduce the number of years of distribution for ineligible designated beneficiaries, the IRS continued use of the employee's remaining life expectancy at the time of death leads to the unusual result of allowing a longer period of distribution if the employee does not name a designated beneficiary. Since the average life expectancy for a newborn in the United States is 79.05 for 2022,[156] continuing to use the employee's remaining life expectancy at death (at age 79) results in a single life expectancy divisor 11.9, reduced by one for each year thereafter. This results in a maximum distribution period of 12 years, which is more than the current 10-year period for ineligible designated beneficiaries. Practitioners will undoubtedly comment about the IRS's interpretation in this context.

An Ineligible Designated Beneficiary Is Named

As one of the goals of the 2002 final 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, the proposed regulations preserves this goal, but subject it to a new caveat that ineligible designated beneficiaries are limited to 10-year payouts. The result is an overly complicated set of calculations, making the minimum distribution rules (which are already extremely complex) even more difficult to implement.

If the employee dies on or after his/her RBD and has named an ineligible designated beneficiary, the applicable denominator to be used (for distributions commencing in the calendar year following the employee's calendar year of death) is the **greater** of the designated beneficiary's remaining life expectancy (using the life expectancy under the Single Life Table, determined on a nonrecalculated basis) or the employee's remaining life expectancy (using the life expectancy under the Single Life Table, determined on a nonrecalculation basis).[157] However, because the named beneficiary is an ineligible designated beneficiary, the entire interest of the employee must be distributed by the end of the 10th calendar year following the calendar year of the employee death (i.e., the new 10-year limit).[158]

Example: Lee's RBD is April 1, 2022, and thus, he attains age 72 in his first distribution year (i.e., 2021). Lee dies during 2030 and designates his adult child, Christine (age 59 in 2030), as beneficiary. Christine is an ineligible designated beneficiary as she is not a minor, nor disabled, nor chronically ill. In 2030 (the year of death), Lee's annual minimum distribution must be computed using the uniform lifetime table; as Lee is age 81 in 2030, his uniform lifetime table divisor is 19.4.[159] Beginning in 2031, the minimum distribution must be made using the **greater** of Lee's single life expectancy (i.e., for an employee age 82, the single life expectancy number is 9.9) or Christine's single life expectancy (i.e., for a beneficiary age 60 in 2031, the single life expectancy number is 27.1). The greater of these is 27.1; for subsequent years (i.e., beginning in 2032), as Christine is not Lee's spouse, the nonrecalculation method must be used and thus the divisor for 2032 would be 26.1 (27.1-1). However, because Christine is not an eligible designated beneficiary, Lee's entire interest must be distributed no later than the 10th calendar year following the calendar year of Lee's death (i.e., 2040). Hence, Christine will continue to use the nonrecalculated applicable divisor for each year, beginning in 2031 through 2039, but in 2040, the entire balance in the account must be distributed due to the new 10-year limit.[160]

Commentary: The IRS is likely to receive a number of negative comments on its interpretation of how distributions are to be made after the employee's death and an ineligible designated beneficiary has been named. Given the statutory language of the Code which states:

[153] Reg. §1.401(a)(9)-9(c).

[154] Prop. Reg. §1.401(a)(9)-5(d)(3)(ii). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

[155] *See* Kathryn J. Kennedy, *Primer on the Code's Required Minimum Distribution Rules: Post SECURE Act,* 49 Tax Mgmt. Comp. Plan. J. (June 4, 2021).

[156] Macrotrends LLC,U.S. Life Expectancy 1950 – 2022.

[157] Prop. Reg. §1.401(a)(9)-5(d)(1)(ii)-§1.401(a)(9)-5(d)(3)(iii). *See also* Preamble, 87 Fed. Reg. 10,504, 10,513–10,514.

[158] Prop. Reg. §1.401(a)(9)-5(e)(2).

[159] Reg. §1.401(a)(9)-9(c).

[160] *See* Preamble, 87 Fed. Reg. 10,504, 10,514.

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> "(H) SPECIAL RULES FOR CERTAIN DEFINED CONTRIBUTION PLANS. — In the case of a defined contribution plan, if an employee dies before the distribution of the employee's entire interest —
>
> (i) IN GENERAL — Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii) —
>
> (I) shall be applied by substituting '10 years' for '5 years', and
>
> (II) shall apply whether or not distributions of the employee's interest have begun in accordance with subparagraph (A).
>
> (ii) EXCEPTION FOR ELIGIBLE DESIGNATED BENEFICIARIES. — Subparagraph (B)(iii) shall apply only in the case of an eligible designated beneficiary. [161]

Practitioners are likely to argue that ineligible designated beneficiaries have a new 10-year rule, applicable when the employee dies before his/her RBD AND when the employee dies on or after his/her RBD. As the new 10-year rule is to operate the same as the prior five-year rule, distributions to the ineligible designated beneficiaries may begin in the calendar year following the calendar year of the employee's death, but no distributions are required until the end of the 10th calendar year following the calendar year of the employee's death. Hence, annual distributions following the employee's death are not required. Eligible designated beneficiaries are to follow the prior life expectancy rules, with new maximum payout requirements if the minor child attains majority age, if the eligible designated beneficiary dies, or if the eligible designated beneficiary is older than the employee as of the employee's date of death.

IRS Publication 590-B, as initially drafted, is consistent with the proposed regulations as it suggested that an ineligible designated beneficiary must take annual minimum distributions using his/her life expectancy in years one through nine; with a full distribution of monies by the 10th anniversary of the owner's death.[162] However, the IRS issued a clarification describing the 10-year rule as one that requires the beneficiary to fully distribute the IRA by the 10th anniversary of the owner's death.[163] In either event, it's unlikely that an IRS Publication can be relied upon in setting policy on the question of how and when the 10-year rule applies.

The staff of the Joint Committee on Taxation also interpreted the new distribution rules as preserving the goal of calculating post-death minimum distributions that take into account the employee's remaining life 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.[164]

Eligible Designated Beneficiary Is Named

If the employee dies on or after his/her RBD and names an eligible designated beneficiary, the prior life expectancy rules continue to apply; however, a new 10-year limit or life expectancy limit applies in three contexts: the minor child attains majority; the eligible designated beneficiary dies; or an older eligible designated beneficiary was named.

> **Example**: Lee's RBD is April 1, 2022, and thus, he attains age 72 in his first distribution year (i.e., 2021). Lee dies during 2030 and designates his disabled child, John (age 57 in 2030), as beneficiary. Assume John meets the definition of disability as of the date of Lee's death. In 2030 (the year of death), Lee's annual minimum distribution must be computed using the uniform lifetime table; as Lee is age 81 in 2030, his uniform lifetime table divisor is 19.4.[165] Beginning in 2031, the minimum distribution must be made using the **greater** of Lee's single life expectancy (i.e., for an employee age 82, the single life expectancy number is 9.9) or John's single life expectancy (i.e., for a beneficiary age 58 in 2031, the single life expectancy number is 28.9).[166] The greater of these is 28.9; for subsequent years (i.e., beginning in 2032), as John is not Lee's spouse, the nonrecalculation method must be used and thus the divisor for 2032 would be 27.9 (28.9-1). Because John is an eligible designated

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[161] *See* SECURE Act, §401 §401(a)(9)(H)).

[162] *See* IRS, Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)*: For use in preparing 2020 Returns, p. 7 (Mar. 25, 2021).

[163] *See* IRS, *Revisions to the 2020 Publication 590-B* (May 13, 2021). For a full description of the examples used by the IRS in the original Publication 590-B and the Revised Publication 590-B, *see* Kathryn J. Kennedy, *Primer of the Code's Required Minimum Distribution Rules: Post SECURE Act,* 49 Tax Mgmt. Comp. Plan. J. No. 6 (June 4, 2021).

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

[165] Reg. §1.401(a)(9)-9(c).

[166] Prop. Reg. §1.401(a)(9)-5(d)(1)(ii).

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beneficiary, we continue to use the nonrecalculated applicable divisor in each year, beginning in 2031 and continuing until John's year of death. Hence, John gets the benefit of the ''stretch.'' Note: if John dies and the entire amount of Lee's interest has not yet been distributed, John's beneficiary would continue taking annual distributions using the rules under the existing regulations for up to nine years after John's death, with a full distribution of Lee's remaining interest in the 10th year.[167]

Example: Lee's RBD is April 1, 2022, and thus, he attains age 72 in his first distribution year (i.e., 2021). Lee dies during 2030 and designates his surviving spouse, Dana, (age 80 during 2030), as sole beneficiary. Any amounts remaining after Dana's death are to be distributed to their niece, Clare. In 2030 (the year of death), Lee's annual minimum distribution must be computed using the uniform lifetime table; as Lee is age 81 in 2030, his uniform lifetime table divisor is 19.4.[168] Beginning in 2031, the minimum distribution must be made using the greater of Lee's single life expectancy (i.e., for an employee age 82, the single life expectancy number is 9.9) or Dana's single life expectancy (i.e., for a beneficiary age 81 in 2031, the single life expectancy number is 10.5).[169] The greater of the two is 10.5; because Dana is the surviving spouse, subsequent divisors for years beginning in 2032 are computed on the recalculation basis.[170] Thus, for 2032, when Dana is age 82, she will use the single life expectancy number of 9.9 (and not 10.5-1=9.5). Dana will continue to use the applicable recalculated divisor for each subsequent year until the year of her death.

Note: if Dana dies at age 83 (when her single life expectancy number is 9.3) and the entire amount of Lee's interest has not yet been distributed, the proposed regulations require that the remaining amount be distributed to Clare using Dana's life expectancy of 9.3 in 2033, reduced by one for each subsequent year, for up to nine calendar years after Dana's death; in the 10th year following the calendar year of Dana's death, a full distribution of Lee's interest would be required to be paid to Clare.[171]

Example: Lee's RBD is April 1, 2022, and thus, he attains age 72 in his first distribution year (i.e., 2021). Lee dies during 2030 and designates his minor child, Nora (age 18 in 2030), as beneficiary. In 2030 (the year of death), the applicable divisor is 19.4, as noted above. Beginning in 2031, the minimum distribution must be made using the **greater** of Lee's single life expectancy (i.e., for an employee age 82, the single life expectancy number of 9.9) or Nora's single life expectancy (i.e., for a beneficiary age 19 in 2031, the single life expectancy number is 66.0. The greater of these is 66.0; for subsequent years (i.e., beginning in 2032), as Nora is not Lee's spouse, the nonrecalculation method must be used and thus the divisor for 2032 would be 65 (66.0-1). However, because Nora is the minor child of Lee's, the entire amount must be distributed to her no later than 10th calendar year following the calendar year in which she reaches majority.[172] As the proposed regulations regards the age of majority to be age 21,[173] the entire amount must be distributed to her by the end of 2043, as she attains age 21 in 2033. Hence, Nora will continue to use the nonrecalculated applicable divisor for each year, beginning in 2031 through 2042, until the entire amount is distributed to her by the end of 2043.

Example: In 2030, Lee dies at age 75 after his RBD and his eligible designated beneficiary is his brother Mark, age 80, (and therefore, not more than 10 years younger than Lee) at the time of Lee's death. As Mark is older than Lee, the applicable denominator would be determined using Lee's remaining life expectancy (i.e., 14.1 for an age 76 year old), redetermined annually on a nonrecalculated basis. However, the proposed regulations require a full distribution by the end of the eligible designated beneficiary's life expectancy. Thus, one determines Mark's remaining life expectancy as of Lee's death as 11.2 years and a full distribution of Lee's benefits must be accomplished when Mark reaches 91 (i.e., 80 + 11), which is the 11th calendar year after Lee's death, when Mark's life expectancy would be less than or equal to one. Mark then would take annual distributions using Lee's life expectancy for years one through 10, with a full distribution of any remaining balance in the 11th calendar year.[174]

Hence, Lee's remaining life expectancy is to be used as the applicable denominator in determining Mark's RMD, but full distribution of Lee's remain-

[167] Prop. Reg. §1.401(a)(9)-5(e)(2).

[168] Reg. §1.401(a)(9)-9(c). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

[169] Prop. Reg. §1.401(a)(9)-5(d)(1)(ii).

[170] Prop. Reg. §1.401(a)(9)-5(d)(3)(iv). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

[171] Prop. Reg. §1.401(a)(9)-5(e)(2). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

[172] Prop. Reg. §1.401(a)(9)-5(e)(4). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

[173] Prop. Reg. §1.401(a)(9)-4(e)(3).

[174] Prop. Reg. §1.401(a)(9)-5(e)(5). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

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ing interest must be distributed as of the end of Mark's life expectancy.[175]

The proposed regulations would include a modified version of the existing rules if the employee has more than one designated beneficiary. Specifically, the proposed regulations would modify the existing rule which uses the beneficiary with the shortest life expectancy. Also the proposed regulations would provide the applicable denominator by using the life expectancy of the oldest designated beneficiary.[176] The proposed regulations would also provide that whether a full distribution is required is determined using the oldest of the designated beneficiaries. For example, if the employee has multiple eligible designated beneficiaries who are all born in the same calendar year, then full distribution of the employee's remaining interest is required by the 10th calendar year following the death of the oldest designated beneficiary.[177]

Example: Assume Lee died at age 75 (after his RBD) and names a see-through trust as beneficiary, which is an accumulation trust. The terms of the trust provide that Lee's surviving spouse, Dana, will be beneficiary as of his death (she is age 74 at Lee's death). Upon Dana's death, the trust will terminate and any remaining amount in the trust will be paid to Lee's sibling, Mark (age 67 at the time of Lee's death). If Mark predeceases Dana, any amount remaining in the trust will be paid to a charity. The charity is disregarded as a beneficiary; as such, all of the other beneficiaries of the trust are eligible designated beneficiaries (as Dana is Lee's surviving spouse and Mark is not more than 10 years younger than Lee). Beginning in the calendar year after Lee's death, minimum required distributions made be made using Dana's single life expectancy (because she is the oldest beneficiary). Upon her death, annual distributions must be made using her remaining life expectancy (in the year of her death) on a nonrecalculated basis (i.e., reduced by one year for each year thereafter). However, the entire interest of Lee's benefit must be distributed no later than the 10th calendar year following the calendar year of Dana's death.[178]

Separate Accounts: Prop. Reg. §1.401(a)(9)-8

As discussed earlier, the identity of the employee's beneficiary is made as of the date of his/her death. Generally, if the employee has more than one designated beneficiary, the proposed regulations would provide that the applicable denominator is determined by using the life expectancy of the oldest designated beneficiary, in the event the employee survives his/her RBD and then dies.[179]

Example: Lee names his living children as beneficiary of his plan interest. Upon his death, his living children consist of John, Nora, and Christine (ages 35, 34, 33 respectively). None of the children are disabled or chronically ill; thus, they are all ineligible designated beneficiaries. If Lee dies on or after his RBD at age 75, distributions will begin to his children using the oldest designated beneficiary (i.e., John, age 36 in the calendar year following Lee's death). The applicable denominator is the greater of John's remaining life expectancy (i.e., 49.6 for an age 36 individual) or Lee's remaining life expectancy (i.e., 14.1 for an age 76 individual). Thus, distributions will begin using the 49.6 life expectancy (reduced for one for each year thereafter) for years one through nine following Lee's death, with a distribution of Lee's remaining account balance in the 10th year following his death.

The 2002 regulations permitted the trustee of the plan to split the employee's account into multiple accounts so that the distributions could be paid over each of the individual beneficiary's life expectancy, as opposed of using the beneficiary with the shortest life expectancy.[180] However, the regulations required that the separate accounts be established on a date no later than the last day of the year following the calendar year of the employee's death.[181] In the above example, had three separate accounts been established, each of the children would be responsible for taking RMDs from Lee's account using their own life expectancy. The proposed regulations generally follow the existing rules for separate accounts under the current regulations, but provide guidance as to how to apply the RMDs separately with respect to the separate interest of the beneficiaries reflected in the separate trusts of each beneficiary of a Type I AMBTs.[182]

CONCLUSION

This article has attempted to guide the reader through the IRS's proposed regulations that affect dis-

[175] Prop. Reg. §1.401(a)(9)-5(e)(5). *See also* Preamble, 87 Fed. Reg. 10,504, 10,514.

[176] Prop. Reg. §1.401(a)(9)-5(f)(1).

[177] *See* Preamble, 87 Fed. Reg. 10,504, 10,515.

[178] Preamble, 87 Fed. Reg. 10,504, 10,515.

[179] Prop. Reg. §1.401(a)(9)-4(e)(2)(i).

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

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

[182] Prop. Reg. §1.401(a)(9)-8(a)(1)(iii)(B).

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tributions from qualified defined contribution plans and IRAs. Preserving the use of these tax shelters, consistent with an individual's needs and goals, is critical; hence, it's imperative to know when distributions are to commence and to cease, and who is to be named as beneficiary. The IRS's clarification of its interpretation of the SECURE Act changes was of utmost importance due to the potential for a 50% excise tax penalty. With respect to distributions subject to the 10-year rule after the employee attains his/her RBD, the IRS's interpretation of the SECURE Act changes is consistent with the "at least as rapidly" rules that it promulgated in its 2002 regulations, but will cause much complexity in its implementation. A 2015 Treasury audit noted that more than half a million IRA participants or beneficiaries missed making their RMDs, resulting in a decline of $100 million in revenue to the Treasury. In response to the audit, the Treasury recommended a more comprehensive reporting structure and less complex rules.[183] Parts of these proposed regulations call in question whether the rules have become less complex.

Due to the IRS's interpretation of how distributions to beneficiaries are to be made on or after the employee's RBD, there will undoubtedly a number of negative comments that it will receive. If such negative comments do not alter the IRS's interpretation in the final regulations, there may be litigation challenging them. If the IRS does decide to amend the proposed regulations, it will have to do so in the third quarter of the year, affording recordkeepers time to process 2022 distributions in the fourth quarter of the year. In the meantime, the author cautions individuals to proceed carefully when applying the new rules to 2022 distributions, which will be due either as of December 31, 2022, or April 1, 2023. This author certainly looks forward to reading the public comments to the IRS's proposed regulations and to listening to the testimonies presented at the public hearing in June.

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[183] Austin R. Ramsey, *IRS Minimum Distribution Proposal Baffles Financial Advisers,* Bloomberg Law (Feb. 24, 2022).

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