ESTATE PLANNING FOR RETIREMENT ASSETS IN VIEW OF THE SECURE ACT, THE PROPOSED REGULATIONS, AND SECURE 2.0

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SELECTED LAW RELATED PUBLICATIONS AND SPEECHES:
- *Fighting Contracts with Contracts: Pre- and Post-Death Agreements to Override Non-Probate Multi-Party Account Agreements*, State Bar of Texas 43rd Annual Advanced Estate Planning and Probate Course, June 18-20, 2019 (Author/Speaker)
- *The Killing of Community Property*, 11 Estate Planning and Community Property Law Journal 1 (2018) (Author) (recipient of Texas Bar Foundation’s Outstanding Law Review Article Award)
- *Qualified Plans and IRAs: Various Issues for Estate Planning & Probate Attorneys*, Austin Bar Association: Estate Planning & Probate Section, March 20, 2015 (Author/Speaker)
- *Drafting to Integrate Retirement plans into the Estate Plan*, State Bar of Texas 25th Annual Estate Planning and Probate Drafting Course, October 9-10, 2014 (Co-Author/Co-Speaker)
- *Current Issues Related to Estate Planning with Qualified Retirement plans and IRAs*, State Bar of Texas 36th Annual Advanced Estate Planning and Probate Course, June 27-29, 2012 (Author/Speaker)
- *Qualified Retirement plans and IRAs: Top Ten List*, State Bar of Texas 34th Annual Advanced Estate Planning and Probate Course, June 23-25, 2010 (Author/Speaker)
- *Revocable Trusts,* State Bar of Texas 18th Annual Advanced Drafting Course: Estate Planning and Probate, October 25-26, 2007 (Author/Speaker)
- *Representing Lottery (and Other) Winners*, State Bar of Texas 28th Annual Advanced Estate Planning and Probate Course, June 9-11, 2004 (Author/Speaker)
- *Naming a Trust as the Beneficiary of Retirement plans: Can We Have Our Cake and Eat It, Too?*, The Southwestern Legal Foundation 38th Annual Wills and Probate Institute, May 1999 (Author/Speaker)
- *Strategies for Building a Successful Estate Planning Practice*, State Bar of Texas, December 1998 (Author, Panelist)
- *Multiple Party Accounts: Multiple Risks for Estate Planning Attorneys and Their Clients*, State Bar of Texas 19th Annual Advanced Estate Planning and Probate Course, June 1995 (Author/Speaker)
- *Tax Considerations in Probate and Trust Litigation*, State Bar of Texas 15th Annual Advanced Estate Planning & Probate Course, June 1991 (Author/Speaker)

TABLE OF CONTENTS

ESTATE PLANNING FOR RETIREMENT ASSETS IN VIEW OF THE SECURE ACT, THE PROPOSED REGULATIONS, AND SECURE 2.0

I. HISTORY OF THE LAW RELATING TO RETIREMENT PLANS (BEFORE THE SECURE ACT)

A. ERISA and Code Section 401(a)(9)

The following is an excerpt from the author's article, *The Killing of Community Property*, which was published by Texas Tech Law School's *Estate Planning and Community Property Law Journal* in Volume 11, Fall 2018. All footnotes from the following excerpt have been omitted from this outline:

"Private pensions developed primarily after World War II. Few rules governed the administration of pension plans until the passage of ERISA in 1974. Pension plan abuses, such as mismanagement and theft—of which there were many 'high profile cases' during the 1950s and 1960s, and other problems (e.g., bankruptcy of the employer)—primarily influenced the passage of ERISA.

"ERISA was passed primarily as a labor law. ERISA is administered by both the Department of Labor (DOL) and the Treasury Department. Although two separate federal agencies co-administer ERISA, and although ERISA provisions appear in both the Labor Code and the Internal Revenue Code, according to one commentator, [with respect to the passage of ERISA,] 'the tax aspects were secondary.'

"ERISA focuses on protecting employees, pension plans, and other retirement plans so that qualified plan participants can be assured of having income during retirement. When ERISA was passed, its primary goals were stated to be the following: (1) to achieve national uniformity in the administration of qualified plans, (2) to reduce the administrative burden on plan administrators, and (3) to insure the payment of retirement benefits for retirees and their 'beneficiaries.'

"Because of the chaos in the administration of employee benefit plans prior to the passage of ERISA, Congress wanted to provide 'uniform rules' at a national level applicable to all qualified plans. In addition, to protecting participants and retirement plans, the duties imposed on administrators of qualified employee benefit plans greatly increased. Thus, the first two stated goals of ERISA were designed (i) to provide clear rules for the administration of qualified plans and (ii) to make it easier for plan administrators to follow the rules. Further, those two goals were designed to eliminate situations in which plan administrators were at risk of paying out benefits twice due to competing claims. The first two goals of ERISA are primarily administrative goals. Consistent with those goals, a significant portion of ERISA is devoted to administrative matters, such as reporting, record keeping, and disclosure.

"The third stated goal of ERISA concerns two sub-goals: (i) making sure retired participants receive the qualified plan benefits they were promised or earned, so that they will have income during retirement, and (ii) making sure that the beneficiaries of those participants receive the benefits to which they are entitled as promptly as possible after the participant's death. The first of those two sub-goals directly responded to pre-ERISA abuses in the management of pension plans. For example, ERISA includes specific participation, vesting, and benefit accrual provisions. It also includes insurance provisions in the case of terminated plans. The first sub-goal of the third stated goal of ERISA correlates highly with the legislative history of and reasons for passing ERISA: to provide income to retired workers (and their spouses) during their retirement years.

"Turning to the second sub-goal of the third stated goal of ERISA, while it is important to insure the prompt payment of qualified plan benefits to beneficiaries of participants who die, this is more incidental to the original purpose of ERISA—to protect participants themselves by also protecting the participants' plans, and to insure participants have income during their retirement." Gerstner, *The Killing of Community Property*, Id at 36-38.

Natalie Choate states the following in her book, *Life and Death Planning for Retirement Plans* 25 (6th Ed. 2006):

> "Congress wants tax-favored retirement plans to be *retirement plans*, not estate-building wealth transfer vehicles. To that end, Congress enacted § 401(a)(9) [of the Internal Revenue Code], which compels certain annual 'minimum required distributions' (RMDs) from plans beginning generally at age 70 ½ or, if earlier, death. § 401(a)(9) and its related regulations are called the 'minimum distribution rules.'"

The "minimum distribution rules" applicable to retirement plans subject to Section 401(a)(9) of the Internal Revenue Code apply to all account balances and benefits in existence on or after January 1, 1985. Prop. Reg. § 1.401(a)(9)-1(b).

In view of recent history (i.e., passage of the SECURE Act), it is interesting to note that, in the forward to the Sixth Edition of her book—in a "proposed letter" to her Congressman—Natalie Choate wrote the following:

> "Congress should abolish the 'life expectancy payout' for distributions of inherited

retirement benefits, replacing it with a flat 10- or 20-year payout that would apply to all plans and beneficiaries." Id at 19.

B. The 2002 Final Treasury Regulations

Section 401(a)(9) of the Code (primary source of the "minimum distribution rules") did not provide sufficient detail in regard to numerous distribution issues relating to retirement plans. Thus, on July 27, 1987, thirteen years after ERISA and Section 401(a)(9) became law, the first set of proposed regulations interpreting Section 401(a)(9) was published. Those proposed regulations were subsequently modified in December 1997 and again in January 2001. The "final" regulations released in April 2002 further modified the minimum distribution rules, providing much needed simplification and clarification of some issues, but also leaving many questions still unanswered. These regulations will sometimes be referred to as the "2002 Treasury Regulations." Some of the post-April 2002 questions were "answered" by subsequent laws, such as the Tax Equity and Fiscal Responsibility Act of 1982 [TEFRA] (P.L. 97-248), the Deficit Reduction Act of 1984 [DEFRA] (P.L. 98-369), and the Pension Protection Act of 2006 [PPA] (P.L. 109-280). However, many interpretive issues relating to distributions from retirement plans that have arisen subsequent to April 2002 have been addressed in private letter rulings, which cannot be cited as precedent by anyone except the taxpayer who obtained the particular ruling, but which, taken together, help to shed light on the Internal Revenue Service's interpretation of the minimum distribution rules.

C. Terms and Abbreviations Used in this Outline

Applicable Age. The Applicable Age is the age component of RBD. In other words, it is the age that triggers commencement of RMDs to the Participant. The Applicable Age has been changed multiple times over the past five years. *See* ID1a, IIB1, and IVB1.

Code or "IRC." References to the "Code" or "IRC" mean the Internal Revenue Code of 1986, as amended.

DB. Designated Beneficiary. A "Designated Beneficiary" is a type of beneficiary of the Participant's retirement plan. Not all beneficiaries of the Participant's retirement plan are DBs. Because of the SECURE Act, this term now includes an Eligible Designated Beneficiary ("EDB") and a Designated Beneficiary who is not an EDB (sometimes referred to as an "ODB"—other DB).

DB Determination Date. This is not a term that is defined in the Code or regulations but it means September 30 of the year following the year of the Participant's death, which is the date on which it is determined who the "effective" beneficiaries of the Participant's retirement plan are.

DCP. Defined Contribution Plan. One type of qualified plan and the only type discussed in this outline. (This outline will not discuss defined benefit plans.)

EDB. Eligible Designated Beneficiary. A sub-category of Designated Beneficiary put in place by the Secure Act. *See* IIC2, infra.

Ghost Life Expectancy. This refers to the Participant's single life expectancy, per the Single Life Table (SLT), not recalculated.

Inherited IRA. In the vast majority of cases, what a beneficiary of the Participant's plan or IRA ends up with on the Participant's death is an "inherited IRA" (rather than an inherited interest in an employee benefit plan that continues to be administered by the Plan Administrator). Therefore, the term "inherited IRA" will be used to refer to what a beneficiary of a deceased Participant's plan or IRA establishes to receive his or her share of the Participant's plan or IRA on the Participant's death (even if the particular beneficiary can remain a *beneficiary* within the Participant's employee benefit plan).

JLT: Joint Life and Last Survivor Expectancy Table. The Joint Life and Last Survivor Expectancy Table should be used to calculate RMDs for a living Participant whose more than 10 years younger spouse is his sole beneficiary as of his RBD. This table may sometimes be referred to as the "JLT."

LE. Life Expectancy.

Minimum Distribution Rules (*or* "RMD Rules"). The rules in regard to the amount and timing of distributions from qualified plans, IRAs and other retirement plans, and the related income tax aspects of those distributions, are collectively known as the *minimum distribution rules* (or the "RMD Rules"). These rules are generally found in Section 401(a)(9) of the Code and the applicable Treasury Regulations. Employees and retirees who participate in qualified plans, named owners of Individual Retirement Accounts (IRAs), and beneficiaries of the foregoing are subject to the RMD Rules.

Participant. The term "Participant" will be used to refer to the employee or retiree who participates in a qualified plan or in a governmental or tax exempt employee benefit plan subject to the RMD Rules. In addition, unless a distinction is necessary, the term "Participant" will also be used to refer to the named owner of an IRA (of any type). However, sometimes the named owner of an IRA will be specifically referred to as the "Named IRA Owner" or the "Named Owner of an IRA."

Plan or Retirement Plan. Unless otherwise specifically noted, the term "plan" or "retirement plan" will include qualified employee benefit plans that are "defined contribution plans" (DCPs), IRAs (of all types), and governmental and tax exempt employee plans subject to the RMD Rules. The RMD Rules specifically apply to all of the foregoing retirement plans. *See* IRC §§ 401(a)(9), 403(b)(10), 408(a)(6), and 457(d)(2). Note: This outline will not discuss defined benefit plans to any extent.

Plan Administrator. When discussing the RMD Rules, sometimes it is necessary to distinguish between a defined contribution plan and an IRA, but sometimes it is not. The term "Plan Administrator" can refer solely to the administrator of a qualified plan, such as a defined contribution plan. However, per the Code, the 2002 Final Regulations and the Proposed Regulations, the term "Plan Administrator" also includes the custodian or trustee of an IRA. Prop. Reg. § 1.408-8(a)(3). So, unless a distinction is necessary, references to "Plan Administrator" will include both the administrator of a qualified plan and the custodian or trustee of an IRA.

Plan Benefits. The term "Plan Benefits" will sometimes be used to refer to the assets held in the Participant's retirement plan and/or the assets distributed from the Participant's retirement plan on the Participant's death. This is not a term defined in the Code or regulations.

RBD. The *required beginning date* (RBD) is the date by which a living Participant must take his first required minimum distribution (RMD) from his retirement plan. The Participant's RBD, which is a particular April 1 during a specified year based on the circumstances applicable to the Participant, is actually a date during the second distribution year applicable to the Participant's retirement plan. *See* ID1, infra.

RMD. A *required minimum distribution* (RMD) is the smallest amount that is required to be withdrawn from, or distributed out of, (i) the Participant's plan or IRA during the Participant's life or (ii) the beneficiary's inherited IRA after the Participant's death, that will satisfy the RMD Rules and avoid triggering an "under-distribution" penalty. In the early 2000s, this amount was referred to as either the "minimum required distribution" ("MRD") or the "required minimum distribution" ("RMD"). However, at the present time, nearly everyone refers to this amount as the "required minimum distribution" or "RMD." Of course, the SECURE Act changed the rules for Designated Beneficiaries so that *some* Designated Beneficiaries now only have one required distribution and not annual RMDs as they had prior to the SECURE Act. *See* IIID1, infra.

SLE. Single Life Expectancy.

Single Life Expectancy Table ("SLT"). This table, which used to be called the "Single Life Table," is used by most beneficiaries to determine the life expectancy to use to calculate RMDs after the Participant's death. This table may sometimes be referred to as the "SLT."

Uniform Lifetime Table ("ULT"). The Uniform Lifetime Table applies to most living Participants and provides the "life expectancy factors" (f/k/a "divisors" and a/k/a "applicable denominators") used to calculate RMDs during the Participant's life (and now, per SECURE 2.0, during the life of the Participant's sole beneficiary spouse if she makes the Section 327 election). This table may sometimes be referred to as the "ULT."

5 year rule and 10 year rule. Although the Code and Regulations both refer to the "5-year rule" using a hyphen, and IRS Publication 590-B refers to the "10-year rule" using a hyphen, in this outline, both the "5 year rule" and the "10 year rule" will be expressed without a hyphen.

Gender References. To simplify understanding of the concepts discussed in this outline, it will sometimes be assumed that the Participant is male and that the Participant's spouse is female and gender references will be made accordingly.

D. Pre-Secure Act Law Applicable To Distributions from Retirement Plans

The SECURE Act did not actually repeal very much of the RMD Rules that were in effect prior to its passage (the "old rules"). The SECURE Act did modify some of the old rules and did add some "new rules." However, for the most part, the SECURE Act seemed to be designed in a way so that the *new rules* could be "layered into" the *old rules*.

WARNING: Now that the SECURE Act, the Proposed Treasury Regulations relating to the SECURE Act, and SECURE 2.0 have been passed into law or published (as applicable), some of the *new rules* per the SECURE Act no longer apply as originally passed or understood. And certainly many of the pre-SECURE Act rules no longer apply. *The provisions in this Section ID are included primarily to provide background information.*

1. Pre-SECURE Act: Required Distributions During Participant's Life

a. *Required Beginning Date ("RBD")*

For most Participants of qualified plans (those who do not own 5% or more of the employer sponsoring the plan), the Required Beginning Date (RBD) for commencing lifetime distributions is April 1 of the year following *the later of* (a) the year the Participant reaches the "Applicable Age," which was 70½ prior to the SECURE Act (and is currently age 73 per SECURE 2.0), or (b) (if the plan so provides) the year the Participant retires. IRC § 409(a)(9)(C)(i). For Participants in qualified plans who own 5% or more of the employer sponsoring the plan and for IRA owners, RBD is April 1 of the year following the year the Participant reaches his "Applicable Age," which was 70½ prior to the SECURE Act (and is currently age 73 per SECURE 2.0).

The year prior to the Participant's RBD is technically the "first distribution year," although many Participants wait until RBD to take their first RMD. In that case, however, the RMD for the "second distribution year" would have to be taken by December 31 of the year of the RBD, resulting in two RMDs being taken during that same year (the first by April 1 of that year and the second by December 31 of that year). This is usually not desirable from an income tax standpoint due to distributions from pre-tax retirement plans being taxable as ordinary income in the year taken.

b. *Required Minimum Distribution ("RMD")*

The amount of the RMD for each distribution calendar year through and including the year of the Participant's death is determined using the Uniform Lifetime Table (ULT), unless a married Participant's spouse is his sole beneficiary as of his RBD and the spouse is more than 10 years younger than the Participant. In that case, the RMD amount is determined using the Joint Life and Last Survivor Expectancy Table (JLT). The Participant's more than 10 years younger spouse will only be treated as the Participant's *sole* beneficiary for purposes of using the life expectancies from the JLT if the Participant has named as his beneficiary either (i) his spouse, outright, or (ii) a conduit trust for the sole benefit of his spouse. If the Participant has named a conduit trust for the sole benefit of his more than 10 years younger spouse as of his RBD and wants to use the JLT to calculate RMDs, he must submit the required trust documentation to the plan administrator by his RBD.

The ULT contains life expectancy factors based on the Participant's attained age each year, plus ten years. In other words, the ULT assumes the Participant has a beneficiary who is ten years younger. In contrast, the Single Life Table (SLT) only contains life expectancy factors for one individual, based on that individual's attained age (or assumed attained age). Thus, RMDs calculated using the life expectancy factors in the ULT will be lower than RMDs calculated using the life expectancy factors from the SLT.

Assuming the Uniform Lifetime Table (ULT) applies, in general, the prior year-end balance of the Participant's retirement plan is divided by what used to be called the "divisor" (and is now referred to as the "applicable denominator" or "life expectancy factor") from the ULT to determine the Participant's RMD for that year. When selecting the "divisor" from the applicable table, one must assume that the particular individual will be alive on his birthday during that year (whether he actually is or not). In the case of a living Participant, a new "divisor" is obtained each year from the applicable table (either the ULT or the JLT, depending on the facts) to calculate that year's RMD. Because the life expectancy of a living Participant who continues to live does not drop by the whole number one each year, when a new "divisor" is obtained each year from the ULT (or the JLT, if applicable), that means a living Participant's life expectancy is being recalculated each year. Recalculation of life expectancy slows down the rate of depletion of the retirement plan.

2. <u>Pre-SECURE Act: Distributions After Participant's Death-General Concepts</u>

a. *Basic Analysis*

Prior to the SECURE Act, there were basically six distribution rules applicable to beneficiaries of retirement plans after the Participant's death: three applicable in the event the Participant died *before* his RBD and three applicable in the event the Participant died *on or after* his RBD (sometimes simply referred to as "*after* his RBD"). Under the old rules, there were two categories of beneficiaries: Designated Beneficiaries ("DBs") and beneficiaries who were *not* Designated Beneficiaries ("Non DBs"). Within the category of DBs, the Participant's spouse had options that other DBs did not have. However, in order for the Participant's spouse to be able to use those more favorable options, she had to be the Participant's *sole* beneficiary (i.e., either the sole beneficiary of the Participant's entire retirement plan or the sole beneficiary of a timely created "separate account" representing the spouse's beneficial share of the Participant's retirement plan). That meant either the Participant had to have named his spouse as the outright beneficiary of his retirement plan or he had to have named a conduit trust for the sole benefit of his spouse as the beneficiary of his retirement plan.

In essence, *prior to* the SECURE Act, to determine the applicable distribution period after the Participant's death, two questions had to be asked:

- Did the Participant die before or after his RBD?
- Did the Participant have a Designated Beneficiary and, if so, who is "the" Designated Beneficiary of the Participant's retirement plan?

b. *Designated Beneficiary (DB)*

Not every beneficiary of the Participant's retirement plan is a DB. DBs must be individuals (i.e., natural persons). Treas. Reg. § 1.401(a)(9)-4, Q&A-1 and Q&A-3. Therefore, an entity, such as a business, charity, or estate, cannot be a DB. A trust named as beneficiary of the Participant's retirement plan can either be (i) a "non-qualifying trust," in which case it (and its beneficiaries) would *not* be a DB, or (ii) a trust that qualifies for DB treatment per the "see-through trust rules." If the trust qualifies for DB treatment, the "countable" beneficiaries of the trust are treated as the Participant's DBs.

DBs are those individuals designated as beneficiaries of the Participant's retirement plan as of the Participant's date of death who remain beneficiaries of the retirement plan on September 30 of the year following the year of the Participant's death (informally known as the "DB Determination Date"). Beneficiaries who are not DBs can often be "removed" prior to the DB Determination Date via qualified disclaimers and cash outs of their shares. To qualify as a DB, the beneficiary must have been "named" or "designated" by the Participant or the plan and must effectively have been in place as a beneficiary as of the Participant's death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(a). The Proposed Regulations added some exceptions to this rule in the case of Trust Modifications and Powers of Appointment. *See* IIIG7 and IIIG8.

Prior to the Proposed Regulations, there was no ability to add new beneficiaries "out of whole cloth" after the Participant's death (*but see* the Power of Appointment and Trust Modification provisions in the Proposed Regulations, discussed at IIIG7 and IIIG8, infra). However, as noted, even before the recent changes to the RMD Rules, beneficiaries as of the Participant's date of death could be eliminated after the Participant's death by taking certain actions. Per Pre-SECURE law, only those beneficiaries "still standing" on the DB Determination Date were treated as the Participant's actual beneficiaries. On the other hand, the death of a named beneficiary who actually survived the Participant but died prior to the DB Determination Date does not remove (and still does not remove) that beneficiary as a beneficiary of the Participant's retirement plan (unless that beneficiary executed a qualified disclaimer or received full distribution of the amount to which he was entitled from the Participant's plan prior to the DB Determination Date or unless a state law "simultaneous death provision" applies). In other words, even though that beneficiary died before the DB Determination Date, if he/she actually survived the Participant, unless one of the exceptions applies, he/she is still considered a beneficiary of the Participant's plan for purposes of determining whether the Participant had a designated beneficiary as of the DB Determination Date. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(c).

In the case of multiple DBs of a single retirement plan, if "separate accounts" can be timely created, each DB is treated as "the" DB of his/her separate account. However, separate account treatment is not always available. *See* Separate Accounts at ID2e, infra.

c. *Pre-SECURE Act: Trusts as Beneficiaries of Retirement Plans*

If a trust named as beneficiary of the Participant's retirement plan meets the requirements to be a "qualified see-through trust," then the "countable" beneficiaries of the trust are treated as the beneficiaries of the Participant's retirement plan. Per the 2002 Treasury Regulations, the four general trust qualification requirements (sometimes referred to as the "trust regulatory requirements") are (i) the trust is a valid trust under state law, or would be but for the fact that there is no corpus; (ii) the trust is irrevocable or will, by its terms, become irrevocable upon the Participant's death; (iii) the beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the Participant's retirement plan are identifiable from the trust instrument; and (iv) the required documentation is provided to the plan administrator by October 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-4, Q&A-5.

By including specific examples, the 2002 Treasury Regulations recognized two types of *qualified see-through trusts*: (i) accumulation trusts (Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 1) and (ii) conduit trusts (Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 2). However, those terms were not defined as such in the 2002 Treasury Regulations (*but see* the Proposed Regulations at IIIG2, infra).

1) <u>*Conduit Trust*</u>

A conduit trust must specifically provide that the entire amount withdrawn from the inherited IRA that belongs to the trust (whether the amount withdrawn is the RMD or an amount larger or smaller than the RMD or a purely discretionary amount) must be distributed out of the trust upon receipt (i.e., at least during that same year) to the current beneficiary of the trust (i.e., the "conduit" beneficiary). Because the conduit trust is merely a "flow through," remainder beneficiaries of the conduit trust do not have to be taken into account (i.e., are not treated as "countable" beneficiaries) for purposes of identifying all beneficiaries of the trust with an interest in the Participant's retirement plan. Thus, the current beneficiary of the conduit trust is "the" DB with respect to the retirement plan payable to the conduit trust. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 2. If there are multiple current beneficiaries of the conduit trust, the oldest current beneficiary is "the" DB.

Note that, if the conduit trust beneficiary is not the Participant's surviving spouse and the conduit trust beneficiary lives "beyond" his or her single life expectancy, no retirement plan benefits will remain in the conduit trust when the conduit trust beneficiary dies to be distributed to the remainder beneficiary of the trust. Only the Participant's surviving spouse as "sole" beneficiary of the Participant's retirement plan is entitled to recalculate her life expectancy each year when determining the amount of her RMD. Thus, beneficiaries other than the Participant's spouse who were entitled to a life expectancy distribution on the Participant's death could not recalculate their life expectancy each year. Because of that, if those beneficiaries lived beyond their assumed life expectancy, they could "out-live" their inherited IRA even if they only took the RMD each year. For that reason, a conduit trust did not necessarily preserve any of the Participant's Plan Benefits for the remainder beneficiaries of the conduit trust.

2) *Accumulation Trust*

An accumulation trust will always have at least two "countable" beneficiaries: one current beneficiary and one remainder beneficiary. An accumulation trust does not have to provide that the full amount withdrawn from the inherited IRA belonging to the trust has to be distributed out of the trust to the current beneficiary in the year of the withdrawal. Thus, amounts withdrawn from the inherited IRA belonging to the trust can be retained and *accumulated* in the trust. For that reason, prior to the updated trust rules in the Proposed Regulations, at least the "first tier remainder beneficiaries" of accumulation trusts, who might receive those accumulated retirement plan distributions in the future, had to be taken into account to determine whether all beneficiaries of the accumulation trust qualified as DBs and, if so, who the oldest DB of all "countable" beneficiaries was. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 1.

Prior to the Proposed Regulations, practitioners were concerned that potential appointees under powers of appointment also had to be counted as beneficiaries of an accumulation trust, *although there never was a single case or ruling that expressly held that*. In addition, the 2002 Treasury Regulations indicating which "contingent beneficiaries" had to be taken into account referred to beneficiaries whose "entitlement to an employee's benefit after the employee's death is a contingent right." It did not seem that merely being a permissible appointee of a power of appointment amounted to a "right" or "entitlement." Treas. Reg. § 1(a)(9)-5, Q&A-7(b). Fortunately, the Proposed Regulations to the SECURE Act, published in February 2022, provide some specific rules relating to Powers of Appointment. *See* IIIG7, infra.

Prior to the Proposed Regulations, an accumulation trust was much harder to analyze than a conduit trust because of the rule that all beneficiaries with an interest in the Participant's retirement plan must be "identifiable" from the trust instrument. It is fine for beneficiaries to be described as a class (such as "children" of the Participant) if the members of the class can be identified with certainty. Treas. Reg. § 1.401(a)(9)-4, Q&A-1. The beneficiaries of the trust with an interest in the Participant's retirement plan had to be identified because the first issue that had to be determined in the case of trusts named as beneficiaries of retirement plans was whether all "countable" beneficiaries of the trust qualified as DBs. If all "countable" beneficiaries of the trust qualified as DBs, the second matter that had to be determined was the identity of the oldest beneficiary out of all of the "countable" beneficiaries of the trust, because it was the oldest beneficiary's life expectancy that had to be used to calculate RMDs from the inherited IRA belonging to the trust. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(a).

d. *Multiple Beneficiaries*

In cases in which there is more than one DB of a single retirement plan and separate accounts *cannot* be created (which applies to accumulation trusts), the shortest life expectancy – that of the oldest beneficiary – was used to calculate RMDs. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(a).

e. *Separate Accounts*

Depending on the structure of the beneficiary designation, it was possible for multiple beneficiaries of a single retirement plan to obtain separate account treatment, which meant that each beneficiary would have his/her own applicable distribution period after the Participant's death. To obtain separate account treatment for separately named beneficiaries, a separate account must be established and maintained for each individual beneficiary by December 31 of the year following the year of the Participant's death, bearing its own pro rata share of gains and losses and otherwise separately accounted for to comply with the regulations. Treas. Reg. § 1.401(a)(9)-8, Q&A-3. Due to the wording used in the 2002 Treasury Regulations, it appears that only "fractional" or "percentage" interests in a beneficiary designation could qualify for separate account treatment. (It was assumed that if any beneficiaries were entitled to specific dollar amounts from the Participant's retirement plan, they would be "cashed out" before the DB Determination Date, so that they could be ignored as beneficiaries). Treas. Reg. § 1.401(a)(9)-8, Q&A-3(a).

In general, separate account treatment is not available to the beneficiaries of a single trust (although certain provisions in the SECURE Act and the Proposed Regulations provided some exceptions to this "old rule"). *See* IIIG4, infra. In addition, separate account treatment is generally not available when the retirement plan is payable to a single trust (such as the participant's revocable trust) and then those Plan Benefits are divided into separate shares per the trust instrument, rather than per the beneficiary designation. In Private Letter Ruling 200317041, in the case of a retirement plan distributable per the beneficiary designation to a single trust (a revocable trust), which divided into sub-trusts after the trust grantor's death (i.e., the separate sub-trusts were not listed in the beneficiary designation itself but were created pursuant to the trust instrument), the IRS stated it this way "... the 'Final' Regulations do preclude 'seperate [sic] account' treatment for Code § 401(a)(9) purposes where amounts pass through a trust." I.R.S. Priv. Ltr. Rul. 200317041 (Apr. 25, 2003). *See also* I.R.S. Priv. Ltr. Rul. 200317043 (Apr. 25, 2003); I.R.S. Priv. Ltr. Rul. 200317044 (Apr. 25, 2003); I.R.S. Priv. Ltr. Rul. 200537044 (Sept. 16, 2005); I.R.S. Priv. Ltr. Rul. 200432027 (Aug. 6, 2004); I.R.S. Priv. Ltr. Rul. 200432028 (Aug. 6, 2004); I.R.S. Priv. Ltr. Rul. 200432029 (Aug. 6, 2004); I.R.S. Priv. Ltr. Rul. 200608032 (Feb. 24, 2006). Thus, to insure separate account treatment in the case in which the Participant desires to name multiple trusts as beneficiaries of his retirement plan, the Participant should name the separate trusts (or sub-trusts) as beneficiaries of separate shares directly in the beneficiary designation, rather than naming a single trust (such as a revocable trust) that by its terms divides into separate sub-trusts for separate beneficiaries on the Participant's death. Note that the SECURE Act and the Proposed Regulations changed this rule in the case of AMBTs. *See* IIID4, infra.

NOTE: In the comment letter sent to the IRS and Treasury that was prepared by ACTEC with respect to SECURE 2.0, ACTEC (subtly) asked for this longstanding separate account rule to be "liberalized" in cases in which the Participant named his revocable trust as beneficiary of his retirement plan and the terms of his revocable trust provide for a split of those Plan Benefits into separate trusts. The IRS and Treasury have already allowed this in the case of AMBTs, so it may not be too great of a stretch to allow this in other cases.

NOTE AND WARNING: What follows is a summary of the six basic post-death RMD Rules that were in effect prior to the SECURE Act, the Proposed Regulations and SECURE 2.0. Many of these rules were changed by the SECURE Act, the Proposed Regulations and SECURE 2.0. Again, this section is included primarily for background information.

3. <u>Pre-SECURE Act Distribution Rules: Participant Died Before RBD</u>

a. *No Designated Beneficiary: 5 year rule*

If the Participant did not have a DB as of the DB Determination Date, then the entire amount in the Participant's retirement plan had to be distributed to the (actual) beneficiary by December 31 of the year that contained the fifth anniversary of the Participant's death. Treas. Reg. § 1-401(a)(9)-3, Q&A-4(a)(2). The retirement plan benefits could have been distributed entirely in the fifth year, ratably over the five (5) year period, or in any other manner just as long as no amount remained in the plan after December 31 of the year containing the fifth anniversary of the Participant's death.

b. *Spouse was Participant's* Sole *Beneficiary*

This rule was available if either (i) the Participant named his spouse as the outright beneficiary of his retirement plan or (ii) the Participant named a conduit trust for the sole benefit of his spouse as the beneficiary of his retirement plan. This distribution rule was not available if the Participant named an accumulation trust as the beneficiary of his retirement plan even if the Participant's spouse was the sole, current beneficiary of that trust. If the Participant named multiple beneficiaries of his retirement plan and if the form of the beneficiary designation permitted separate accounts, the separate share allocable to the Participant's surviving spouse could qualify for this particular set of rules if a separate account was timely created for the spouse.

1) *<u>Rollover Option for Spouse Named as Outright Beneficiary (Spouse Changes Position)</u>*

A surviving spouse who is the Designated Beneficiary of the Participant's retirement plan can roll over all eligible amounts to her own plan (if her plan permits) or to an IRA rollover in her own name. IRC §§ 402(c)(9), 402(c)(4) and 402(c)(8); Treas. Reg. §§ 1.402(c)-2, Q&A-12(a) and 1.408-8, Q&A-5 and Q&A-7. If the Participant's spouse does that, she is then *treated as the Participant* of those Plan Benefits due to her rollover and, as a result, the distribution rules applicable to a living Participant apply to her (rather than the post-death distribution rules). IRC §§ 408(d)(3), 402(a)(7), 402(c)(9), 401(a)(9)(A). A surviving spouse who is the Designated Beneficiary of the Participant's IRA can elect to treat the Participant's IRA as her own. Treas. Reg. § 1.408-8, Q&A-5(a) and Q&A-8. The effect of that is basically the same as the spouse making a spousal IRA rollover: the spouse becomes the Participant. But note the deadline for implementing this latter option imposed per Section 1.408-8(c) of the Proposed Regulations. *See* IIIC, infra.

2) *<u>Spouse Or Conduit Trust for Spouse as Participant's Sole Beneficiary (Spouse Remains as P's Beneficiary)</u>*

A surviving spouse named as outright beneficiary can maintain her position as the Participant's *beneficiary*, rather than making a spousal rollover of the Participant's Plan Benefits to her own plan or IRA and becoming the *participant* of those benefits herself. Per Pre-SECURE Act rules, in the case in which the Participant's spouse remained in the position of being the DB of the Participant, and in the case of a conduit trust for the benefit of the Participant's spouse, if the Participant died before his RBD, RMDs from the inherited retirement plan did not have to commence until December 31 of the calendar year in which the Participant would have attained his "Applicable Age," which was age 70½ before the SECURE Act changed it.

Treas. Reg. § 1.401(a)(9)-3, Q&A-3(b)(2). When RMDs commenced in that situation, they were based on the surviving spouse's single life expectancy, recalculated each year. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(b) and (c)(2). That means that, to determine the RMD for the applicable distribution year, the prior year-end balance of the inherited retirement plan was divided by the divisor from the SLT for the age the spouse attained (or would have attained) in that distribution calendar year. Each distribution year, the spouse obtained a new divisor from the SLT for the spouse's attained age (or age the spouse would have attained) in that year to calculate that year's RMD. In that way, the spouse's life expectancy was being recalculated.

If the surviving spouse was named as the outright beneficiary of the Participant's retirement plan in this case (where the participant died before reaching his RBD), she could then name a successor beneficiary to whom the inherited retirement plan would be distributed upon her death. A successor beneficiary would be treated as the surviving spouse's beneficiary if such successor beneficiary was alive on September 30 of the year following the year of the surviving spouse's death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(b) and § 1.401(a)(9)-3, Q&A-5. THIS RULE HAS BEEN CHANGED SIGNIFICANTLY BY SECURE 2.0. *See* IVB2 and V, infra.

In the case of the Participant's death before RBD with the spouse as sole beneficiary (the situation where the commencement date of RMDs to the spouse was delayed), if the spouse died *before* RMDs from the inherited retirement plan commenced, the spouse's successor beneficiary had to commence taking RMDs by December 31 of the year following the year of the spouse's death. If the successor beneficiary was a DB, RMDs to the successor beneficiary had to be taken over the successor beneficiary's non recalculated life expectancy. The successor beneficiary was treated as the spouse's DB if living on September 30 of the year following the year of the spouse's death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(b), § 1.401(a)(9)-3, Q&A-5, and § 1.401(a)(9)-3, Q&A-3(a). If the spouse did not have a successor beneficiary, then the 5 year rule applied under these circumstances. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(b). Under the old rules, even if the Participant's spouse's new spouse was her sole successor beneficiary, in this particular situation (Participant died before his RBD with spouse as sole DB and spouse died before RMDs commenced to her), in determining RMDs from the Participant's retirement plan after the spouse's death, the Participant's spouse's new spouse could not recalculate his life expectancy each year. Treas. Reg. § 1.401(a)(9)-3, Q&A-5 [last sentence].

c. *Participant had a DB but Spouse was Not Sole DB*

If the Participant had one or more DBs but the Participant's spouse was *not* treated as his sole DB, RMDs from his retirement plan after his death had to be taken over "the" DB's life expectancy. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(b) and (c)(1). Distributions pursuant to this rule had to commence by December 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(a) and § 1.401(a)(9)-5, Q&A-5(b) and (c)(1). For the first distribution year, the prior year-end balance of the inherited retirement plan was divided by the "divisor" for the DB's age as of his/her birthday in the year following the year of the Participant's death (i.e., in the first distribution year), which divisor was obtained from the SLT. Treas. Reg. § 1.401(a)(9)-9, Q&A-1. That divisor was then reduced by 1 in each subsequent year to calculate the RMD for the applicable year. If there were multiple beneficiaries of the retirement plan and separate accounts were timely created, then each DB was able to use his/her own life expectancy to calculate post-death RMDs from his/her separate inherited retirement plan. *See* Separate Accounts at ID2e, supra. THIS RULE HAS BEEN CHANGED SIGNIFICANTLY BY THE SECURE ACT.

4. <u>Pre-SECURE Act Distribution Rules: Participant Died On or after RBD</u>

a. *Participant's Final RMD*

The first consideration when a Participant dies on or after his RBD is whether the Participant took the full amount of his RMD for the year of death prior to his death. If the Participant dies on or after his RBD without having taken the full amount of his RMD from his retirement plan prior to his death, that RMD (or the shortfall) has to be distributed by December 31 *of the year of the Participant's death* to the Participant's beneficiary/beneficiaries. Treas. Reg. § 1.401(a)(9)-5, Q&A-4(a)(1); Treas. Reg. § 1.408-8, Q&A-4 and Q&A-5(a). This deadline can be hard to meet if the participant dies late in the year. Fortunately, the Proposed Regulations provide a special rule to help beneficiaries in this situation. *See* IIIA2, infra.

b. *No Designated Beneficiary: Participant's "Ghost Life Expectancy"*

If the Participant died on or after his RBD without having a DB, the Participant's remaining single life expectancy, not recalculated (the so-called "ghost life expectancy"), is the applicable distribution method. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a)(2). Distributions to the actual beneficiary (i.e., the Non DB) had to commence by December 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a)(2) and (c)(3) and § 1.401(a)(9)-3, Q&A-3(a). For the first distribution year, the prior year-end balance of the inherited retirement plan was divided by the "divisor" from the SLT for the age the Participant attained (or would have attained) in the year of his death. That divisor was reduced by 1 in each subsequent year to calculate the RMD in each subsequent year. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(3).

c. *Spouse is Participant's Sole Beneficiary*

This rule was available if either (i) the Participant named his spouse as the outright beneficiary of his retirement plan or (ii) the Participant named a conduit trust for the sole benefit of his spouse as the beneficiary of his retirement plan. This distribution rule was not available if the Participant named an accumulation trust as the beneficiary of his retirement plan even if the Participant's spouse was the sole, current beneficiary of that trust. If the Participant named multiple beneficiaries of his retirement plan and *if the form of the beneficiary designation permitted separate accounts to be established*, the separate share allocable to the spouse could qualify for this particular set of rules if the spouse timely created a separate account.

1) Rollover Option for Spouse Named as Outright Beneficiary

A surviving spouse who is the Designated Beneficiary of the Participant's retirement plan can roll over all eligible amounts to her own plan (if her plan permits) or to an IRA rollover in her own name. IRC §§ 402(c)(9), 402(c)(4) and 402(c)(8); Treas. Reg. §§ 1.402(c)-2, Q&A-12(a) and 1.408-8, Q&A-5 and Q&A-7. If the surviving spouse does that, she is then *treated as the Participant* of those Plan Benefits and, as a result, the distribution rules applicable to a living Participant apply to her (and not the distribution rules applicable to beneficiaries of a deceased Participant). IRC §§ 408(d)(3), 402(a)(7), 402(c)(9), 401(a)(9)(A).

A surviving spouse who is the Designated Beneficiary of the Participant's IRA can elect to treat the Participant's IRA as her own. Treas. Reg. § 1.408-8, Q&A-5(a) and Q&A-8. The effect of that is basically the same as making a spousal IRA rollover—the spouse becomes the Participant of that IRA. Note, however, that Section 1.408-8(c) of the Proposed Regulations is imposing a deadline on the surviving spouse with respect to this particular option that did not previously exist. *See* IIIC, infra.

2) *Spouse Or Conduit Trust for Spouse as* Sole *Beneficiary of the Participant*

A surviving spouse named as outright beneficiary can maintain her position as the Participant's *beneficiary*, rather than making a spousal IRA rollover (and becoming the Participant of that IRA). Under the old rules, in the case in which the Participant died after his RBD and the Participant's surviving spouse chose to remain as the Participant's beneficiary, and also in the case of a conduit trust for the sole benefit of the Participant's surviving spouse, RMDs from the inherited retirement plan were required to commence by December 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(2) and § 1.401(a)(9)-3, Q&A-3(b)(1). When RMDs commenced in that situation, they were based on the surviving spouse's single life expectancy, recalculated each year. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(b) and (c)(2). That means that, to determine the RMD for the applicable distribution year, the prior year-end balance of the inherited retirement plan was divided by the "divisor" from the SLT for the age the spouse attained (or would have attained) in that distribution calendar year. Each year, the spouse obtained a new divisor from the SLT for the spouse's attained age (or age the spouse would have attained) in that year to calculate that year's RMD. In that way, the spouse's life expectancy was being recalculated. Note that, If the deceased Participant's remaining, non recalculated life expectancy would have been longer than the sole DB spouse's recalculated life expectancy (e.g., the surviving spouse was much older than the deceased Participant at the time of his death), then the deceased Participant's remaining, non recalculated life expectancy (i.e., the "ghost life expectancy"), instead of the spouse's recalculated life expectancy, was used to calculate RMDs to the spouse after the Participant's death. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a)(1). THIS RULE HAS BEEN CHANGED BY SECURE 2.0. *See* IVB2 and V, infra.

5. Pre-SECURE Act Distribution Rules: Participant Had a DB but Spouse is Not Sole DB

Under the rules in effect before the SECURE Act became law, if the Participant had one or more DBs but the Participant's spouse was *not* treated as his sole DB, RMDs from his retirement plan after his death had to be calculated based on "the" DB's life expectancy. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(b) and (c)(1). The DB was the sole (non spouse) beneficiary of a conduit trust or the oldest "countable" beneficiary of an accumulation trust. Distributions pursuant to this rule had to commence by December 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(a) and § 1.401(a)(9)-5, Q&A-5(b) and (c)(1). Per the old rules, for the first distribution year, the prior year-end balance of the inherited retirement plan was divided by the "divisor" for *the* DB's age as of his/her birthday in the year following the year of the Participant's death (i.e., in the first distribution year), which was obtained from the SLT. Treas. Reg. § 1.401(a)(9)-9, Q&A-1. That divisor was then reduced by 1 in each subsequent year to calculate the RMD for the applicable distribution year. If there were multiple beneficiaries of a single retirement plan per the beneficiary designation itself and separate accounts were timely created, then each DB could use his/her own life expectancy to calculate post-death RMDs from his/her separate inherited retirement plan. *See* Separate Accounts at ID2e, supra. NOTE: THIS RULE APPLIED TO ACCUMULATION TRUSTS PRIOR TO THE SECURE ACT, BUT NO LONGER APPLIES IN THE CASE OF DBS.

Note that, if the deceased Participant's remaining, non recalculated single life expectancy (i.e., the "ghost life expectancy") was longer than the sole DB's non recalculated single life expectancy, then the deceased Participant's ghost life expectancy was used to calculate RMDs, instead of the DB's non recalculated single life expectancy. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a)(1). After the DB died, RMDs would continue to be distributed to the DB's successor beneficiary based on the same distribution schedule in use prior to the DB's death until exhaustion of the inherited IRA. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(2).

6. <u>Pre-SECURE Act Distribution Rules: Successor Beneficiaries</u>

a. *Successor Beneficiaries of Sole Beneficiary Spouse*

Under pre-SECURE Act rules, if the Participant's surviving spouse was named as the outright beneficiary of the Participant's retirement plan and she decided to remain in the position of being the Participant's *beneficiary* (rather than making a spousal rollover and becoming the Participant of those Plan benefits herself), the spouse could name a beneficiary ("successor beneficiary") to take the amount remaining in the inherited retirement plan upon her death. Because the sole beneficiary spouse's life expectancy was being recalculated each year, unless the spouse actually withdrew 100% of the remaining balance of the retirement plan "prematurely," there would <u>always</u> be an amount remaining in the spouse's inherited retirement plan at the time of her death. The fact that the spouse could name a successor beneficiary of her inherited retirement plan did not disqualify the plan or alter the initial DB determination or the applicable distribution period. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c). A successor beneficiary would be treated as the surviving spouse's beneficiary if such successor beneficiary was alive on September 30 of the year following the year of the surviving spouse's death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(b) and § 1.401(a)(9)-3, Q&A-5.

In the case of the Participant's death *before* his RBD with the spouse as sole beneficiary (the situation where the commencement date of RMDs to the spouse was delayed), if the spouse died *before* RMDs from the inherited retirement plan commenced, the successor beneficiary had to commence taking RMDs by December 31 of the year following the year of the spouse's death. If the successor beneficiary was a DB, RMDs to the successor beneficiary had to be taken over the successor beneficiary's non recalculated life expectancy. The successor beneficiary was treated as the spouse's DB if living on September 30 of the year following the year of the spouse's death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(b), § 1.401(a)(9)-3, Q&A-5, and § 1.401(a)(9)-3, Q&A-3(a). If the spouse did not have a successor beneficiary who qualified as a DB, then the 5 year rule applied under these circumstances. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(b). Under the old rules, even if the Participant's spouse's new spouse was her sole successor beneficiary, in this particular situation (Participant died before his RBD with spouse as sole DB and spouse died before RMDs commenced to her), in determining RMDs from the Participant's retirement plan after the spouse's death, the Participant's spouse's new spouse could not recalculate his life expectancy each year. Treas. Reg. § 1.401(a)(9)-3, Q&A-5 [last sentence].

If the Participant's spouse died *after* RMDs commenced from the Participant's retirement plan, the final RMD attributable to the Participant's spouse for the year of her death had be taken, first, and then the successor beneficiary of the spouse had to commence RMDs by December 31 of the year following the year of the spouse's death. In that situation, RMDs to the successor beneficiary (whether such beneficiary qualified as a DB or not) were based on the spouse's remaining, non recalculated single life expectancy. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(2) [last sentence].

b. *Pre-SECURE Act: Successor Beneficiary of a DB Other than Participant's Spouse*

In the case of non-spouse DBs of the Participant, after the death of *the* DB, RMDs would continue to the DB's successor beneficiary following the same distribution schedule that applied to the Participant's DB. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(2).

c. *Pre-SECURE Act: Successor Beneficiary of a Non DB*

The successor beneficiary who inherited a retirement plan that was subject to the 5 year rule had to withdraw 100% of the amount remaining in that inherited retirement plan by December 31 of the year that contained the fifth anniversary of the Participant's death (i.e., based on the original 5 year rule). A successor beneficiary of a Non DB taking RMDs over the Participant's ghost life expectancy, took RMDs based on that same distribution schedule until the Participant's Plan Benefits were exhausted.

d. *Pre-SECURE Act: "Contingent Beneficiary" vs. "Mere Successor Beneficiary"*

A "contingent beneficiary" of the Participant who had a right to any of the Participant's retirement plan had to be taken into account for purposes of the RMD Rules. Treas. Reg. § 1.401(a)(9)-5, Q&A-7(b). That is why at least "first tier" remainder beneficiaries of an accumulation trust were "countable" beneficiaries under the RMD Rules. However, an individual will *not* be considered a beneficiary for purposes of determining whether only individuals have been named as beneficiaries of the Participant's retirement plan and, if so, which individual has the shortest life expectancy, merely because "the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death." Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(1). That is the so-called "mere successor beneficiary" rule that caused so much confusion before the SECURE Act and the Proposed Regulations. Before the SECURE Act and the Proposed Regulations included new provisions that added some clarity, in determining who was a *mere successor beneficiary* in the case of an accumulation trust, a general "rule of thumb" was to keep "counting" beneficiaries of accumulation trusts in each level until one reached a beneficiary who was entitled to receive his/her share outright and free of trust. Trust beneficiaries who were only entitled to benefits after the death of an already living beneficiary who was entitled to receive his/her share outright could be ignored as "mere successor beneficiaries."

II. THE SECURE ACT — <u>BEFORE</u> THE PROPOSED REGULATIONS AND SECURE 2.0

A. Overview

1. <u>Legislative History</u>

The SECURE Act—Setting Every Community Up for Retirement Enhancement Act of 2019—was originally introduced in the United States House of Representatives (the "House") as H.R. 1994 on March 29, 2019. The SECURE Act was passed by the House on May 23, 2019. Ultimately, the substance of the SECURE Act was included in the 2020 appropriations bill, H.R. 1865, which saw most of its activity late in 2019. On December 19, 2019, the agreed bill passed the Senate after final changes in the House. The following day, December 20, 2019, H.R. 1865 (containing the SECURE Act) was signed into law by the President. The provisions in the SECURE Act affecting retirement plans (some of which did not end up with an actual provision in the Code) applied almost immediately – "to plan years beginning after December 31, 2019." *See* Section 401(b) of the SECURE Act.

2. <u>Quick Summary</u>

For purposes of this topic, the most important provisions of the SECURE Act are found in Sections 114 and 401 of the Act. Section 114 of the Act changed the age component of RBD. (Note: SECURE 2.0 made additional changes to the age component of RBD.) Section 401(a) of the Act made changes to Code Section 401(a)(9) by adding new sub-section (H) and modifying sub-section (E). Section 401(b) of the SECURE Act provided the effective date rules. These provisions of the SECURE Act, which are not that extensive, are shown in Exhibit A attached to this outline.

3. <u>Plans Affected</u>

The retirement plan changes made by the SECURE Act apply to "defined contribution plans," 403(b) annuities, certain governmental and tax exempt employee plans and IRAs (because all of these retirement plans and accounts are subject to IRC 401(a)(9)). IRC §§ 401(a)(9), 403(b)(10), 408(a)(6), and 457(d)(2). Even Roth IRAs are affected by the new SECURE Act distribution rules that apply after the Roth IRA Owner's death (discussed at IIE, infra).

4. <u>Primary Changes</u>

The primary changes affecting retirement plans made by the SECURE Act are the following:

- The "age component" of RBD was changed from 70½ to 72. Section 114 of the SECURE Act.
- Designated Beneficiaries were split into two types: Eligible Designated Beneficiaries ("EDBs") and "Other" Designated Beneficiaries (which is not a defined term, but will sometimes be referred to as "ODBs"). Section 401(a) of the SECURE Act, amending IRC Section 401(a)(9)(E).
- A new "10 year rule" applies on the Participant's death to distributions from retirement plans payable to Designated Beneficiaries who are not Eligible Designated Beneficiaries. Section 401(a) of the SECURE Act, adding new IRC Section 401(a)(9)(H)(i).
- Only Eligible Designated Beneficiaries can obtain a life expectancy distribution from inherited retirement plans. Section 401(a) of the SECURE Act, adding new IRC Section 401(a)(9)(H)(ii).
- A new type of trust, called an "Applicable Multi-Beneficiary Trust" ("AMBT"), may be used for certain types of EDBs. Section 401(a) of the SECURE Act, adding IRC Section 401(a)(9)(H)(iv).
- The "10 year rule" is the new distribution period applicable to successor beneficiaries of Eligible Designated Beneficiaries. Section 401(a) of the

SECURE Act, adding new IRC Section 401(a)(9)(H)(iii).

5. Effective Date Rules

The SECURE Act was signed into law on December 20, 2019, and became effective less than two weeks later—on January 1, 2020. The effective date rule applicable to Participants provides, "Except as provided in this subsection, the amendments made by this section shall apply to distributions with respect to employees [Participants] who die after December 31, 2019." Section 401(b)(1) of the SECURE Act. A later effective date applies to employees who participate in government plans (December 31, 2021 is substituted for December 31, 2019 in the prior quoted sentence). Section 401(b)(3) of the SECURE Act. There is also an exception for certain existing annuity contracts. Section 401(b)(4) of the SECURE Act. Another effective date provision deals with *beneficiaries* of employees (Participants) who died prior to January 1, 2020. Section 401(b)(5) of the SECURE Act. *See* IIIG, infra.

6. ACTEC Comments

In response to the SECURE Act, ACTEC submitted two letters to the IRS and Treasury, one dated July 14, 2020, and the other dated July 29, 2020, making comments and recommendations regarding numerous provisions in the SECURE Act and requesting the issuance of regulations to clarify certain RMD Rules deemed ambiguous as a result of the SECURE Act. Some of the issues submitted by ACTEC were reported in detail in Gerstner, *Estate Planning for Retirement Plans in View of the SECURE Act*, 44th Annual State Bar of Texas Advanced Estate Planning and Probate Course, June 3-5, 2020. Many of the issues submitted by ACTEC were addressed in the Proposed Regulations, which are discussed in III, infra.

7. Disclaimer

This portion of the outline will focus primarily on the "new rules" for classifying beneficiaries and the "new rules" relating to distributions from retirement plans as a result of the changes made by the SECURE Act. **WARNING:** Now that the Proposed Treasury Regulations have been published and SECURE 2.0 has been passed, some of the *new rules* per the SECURE Act no longer apply as originally stated or as originally understood.

B. The SECURE Act Distribution Rules: Distributions During Participant's Life

1. Required Beginning Date ("RBD")

The SECURE Act changed the age component of RBD to 72. *See* Section 114 of the Act. RMDs to the Participant from the Participant's retirement plan must begin no later than the Participant's RBD, which became (except in certain cases), per the SECURE Act, April 1 of the year following the year the Participant reaches age 72. IRC § 409(a)(9)(C)(i). The exception is that qualified plans may permit or require active employees (other than 5% owners of the sponsoring company) to defer RBD until April 1 of the year following the year in which the employee (Participant) retires. The first "distribution calendar year" is the calendar year prior to the year in which RBD occurs (i.e., the year during which the Participant reaches the specified age or, if applicable, retires). In the past, many Participants waited until their RBD to take their first RMD. In that case, however, the RMD for the second distribution year would have had to have been taken by December 31 of the year of the RBD, resulting in two RMDs being taken during that year. NOTE: SECURE 2.0 changed the age component of RBD again. *See* IVB1, infra.

2. Minimum Distribution Amount

The method for calculating a living Participant's RMD was not changed by the SECURE Act. The Participant's RMD for each distribution calendar year through and including the year of the Participant's death is determined using the Uniform Lifetime Table (ULT), except in the case of a married Participant whose more than 10 years younger spouse is his sole beneficiary as of his RBD, in which case the RMD amount is determined using the Joint Life and Last Survivor Expectancy Table (JLT).

The Participant's more than ten years younger spouse will only be treated as the Participant's sole beneficiary for purposes of using the "life expectancy distribution periods" in the JLT during the Participant's life if the Participant's beneficiary is either (i) his spouse, outright, or (ii) a conduit trust for the sole benefit of his spouse. If the Participant has named a conduit trust for the sole benefit of his spouse as the beneficiary of his retirement plan, the "documentation requirement" that normally only has to be met after the Participant's death must be satisfied by the Participant's RBD to enable use of the JLT to calculate RMDs during the Participant's life. Treas. Reg. § 1.401(a)(9)-4, Q&A-6.

Single Participants and married Participants whose spouse is not more than 10 years younger (or who did not name their more than 10 years younger spouse as sole beneficiary of their retirement plan) use the ULT to calculate RMDs during their lives. The ULT already assumes the Participant has named a beneficiary who is 10 years younger than the Participant, which is why the ULT provides for a longer distribution period than the SLT. To determine a living Participant's RMD, in general, the prior year-end balance of the Participant's retirement plan is divided by the "distribution period" (i.e., life expectancy factor) from the ULT table for the age of the Participant (or age the Participant will attain that year) to determine the RMD for that year. Because a new divisor is obtained from the ULT each year, a living Participant's life expectancy is being recalculated.

C. The SECURE Act Distribution Rules: Distributions After Participant's Death: General Concepts

1. Designated Beneficiaries Per the SECURE Act

The SECURE Act did not delete the definition of Designated Beneficiary ("DB") per prior law, but it did cause a division of DBs into two sub-categories: Eligible Designated Beneficiaries (EDBs) and "Other" Designated Beneficiaries. To distinguish between the two types of DBs in this section of the outline, the term "ODB" (which is not a defined term) will be used to refer to DBs who are not EDBs.

Revised Code Section 401(a)(9)(E) retains the prior definition of Designated Beneficiary in sub-section (i) [only an individual can be a DB], but goes on to create the new sub-category of EDBs in sub-section (ii). IRC § 401(a)(9)(E)(ii). As previously noted, not every beneficiary of the Participant's retirement plan is even a DB. DBs must be individuals. Therefore, an entity, such as a charity, business, estate or "non-qualifying trust," cannot be a DB (*but see* Trusts as Beneficiaries at IIC).

DBs are those individuals designated as beneficiaries of the Participant's retirement plan as of the Participant's date of death who remain beneficiaries of the retirement plan on September 30 of the year following the year of the Participant's death (informally known as the "DB Determination Date"). Beneficiaries who are not DBs can often be "removed" by the DB Determination Date via qualified disclaimers or by fully distributing their shares. The Participant's DB must have been "named" or "designated" by the Participant or the plan and must effectively have been in place as a beneficiary as of the Participant's date of death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(a). That is, new beneficiaries cannot be added "out of whole cloth" after the Participant's death (*but see* the provisions in the Proposed Regulations regarding Powers of Appointment and Trust Modifications at IIIG7 and IIIG8, infra). However, the opposite is not true: beneficiaries in place as of the Participant's date of death can be eliminated after the Participant's death, and only those beneficiaries who are "left standing" on the DB Determination Date will be treated as the Participant's actual beneficiaries. On the other hand, if a named beneficiary survives the Participant but then dies prior to the DB Determination Date, that now deceased beneficiary continues to be a beneficiary of the Participant's retirement plan unless that beneficiary executed a qualified disclaimer or received full distribution of the amount to which he/she was entitled from the Participant's plan prior to his/her death. Treas. Reg. § 1.401(a)(9)-4, Q&A-4(c).

2. Eligible Designated Beneficiaries

The following are the five types of EDBs per the SECURE Act:

- Participant's surviving spouse (IRC § 401(a)(9)(E)(ii)(I)).
- Participant's child who has not reached the age of majority (IRC § 401(a)(9)(E)(ii)(II)).
- A disabled individual (IRC § 401(a)(9)(E)(ii)(III)).
- A chronically ill individual (IRC § 401(a)(9)(E)(ii)(IV)).
- A beneficiary who is not more than 10 years younger than the Participant (IRC § 401(a)(9)(E)(ii)(V)).

3. General EDB Requirements

Pursuant to the SECURE Act, to qualify as an EDB, an individual must fit into one of the five specific EDB categories listed above. The determination as to whether a DB is an EDB must be made *as of the date of the Participant's death*. IRC § 401(a)(9)(E)(ii) [last sentence]. An outright beneficiary designation of an individual who falls within an EDB category will qualify. Designation of a conduit trust for the sole benefit of an individual who is an EDB should also qualify based on the treatment of conduit trusts. A conduit trust is not always the best choice for the type of trust to use for certain EDBs, however. Recognizing that, Congress provided a new type of trust, an "Applicable Multi-Beneficiary Trust" (a modified type of accumulation trust) that can be created for the benefit of two types of EDBs: disabled and chronically ill individuals. IRC § 401(a)(9)(H)(iv). *See* Applicable Multi-Beneficiary Trusts at IIIG4, infra.

4. Post-Death Distribution Periods

The SECURE Act made significant changes to the RMD Rules applicable to the Participant's DBs after the Participant's death. The initial question per the new rules is whether the Participant is deemed to have a "Designated Beneficiary" as of the "DB Determination Date" (or not). If the Participant does *not* have a Designated Beneficiary, the applicable distribution period differs depending on whether the Participant dies before or after his RBD. If the Participant does have a DB, the applicable distribution period after the Participant's death depends on the type of DB—i.e., whether the DB is an ODB or an EDB and, if the DB is an EDB, which particular type of EDB. In some cases involving multiple Designated Beneficiaries, separate account treatment may be possible. S*ee* Separate Accounts at ID2E, supra.

D. The SECURE Act Distribution Rules: Distributions After Participant's Death

1. Participant's Beneficiary is Not a DB (a "Non DB")

Entities (charities, businesses, estates and non-qualifying trusts) are not DBs. The SECURE Act did not change the RMD Rules applicable to beneficiaries who are not DBs (Non DBs). *See* IRC § 401(a)(9)(H)(i) [providing the new 10 year rule applicable to DBs other than EDBs: "Except in the case of a beneficiary who is not a designated beneficiary…"] Thus, distributions after the Participant's death *when there is no DB* still depend on whether the Participant dies before or after his RBD. In essence, the "old rules" still apply to "Non DBs."

a. *Participant's Death* Before *RBD with No DB: 5 year rule*

If the Participant dies before his RBD without having a DB, the 5 year rule applies. Pursuant to the 5 year rule, one hundred percent of the inherited retirement plan must be distributed to the Non DB by December 31 of the year that contains the fifth anniversary of the Participant's death. Treas. Reg. § 1-401(a)(9)-3, Q&A-4(a)(2). No distributions have to be taken during the first four years following the Participant's death, but the entire inherited retirement plan must be fully distributed by the end of the fifth year. Note that, if the Participant dies early enough in the year, the "Non DB" would actually have a period exceeding five years to withdraw the inherited retirement plan per this rule (i.e., the remainder of the year of the Participant's death plus the subsequent five years).

b. *Participant's Death On or after RBD with No DB: "Ghost Life Expectancy" Rule*

If the Participant dies on or after his RBD without having a DB, the Participant's remaining single life expectancy, not recalculated (the so-called "ghost life expectancy" of the Participant), is the applicable distribution method. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a)(2). Distributions to the Non DB must commence by December 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(a). For the first distribution year, the prior year-end balance of the inherited retirement plan is divided by the divisor from the SLT for the age the Participant attained (or would have attained) in the year of his death. That divisor is reduced by 1 in each subsequent year to calculate the RMD in each subsequent year. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(3). (When a divisor is reduced by 1 each year, that means life expectancy is *not* being recalculated. Not recalculating life expectancy produces a "more rapid" distribution than recalculating life expectancy.)

2. Participant's Beneficiary is an "ODB"

If the beneficiary is an ODB, the new 10 year rule applies to distributions from the inherited retirement plan after the Participant's death. IRC § 401(a)(9)(H)(i). The 10 year rule applies to ODBs whether the Participant dies before RBD or after RBD. However, pursuant to the Proposed Regulations, two different 10 year rules apply, depending on whether the Participant dies before or after his RBD. (NOTE: Prior to publication of the Proposed Regulations, nearly everyone assumed that the new 10 year rule would be applied in the same manner as the longstanding 5 year rule, whether the Participant died before or after his RBD. However, that turned out not to the case. *See* the Proposed Regulations at IIID, infra).

If the 10 year rule applies and the Participant dies early enough during the year, the ODB could actually have more than 10 years to withdraw the entire amount held in his inherited IRA (i.e., the remainder of the year of the Participant's death plus the subsequent 10 years).

a. *10 Year Rule = 10 Year Limit*

When annual RMDs are required based on a life expectancy distribution, the *10 year rule* should be thought of more as the "10 year limit" because it is possible, depending on the period of the applicable life expectancy, for the inherited IRA to be depleted before the end of the 10^{th} year after the Participant's death (or after the EDB's death, if applicable).

b. *End of 10 Year Limit ≠ End of Trust*

If an accumulation trust for the benefit of ODBs is the beneficiary of the retirement plan, even though 100% of the inherited IRA belonging to the trust must be withdrawn from the inherited IRA by December 31 of the year containing the 10^{th} anniversary of the Participant's death, the 10 year rule does *not* necessarily mean (i) that all of those withdrawn Plan Benefits have to be further distributed out of the trust to the trust beneficiaries by that date or (ii) that the trust itself has to terminate on (or before) that date.

3. Participant's Beneficiary Is An EDB

The distribution rules for EDBs vary depending on the particular type of EDB and also depending on whether the Participant dies before or after his RBD.

a. *Participant's Spouse*

1) *Qualification*

To qualify for EDB treatment as the Participant's surviving spouse, the Participant must have named as the beneficiary of his retirement plan (i) his spouse, outright, or (ii) a conduit trust for the sole benefit of his spouse. An accumulation trust of which the spouse is the sole or primary beneficiary for life will *not* qualify for the spouse EDB rule, unless the spouse qualifies as a disabled or chronically ill beneficiary and the accumulation trust is drafted as an AMBT.

2) *Spousal Rollover*

The SECURE Act did not change the IRA rollover option available to the Participant's surviving spouse named as the outright beneficiary of the Participant's retirement plan (discussed earlier at ID3b and ID4c). If the Participant's spouse rolls over the Participant's qualified plan to her own IRA (or to her own qualified plan, if her plan permits), or treats the Participant's IRA as her own IRA, she will become the *Participant* of those Plan Benefits and the lifetime rules applicable to living Participants will apply to her (instead of the spousal EDB rule). But spouses who are under age 59½ need to consider whether they will need to take distributions from the IRA (or plan) titled in their name before they choose this option because early distributions incur a 10% penalty (unless an exception is available).

3) *Spousal EDB Distribution Rule*

IMPORTANT NOTE: This rule was changed by SECURE 2.0. *See* IVB2 and V, infra.

Prior to SECURE 2.0, *assuming the Participant's spouse did not make a spousal IRA rollover*, which meant that the spouse was choosing to remain in the position of being the Participant's beneficiary (rather than becoming the Participant of her spousal IRA rollover), if the Participant died before his RBD, RMDs to the spouse from the Participant's retirement plan inherited by the spouse did not have to begin until December 31 of the year in which the Participant would have reached his Applicable Age. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(b)(2). The spouse could take discretionary distributions from the Participant's plan prior to that commencement date, if she desired, without penalty, regardless of her age.

Prior to SECURE 2.0, if the Participant died on or after RBD, RMDs to the spouse had to commence by December 31 of the year following the year of the Participant's death. Treas. Reg. § 1.401(a)(9)-3, Q&A-3(b)(1). Once RMDs to the spouse commenced, they were based on the spouse's life expectancy per the Single Life Table (SLT), *recalculated each year*. Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(2). That means that, to determine the RMD for the applicable distribution year, the prior year-end balance of the inherited retirement plan was divided by the "life expectancy factor" (previously, the "divisor") from the SLT for the age the spouse had attained (or would have attained) in that distribution calendar year. Each year, the spouse would obtain a new "life expectancy factor" (i.e., divisor) from the SLT for the spouse's age (or age the spouse would have attained) in that year to calculate that year's RMD. In that way, the spouse's life expectancy was being *recalculated*. In the case in which the Participant died on or after his RBD, ACTEC sought guidance from Treasury to the effect that the SECURE Act did not preclude the Participant's spouse from using the Participant's "ghost life expectancy" (i.e., single life expectancy, not recalculated), rather than her own life expectancy, recalculated, per Treasury Regulation Section 1.401(a)(9)-5, Q&A-5(a)(1), to determine RMDs after the Participant's death. This question was answered. *See* the Proposed Regulations at III, infra.

b. *Participant's Child Who Had Not Reached the Age of Majority as of the Participant's Date of Death*

1) General Rule

Only the Participant's child (and not someone else's child) can qualify for this category of EDB. This rule was referred to as the "Minor Child EDB Rule" before the Proposed Regulations were published. However, because the Proposed Regulations defined the "age of majority" as the age when the Participant's child reaches age 21, this rule applies to both actual minor children of the Participant and children of the participant who are ages 18 to 21 as of the Participant's date of death. NOTE: For ease of discussion, the Participant's child who has not yet reached the age of majority will sometimes be referred to as the Participant's "minor child" and this distribution rule will sometimes be referred to as "the minor child rule."

If the Participant named as beneficiary of his retirement plan (i) his minor child, outright, or (ii) a conduit trust for the benefit of his minor child, or (iii) a custodian for his minor child pursuant to the Uniform Transfers to Minors Act (or Uniform Gifts to Minors Act), then RMDs after the Participant's death will be based on the minor child's life expectancy, not recalculated, per the SLT. IRC §§ 401(a)(9)(H)(ii) and 401(a)(9)(B)(iii). Distributions to the minor child must commence by December 31 of the year following the year of the Participant's death. Id. To calculate the RMD for the first distribution year, the prior year-end balance of the minor child's inherited retirement plan must be divided by the "life expectancy factor" (previously, the "divisor") for the age the child has attained (or would have attained) in the first distribution year. In each subsequent year, the number used in the prior year will be reduced by 1 to calculate that year's RMD. Once the minor child reaches the age of majority, the 10 year rule applies. Thus, the Participant's minor child is only an EDB until such child reaches the age of majority. At that point, the Participant's child becomes an ODB. However, RMDs must continue to the Participant's child until the end of the period of the 10 year rule.

2) *ACTEC Requested Clarification Regarding Some Minor Child EDB Issues*

Several aspects of the minor child EDB rule were in need of clarification. ACTEC submitted two letters to the IRS and Treasury requesting clarification. The Proposed Treasury Regulations clarified most, but not all, of these ambiguities. *See* the Proposed Regulations at III, infra. Most of the issues relating to the minor child EDB rule that needed clarification and were submitted to Treasury by ACTEC were included in Gerstner, *Estate Planning for Retirement Plans in View of the SECURE Act*, State Bar of Texas 44th Annual Advanced Estate Planning and Probate Course, June 3-5, 2020, and will not be repeated in this outline.

3) *The Minor Child EDB Rule is Not A Great Rule*

The minor child EDB rule is not very favorable compared to the other EDB rules. That is because the Participant's minor child is only a "temporary" EDB. Once the child reaches the age of majority (age 21), the child converts to an ODB and is subject to the 10 year rule. Instead of trying to qualify for the minor child EDB rule, a Participant who has a minor child and a retirement plan with a significant value might name as the beneficiary of his retirement plan an accumulation trust for the benefit of his minor child in the form of the "Age 31 Trust" added by the Proposed Regulations (*see* IIIG6, infra) or in the form of a trust containing both one or more minor children of the Participant and one of more ODBs, which will qualify for the "modified" minor child rule (*see* IIIG5, infra).

c. *Disabled and Chronically Ill Beneficiaries*

Two of the five categories of EDBs are disabled beneficiaries and chronically ill beneficiaries. The definitions of these EDBs are in subsections (III) and (IV) of Code Section 401(a)(9)(E)(ii).

1) *Disabled Beneficiary*

Pursuant to Code Section 401(a)(9)(E)(ii)(III) added by the SECURE Act, an individual is a disabled beneficiary if disabled within the meaning of Section 72(m)(7). The Code and Regulations provide that the disabled person must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." IRC § 72(m)(7); Treas. Reg. § 1.72-17(f). This definition differs somewhat from the definition of disability used for purposes of entitlement to SSI and SSDI. For purposes of SSI and SSDI, the Social Security Administration defines disability as "the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c. This difference in definition for retirement plan purposes versus SSI and SSDI purposes makes sense because, with respect to the distribution of retirement plan benefits after the Participant's death, it would be administratively unworkable to change the distribution period at a later point in time due to the disabled person improving to the point of no longer being disabled. For additional information regarding disabled beneficiaries per the Proposed Regulations, see IIIF1, infra.

2) *Chronically Ill Beneficiary*

Per Code Section 401(a)(9)(E)(ii)(IV) added by the SECURE Act, an individual is a chronically ill beneficiary "within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certificate that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature." Code Section 7702B(c)(2) defines a "chronically ill individual" as "(i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity, (ii) having a level of disability similar (as determined under regulations prescribed by the Secretary in consultation with the Secretary of Health and Human Services) to the level of disability described in clause (i), or (iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment." IRC § 7702B(c)(2).

3) *Determination of Beneficiary's Status*

The beneficiary's status as disabled or chronically ill is determined as of the Participant's date of death. IRC § 401(a)(9)(E)(ii) [last sentence]. This could be an unfortunate rule for some individuals with certain types of diseases that have not progressed to the point of *disability* by the time of the Participant's death, but which will likely result in disability later. Many issues relating to disabled and chronically ill beneficiaries were submitted to Treasury for its consideration by ACTEC (and others) and were addressed in the Proposed Regulations. *See* the Proposed Regulations at IIIF, infra.

4) *Applicable Multi-Beneficiary Trusts*

The SECURE Act recognizes that, normally, a Participant who wants to provide benefits to a disabled or chronically ill beneficiary from his retirement plan will name a trust for the disabled or chronically ill beneficiary as beneficiary of his retirement plan, rather than naming such individual as the outright beneficiary of his retirement plan.

Prior to the SECURE Act, the trust created for the benefit of a disabled or chronically ill beneficiary was usually structured as an accumulation trust, rather than as a conduit trust. In the case of the other three categories of EDBs added by the SECURE Act, to obtain EDB treatment when a trust for the benefit of the EDB individual (rather than the EDB individual, outright) is being named as the beneficiary, the trust would likely need to be in the form of a conduit trust. In most cases, a conduit trust is not the best choice for a disabled or chronically ill beneficiary. Thus, Code Sections 401(a)(9)(H)(iv) and (v) added by the SECURE Act provide special rules applicable to a new type of trust for the benefit of disabled and chronically ill beneficiaries called an "Applicable Multi-Beneficiary Trust." Per Code Section 401(a)(9)(H)(v), an Applicable Multi-Beneficiary Trust is a trust that has more than one beneficiary, all of which are DBs [this requirement was changed by SECURE 2.0], and at least one of which is a disabled or chronically ill beneficiary. *See* the Proposed Regulations at IIIG4, and SECURE 2.0 at IVB4, infra.

5) <u>*Separate Account Rule for Applicable Multi-Beneficiary Trust and Life Expectancy Issue*</u>

Code Section 401(a)(9)(H)(iv) provides that, if, per the terms of the trust named as beneficiary of the Participant's retirement plan, (I) the trust is to be divided immediately upon the Participant's death into separate trusts for each beneficiary, *or* (II) no individual other than a disabled or chronically ill beneficiary has any right to the Participant's retirement plan until the death of all such EDBs, clause (ii) of Code Section 401(a)(9)(H) (the exception to the 10 year rule for EDBs) shall be applied separately with respect to the portion of the Participant's interest in the retirement plan payable to the trust for the benefit of the disabled or chronically ill beneficiary. Presumably, these provisions were intended (i) to override the separate account rule in the case of an Applicable Multi-Beneficiary Trust that is a sub-trust of a (multi-beneficiary) trust named as beneficiary of the Participant's retirement plan (such as the Participant's revocable trust) and (ii) to allow RMDs payable to the trust for the disabled or chronically ill beneficiary to be calculated based on the disabled or chronically ill beneficiary's single life expectancy, not recalculated (instead of based on the life expectancy of the oldest DB of the trust—the pre-SECURE Act rule applicable to accumulation trusts). The Proposed Regulations addressed some of the ambiguities in these provisions. See the Proposed Regulations at III, infra. SECURE 2.0 changed the rule that all beneficiaries of the AMBT other than the disabled or chronically ill beneficiary had to be DBs. *See* SECURE 2.0 at IVB4, infra.

d. *Beneficiaries Not More Than Ten Years Younger Than the Participant*

An individual who is *not more than ten years younger* than the Participant is in this EDB category. To qualify for this EDB category, the Participant must either name the "not more than ten years younger beneficiary" as the outright beneficiary of his retirement plan or must name as the beneficiary of his retirement plan a conduit trust for the benefit of the "not more than ten years younger beneficiary." This particular EDB rule might be useful in the case of siblings of the Participant or a "significant other" of the Participant who is not the Participant's spouse.

If the Participant dies before his RBD, RMDs to this type of EDB will be based on the single life expectancy of the EDB, not recalculated. IRC § 401(a)(9)(H)(ii), citing IRC § 401(a)(9)(B)(iii). The first RMD must be taken by December 31 of the year following the year of the Participant's death. Id. To determine the RMD in the first distribution year, the prior year-end balance of the inherited retirement plan is divided by the divisor from the Single Life Table for the age the EDB has attained (or would have attained) in the first distribution year. That divisor is reduced by 1 in each subsequent distribution year to determine the applicable RMD in those future years. The successor beneficiary of this type of EDB will be subject to the 10 year rule. IRC § 401(a)(9)(H)(iii). *See also* the Proposed Regulations at IIIF, infra.

E. The SECURE Act: Roth IRAs

Even though "qualified distributions" from Roth IRAs after the Participant's death are not subject to income tax, the distribution rules per the SECURE Act applicable after the death of the Participant also apply to Roth IRAs. The Participant of a Roth IRA is always deemed to have died before reaching his RBD, regardless of his actual age at death, because the Participant is not required to take RMDs from his Roth IRA during his life. Thus, (i) if an ODB is the beneficiary of the Participant's Roth IRA, the 10 year rule will apply, (ii) if a Non DB is the beneficiary of a Roth IRA, the 5 year rule will apply, and (iii) if an EDB is the beneficiary of the Roth IRA, the post-death distribution rule applicable to that particular type of EBD will apply.

F. The SECURE Act: Distribution Rule After the Death of an EDB

Per the SECURE Act, after the death of an EDB, the successor beneficiary of the EDB is subject to the 10 year rule. IRC § 401(a)(9)(H)(iii). This distribution rule was confirmed in the Proposed Regulations. *See* Prop. Reg. § 1.401(a)(9)-4(e)(3).

G. The SECURE Act: Transition Rule In Case Of Participant Who Died Before Effective Date

Code Section 401(b)(5) provides this "effective date rule" for beneficiaries of Participants who died before the SECURE Act became effective:

> (A) In General.—If an employee dies before the effective date [January 1, 2020], then, in applying the amendments made by this section to such employee's designated beneficiary who dies after such date—
>
> (i) such amendments apply to any beneficiary of such designated beneficiary; and
> (ii) the designated beneficiary shall be treated as an eligible designated beneficiary for purposes of applying section 401(a)(9)(H)(ii) of the Internal Revenue Code of 1986 (as in effect after such amendments)."

This particular effective date rule in the SECURE Act was worded in a confusing manner. The predominant interpretation was that this rule was intended to apply the 10 year rule to the successor beneficiary of a DB who had already started taking RMDs from the retirement plan of a Participant who died prior to 2020 when that DB died after 2020, by treating that DB as if that DB were an EDB. That interpretation was confirmed by the Proposed Regulations. Thus, in the case of a Participant who died before January 1, 2020 (the effective date of the SECURE Act), with a Designated Beneficiary taking distributions on a life expectancy basis who was still living on January 1, 2020, that DB is treated as an EDB *solely for the purpose of applying, on that beneficiary's death, the 10 year rule that applies on the death of an EDB, instead of the 10 year rule that applies on the death of the Participant or on the death of the Participant's DB*. Prop. Reg. § 1.401(a)(9)-1(b)(iii). If the Participant who died before the effective date had multiple DBs still living on the effective date (i.e., those DBs did not have separate accounts), then the 10 year limit is based on the death of the oldest DB of the Participant.

III. THE PROPOSED REGULATIONS

On February 23, 2022, the Treasury Department issued proposed regulations (the "Proposed Regulations") addressing the RMD Rules as a result of the SECURE Act. The Proposed Regulations were published on February 24, 2022. The Proposed Regulations and the preamble contain a total of 275 pages. Not only were the Proposed Regulations lengthy, they were also "surprising" in certain respects.

During the more than 24 months subsequent to the effective date of the SECURE Act, Participants, beneficiaries and their advisors had been making certain assumptions regarding the interpretation of various provisions in the SECURE Act, including the application of the new 10 year rule. Per the Proposed Regulations, some of those assumptions turned out to be "different" from the Treasury Department's interpretation of the SECURE Act. However, the Proposed Regulations did provide some much needed clarification of certain ambiguous provisions and also included some favorable provisions.

A. Applicable Denominator

Because of the significant changes made by the SECURE Act, in regard to calculating RMDs, the Proposed Regulations changed the term "divisor" to "Applicable Denominator."

B. Automatic Waiver of Late Distribution Penalty Relating to Participant's Final RMD

Prior to passage of SECURE 2.0, the penalty for failure to take the full amount of an RMD, which included the participant's final RMD for the year of his death, was 50%. In view of the high penalty amount, and also the practical difficulty of timely making that distribution in cases where the Participant died late in the year, as part of the Proposed Regulations, the excise tax provisions in Section 4974 were modified. In the case of the late payment of the Participant's final RMD, the penalty is automatically waived if the beneficiary who was supposed to take that final RMD by December 31 of the year of the Participant's death takes that final RMD no later than the tax filing deadline (including extensions) for the taxable year of the beneficiary that begins with or within that calendar year. Prop. Reg. § 54.4974-1(g)(3), effective for tax years beginning on or after January 1, 2022.

C. Adding a Deadline for Spouse to Treat Participant's IRA as her Own

The Proposed Regulations amend the IRA rules to provide that, if the Participant's spouse is the sole beneficiary of the Participant's IRA and the spouse wants to treat the Participant's IRA as if she were the owner of that IRA (using that option, rather than doing a spousal IRA rollover), the spouse now has a deadline for doing that. Per the Proposed Regulations, the deadline for the Participant's spouse to treat the Participant's IRA as her own is *the later of* (i) the calendar year in which the spouse reaches her Applicable Age and (ii) the calendar year following the calendar year of the Named IRA Owner's death. Prop. Reg. § 1.408-8(c).

D. Two Different 10 Year Rules Applicable to DBs

The most surprising provisions in the Proposed Regulations were the provisions indicating that there are two different 10 year rules applicable to Designated Beneficiaries who are not EDBs (hereafter, simply referred to as "DBs"), depending on when the Participant dies. The difference has to do with the "At Least As Rapidly Rule" ("ALAR Rule"). The ALAR Rule was not specifically repealed by the SECURE Act and applies when the Participant dies on or after his RBD (hereafter, sometimes simply referred to as "after RBD"). Thus, a technical argument can be made in favor of the "2 different 10 year rules" in the Proposed Regulations, despite what appeared to be Congress' intent to simplify the rules by imposing the 10 year rule on all Designated Beneficiaries other than EDBs, whether the Participant died before or after his RBD.

1. Participant Dies Before RBD and Participant's Beneficiary is a DB

In this case, the 10 year rule applies like the longstanding 5 year rule. No RMDs are required during years 1 through 9 following the year of the Participant's death. The DB may take discretionary distributions during those years, but no required distributions have to be taken during those years. However, per the 10 year rule that applies in this case, the DB must withdraw 100% from the DB's inherited IRA by December 31 of the year that contains the 10th anniversary of the Participant's death.

2. Participant Dies On or After RBD and Participant's Beneficiary is a DB

If the Participant dies after his RBD, the Participant's DB (i) must take Participant's final RMD (if not taken by Participant prior to his death), (ii) *must take RMDs in years 1 through 9 following the year of Participant's death*, and (iii) must withdraw 100% from the DB's inherited IRA by December 31 of the year containing the 10th anniversary of the Participant's death.

Any time the Participant dies after his RBD, if the Participant did not take the full amount of his RMD during the year of his death, the Participant's beneficiary (no matter who it is) must take that RMD (or the shortfall) by December 31 of the year of the Participant's death. Thus, that is not a new requirement.

In addition, the fact that the DB must withdraw the full remaining amount in the DB's inherited IRA by December 31 of the year that contains the 10th anniversary of the Participant's death is not surprising because that is interpreting the 10 year rule like the longstanding 5 year rule.

But, per the Proposed Regulations, the DB must *also* take RMDs during years 1 through 9 following the year of the Participant's death. This requirement is derived from Code Section 401(a)(9)(B)(i), which is the "at least as rapidly rule" (i.e., the ALAR rule).

Although the RMDs to the DB are technically based on the longer of the DB's single Life Expectancy (not recalculated) per the SLT or the deceased Participant's "ghost life expectancy" (i.e., Participant's single life expectancy, not recalculated) per the SLT, in the case of a DB (versus an EDB) who is an individual, the applicable rule is almost always going to be the DB's single life expectancy (not recalculated) because, if an individual DB had a shorter life expectancy than the Participant (which would make the Participant's ghost life expectancy longer than the DB's life expectancy), the DB would be a "Not More Than 10 Years Younger Beneficiary," which would mean that that particular individual is an EDB (and not just a DB) and is subject to a different distribution rule.

E. Per Qualified Plan, 10 Year Rule Might Apply to Some EDBs If Participant Dies Before RBD

The Proposed Regulations indicate that, if the Participant dies *before* reaching his RBD, in the case of a qualified plan, there are some situations where an EDB might end up being subject to the 10 year rule, rather than being able to use the otherwise applicable life expectancy distribution rule. This could be for any of the following reasons: (i) the Participant's plan *requires* that payout; (ii) the Participant's plan allowed the Participant to elect that payout and the Participant made that election; or (iii) the Participant's plan allows the EDB to elect the 10 year rule instead of the life expectancy payout and the EDB makes that election. Prop. Reg. § 1.401(a)(9)-3(c)(5)(ii),(iii).

NOTE: This option is only available (if at all) if the Participant dies *before* his RBD. In addition, this option is only an option if the Participant's beneficiary is an EDB (because "regular" DBs are already subject to the 10 year rule). Further, in order for this option to be available, the plan must specifically provide for it.

For an example of a situation in which an EDB may want to elect this option (if available), *see* VB5, infra.

F. Proof of EDB Status

The Proposed Regulations provided clarification regarding many issues relating to various types of EDBs.

1. Disabled Beneficiary

   a. Documentation Requirement: Provide evidence of the beneficiary's disability *as of the Participant's date of death* to the Plan Administrator by October 31 of the year following the year of the Participant's death.
   b. Safe Harbor: Provide a copy of the disability qualification letter from the SSA to the Plan

Administrator by October 31 of the year following the year of the Participant's death.

c. The definition of disability for an individual age 18 or older who does not have a qualification letter from the SSA: The individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration.

d. The definition of disability for an individual under age 18: The individual suffers from a medically determinable physical or mental impairment that results in marked or severe functional limitations that can be expected to result in death or to be of long-continued and indefinite duration. Prop. Reg. § 1.401(a)(9)-4(e)(4).

2. <u>Chronically Ill Beneficiary</u>

a. Documentation Requirement: Provide evidence of the beneficiary's chronic illness *as of the Participant's date of death* to the Plan Administrator by October 31 of the year following the year of the Participant's death.

b. Health Care Practitioner Certification: Provide certification by a "licensed health care practitioner" (defined in IRC § 7702B(c)(4)) that the beneficiary is unable to perform at least two activities of daily living for an indefinite period that is reasonably expected to be lengthy in nature. Prop. Reg. § 1.401(a)(9)-4(e)(5).

3. <u>Individual Not More Than 10 Years Younger Than Participant</u>

Qualification is based on actual birthdates (not birth years) of the Participant and his beneficiary. Prop. Reg. § 1.401(a)(9)-4(e)(6).

4. <u>Child of Participant Who Has Not Reached "Age of Majority"</u>

This rule is sometimes still referred to as the "Minor Child Rule" even though the "age of majority" has been set at age 21 and, in nearly all states, a minor is an individual who is under age 18.

a. *Age of Majority is Age 21*

The Proposed Regulations define "the age of majority" as the age when the Participant's child reaches age 21. Prop. Reg. § 1.401(a)(9)-4(e)(3). Being provided with a definitive age for "the age of majority" was one of the best provisions in the Proposed Regulations. That was something ACTEC asked Treasury to provide. Even though a child of the Participant who is age 18, 19 and 20 when the Participant dies is not technically a "minor child," this rule will sometimes be referred to as the "minor child rule" for ease of discussion.

1) *<u>Exception</u>*: Defined Benefit Plans already using age 26 as the age of majority for purposes of those plans can continue to use that age. Preamble to Proposed Regulations, page 25.

b. *Minor Child who is Disabled or Chronically Ill*

1) If the Participant's minor child is disabled or chronically ill at time of the Participant's death and the applicable proof can be provided, it is better to qualify that minor child as a disabled or chronically ill beneficiary because, otherwise, that child's status as an EDB will terminate when that child reaches age 21.

2) If it is not known or cannot be proven that the Participant's minor child is disabled or chronically ill *at the time of the Participant's death*, then that child cannot qualify as an EDB as a Disabled or Chronically Ill Beneficiary. Preamble to Proposed Regulations, page 26.

c. *Qualified Forms of Distribution to Minors*

The Participant may use the following forms of beneficiary designation to qualify his child who has not reached the age of majority for the minor child EDB rule: (i) outright to the child (risky if the child is under age 18 due to the possibility that the Plan Administrator will require distribution to a court-appointed legal guardian); (ii) to a conduit trust for the benefit of that child (or for the benefit of multiple minor children of the Participant); or (iii) to a custodian pursuant to the Uniform Transfers (or Gifts) to Minors Act [there is no citation on this in the Proposed Regulations, but there are IRS rulings that say that gifts to a custodial account for the benefit of a minor qualify as gifts to the minor—*see*, e.g., Rev. Rul. 56-86, 1956-1 CB 449 and Rev. Rul. 59-357, 1959-2 CB 212)].

G. Trusts

Although the authors of the Proposed Regulations are employee benefit plan lawyers and not trust lawyers, because of input from trust lawyers, they are starting to obtain a better understanding of the types of trusts that are used in estate planning and the reasons why some Participants may wish to name those trusts as the beneficiaries of their retirement plans. Therefore, the level of "suspicion" toward trusts as beneficiaries of retirement plans has declined (as evidenced by some of the very favorable trust provisions in the Proposed Regulations).

1. Trust Rules and Definitions-In General

The Proposed Regulations include specific definitions relating to trusts and certain beneficiaries of trusts. If the Proposed Regulations become final, these definitions will supersede the provisions in the 2002 Treasury Regulations.

a. *"See-Through Trust"*

The 2002 Treasury Regulations did not include an actual definition of a "see-through trust." Prior to issuance of the Proposed Regulations, that term was often used by practitioners, with the addition of the word, "qualified" (i.e., "qualified see-through trust") to refer to a trust named as beneficiary of the Participant's plan that qualified for DB treatment. However, the Proposed Regulations include a specific definition of a "see-through trust": If a trust named as beneficiary of the Participant's retirement plan meets all four of the "trust regulatory requirements," then certain beneficiaries of the trust will be treated as the beneficiaries of the participant's plan. Prop. Reg. § 1.401(a)(9)-4(f)(1)(i). Thus, per the Proposed Regulations, a "see-through trust" is a trust that meets the four trust regulatory requirements so that "certain beneficiaries" of the trust will be considered to be the actual beneficiaries of the Participant's plan.

The reference in the prior paragraph to "certain beneficiaries" basically means those beneficiaries of the trust who must be taken into account as beneficiaries of the Participant's plan for purposes of the RMD Rules (sometimes referred to as "countable" beneficiaries in this outline). *See* definitions of Current Beneficiary and Secondary Beneficiary at IIIG3, infra.

b. *Trust Regulatory Requirements*

1) *The New Wording*

The four trust regulatory requirements are basically the same as in the 2002 Treasury Regulations, but with some updates in wording due to the restructuring done in the Proposed Regulations. Those requirements are:

(i) The trust is a valid trust under state law or would be but for the fact that there is no corpus.

(ii) The trust is irrevocable or will, by its terms, become irrevocable upon the death of the employee [Participant].

(iii) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's plan are identifiable (within the meaning of paragraph (f)(5) of this section) from the trust instrument.

(iv) The documentation requirements in paragraph (h) of this section have been satisfied.

Prop. Reg. § 1.401(a)(9)-4(f)(2).

2) *"Identifiable"*

The third trust regulatory requirement is referred to in the Proposed Regulations as the "Identifiability Requirement" (and will sometimes be referred to that way in this outline).

3) *Trust Documentation*

Sub-paragraph (h) of Prop. Reg. § 1.401(a)(9)-4 continues the two major trust document rules: (i) trust documentation must be provided to the Plan Administrator during the Participant's life when the Participant reaches his RBD if a trust for the sole benefit of the Participant's more than 10 years younger spouse is his beneficiary and (ii) trust documentation must be provided to the Plan Administrator after the Participant's death if a trust is named as beneficiary of the Participant's retirement plan and remains a beneficiary as of the DB Determination Date.

With respect to each trust named as a beneficiary of Participant's retirement plan on the Participant's death, a copy of the trust instrument, or a list of all beneficiaries of the trust and their entitlement to any interest in the Participant's plan, must be provided to the Plan Administrator by October 31 of the year following the year of the Participant's death. Prop. Reg. § 1.401(a)(9)-4(h)(3). As was true before the Proposed Regulations were published, the term, "Plan Administrator," includes the custodian or trustee of the Participant's IRA. Prop. Reg. § 1.408-8(a)(3).

c. *Background: Accumulation Trusts and Conduit Trusts Per the 2002 Treasury Regulations*

The 2002 Treasury Regulations specifically recognized two types of qualified see-through trusts by providing examples based on the terms of trust, but those regulations did not use those specific terms to refer to those trusts. *See* 2002 Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 1 (accumulation trust) and 2002 Treas. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 2 (conduit trust).

2. Specific Trusts Defined

The Proposed Regulations include specific definitions of a "conduit trust" and an "accumulation trust." In addition, the definition of a "conduit trust" in the Proposed Regulations includes one phrase that is an improvement over the prior "definition."

a. Conduit Trust

A *conduit trust* is a see-through trust, the terms of which provide that, with respect to the deceased Participant's interest in the retirement plan, all distributions will, upon receipt by the trustee, be paid directly to, *or for the benefit of,* "specified beneficiaries" (referring to "Current Beneficiaries"—*see* below). Prop. Reg. § 1.401(a)(9)-4(f)(ii)(A) (emphasis added). The italicized wording is an improvement over the prior definition of a conduit trust because it appears to allow payments to be made by the conduit trust trustee on behalf of the current beneficiary (i.e., plan benefits received by the trustee do not have to be distributed directly [outright] to the beneficiary as long as they are distributed out of the trust "upon receipt" for the benefit of the beneficiary).

b. *Accumulation Trust*

An *accumulation trust* means any see-through trust that is not a conduit trust. Prop. Reg. § 1.401(a)(9)-4(f)(ii)(B).

3. Certain Trust Beneficiaries Defined

a. *Current Beneficiary*

A *Current Beneficiary* is a beneficiary of a trust that was named as the beneficiary of the Participant's plan who could receive amounts in the trust representing the Participant's interest in the plan ("Plan Benefits") that are neither contingent upon, nor delayed until, the death of another beneficiary of the trust who did not predecease (and is not treated as having predeceased) the Participant. Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(A). All beneficiaries of a conduit trust who are eligible to receive distributions from the Participant's Plan that is payable to the trust upon the Participant's death are in this category.

b. *Secondary Beneficiary*

A *Secondary Beneficiary* is a beneficiary of an accumulation trust who could receive an interest in Plan Benefits not distributed to Current Beneficiaries. Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(B).

In the context of an accumulation trust, Secondary Beneficiaries are usually (but not always) going to be "remainder beneficiaries" of the trust. However, the Proposed Regulations do not define different levels of Secondary Beneficiaries using typical trust terminology, such as "first tier remainder beneficiary," "contingent remainder beneficiary," "vested remainder beneficiary," etc.

c. *Beneficiaries of Accumulation Trusts Whose Entitlement is Conditioned on Death of Secondary Beneficiary*

Any beneficiary of an accumulation trust who could receive amounts from the trust that represent the Participant's interest in the plan (i.e., Plan Benefits) solely because of the death of another Secondary Beneficiary can be disregarded as a beneficiary of the Participant's Plan Benefits. In other words, if a particular Secondary Beneficiary of an accumulation trust would only receive Plan Benefits due to the death of another Secondary Beneficiary who is entitled to receive Plan Benefits outright (not in trust) prior to that second Secondary Beneficiary receiving any of those Plan Benefits, that "contingent beneficiary" (i.e., subsequent Secondary Beneficiary) is ignored as a beneficiary of the trust. Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii). This concept is similar to the "mere successor beneficiary" concept in the 2002 Treasury Regulations but is a little bit clearer than that wording.

Note, however, that there are two exceptions to the rule stated above:

Exception 1. That subsequent Secondary Beneficiary cannot be ignored if that subsequent Secondary Beneficiary predeceased the Participant (or is treated as having predeceased the Participant due to a simultaneous death statute).

Exception 2. That subsequent Secondary Beneficiary cannot be ignored if that subsequent Secondary Beneficiary also meets the definition of being a Current Beneficiary of the trust.

4 AMBT Provisions

a. *AMBT Definition*

As noted in II, supra, the SECURE Act added a new type of accumulation trust that could be created for the benefit of disabled or chronically ill individuals called an Applicable Multi-Beneficiary Trust ("AMBT"). *See* Code Section 401(a)(9)(H)(iv), included in Exhibit A, attached. Per the Proposed Regulations, an AMBT is a see-through trust with more than one beneficiary and with respect to which—

(i) All of the trust beneficiaries are designated beneficiaries; and
(ii) At least one of the trust beneficiaries is an eligible designated beneficiary who is disabled…or chronically ill.

Prop. Reg. § 1.401(a)(9)-4(g)(1).

But see the change to sub-section (i) made by SECURE 2.0, at IVB4, infra.

b. *Type I and Type II AMBTs*

1) Type I AMBT

The Type I AMBT is really a provision about dividing the particular trust that is actually named as the beneficiary of the Participant's retirement plan (such as the Participant's revocable trust) on the Participant's death into separate trusts (a/k/a "sub-trusts"), one of which is an AMBT for the exclusive lifetime benefit of a disabled or chronically ill beneficiary (or multiple disabled or chronically ill beneficiaries). The trust instrument must provide for such a division, presumably on a percentage or fractional basis. Prop. Reg. §

1.401(a)(9)-4(g)(2). When the trust named as beneficiary is divided, the separate trust for the disabled or chronically ill individual(s) established per the trust instrument and made effective pursuant to the required division must basically qualify as a Type II AMBT. The apparent purpose of the Type I AMBT provision is to override the separate account rule that would usually prevent a trust divided per a trust instrument (instead of per the beneficiary designation) from obtaining separate account treatment.

2) <u>*Type II AMBT*</u>

This is basically the provision that provides the terms of the AMBT, whether the AMBT starts out as a Type I AMBT or is an AMBT from inception. The trust instrument that creates the Type II AMBT must (i) identify the disabled and/or chronically ill individual(s) who are beneficiaries of the trust and (ii) provide that no individual other than the disabled or chronically ill individual(s) has any right to any of the Participant's Plan Benefits until the death of all of the disabled or chronically ill beneficiaries. Prop. Reg. § 1.401(a)(9)-4(g)(3)(i).

c. *Other Beneficiaries of AMBT Disregarded*

If the trust qualifies as a Type II AMBT, then the disabled or chronically ill beneficiaries are treated as EDBs without regard to whether the other beneficiaries of the trust are EBDs. Prop. Reg. § 1.401(a)(9)-4(g)(3)(ii). Prior to SECURE 2.0, however, all of the "countable" Secondary Beneficiaries of the AMBT had to be DBs. That requirement was changed by SECURE 2.0, which now allows a charity to be named as a Secondary Beneficiary of an AMBT. *See* IVB4, infra.

d. *RMDs During Term of AMBT*

During the term of an AMBT for the benefit of just one disabled or chronically ill individual, RMDs are calculated based on the life expectancy of that disabled or chronically ill individual, regardless of the ages of the remainder beneficiaries of the AMBT (and, per SECURE 2.0, regardless of whether the remainder beneficiary is a charity). Prop. Reg. § 1.401(a)(9)-5(f)(1)(ii). This is a special exception to the usual rule applicable to an accumulation trust. If there are multiple disabled or chronically ill beneficiaries of the AMBT, RMDs are calculated based on the life expectancy of the oldest disabled or chronically ill beneficiary. Prop. Reg. § 1.401(a)(9)-5(f)(1)(i).

e. *Distribution on Termination of AMBT*

In the case of an AMBT for the benefit of a single disabled or chronically ill individual, the AMBT will terminate on that individual's death. In the case of an AMBT for multiple disabled or chronically ill individuals, the AMBT will terminate on the death of the last disabled or chronically ill individual. Upon termination of the AMBT, the remainder beneficiaries of the AMBT are subject to the 10 year rule that applies on the death of an EDB (or, in the case of multiple disabled or chronically ill individuals, on the death of the last such individual). Prop. Reg. § 1.401(a)(9)-5(e)(3) and 1.401(a)(9)-5(f)(2)(iii)(A).

5. <u>Trusts for Children of Participant Named As Beneficiary</u>

a. *Conduit Trust for One "Minor" Child of Participant*

In the case of a conduit trust for the benefit of just one child of the participant who has not reached age 21 at the time of the Participant's death, the full amount held in the inherited IRA belonging to that trust must be withdrawn and distributed out of the trust by December 31 of the year that contains the 10th anniversary of *the earlier of* (i) the year that child reaches the age of majority (i.e., by 12/31 of the year when that child reaches age 31) and (ii) the year of the child's death. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3) and (4).

b. *Conduit Pot Trust for Multiple "Minor" Children of Participant*

A conduit pot trust is permitted. If the Participant's retirement plan is distributable to a conduit pot trust for multiple children of the Participant, none of whom has reached the age of majority by the Participant's date of death (i.e., *all* of the Participant's children are under age 21 as of his date of death), the minor child EDB rule applies to that trust. However, in this case, it is the oldest "minor child" of the Participant who is treated as *the* EDB for purposes of the RMD Rules. Therefore, the full amount held in the inherited IRA belonging to that trust must be withdrawn and distributed out of the trust by December 31 of the year that contains the 10th anniversary of *the earlier of* (i) the year that the Participant's oldest "minor" child reaches the age of majority (i.e., by 12/31 of the year when that child reaches age 31) and (ii) the year of death of the Participant's oldest "minor" child. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3) and (4). Of course, some of the Participant's other children could still be "minors" at that time.

c. *Accumulation Pot Trust Having Both a "Minor" Child Beneficiary and At Least One DB as Beneficiaries*

1) <u>*Exception to General Rule*</u>

The general rule is that, if the Participant has multiple beneficiaries and separate accounts cannot be created for each of them (*which is the case with multiple beneficiaries of a single trust*), then even if one of those beneficiaries is an EDB, it will be deemed that the Participant did not name an EDB. Prop. Reg. §

1.401(a)(9)-5(f)(2)(i). However, the Proposed Regulations contain an exception to that rule, which is, if the Participant names as the beneficiary of his retirement plan a pot trust for the benefit of multiple DBs and at least one of those beneficiaries is a child of the Participant who has not reached the age of majority at the time of Participant's death, the "minor child EDB rule" will apply to that trust, instead of the rule applicable to DBs. Prop. Reg. § 1.401(a)(9)-5(f)(2)(ii). This rule could apply if the Participant names a pot trust for the benefit of all his children as the beneficiary of his retirement plan and some of those children are above age 21 at the time of his death, as long as at least one child of the Participant who is a beneficiary of the trust is under age 21 at the time of the Participant's death. However, the trust cannot have a Non DB as a "countable" beneficiary to obtain this modified EDB rule.

2) *Accumulation Pot Trust Having Both a "Minor" Child Beneficiary and At Least One DB as Beneficiaries—Determination of RMDs*

RMDs must commence by December 31 of the year following the year of the Participant's death, based on the life expectancy of the oldest "countable" beneficiary of the trust. In this particular example, the DB would be older than the minor child EDB and, therefore, the life expectancy of the DB would be used to calculate RMDs.

3) *Accumulation Pot Trust Having Both a "Minor" Child Beneficiary and At Least One DB as Beneficiaries—Final Distribution*

The final distribution from the inherited IRA that belongs to the pot trust in which there is at least one "minor" child beneficiary and one DB must be made by December 31 of the year that contains the 10th anniversary of *the earlier of* (i) the year the oldest living child who had not reached his/her age of majority at the time of the Participant's death reaches that age (i.e., by 12/31 of the year when the Participant's oldest "minor" child reaches age 31) or (ii) the year of that child's death. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3) and (4). While there still might be one or more beneficiaries of the trust who are minor children of the Participant, if the trust is an accumulation pot trust, full distribution from the inherited IRA that belongs to the trust to the trust satisfies the RMD rules.

d. *"Shortcomings" of the Minor Child EDB Rule and Other Options*

1) While a minor child of the Participant is technically an EDB, a minor child is not an EDB in the same way that the other four types of EDBs are EDBs because a minor child is basically only a "temporary" EDB. Once the minor child reaches the age of majority, the minor child switches to becoming a "regular" DB.

2) It might be better in some cases to name as the beneficiary of the Participant's retirement plan an "Age 31 Trust" for the sole benefit of the Participant's minor child. *See* next section. Or, if the Participant wants to name a single trust for all of his children (i.e., a "pot trust") as the beneficiary of his retirement plan, it might be better to use an accumulation trust, rather than a conduit trust, even though the applicable 10 year rule will apply to that trust.

e. *Comments regarding Use of Accumulation Trust for Multiple Children of Participant*

Assuming all of the trust's beneficiaries are DBs and the trust meets the four regulatory requirements, the trust will qualify for DB Treatment as a "plain old DB" ("PODB" in this section). Per the distribution rule applicable to PODBs, 100% of the Inherited IRA that belongs to the accumulation trust must be withdrawn from that IRA pursuant to the 10 year rule (i.e., by December 31 of the year that contains the 10th anniversary of the Participant's death). However, that does *not* mean that (i) all of those withdrawn Plan Benefits have to be further distributed out of the trust to the Current Beneficiaries of the trust by that date or (ii) that the trust itself has to terminate on that date. Of course, the downside of retaining retirement plan distributions from a pre-tax retirement plan in the trust would be the high rate of income taxes payable by the trust on the distributions that are retained in the trust. In 2024, an accumulation trust will reach the top income tax bracket (37%) as soon as it has income of $15,200. On the other hand, if the Participant creates an *accumulation pot trust* for all of his children (some of whom might be adults or will soon become adults), that would increase the possibility of the Trustee making distributions from the trust each year of the withdrawn Plan Benefits to multiple beneficiaries, which will carry out that taxable income to the children who receive those distributions. Some of those children might be subject to the "Kiddie Tax," but some of those children might be taxable in their own tax bracket and that could be a low tax bracket. Participants with minor children have to weigh the income tax consequences of the trust paying income taxes at a high rate on retirement plan distributions retained in the trust against their desire for their children not to receive significant amounts, outright and free of trust, at an early age.

6. Age 31 Trust

This provision in the Proposed Regulations was not expected and can be very useful. Many Participants do not have any children at all or do not have at least one child who is under age 21. Some of those Participants may want to name one or more beneficiaries who are under age 31 as beneficiaries of their retirement plan. However, many of those Participants might prefer that the share of their retirement plan distributable to a beneficiary under age 31 be held in a trust for that beneficiary until that beneficiary reaches that age, rather than be distributed outright to that beneficiary. The so-called "Age 31 Trust" (which is not a defined term but is being used by many practitioners) can be useful for those Participants.

a. *Definition of Age 31 Trust*

An "Age 31 Trust" is basically a "see-through trust" for the benefit of a single "young" beneficiary that provides for full distribution of all amounts held in and belonging to the trust representing the Participant's interest in his retirement plan to that "young" beneficiary by *the later of* (i) December 31 of the year that contains the 10th anniversary of the date when that "young" beneficiary reaches age 21 (i.e., by December 31 of the year when the "young" beneficiary reaches age 31) or (ii) December 31 of the year following the year of the Participant's death. Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B). An "Age 31 Trust" can be either in the form of a conduit trust or an accumulation trust. An Age 31 Trust in accumulation trust form is usually going to be the more desired choice.

b. *Benefits of Age 31 Trust*

The trust *can* be structured as an accumulation trust, rather than as a conduit trust, and all Secondary Beneficiaries will still be ignored, and the trust can be created for *any* "young" beneficiary—not just a child of the Participant. With the exception of an AMBT, the Age 31 Trust is the only (other) accumulation trust as to which the Secondary Beneficiaries (i.e., remainder beneficiaries) do not have to be taken into account for purposes of the RMD Rules. The example of an Age 31 Trust in the Preamble to the Proposed Regulations is of a trust created for the Participant's niece. Preamble to Proposed Regulations I.D.2.a.2, Page 33.

c. *Disadvantages of the Age 31 Trust*

1) *The 10 Year Rule Applies to an Age 31 Trust created for a Young DB*

If the Age 31 Trust is created for the benefit of a "young" beneficiary who is not an EDB, it will be subject to the applicable 10 year rule. Just because the Secondary Beneficiaries of an Age 31 Trust can be disregarded as "countable" beneficiaries of the trust does not mean the applicable 10 year rule does not apply if the "young" beneficiary is a "plain old DB." It does apply.

2) *The Age 31 Trust must be for the sole benefit of one Current Beneficiary*

The only example of an Age 31 Trust in the Proposed Regulations is of a trust for the benefit of just one beneficiary—the Participant's niece. *See* Preamble to Proposed Regulations at I.D.2.a.2, Page 33. There is nothing in the Proposed Regulations that indicated that an Age 31 Trust could be created for multiple beneficiaries. In addition, based on the longstanding separate account rule, the safest course is for the Participant to name the Age 31 Trust as a beneficiary of (a prescribed share of) the Participant's retirement plan directly in the beneficiary designation and not to name the Participant's revocable trust (in which the Age 31 Trust is created as a result of a division pursuant to the trust instrument) as the beneficiary in the Participant's beneficiary designation.

3) *Withdrawals of Plan Benefits Retained in the Age 31 Trust Taxed at the Trust's Income Tax Rate*

If the Age 31 Trust is structured as an accumulation trust (rather than as a conduit trust), withdrawals from the inherited IRA that belong to the trust can be retained (accumulated) in the trust until the full distribution year. However, doing that will cause those withdrawals to be taxed to the trust at the trust's income tax rate.

Even if the individual who is the beneficiary of the Age 31 Trust is incapacitated as of the trust termination date, the trust must still terminate by the required termination date, otherwise the trust will not qualify for the special rule applicable to the Age 31 Trust, which means that the Secondary Beneficiaries of the Trust would need to be treated as beneficiaries with an interest in the Participant's Plan Benefits and, therefore, if the Participant died on or after his RBD, the oldest "countable" Secondary Beneficiary of the trust would be the beneficiary whose life expectancy would need to be used to calculated RMDs payable to the trust during its term.

d. *Comparison to Other Trusts*

See the comparison of the required distributions from the two types of trusts that might be created for the Participant's child who has not reached the "age of majority" to an Age 31 Trust created for the Participant's niece, attached as Exhibit B.

7. Powers of Appointment

This section of the Proposed Regulations also contains some favorable (and unexpected) provisions.

a. *Mere Possession of Power of Appointment Not a Problem*

Even if a beneficiary of the trust that is named as the beneficiary of the Participant's retirement plan possesses a power of appointment over the trust and the beneficiaries of that power of appointment are not identifiable, the mere possession of that power does not cause the trust to fail the "identifiability requirement" in the trust regulatory requirements. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

b. *Exercise of Power of Appointment by DB Determination Date*

If the beneficiary holding a power of appointment over the trust exercises that power in favor of identifiable beneficiaries by September 30 of the year following the year of the Participant's death (i.e., the DB Determination Date), then those identifiable beneficiaries are treated as beneficiaries of the Participant's plan as if they were so named as of the Participant's date of death. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

c. *Restriction of Exercise of Power of Appointment by DB Determination Date*

If, by the DB Determination Date, the beneficiary holding a power of appointment over the trust restricts the power of appointment so that the power can be exercised at a later time in favor or only two or more identifiable beneficiaries, then those identified beneficiaries will be treated as beneficiaries of the trust. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

d. *No Exercise or Action Taken By DB Determination Date*

If the individual holding the power of appointment does not exercise the power or restrict the power by the DB Determination Date, then the takers in default of the exercise of the power are treated as beneficiaries of the Participant's retirement plan. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

e. *Exercise of Power of Appointment After the DB Determination Date*

If the holder of the power of appointment exercises the power after the DB Determination Date to add beneficiaries, then the beneficiaries of the trust must be re-determined at that time. Both the original beneficiaries and the added beneficiaries must be taken into account. The re-determined RMD applies beginning the following year but, if the addition of the particular beneficiaries would have required a full distribution in the year when the beneficiaries were added, that full distribution is delayed to the following year. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii)(B) and Prop. Reg. § 1.401(a)(9)-4(f)(5)(iv).

8. <u>Trust Modifications</u>

a. *State Law Modification Statutes*

The mere fact that applicable state law allows irrevocable trusts to be modified will not cause the trust to fail to satisfy the "identifiability requirement" in the trust regulatory requirements. Prop. Reg. § 1.401(a)(9)-4(f)(5)(iii)(A). Note, however, that nothing is mentioned in regard to a provision in a trust instrument that allows modification of the trust—only a state's statutory modification laws are referenced.

b. *Modification to Remove Beneficiary by DB Determination Date*

If a trust is modified to remove a beneficiary by the DB Determination Date (whether through a trust reformation action, decanting or some other action allowed by state law), then the removed beneficiary is disregarded as a beneficiary of the trust. Prop. Reg. § 1.401(a)(9)-4(f)(5)(iii)(B).

c. *Modification to Add One or More Beneficiaries by DB Determination Date*

If a trust is modified to add one or more beneficiaries by the DB Determination Date (whether through a trust reformation action, decanting or some other action allowed by state law), then the added beneficiary or beneficiaries will be considered beneficiaries of the Participant's plan as of the DB Determination Date. Prop. Reg. § 1.401(a)(9)-4(f)(5)(iii)(C).

d. *Modification to Add One or More Beneficiaries After the DB Determination Date*

If the trust is modified to add one or more beneficiaries after the DB Determination Date, then the beneficiaries must be re-determined at that time. Both the original beneficiaries and the added beneficiaries must be taken into account. The re-determined RMD begins the following year but, if the addition of the particular beneficiaries would have required a full distribution in the year when the beneficiaries were added, that full distribution is delayed to the following year. Prop. Reg. § 1.401(a)(9)-4(f)(5)(iv).

9. <u>Successor Beneficiaries: "Outer Limit"</u>

a. *Successor Beneficiaries After Death of EDB*

If the Participant's beneficiary is an EDB, the "outer limit" for distributing the full remaining amount of the Participant's Plan Benefits after the death of the EDB is the end of the tenth calendar year after the death of the EDB. Prop. Reg. § 1.401(a)(9)-4(e)(3).

b. *Successor Beneficiaries After Death of Participant's DB*

If the Participant's beneficiary is a DB, the "outer limit" for distributing the full remaining amount of the

Participant's Plan Benefits after the death of the DB is the end of the tenth calendar year after the Participant's death. Prop. Reg. § 1.401(a)(9)-4(e)(2).

c. *Other Specific Successor Beneficiary Rules*

There are some other successor beneficiary rules, such as the rules applicable in the case of the Participant's "minor child" and a beneficiary who is older than the Participant. See Prop. Reg. § 1.401(a)(9)-4(e)(4) and Prop. Reg. § 1.401(a)(9)-4(e)(5).

d. *Exhaustion Prior to Outer Limit*

Of course, it is possible that the Participant's Plan Benefits could be exhausted due to distributions to the beneficiary prior to the "outer limit" being reached.

IV. SECURE 2.0

A. Background

The SECURE 2.0 Act of 2022 (simply referred to as "SECURE 2.0") was part of the Consolidated Appropriations Act, 2023, PL 117-328. The Consolidated Appropriations Act is 1,653 pages. SECURE 2.0 can be found at Division T of the Consolidated Appropriations Act, beginning on page 817 and continuing through page 946.

SECURE 2.0 is a combination of three bills from 2022, none of which became law: The Securing a Strong Retirement Act of 2022 (introduced in the House), The Enhancing American Retirement Now Act (EARN) and the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE) (the latter two introduced in the Senate).

The Consolidated Appropriations Act, 2023, including SECURE 2.0, was passed by Congress on December 23, 2022, and signed into law by President Biden on December 29, 2023. SECURE 2.0 contains multiple effective dates for its numerous provisions.

SECURE 2.0 made further changes to the RMD Rules and also made changes to numerous other rules relating to retirement plans. This outline will primarily focus on changes made by SECURE 2.0 that more directly relate to estate planning and to distributions to beneficiaries on the Participant's death.

On June 23, 2023, ACTEC submitted comments to the Treasury Department and the IRS, requesting Guidance Regarding Sections 107(c) and 327 of SECURE 2.0. Section 327 of SECURE 2.0 is the most problematic provision in SECURE 2.0 from an estate planning standpoint.

References in this Part IV to particular provisions in SECURE 2.0 will refer to "the Act."

B. Notable Provisions

1. <u>Change to Age Component of RBD</u>

a. *Changes to Applicable Age*

Per Section 107(c) of the Act, the "age component" of RBD, which is referred to as the "Applicable Age," was changed as follows:

> (I) In the case of an individual who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, the applicable age is 73.
>
> (II) In the case of an individual who attains age 74 after December 31, 2032, the applicable age is 75."

b. *Technical Problem*

A Participant born in 1959 meets the requirements of both sub-clause (I) and sub-clause (II) of Section 107(c) of the Act. ACTEC understands that Congress is planning to make a technical correction that will clarify the Applicable Age for individuals born in 1959.

c. *Applicable Age Charts*

Below are two different charts that show the Applicable Ages per the RMD Rules.

Applicable Age	Years	Law
70½	Through 2019	TRA 1986
72	2020-2022	SECURE Act
73	2023-2032	SECURE 2.0
75	2033 →	SECURE 2.0

Date of Participant's Birth	Applicable Age
→ 6/30/1949	70½
7/1/1949 through 12/31/1950	72
(*depending on technical correction—see B1 above*) 1/1/1951 through 12/31/1958 *or* 1/1/1951 through 12/31/1959	73
(*depending on technical correction—see B1 above*) 1/1/1959 → *or* 1/1/1960 →	75

d. *NOTE: No Change to QCD Age*

When the SECURE Act, which was passed on December 19, 2019, and became effective on January 1, 2020, changed the age component of RBD from 70½ to 72, it did not change the age when the Named Owner of an IRA could make a Qualified Charitable Distribution ("QCD") from his IRA. The QCD age remained 70½. And even though SECURE 2.0 made additional changes to the Age Component of RBD, it did not change the

QCD age either. Thus, a Named IRA Owner who reaches age 70½ may still make QCDs from his IRA, even if he has not yet reached his Applicable Age.

2. Section 327: Surviving Spouse's Election to be Treated as Employee

Perhaps the most problematic and important section of SECURE 2.0 (from an estate planning and retirement plan distribution standpoint) is Section 327. ACTEC submitted a letter to the IRS and Treasury on June 23, 2023, totaling 32 pages, requesting guidance regarding various issues, compliance challenges, uncertainties and ambiguities in Section 327 of SECURE 2.0. The only other provision from SECURE 2.0 in that comment letter was the technical problem with the new Applicable Age rules, described in the immediate prior section of this outline.

NOTE: Because the issues are likely to affect a lot of surviving spouses of Participants, Section 327 of the Act will be discussed, separately, in more detail at V, infra.

3. One Time Election for Qualified Charitable Distribution to Split-Interest Entity

This is an expansion of the QCD provisions in Code Section 408(d)(8). Section 307 of the Act allows a one-time distribution of $50,000 from the Named IRA Owner's IRA to a charitable split-interest entity, such as a Charitable Remainder Annuity Trust (CRAT), a Charitable Remainder Unitrust (CRUT) or a Charitable Gift Annuity (CGA). Like the usual QCD, it must be a direct transfer from the IRA to the split-interest charitable entity, and only a public charity (not a donor-advised fund or private foundation) qualifies as the charitable beneficiary of the split-interest arrangement. If this election is made, the $50,000 transfer counts toward the Named IRA Owner's $100,000 QCD limit for that year (the QCD limit is $105,000 for 2024 per inflation adjustments). The only permissible non charitable beneficiaries of the split-interest entity are the Named IRA Owner and his spouse (if applicable). This type of QCD is the only permissible manner for funding the particular split-interest charitable entity. In other words, this provision cannot be used to add to a separately created and funded CRT, for example. If both spouses are named owners of IRAs, they can each make this election in the same year, resulting in a $100,000 funding amount to the split-interest entity.

The amount is too small to justify funding a CRT, but it might be sufficient to make funding a CGA worthwhile. However, in the case of a CGA, there can be no deferral of the annuity starting date (payments must begin not less than 1 year after funding), and the minimum annuity rate must be at least 5%. Finally, all payments distributed to the non charitable beneficiary or beneficiaries (i.e., the IRA Owner and/or the IRA Owner and his spouse) from the CGA will be classified as ordinary income.

Comment: Representatives of charities who were involved in the legislative effort to obtain these provisions have indicated that they were aware the amount allowed to fund a split-interest entity under these circumstances was "too small," but still felt it worthwhile to obtain passage of this provision to enable future amendments to the amount allowed.

4. Charity Permitted to be Remainder Beneficiary of AMBT

The SECURE Act added two versions of a qualified see-through trust in the form of an accumulation trust— rather than a conduit trust—that could be created for the benefit of disabled and chronically ill beneficiaries, both of whom qualified as EDBs, (i) without causing such beneficiaries to lose their government benefits and (ii) enabling retirement plan benefits payable to such trusts to be distributed over the life expectancy of the disabled or chronically ill beneficiary, rather than pursuant to the 10 year rule made applicable to most beneficiaries per the SECURE Act. Those trusts (Type I and Type II) were called "Applicable Multi-Beneficiary Trusts" or "AMBTs." However, the original AMBT requirements per the SECURE Act prohibited a charity from being named as a remainder beneficiary of the AMBT. Thus, in order to qualify for the life expectancy distribution method for the retirement plan benefits payable to the AMBT, all remainder beneficiaries of the trust had to be "designated beneficiaries" or "DBs."

The original requirement forbidding charities as remainder beneficiaries of AMBTs was unfortunate because sometimes family members of disabled and chronically ill individuals—i.e., the people likely to create an AMBT for their loved one suffering from a particular illness or disease that caused or contributed to their loved one's disability or chronic illness—often desired to have the funds remaining in their loved one's trust after the death of their loved one be distributed to the charitable organization doing research into the particular illness or disease that affected their loved one. Fortunately, Section 337 of the Act now provides that, after the death of the disabled or chronically ill beneficiary who was the initial sole current beneficiary of the AMBT (or, if the AMBT has multiple disabled or chronically ill current beneficiaries, then after the death of the last such beneficiary), it is permissible for the remaining assets of the AMBT to be distributed to a "qualified charity" as the remainder beneficiary of the AMBT. For this purpose, a "qualified charity" has the same definition as the definition used in Code Section 408(d)(8)(B)(i) with respect to QCDs, which is basically a public charity (and *not* a donor-advised fund or private foundation). This provision became effective on January 1, 2023.

5. Reduction in Penalty for Failure to Take RMD or other Required Distribution

The very onerous penalty for failure to take the full amount of a required minimum distribution (RMD), or any other required distribution from a retirement plan (such as the 100% distribution per the 5 year rule or 10 year rule), has been reduced from 50% of the shortfall to 25% of the shortfall, effective in 2023, per Section 302 of the Act. In addition, if the total amount of the shortfall is actually taken within the "correction window," the penalty is further reduced to 10%. The "correction window" is defined as beginning on the date the tax penalty is imposed and ending on the earliest of the following dates: (i) the date the notice of deficiency is mailed to the taxpayer, (ii) the date when the tax is assessed by the IRS, and (iii) the last day of the second tax year after the tax is imposed.

Presumably, a taxpayer can still seek complete waiver of the penalty by filing Form 5329. In the past, when a taxpayer was able to show that his/her failure to take the required distribution was due to reasonable cause and the taxpayer was also able to show that he/she took or was taking reasonable steps to remedy the error, the IRS often waived the penalty entirely. Whether that 100% penalty waiver will be as readily granted remains to be seen in view of the very low 10% penalty that should be available in many cases.

6. Tax-Free Rollovers from Qualified Tuition Programs (a/k/a 529 Plans) to Roth IRAs

This provision was included in SECURE 2.0 in an effort to encourage more people to contribute to 529 plans. Investment in 529 plans has declined significantly during the past few years due to concerns that the funds in the 529 plan will not be used. (One report: Total investments in 529 plans fell to $411 billion in 2022, down nearly 15% from $480 billion the year before, according to data from College Savings Plans Network, a network of state-administered college savings programs.) While this is a welcome provision, there are multiple conditions that must be met (and various limitations) relating to this new option, which are as follows:

- The 529 plan must have been maintained for at least 15 years prior to the rollover
- The amount that can be rolled over is limited to the aggregate contributions (and earnings on those contributions) made to the plan at least 5 years before the date of the rollover
- The Roth IRA beneficiary must be identical to the beneficiary of the 529 plan
- The annual limit for how much can be moved from a 529 plan to a Roth IRA is the Roth IRA contribution limit for that year (e.g., for 2024, the Roth IRA contribution limit for an individual under age 50 is $7,000), less any "regular" IRA or Roth IRA contributions that are actually made that year by or for that same individual
- The Roth IRA modified adjusted gross income limits do not apply
- The maximum total amount that can be moved from a 529 plan to a Roth IRA for the benefit of an individual during that individual's lifetime is $35,000
- The 529 plan to Roth IRA rollover must be a "direct rollover" or "trustee to trustee transfer"
- The 529 plan beneficiary must have earned income in the amount being rolled over from the 529 plan to the Roth IRA (this requirement is not obvious from reading the provision in the Act but results from the incorporation of the provisions of Section 219 of the Code into these provisions)
- The "officer" or "employee" having control of the 529 plan (or his/her designee) must provide a report to the trustee of the Roth IRA to which the rollover distribution is made, which needs to include information regarding contributions, distributions and earnings of the 529 plan as of the date of the rollover

Section 126 of the Act, effective after December 31, 2023.

- Question (Answer unknown at this time):

If the beneficiary of the 529 plan is changed (via a rollover from the prior beneficiary to a new beneficiary), does that start a new 15 year "eligibility period" for rolling over amounts from the 529 plan to a Roth IRA for the benefit of the new beneficiary?

7. Tax Treatment of IRA Involved in Prohibited Transaction

Some IRA Owners like to make "non traditional" investments inside their IRAs. These types of investments can be risky and the IRS is sometimes successful in challenging them as "prohibited transactions." In that case, the entire IRA is disqualified as an IRA and all of the assets held in the disqualified account are deemed to be immediately distributable to the owner of the account and, therefore, fully taxable to the owner at that time. Section 322 of the Act provides that, if an individual has multiple IRAs, only the IRA with respect to which the prohibited transaction has occurred will be disqualified and taxable at that time. Therefore, a person who wishes to make non traditional investments inside his IRA can divide his IRAs into separate IRAs, and only invest in non traditional investments in one of his separate IRAs, so that, if the IRA that owns non traditional investments becomes fully taxable due to the prohibited transaction rule, his other IRAs can still be deemed to be valid IRAs. Section 322, effective January 1, 2023.

Comment: This is a curious rule because that is the way this situation has always been handled anyway.

8. Elimination of Pre-Death RMDs for Roth Designated Accounts within Employer Qualified Plans

During the Participant's life, no RMDs are required to be taken from the Participant's Roth IRA. However, prior to SECURE 2.0, Participants who reached their RBD have been required to take RMDs from their "Roth designated accounts." Roth designated accounts (a/k/a designated Roth accounts) are separate accounts under section 401(k), 403(b), or 457(b) plans that accept elective deferrals that are referred to as Roth contributions. In other words, some participants in qualified plans have a separate account within their employer's qualified plan to which Roth contributions have been made. These accounts are sometimes referred to as Roth 401(k) accounts, Roth 403(b) accounts, and Roth 457(b) accounts.

Prior to SECURE 2.0, Participants with Roth 401(k) accounts, Roth 403(b) accounts, and Roth 457(b) accounts have been required to take RMDs from those accounts upon reaching their RBD. Now, due to passage of SECURE 2.0, Section 325 of the Act eliminates pre-death RMDs for Participants in Roth designated accounts beginning in 2024. Participants who have previously begun taking RMDs from their Roth designated accounts in their employer's qualified plans can stop doing so in 2024.

9. Expansion of Exceptions to 10% Early Distribution Penalty

Section 72(t) of the Internal Revenue code imposes a 10% penalty on "premature" distributions from qualified plans and IRAs. The 10% penalty is basically an additional tax on top of the income tax applicable to the amount distributed from the retirement plan. The most commonly encountered "premature distribution" is probably the one involving a participant under age 59½, but there are others.

Fortunately, there have always been a number of exceptions to the 10% early withdrawal penalty. Many more exceptions were added by SECURE 2.0. In other words, per various sections of SECURE 2.0, Participants can now take early withdrawals from their retirement plans for additional reasons and based on additional circumstances without triggering the 10% penalty per Code Section 72(t). Natalie Choate, author of one of the most often referred to books on the minimum distribution rules, *Life and Death Planning for Retirement Plans* (various editions through the 8th edition published by Ataxplan Publications), has prepared a couple charts summarizing all of the types of distributions and withdrawals from retirement plans that will *not* be subject to the 10% penalty and has granted this author permission to attach those charts to this outline. *See* Exhibit C attached.

10. Numerous Provisions Designed to Encourage Broader Participation in Retirement Plans

SECURE 2.0 contains numerous provisions designed to encourage broader participation in retirement plans. As those provisions are not directly related to estate planning, they will not be discussed in this outline.

V. SECURE 2.0: SECTION 327—SURVIVING SPOUSE BENEFICIARY OF PARTICIPANT'S PLAN OR IRA—NEW RULES AND TRAPS

A. Compare Provisions

Attached as Exhibit D is a comparison of the Surviving Spouse Beneficiary Rule in Code Section 401(a)(9)(B)(iv) before and as a result of SECURE 2.0. NOTE: In this section V, *the Participant* will simply be referred to as "Participant" and *the Participant's spouse* will simply be referred to as "Participant's Spouse" or "Spouse." The term, *employee*, will be used to refer, generically, to an individual who is participating in a retirement plan (whether the plan is a DCP or an IRA).

B. Summary of Law Before SECURE 2.0

1. Participant's Death *Before* RBD

a. *Spouse Could Roll Over Participant's Plan to Spouse's Plan or to IRA in Spouse's Name*

If Participant named Spouse as sole beneficiary of his qualified plan (or of a separate share), Spouse could roll over Participant's plan to a plan in which she participated or to an IRA in Spouse's name. Treasury Regulation §1.408-8, A-7. As a result, Spouse became Participant of those rolled over Plan Benefits. In that case, upon making the rollover, the RMD Rules applicable to a living Participant applied to Spouse.

b. *Spouse Could Treat Participant's IRA as Spouse's own IRA*

If Spouse was the sole beneficiary of Participant's IRA (or of a separate share), Spouse could assume ownership of Participant's IRA. In that case, Spouse was thereafter treated as the owner of that IRA. Thus, upon assuming ownership of the IRA, the rules applicable to a living Participant applied to Spouse. Per the regulations prior to the Proposed Regulations, Spouse could do this at any time. Treas. Reg. § 1.408-8, A5b. However, the Proposed Regulations impose a deadline on Spouse to do this. Prop. Reg. § 1.408-8(c). See IIIC, supra.

c. *Spouse Could Remain as Beneficiary of Participant's Plan or IRA*

If Spouse was the sole beneficiary of Participant's qualified plan or IRA (or of a separate share), Spouse could choose to remain in the position of being Participant's *beneficiary* and not become Participant of those Plan Benefits. *Prior to SECURE 2.0, no formal election was required by Spouse to choose this option.* Results Before SECURE 2.0:

1) In this case, RMDs to the Spouse were not required to commence until 12/31 of the year when Participant would have reached his Applicable Age.
2) Regardless of Spouse's age, Spouse could withdraw amounts from Participant's plan or IRA without a penalty.
3) When RMDs to the Spouse commenced from Participant's Plan or IRA, they were based on Spouse's Single Life Expectancy (SLE) from the SLT, recalculated each year.
4) Spouse could name successor beneficiaries to take amounts remaining in Participant's plan/IRA on Spouse's death.
5) On death of spouse—

    a) if Spouse died *before* RMDs from Participant's plan commenced,

        i) Spouse's successor beneficiaries (even if successor beneficiary was Spouse's new spouse) took RMDs over Spouse's SLE per the SLT, not recalculated, or
        ii) if no successor beneficiary was named, the 5 year rule applied, or

    b) if Spouse died *after* RMDs to her had commenced, Spouse's successor beneficiaries took RMDs over the Spouse's SLE per the SLT, not recalculated.

6) "Later" Rollover By Spouse - Even when Spouse made the choice to remain in the position of being Participant's beneficiary, Spouse could still roll over Participant's Plan Benefits at a later time (before RMDs to Spouse commenced). Spouse often chose to remain in the position of being Participant's beneficiary (i) when spouse was under age 59½ at the time of Participant's death or (ii) when spouse was much older than Participant at the time of Participant's death. But note the deadline in the Proposed Regulations (Prop. Reg. § 1.408-8(c)) applicable to Spouse treating Participant's IRA as her own. *See* IIIC, supra.

2. <u>Participant's Death *On or After* RBD</u>

a. *Spouse Could Roll Over Participant's Plan to Spouse's Plan or to an IRA in Spouse's Name*

If Participant named Spouse as sole beneficiary of his qualified plan (or of a separate share), Spouse could roll over Participant's plan to a plan in which she participated or to an IRA in Spouse's name. As a result, Spouse became Participant of those rolled over Plan Benefits. In that case, upon making the rollover, the RMD Rules applicable to a living Participant applied to Spouse.

b. *Spouse Could Treat Participant's IRA as Spouse's IRA*

If Spouse was the sole beneficiary of Participant's IRA (or of a separate share), Spouse could assume ownership of Participant's IRA. In that case, Spouse was thereafter treated as the owner of that IRA. Thus, the rules applicable to a living Participant applied to Spouse. Per the regulations prior to the Proposed Regulations, Spouse could do this at any time. Treas. Reg. § 1.408-8, Q&A-5(b). However, the Proposed Regulations impose a deadline on Spouse to do this. *See* Prop. Reg. § 1.408-8(c), discussed at IIIC, supra.

c. *Spouse Could Remain in Position as Beneficiary of Participant's Plan or IRA*

If Spouse was the sole beneficiary of Participant's Plan or IRA (or of a separate share), Spouse could choose to remain in the position of being Participant's *beneficiary* and not become Participant of those Plan Benefits herself. *Prior to SECURE 2.0, no formal election was required to choose this option.*

Results *Before* SECURE 2.0:

1) Participant's final RMD (or the shortfall), if not taken by Participant prior to his death, had to be paid to Spouse by 12/31 of year of Participant's death.
2) RMDs to Spouse commenced by 12/31 of year following year of Participant's death.
3) RMDs to Spouse were based on Spouse's SLE from the SLT, recalculated each year.
4) Spouse could name successor beneficiaries to take amounts remaining in Participant's plan/IRA on Spouse's death.
5) On death of spouse, successor beneficiaries took RMDs over Spouse's SLE, not recalculated.

NOTE: The rules relating to distributions to beneficiaries on Spouse's death were changed significantly by the SECURE Act and the Proposed Regulations and will not be repeated here (*see* II and III of this outline, supra). The purpose of including this reminder of Spouse's options *before* SECURE 2.0 in this part V is to be able to compare Spouse's options *before* SECURE 2.0 to Spouse's options *as a result of SECURE 2.0.*

B. SECURE 2.0: Section 327

1. Provisions Not Changed By SECURE 2.0

a. *Rollover of Participant's Plan or IRA to Spouse's Plan or IRA*

SECURE 2.0 did not eliminate the rollover option for Spouse. As long as Participant named Spouse as the outright beneficiary of his plan or IRA (or of a separate share), Spouse still retains the rollover option.

b. *Spouse's Option to Treat Participant's IRA as Spouse's IRA*

SECURE 2.0 did not change this option, but the Proposed Regulations impose a deadline on Spouse that did not apply under the 2002 Treasury Regulations. Per the 2002 Treasury Regulations, Spouse could do this (assume ownership of Participant's IRA) at any time after Participant's death. Treas. Reg. § 1.408-8, Q&A-5(b). However, per the Proposed Regulations, the deadline for Spouse to treat Participant's IRA as her own is *the later of* (i) the calendar year in which Spouse reaches Spouse's Applicable Age and (ii) the calendar year following the calendar year of the Named IRA Owner's death. *See* Prop. Reg. § 1.408-8(c).

2. New Law Per Section 327

a. *Spouse Must Make Actual Election*

Per Section 327 of SECURE 2.0, Spouse can only avail herself of the benefits of remaining in the position of being Participant's beneficiary if she makes a "formal election" to do so. This election will be referred to as the "Section 327 Election" or, simply, the "327 Election." The Section 327 Election must be in the form and manner specified by the Secretary and must be made prior to the deadline. Notice of Spouse's 327 Election must be provided to the Plan Administrator. In addition, once made, the 327 Election is not revocable without the consent of Treasury. *See* IRC § 401(a)(9)(B)(iv) (included in Exhibit D).

b. *Benefits of Making the 327 Election*

1) RMDs do not have to commence until the year when Participant would have reached his Applicable Age. This is basically the same as before, *but this advantage can now only be obtained if Spouse makes the 327 Election.*

2) Based on the most likely interpretation of Section 327, whether Participant dies before or after his RBD, if Spouse makes the 327 election, because Spouse will be treated as if Spouse were the employee (Participant), once RMDs commence, they will be based on Spouse's single life expectancy per the Uniform Lifetime Table, recalculated each year. The ULT assumes Spouse has a beneficiary who is ten years younger and, thus, provides a longer distribution period than the Single Life Table, which is what Spouse had to use in this situation before SECURE 2.0 added Section 327.

3) Because Spouse will be treated as if Spouse were the employee (Participant), if Spouse dies before RMDs to Spouse commence, the beneficiaries named by Spouse (if any) are treated as if they were beneficiaries of an "employee" (i.e., a participant) and not as "successor beneficiaries" of Participant's beneficiary (i.e., Spouse).

3. Some Major Differences

a. Under the prior rule, Participant's Spouse was not required to make a "formal election" to be treated as the employee (i.e., Participant) in order to obtain the delayed commencement of RMDs. If Participant died before his RBD and Participant's Spouse did not immediately become the Participant herself of the deceased Participant's Plan Benefits (due to making a rollover from Participant's plan to her own plan or to an IRA in her name or due to treating the Participant's IRA as her own), Participant's Spouse "automatically" enjoyed deferral of RMDs until the year when her deceased spouse would have reached his Applicable Age.
In addition, once made, the new Section 327 election is irrevocable unless permission is obtained from the Secretary of the Treasury to revoke it.

b. The verb in the provision regarding death of Participant's Spouse prior to commencement of RMDs was changed from "were" (subjunctive) to "is" (present tense). What was the intent (if any) of this change? *See* Exhibit D for a comparison of these provisions before and after SECURE 2.0.

c. If the 327 Election is made, Participant's Spouse gets to calculate RMDs using the ULT, rather than the SLT (i.e., she gets a longer distribution period than under the prior rule).

d. If the election is made, the beneficiaries of Participant's Spouse are treated as if they are beneficiaries of Spouse as employee (i.e., Participant), rather than as the successor beneficiaries of Spouse as beneficiary of Participant.

4. Some Problems/Issues with Section 327

a. In order to make the Section 327 election, must Participant's Spouse be the sole beneficiary of Participant's *entire* plan or IRA or can Participant's Spouse simply be the beneficiary of a separate share of Participant's plan or IRA or of a timely created separate account?

b. The regulations to Code Section 401(a)(9)(B)(iv) prior to SECURE 2.0 provided that Spouse's RMD commencement date was December 31 of the year when Participant would have reached his Applicable Age (and *not* the actual date during the year when Participant would have reached his Applicable Age). Will that same deferral to December 31 apply if the 327 Election is made?

c. What are the applicable distribution rules if Participant dies before his RBD and Participant's Spouse does *not* make the 327 election?

d. What are the applicable distribution rules if Participant dies after his RBD and Participant's Spouse does *not* make the 327 election?

e. If Participant's Spouse makes the 327 election, whose life expectancy is used to calculate RMDs once they commence? Per IRC Section 401(a)(9)(B)(iv)(**I**), as amended by Section 327 of SECURE 2.0, in determining the distribution period after Participant's death, Participant's electing Spouse shall be treated "as if the surviving spouse **were** the employee." Does that mean use the Spouse's age to calculate RMDs once they commence because Spouse is supposed to be treated as if she herself were the employee participating in the retirement plan? That is the most likely interpretation, although some commentators mentioned, early on, that this provision means that we are to use the deceased Participant's age to calculate RMDs once they commence because Participant's Spouse is being treated *as if she were that particular Participant*. (Often when delayed commencement of RMDs is desirable, it is because Participant was younger than Spouse.)

f. What is the distribution rule if Participant's Spouse *does* make the 327 election but she dies before RMDs to her as "Participant's beneficiary" commence? In amending IRC Section 401(a)(9)(B)(iv), subsection III added by Section 327 of SECURE 2.0, says to apply subparagraph (iv) in that case "as if the surviving spouse **is** the employee." Although this "new" sub-section III appears to be worded the same as the "old" sub-section II, there is a slight difference in wording because the verb "were" was changed to the verb "is." Does that mean treat the Spouse as if she were identical to the now deceased employee (i.e., had his birthdate) or simply as if she, herself, is *the employee* who is participating in the retirement plan that she inherited from Participant, even though, by making the 327 election, Spouse is choosing to remain in the position of being Participant's "beneficiary"? In other words, if Spouse dies before RMDs commence to her from Participant's plan or IRA, do you look at Spouse's actual age as of her date of death to determine whether she died before or after *her* Applicable Age (as if she were the employee) or do you just "automatically" consider Spouse to have died before her Applicable Age (even if she is past her Applicable Age on that date) because she is treated as if she were/is the employee and, in this case, Participant died before *his* Applicable Age in this case? This makes a difference in regard to the applicable distribution rule to Spouse's beneficiaries on Spouse's death.

g. If Participant dies *before* his RBD and Participant's Spouse makes the 327 election, *in view of the title of Section 327(b) of the Act*, is it clear that Spouse can use the ULT to calculate RMDs once they commence (since the "At Least As Rapidly Rule" only applies in the case where the employee dies *on or after* his RBD)? The ULT is not specifically mentioned in Section 327(a)—it is only mentioned in Section 327(b). In addition, there is a likely typographical error in Section 327(b). The reference to "Q&A-5(a)" of Section 1.401(a)(9)-5 of the 2002 Treasury Regulations most likely should have been to "Q&A 5(c)(2)."

h. Treasury will need to publish a new ULT, for use beginning on January 1, 2024 (the effective date of the Section 327 changes per Section 327(c)), so that surviving spouses younger than age 70 who make the 327 election and whose RMDs commence in 2024 can calculate their RMDs from Participant's plan or IRA (as of the date this outline is being written, the current ULT commences with age 70).

i. Can Participant's Spouse make the 327 election with respect to one of Participant's plans or IRAs and not with respect to other plans or IRAs of Participant as to which the spouse is also named as Participant's sole beneficiary?

j. If Participant's Spouse is mentally incapacitated at the time of Participant's death, who (if anyone) can make the 327 election on behalf of Spouse and how would that be done effectively?

k. Under prior law, Participant's Spouse could remain in the position of being Participant's *beneficiary* (i.e., not make the spousal rollover/not treat Participant's IRA as the spouse's IRA) right away, but, could, at a later time, make the rollover from Participant's plan to her own plan or IRA (say, once she reached age 59½ or during the year before RMDs were to commence). We know the Proposed Regulations have added a deadline by when Spouse has to make the decision whether to treat Participant's IRA as her own. However, that rule only applies to that particular option. If Participant's Spouse makes the 327 election, can Spouse still make the spousal rollover later (i.e., roll over Participant's plan or IRA to her own plan or her own IRA), even though she has made the 327 Election)?

l. In some cases, such as a blended family situation, Participant may name as the beneficiary of his plan or IRA a conduit trust for the sole benefit of Spouse for Spouse's life, rather than Spouse, outright. Section 327 indicates that Spouse is the person who has the right to make the 327 election (not the Trustee of the conduit trust). ACTEC has asked Treasury to provide guidance to the effect that, if Spouse is not the Trustee of the conduit trust for her sole current benefit, then the Trustee of the conduit trust, rather than Spouse, would have the ability to make the 327 election.

m. Guidance is needed regarding the exact time and manner for making the 327 election and how the effective date rule of Section 327 should be applied.

5. <u>Blended Family Issue: Potential Conflict Between Participant and Spouse</u>

As noted in IIIE of this outline, per the Proposed Regulations, in some cases where Participant dies *before* his RBD while participating in a defined contribution plan (DCP), the 10 year rule might be mandated even if the Participant has named an EDB as beneficiary due to the terms of the DCP or, based on the terms of the DCP, the 10 year rule might be available pursuant to an election by the Participant or the Participant's spouse (or both). The following is an example of a situation in which Participant's Spouse might want to make the election to have the 10 year rule to apply (if that option is available), rather than allow the life expectancy distribution rule to apply.

Suppose Participant and Spouse are in a second marriage and both have children from their prior marriages. Suppose also that Participant, who has not yet reached his RBD, has a terminal illness. Suppose further that Participant's interest in his company's DCP has a significant value. Under these facts, Participant might create a conduit trust for the sole benefit of Spouse for Spouse's life, with an independent Trustee, and might name that trust as the beneficiary of his DCP. Because of the structure of the conduit trust, the conduit trust for Spouse is an EDB. Participant might be satisfied with RMDs being paid to Spouse over her life expectancy, because he wants Spouse to have the support she needs for the rest of her life. However, Participant is also satisfied using the conduit trust approach knowing that, if Spouse dies "prematurely" (before the end of her life expectancy), what remains of his qualified plan (now owned by the conduit trust) will be distributed to *his* children, rather than to Spouse's children (or to Spouse's new spouse). HOWEVER, if Participant's qualified plan gives either Participant or Spouse the option to elect the 10 year rule, rather than the life expectancy distribution rule that otherwise would apply, Participant and Spouse will have a conflict (or at least a potential conflict). Participant will definitely want his qualified plan to be distributed using the life expectancy distribution rule applicable to a surviving spouse EDB (which also applies to a conduit trust for the sole current benefit of the Participant's surviving spouse). Participant's Spouse may prefer the 10 year rule because she will receive much larger distributions from the conduit trust each year and, in fact, will end up with Participant's entire qualified plan by the end of the year containing the 10th anniversary of Participant's death. As noted earlier in this part, only Participant's Spouse—and not the Trustee of the conduit trust—can make the 327 election. To recap, if Participant's Spouses does not make the 327 election and has the option to elect the 10 year rule pursuant to the terms of Participant's DCP, and if Participant's Spouse makes the election to have the 10 year rule apply, then Participant's entire qualified plan will end up being distributed to Spouse by 12/31 of the year containing the 10th anniversary of Participant's death (i.e., much more rapidly than Participant desires).

QUESTION: One question relating to the above example is whether this situation could be addressed in a Marital Property Agreement between Participant and Spouse? If it cannot be so addressed, Participant may be able to "encourage" Spouse to make the 327 election (and *not* to elect the 10 year rule, if that is an option per the plan) by providing other benefits to Spouse as part of his estate plan that are only effective if Spouse makes the choices Participant wants her to make.

6. Summary of Distribution Rules per the Proposed Regulations and SECURE 2.0

Attached as Exhibit E are two charts that summarize the minimum distribution rules per the Proposed Regulations, *as modified by SECURE 2.0*.

VI. OTHER RECENT LAWS AND NOTICES RELATING TO THE RMD RULES

A. CARES Act Provisions Relating to Retirement Plans

The "Coronavirus Aid, Relief, and Economic Security Act" ("CARES Act"), P.L. 116-136, became law on March 27, 2020. It is separate from the SECURE Act, of course, but certain CARES Act provisions relating to retirement plans will be noted in this outline. Certain provisions in the CARES Act need interpretation. ACTEC has submitted a letter to Treasury, seeking guidance on ambiguous provisions in the CARES Act.

1. Waiver of 2020 RMDs

Per Section 2203 of the CARES Act, which adds Section 401(a)(9)(I) to the Internal Revenue Code, RMDs that would otherwise be required to be taken in 2020 are waived. IRC § 401(a)(9)(I). This applies to employees and retirees who participate in qualified plans, IRA owners, and beneficiaries of inherited IRAs (i.e., anyone having a 2020 RMD due to the minimum distribution rules in Section 401(a)(9) of the Code).

a. *Special Rule for Participants Who Reached 70½ in 2019*

If a Participant reached age 70½ in 2019, 2019 would be his first "distribution year." Pre-SECURE Act, Participants who reached age 70 ½ could delay taking the RMD for their first distribution year until April 1 of the following year, i.e., until their required beginning date (RBD). Normally, if the Participant waits to take his first RMD until his RBD (April 1 of the following year), the Participant ends up having to take *two* RMDs in that year (the RMD for the first distribution year and the RMD for the second distribution year). However, in the case of a Participant who reached 70½ in 2019 and did not take the RMD for his first distribution year in 2019 (or in 2020 prior to enactment of the CARES Act), because of the CARES Act, that Participant gets a "double break"—both his first RMD and his second RMD are waived.

b. *Participants Who Die in 2020*

Normally, in the year of the Participant's death, if the Participant did not take his RMD (or the full amount of his RMD) for the year of his death, his beneficiaries would be required to take his final RMD (or the shortfall) by December 31 of the year of his death. However, because of the CARES Act, if a Participant who was required to take an RMD in 2020 died before taking his 2020 RMD, his beneficiaries do not have to take his final 2020 RMD.

c. *Participants Who Took their 2020 RMD Prior to Enactment of the CARES Act*

If a Participant took his 2020 "non-required RMD" from his IRA before the CARES Act was passed, and then he found out about the waiver of 2020 RMDs per the CARES Act and rolled that distribution into an IRA within 60 days of taking it, he will not owe income taxes on that distribution for 2020. It will be as if nothing happened. The Participant does need to observe the "one rollover per year rule," however. IRC § 408(d)(3)(B). If the Participant took his 2020 "non-required RMD" and federal income taxes were withheld from it, the Participant would need to put the gross amount into the IRA, not the net amount distributed to him after income tax withholding, if he wants to avoid income taxes on the full amount of the "non-required RMD" he took in 2020.

2. Special Tax Rules Applicable to "Coronavirus-Related Distributions" from Retirement Plans

These rules can be found in Section 2202 of the CARES Act (which does not directly amend the Internal Revenue Code).

a. *Coronavirus-Related Distributions*

A *coronavirus-related distribution* means any distribution from an eligible retirement plan made on or after January 1, 2020 and before December 31, 2020, to an individual (i) in the case of an individual, the individual's spouse or a dependent of the individual who has been diagnosed with COVID-19 by a test approved by the Centers for Disease Control and Prevention (CDC) *or* (ii) who "experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced …, being unable to work due to lack of child care …, closing or reducing hours of a business owned or operated by the individual…, or other factors as determined by the Secretary of the Treasury." Section 2202(a)(4)(A)(ii) of the CARES Act.

Note the time period during which the coronavirus-related distribution must be made: on or after January 1, 2020 and *before* December 31, 2020. Thus, a person who wishes to come within this special tax rule cannot wait until December 31, 2020, to make the withdrawal. The aggregate amount of the coronavirus-related distribution cannot exceed $100,000. Section 2202(a)(2)(A) of the CARES Act.

The first category for qualifying is objective: a diagnosis of COVID-19 pursuant to a test approved by the CDC. The second category for qualifying is less objective (the person has experienced "adverse financial consequences" as a result of the coronavirus pandemic and related financial fall out).

b. *Waiver of Early Withdrawal Penalty for Coronavirus-Related Distributions up to $100,000 from Retirement Plans*

Section 2202(a)(1) of the CARES Act provides for a waiver of the 10% early distribution penalty (Code Section 72(t)) if a Participant who is under age 59½ makes a withdrawal from his retirement plan of up to $100,000 that qualifies as a "coronavirus-related distribution." The waiver of the Section 72(t) penalty is retroactive to January 1, 2020.

c. *Taxation of Coronavirus-Related Distributions*

Unless the taxpayer elects otherwise, any amount required to be included in gross income for the taxable year due to a coronavirus-related distribution may be included ratably over the 3-taxable-year period beginning with the year of the distribution. Section 2202(a)(5)(A) of the CARES Act.

3. Loans from Qualified Plans

   i. The amount that can be borrowed from the Participant's qualified plan is doubled through the end of 2020: lesser of $100,000 or 100% of plan benefits (normally, lesser of $50,000 or 50% of plan benefits). Section 2202(b)(1) of the CARES Act.
   ii. A qualified plan Participant who already has an outstanding loan from his plan whose repayment due date is between March 27, 2020 and December 31, 2020, can extend repayment for one year. Section 2202(b)(2) of the CARES Act.

4. 5 Year Rule: Do Not Count the Year 2020

Per the CARES Act, for purposes of applying the 5 year rule, the year 2020 is ignored. Thus, if the Participant died prior to 2020 without having a DB, so that the 5 year rule would apply, the year 2020 is excluded from application of the 5 year rule. For example, if a pre-RBD Participant died in 2018 without having a DB, instead of the ultimate distribution date per the 5 year rule being December 31, 2023, the new ultimate distribution date would be December 31, 2024. IRC § 401(a)(9)(I)(iii). Whether this rule applies (i) to Participants who die in 2020 prior to their RBD without having a DB and (ii) to the new 10 year rule is not clear at the time when this outline was being prepared (clarification is being sought).

5. Deadline for IRA Contributions is extended from April 15, 2020 to July 15, 2020

B. Notice 2022-53

Per Notice 2022-53, if a DB who is not an EDB (i.e., an "ODB") was required to take an RMD in 2021 (or is required to take an RMD in 2022) from his Inherited IRA because the Participant died (i) on or after January 1, 2020 and (ii) on or after his RBD, and that ODB failed to take (or fails to take) his RMD(s) applicable for 2021 and 2022, the penalty for failure to take the RMD in the applicable year(s) is waived. Specifically, the Notice says, "the IRS will not assert that an excise tax is due under section 4974" in these cases. In addition, if the ODB already paid an excise tax for an RMD the ODB failed to take from his Inherited IRA in 2021, the ODB may request a refund of the excise tax paid.

Notice 2022-53 also addresses the potential liability of a Plan Administrator with respect to RMDs from "defined contribution plans." If the Plan Administrator of a defined contribution plan failed to distribute RMDs to ODBs in 2021 and/or fails to distribute RMDs to ODBs in 2022 per the February 2022 interpretation of the RMD Rules in the Proposed Regulations, that plan will not be treated as having failed to satisfy the applicable RMD Rules. This is important because, if a Plan Administrator takes action or fails to take action that violates the RMD Rules, the entire qualified plan becomes "disqualified" from the favorable provisions in the Code and regulations applicable to qualified plans. That type of consequence would negatively affect *all* of the Participants of that plan.

C. Notice 2023-54

Although Proposed Regulations were published in February 2022, which clarified that RMDs to DBs are required in years 1 through 9 after the participant's death if the participant dies after his RBD, as of mid-year 2023, final regulations on the RMD Rules had not yet been published. Designated Beneficiaries of a Participant who died *after* his or her RBD in the year 2020, 2021 or 2022 were supposed to take an RMD for 2023 pursuant to the 10 year rule (those same beneficiaries may have been required to take an RMD in years 2021 and 2022, but Notice 2022-53, discussed above, waived the penalty for failure to take RMDs in those two years, so, in 2023, the RMDs in question were the RMDs for the year 2023). Recognizing the difficult situation these particular beneficiaries were in, on July 14, 2023, the Treasury Department and the IRS published Notice 2023-54.

Notice 2023-54 provides that final regulations relating to the RMD Rules, when published by the Treasury Department, will not apply earlier than calendar year 2024. Thus, even though the Proposed Regulations indicate that ODBs who inherited the Participant's plan or IRA from a participant who died *after* his RBD in the year 2020, 2021 or 2022 would be required to take an RMD in 2023, if that RMD is not taken, no penalty will be imposed on that ODB. The relief granted also applies to beneficiaries of deceased EDBs, who are also subject to the 10 year rule upon the death of the EDB. Further, if the Plan Administrator of a qualified plan does not distribute to a plan participant the 2023 RMD that would be required based on the provisions in the Proposed Regulations, that failure will not disqualify the plan.

Notice 2023-54 provides relief for certain other situations, too. One of the changes made by SECURE 2.0 was to change the "Applicable Age" (used to determine the participant's RBD) from 72 to 73 for participants who attain age 73 after December 31, 2022 and before January 1, 2033. Administrators of qualified plans and other payors of RMDs advised the IRS and Treasury that they needed more time to update their automated payment systems to reflect this recent change made by SECURE 2.0. Thus, some distributions may have been made to Participants in 2023 based on the previous Applicable Age (i.e., 72) that were "coded" as RMDs but, in fact, would not be RMDs due to the change made to the Applicable Age by SECURE 2.0. RMDs made to the participant from his qualified plan may *not* be rolled over to the participant's IRA, but a distribution from the participant's qualified plan that is *not* an RMD may be rolled over to the participant's IRA. However, if a rollover is not a "direct" (or "trustee to trustee") transfer from the Participant's plan to the Participant's IRA rollover (or from one IRA to another IRA), federal income taxes must be withheld by the payor (at the rate of 20%) and a time limit of 60 days applies for making the rollover. Notice 2023-54 provides that, if a distribution was made to a Participant from his qualified plan or IRA between January 1, 2023 and July 31, 2023, that was mischaracterized as an RMD but, in fact, was not an RMD due to the change to the Applicable Age made by SECURE 2.0, that Participant would have until September 30, 2023, to roll over that mischaracterized distribution.

D. Notice 2024-35

In view of the fact that final regulations to the SECURE Act have not yet been published, on April 16, 2024, the IRS issued Notice 2024-35 taking the same action previously taken in Notice 2022-53 and Notice 2023-54 (*see* VI B and C, supra). In other words, even though, per the Proposed Regulations, an ODB is required to take RMDs during years 1 through 9 following the year of the Participant's death if a Participant who died on or after January 1, 2020 died after his RBD, that rule will not apply until January 1, 2025. In addition, if an ODB fails to take a 2024 RMD pursuant to that rule, the IRS will not impose a penalty on that failure. This relief applies to both IRAs and defined contribution plans and also applies to ODBs who are beneficiaries of EDBs who have died during the applicable time period.

EXHIBIT A
SELECTED PORTIONS OF THE SECURE ACT

SEC. 114. INCREASE IN AGE FOR REQUIRED BEGINNING DATE FOR MANDATORY DISTRIBUTIONS.

(a) IN GENERAL. –Section 401(a)(9)(C)(i)(I) of the Internal Revenue Code of 1986 is amended by striking "age 70 ½" and inserting "age 72".

(b) SPOUSE BENEFICIARIES; SPECIAL RULE FOR OWNERS. –Subparagraphs (B)(iv)(I) and (C)(ii)(I) of section 401(a)(9) of such Code are each amended by striking "age 70 1/2" and inserting "age 72".

(c) CONFORMING AMENDMENTS. –The last sentence of section 408(b) of such Code is amended by striking "age 70 ½" and inserting "age 72".

(d) EFFECTIVE DATE. –The amendments made by this section shall apply to distributions required to be made after December 31, 2019, with respect to individuals who attain age 70 ½ after such date.

SEC. 401. MODIFICATION OF REQUIRED DISTRIBUTION RULES FOR DESIGNATED BENEFICIARIES.

(a) MODIFICATION OF RULES WHERE EMPLOYEE DIES BEFORE ENTIRE DISTRIBUTION. –

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

"(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 interests 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.

"(iii) RULES UPON DEATH OF ELIGIBLE DESIGNATED BENEFICIARY.—If an eligible Designated Beneficiary dies before the portion of the employee's interest to which this subparagraph applies is entirely distributed, the exception under clause (ii) shall not apply to any beneficiary of such eligible Designated Beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible Designated Beneficiary.

"(iv) SPECIAL RULE IN CASE OF CERTAIN TRUSTS FOR DISABLED OR CHRONICALLY ILL BENEFICIARIES.—In the case of an applicable multi-beneficiary trust, if under the terms of the trust—

"'(I) it is to be divided immediately upon the death of the employee into separate trusts for each beneficiary, or

"(II) no individual (other than a eligible Designated Beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii)) has any right to the employee's interest in the plan until the death of all such eligible Designated Beneficiaries with respect to the trust,

for purposes of a trust described in subclause (I), clause (ii) shall be applied separately with respect to the portion of the employee's interest that is payable to any eligible Designated Beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii); and, for purposes of a trust described in subclause (II), subparagraph (B)(iii) shall apply to the distribution of the employee's interest and any beneficiary who is not such an eligible Designated Beneficiary shall be treated as a beneficiary of the eligible Designated Beneficiary upon the death of such eligible Designated Beneficiary.

'"(v) APPLICABLE MULTI-BENEFICIARY TRUST.—For purposes of this subparagraph, the term 'applicable multi-beneficiary trust' means a trust—

"(I) which has more than one beneficiary,

"(II) all of the beneficiaries of which are treated as Designated Beneficiaries for purposes of determining the distribution period pursuant to this paragraph, and

"(III) at least one of the beneficiaries of which is an eligible Designated Beneficiary described in sub-clause (III) or (IV) of subparagraph 2 (E)(ii).

"(vi) APPLICATION TO CERTAIN ELGIBLE RETIREMENT PLANS.—For purposes of applying the provisions of this subparagraph in determining amounts required to be distributed pursuant to this paragraph, all eligible Retirement Plans (as defined in section 402(c)(8)(B), other than a defined benefit plan described in clause (iv) or (v) thereof or a qualified trust which is a part of a defined benefit plan) shall be treated as a defined contribution plan.".

(2) DEFINITION OF ELIGIBLE DESIGNATED BENEFICIARY.—Section 401(a)(9)(E) of such Code is amended to read as follows:

"(E) DEFINITIONS AND RULES RELATING TO DESIGNATED BENEFICIARIES.—For purposes of this paragraph—

"(i) DESIGNATED BENEFICIARY.—The term 'Designated Beneficiary' means any individual designated as a beneficiary by the employee.

"(ii) ELIGIBLE DESIGNATED BENEFICIARY.—The term 'eligible Designated Beneficiary' means, with respect to any employee, any Designated Beneficiary who is—

"(I) the surviving spouse of the employee,

"(II) subject to clause (iii), a child of the employee who has not reached majority (within the meaning of subparagraph (F)),

"(III) disabled (within the meaning of section 72(m)(7)),

"(IV) a chronically ill individual (within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature), or

"(V) an individual not described in any of the preceding subclauses who is not more than 10 years younger than the employee.

The determination of whether a Designated Beneficiary is an eligible Designated Beneficiary shall be made as of the date of death of the employee.

"(iii) SPECIAL RULE FOR CHILDREN.—Subject to subparagraph (F), an individual described in clause (ii)(II) shall cease to be an eligible Designated Beneficiary as of the date the individual reaches majority and any remainder of the portion of the individual's interest to which subparagraph (H)(ii) applies shall be distributed within 10 years after such date."

(b) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in this subsection [b], the amendments made by this section [SEC. 401. MODIFICATION OF REQUIRED DISTRIBUTION RULES FOR DESIGNATED BENEFICIARIES] shall apply to distributions with respect to employees who die after December 31, 2019.

(2) COLLECTIVE BARGAINING EXCEPTION.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before the date of enactment of this Act, the amendments made by this section shall apply to distributions with respect to employees who die in calendar years beginning after the earlier of—

(A) the later of—

(I) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof agreed to on or after the date of the enactment of this Act), or

(ii) December 31, 2019, or

(B) December 31, 2021.

For purposes of subparagraph (A)(I), any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by this section shall not be treated as a termination of such collective bargaining agreement.

(3) GOVERNMENTAL PLANS.—In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), paragraph (1) shall be applied by substituting “December 31, 2021" for “December 31, 2019.”

(4) EXCEPTION FOR CERTAIN EXISTING ANNUITY CONTRACTS.—

(A) IN GENERAL.—The amendments made by this section shall not apply to a qualified annuity which is a binding annuity contract in effect on the date of enactment of this Act and at all times thereafter.

(B) QUALIFIED ANNUITY.—For purposes of this paragraph, the term “qualified annuity” means, with respect to an employee, an annuity—

(I) which is a commercial annuity (as defined in section 3405(e)(6) of the Internal Revenue Code of 1986);

(ii) under which the annuity payments are made over the life of the employee or over the joint lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the joint life expectancy of such employee and a designated beneficiary) in accordance with the regulations described in section 401(a)(9)(A)(ii) of such Code (as in effect before such amendments) and which meets the other requirements of section 401(a)(9) of such Code (as so in effect) with respect to such payments; and

(iii) with respect to which—

(I) annuity payments to the employee have begun before the date of enactment of this Act, and the employee has made an irrevocable election before such date as to the method and amount of the annuity payments to the employee or any designated beneficiaries; or

(II) if subclause (I) does not apply, the employee has made an irrevocable election before the date of enactment of this Act as to the method and amount of the annuity payments to the employee or any designated beneficiaries.

(5) EXCEPTION FOR CERTAIN BENEFICIARIES.—

(A) IN GENERAL.—If an employee dies before the effective date, then, in applying the amendments made by this section to such employee's designated beneficiary who dies after such date—

(i) such amendments shall apply to any beneficiary of such designated beneficiary; and

(ii) the designated beneficiary shall be treated as an eligible designated beneficiary for purposes of applying section 401(a)(9)(H)(ii) of the Internal Revenue Code of 1986 (as in effect after such amendments).

(B) EFFECTIVE DATE.—For purposes of this paragraph, the term "effective date" means the first day of the first calendar year to which the amendments made by this section apply to a plan with respect to employees dying on or after such date.

EXHIBIT B
TWO TRUSTS DESIGNED TO TERMINATE AT AGE 31 ARE PARTICIPANT'S BENEFICIARIES

Participant dies Before RBD

Assumptions: Participant ("P"), who is not married, dies in 2024 at age 53 owning a pre-tax IRA. Beneficiaries per the beneficiary designation on file with the IRA custodian for P's IRA: 50% to trust for sole benefit of P's Child and 50% to trust for sole benefit of P's Niece. Both P's child and P's niece are age 15 in 2024. Both trusts are designed to terminate by December 31 of the year when the sole current beneficiary of the trust reaches age 31 (i.e., by 12/31/40). Remainder beneficiary of both trusts is P's cousin, Nancy (outright), who is age 42 in 2024. Current trust beneficiaries do not die "prematurely." A separate inherited IRA belonging to each trust is timely created.

Beneficiary and age as of P's date of death	Type of trust	Annual RMDs required?	Date of Full Withdrawal from Inherited IRA Belonging to Trust	Comments
P's child (age 15)	Conduit trust to age 31	Yes (EDB rule) RMDs commence by 12/31/2025 and continue each year until termination of trust on 12/31/2040 Child's life expectancy (not Nancy's) is used to calculate RMDs because trust is a conduit trust	12/31/2040 (EDB rule applicable to P's child—trust terminates when P's child reaches age 31)	P's child is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust is a conduit trust that terminates when P's child reaches age 31. By 12/31 of year when P's child reaches age 31, entire remaining amount held in inherited IRA belonging to trust for P's child must be withdrawn and distributed outright to P's child.
P's niece (age 15)	Conduit trust to age 31	No P's niece is a "plain old DB" ("PODB") and P died *before* RBD	12/31/2034 (10 year rule applicable to PODBs)	P's niece is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust is a conduit trust that terminates when P's niece reaches age 31. Full amount held in inherited IRA belonging to trust for P's niece must be withdrawn by 12/31/2034 (per 10 year rule) AND distributed upon withdrawal outright of trust to niece (because trust is a conduit trust). *If retirement plan benefits are only assets of trust for P's niece*, then trust will effectively terminate by 12/31/2034 (when P's niece is 25).

Beneficiary and age as of P's date of death	Type of trust	Annual RMDs required?	Date of Full Withdrawal from Inherited IRA Belonging to Trust	Comments
P's child (age 15)	Accumulation trust to age 31	Yes (EDB rule) RMDs commence by 12/31/2025 and continue each year until termination of trust on 12/31/2040 Child's life expectancy (not Nancy's) is used to calculate RMDs because trust qualifies as an "Age 31 Trust"	12/31/2040 (when P's child reaches age 31)	P's child is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust terminates when P's child reaches age 31. By 12/31 of year when P's child reaches age 31, entire remaining amount held in inherited IRA belonging to trust for P's child must be withdrawn and distributed outright to P's child.
P's niece (age 15)	Accumulation trust to age 31	No P's niece is a "PODB" and P died *before* RBD	12/31/2034 (10 year rule applicable to PODBs)	P's niece is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust terminates when P's niece reaches age 31 (trust qualifies as an "Age 31 Trust"). Full amount held in inherited IRA belonging to trust for P's niece must be withdrawn by 12/31/2034 (per 10 year rule), but withdrawn amount does not have to be distributed out of trust to P's niece at that time because trust is an accumulation trust that qualifies as an Age 31 Trust. Withdrawn amounts retained in trust will be taxed to the trust. Trust terminates when P's niece reaches age 31 (i.e., by 12/31/2040), at which time all trust assets (including accumulated Plan Benefits) will be distributed outright to P's niece per terms of trust.

Participant dies After RBD

Assumptions: Participant ("P"), who is not married, dies in 2024 at age 74 owning a pre-tax IRA. Beneficiaries per the beneficiary designation on file with IRA custodian for P's IRA: 50% to trust for sole benefit of P's Child and 50% to trust for sole benefit of P's Niece. Both P's child and P's niece are age 15 in 2024. Both trusts are designed to terminate by December 31 of the year when the sole current beneficiary of the trust reaches age 31 (i.e., by 12/31/2040). Remainder beneficiary of both trusts is P's cousin, Nancy (outright), who is age 42 in 2024. Current trust beneficiaries do not die "prematurely." A separate inherited IRA belonging to each trust is timely created.

Beneficiary and age as of P's date of death	Type of trust	Annual RMDs required?	Date of Full Withdrawal from Inherited IRA Belonging to Trust	Comments
P's child (age 15) (mother of P's child was much younger than P)	Conduit trust to age 31	Yes (EDB rule) RMDs commence by 12/31/2025 and continue each year until termination of trust on 12/31/2040 P's child's life expectancy (not Nancy's) is used to calculate RMDs because P's child is an EDB and trust is a conduit trust	12/31/2040 EDB rule applicable to P's child—trust terminates when P's child reaches age 31	P's child is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust is a conduit trust that terminates when P's child reaches age 31. When P's child reaches age 31, entire remaining amount held in inherited IRA that belongs to the trust for P's child must be withdrawn and distributed outright to P's child.
P's niece (age 15)	Conduit trust to age 31	Yes (ALAR rule) RMDs commence by 12/31/2025 and continue each year until full distribution by 12/31 of year containing 10th anniversary of P's death (12/31/2034) P's niece's life expectancy (not Nancy's) is used to calculate RMDs because trust is a conduit trust and also qualifies as an "Age 31 Trust"	12/31/2034 P's niece is a PODB and 10 year rule applies	P's niece is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust is a conduit trust that terminates when P's niece reaches age 31. Full amount must be withdrawn from inherited IRA that belongs to the trust for P's niece by 12/21/2034 (per 10 year rule) AND distributed upon withdrawal out of trust to P's niece because trust is a conduit trust. *If retirement plan benefits are only assets of trust for P's niece*, then trust will effectively terminate by 12/31/2034 (when P's niece is 25).

Beneficiary and age as of P's date of death	**Type of trust**	**Annual RMDs required?**	**Date of Full Withdrawal from Inherited IRA Belonging to Trust**	**Comments**
P's child (age 15) (mother of P's child was much younger than P)	Accumulation trust to age 31	Yes (EDB rule) RMDs commence by 12/31/2025 and continue each year until termination of trust on 12/31/2040 P's child's life expectancy (not Nancy's) is used to calculate RMDs because P's child is an EDB and trust terminates when P's child reaches age 31 (trust qualifies as an "Age 31 Trust")	12/31/2040 Trust terminates by 12/31 of year when P's child reaches age 31	P's child is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust terminates when P's child reaches age 31. By 12/31 of year when P's child reaches age 31, entire amount then held in inherited IRA that belongs to trust for P's child must be withdrawn and distributed outright to P's child.
P's niece (age 15)	Accumulation trust to age 31	Yes (ALAR rule) RMDs commence by 12/31/2025 and continue each year until termination of trust (and full distribution of P's Plan Benefits) by 12/31 of year containing 10^{th} anniversary of P's death (12/31/2034) P's niece's life expectancy (not Nancy's) is used to calculate RMDs because trust qualifies as an "Age 31 Trust"	12/31/2034 P's niece is a PODB and "outer limit" for withdrawal of full remaining amount of P's benefits held in inherited IRA that belongs to trust for P's niece is 12/31 of year that contains 10^{th} anniversary of P's death (12/31/2034)	P's niece is considered sole beneficiary of 50% share of P's IRA because (i) separation of shares occurs per beneficiary designation, (ii) separate accounts are timely created, and (iii) trust terminates when P's niece reaches age 31 (it's an "Age 31 Trust"). Full amount held in inherited IRA belonging to trust for P's niece must be withdrawn by 12/31/2034 (per 10 year rule), but withdrawn amount does not have to be distributed out of trust to P's niece at that time because trust is an accumulation trust and it qualifies as an "Age 31 Trust." RMDs retained in trust will be taxed to the trust. Trust terminates when P's niece reaches age 31, at which time all trust assets (including accumulated Plan Benefits) will be distributed outright to P's niece.

EXHIBIT C
SECTION 72(t) CHARTS PREPARED BY NATALIE CHOATE

This chart summarizes which "72(t)" exceptions are available for which types of retirement plans, including dollar limit and "payback provisions" (allowing the distributee to contribute the distribution back into a retirement account) if any. Chart #1 lists distributions that are not ever subject to the penalty—categories of distributions that the penalty simply does not apply to. Chart #2 summarizes the true "exceptions" to the penalty—distributions that normally WOULD be subject to the penalty, but due to the particular circumstances of this recipient and/or use of this distribution, it qualifies for an exception. "§"indicates a section of the Internal Revenue Code of 1984 as amended through July 31, 2023. "¶" indicates a section of the author's book *Life and Death Planning for Retirement Benefits* (8th ed. 2018) for exceptions explained therein. See Note 3 for limitations.

Chart #1: Distributions that are not subject to the penalty in the first place

The § 72(t)(2) 10% "additional tax" does not apply to these 12 types of distributions, deemed distributions, or other income-generating event:

Distribution to a participant who is age 59½ or older. 72(t)(2)(A)(i).
There is one exception to this rule: see "modification of SOSEPP," ¶ 9.3.

Distribution from a plan not listed in § 4974(c) such as a 457 plan. § 72(t)(1).
And there is one exception to this rule, see Note 1.

Distributions that are not subject to income tax. § 72(t)(1).
Exception: See ¶ 5.8.02(C) (certain distributions after pre-age-59½ Roth conversion).

Roth conversion. § 408A(d)(3)(A)(ii). ¶ 5.8.02.
Exception: See ¶ 5.8.02(C) (certain distributions after pre-age-59½ Roth conversion).

Inherited accounts. § 72(t)2)(A)(ii). Distributions to a beneficiary are exempt even if beneficiary is under 59½ or participant died before 59½. If spouse as beneficiary rolls it to her own account or elects to treat inherited account as hers she becomes "participant," and loses her "beneficiary" exemption for post-rollover distributions while under 59½.

Dividends paid on stock held in an ESOP under § 404(k). § 72(t)(2)(A)(vi).

"Payments under a phased retirement annuity under section 8366a(a)(5) or 8412a(a)(5) of title 5, United States Code, or a composite retirement annuity under section 8366a(a)(1) or 8412a(a)(1) of such title." § 72(t)(2)(A)(viii). I have no idea what this means.

Distributions from a pension-linked emergency savings account. § 402A(e), § 72(t)(2)(J). These Roth-type accounts, which may be created by plan sponsors after 2023, and are capped at $2,500 (plus earnings, plus COLA), are not further covered in this book.

Deemed distribution resulting from plan-owned life insurance. ¶ 9.1.02(D).
Other "deemed" distributions (due to "failed" plan loans or prohibited transactions) *are* subject to the penalty. ¶ 9.1.02(E), (F).

Corrective distributions from 401 plans (§ 401(k)(8)(D), § 402(g)(2)(C)); IRA contributions withdrawn under § 408(d)(4). After 2022, the *income* included in a § 408(d)(4) distribution is also penalty-free. § 72(t)(2)(A)(ix).

Payments to alternate payees under QDROs. Non-IRA plans only. § 72(t)(2)(C), (3)(A).

Chart #2: Distributions that would be subject to the penalty
(i.e., not "penalty-exempt" under Chart #1), but are exempt because of
the particular circumstances of the recipient and/or use of the distribution

Type of penalty-exempt distribution	**Plan(s) qualifying for this exemption:**	**Dollar limit if any**	**Can dist. be paid back to a plan?**	**Code section**
Disability	All plans subject to the penalty; list in § 4974(c) (see Note 1 for list)	None	No	§ 72(t)(2)(A)(iii) § 72(m)
SOSEPP	IRAs anytime. All other plans: only after separation from service	None	No	§ 72(t)(2)(A)(iv), (3)(B)
Early retirement, age 55	All plans except IRAs **See ¶ 9.4.04 for definition of early ret**.	None	No	§ 72(t)(2)(A)(v), (3)(A).
Early retirement, age 50: Public safety employees	"Governmental" plans as defined in § 414(d)	None	No	§ 72(t)(2)(A)(v), (10)(A), (B)
Early retirement, age 50: private sector firefighters	Qualified plans and 403(a) and (b) plans and accounts (plans listed in § 402(c)(8)(B)(iii), (iv), or (vi)).	None	No	§ 72(t)(2)(A)(v), (10)(A)
§ 6331 tax levy	All plans	None	No	§ 72(t)(2)(A)(vii)
Deductible medical expenses	All plans	None	No	§ 72(t)(2)(B); § 213. See Note 2
Health insurance premiums if unemployed	IRAs only	None	No	§ 72(t)(2)(D)
Higher education expense	IRAs only	None	No	§ 72(t)(2)(E), (7); § 25A(g)(2)
First home purchase	IRAs only	$10,000 lifetime limit	No	§ 72(t)(2)(F), (8)

Qualified reservist distribution as defined in § 72(t)(2)(G)	IRAs; elective deferral accounts in certain types of plans	None	Yes until 2 years after end of active duty; payback NOT deductible	§ 72(t)(2)(G)
Qualified birth or adoption distribution (QBOAD)	All plans	$5,000 per birth or adoption	Yes, within 3 years. Payback treated as tax-free rollover.	§ 72(t)(2)(H)
Emergency expenses (after 2023 only)	All plans except defined benefit plans	$1,000 (or vested acct. value in excess of $1,000 if less). Once per 3 years.	Yes; same rules as QBOAD	§ 72(t)(2)(I)
Domestic abuse (after 2023 only)	IRAs; most profit sharing plans. No pension plans. See § 401(a)(11)(B).	$10,000 or 50% of account if less	Yes; same rules as QBOAD	§ 72(t)(2)(K)
Terminal illness	All plans	None	Yes; same rules as QBOAD	§ 72(t)(2)(L)
Federally declared disasters	All plans	$22,000 per disaster. Tax spread over 3 years (optional).	Yes; similar to QBOAD	§ 72(t)(2)(M), (11)
Long-term care insurance premiums (after 12/29/2025 only)	401(a) qualified plans only	$2,500 (plus COLA after 2024) or 10% of vested acct. if less	No	§ 72(t)(2)(N); § 401(a)(39)

Note: The author notes with appreciation the contributions of Denise Appleby.

Notes to charts:

Note 1: Explanation of Code sections defining plans to which a particular exemption applies: "All plans" in these charts means all plans subject to the 10% penalty, as defined in § 4974(c). § 72(t)(1). § 4974(c) plans are: qualified plans under § 401 (such as 401(k) plans); § 403(a)/§ 403(b) annuities and accounts; and individual retirement accounts under § 408(a) (IRAs), and individual retirement annuities under § 408(b). The definition includes Roth IRAs; see § 408A(a), and Reg. § 1.408A-6, A-5(a). The definition specifically includes any plan or account that has been determined by the IRS to be tax-qualified under one of those Code sections even if it is no longer so qualified.

Since 457 plans are not included in § 4974(c), 457 plans are generally not subject to the 10% penalty; however, if money is rolled over into a 457 plan, from a plan that IS subject to the penalty, distributions from the rollover account are subject to the penalty.§ 72(t)(9).

Note 2: Deductible medical expenses *only* to the extent not already penalty-free under certain other exemptions, namely, those listed in § 72(t)(2)(A), (C) [alternate payee] or (D) [health insurance premiums]. Some other exceptions also have provisions dealing with how to deal with a distribution that qualifies for more than one exception.

Note 3: These charts are intended to provide a quick introduction to and summary of the § 72(t) exceptions to the 10% penalty. The goal is to provide a handy reference tool enabling the practitioner to find exceptions that may help a client. Most of the "exceptions" are surrounded by many more details than can be summarized in a chart. Use the citations provided to learn the full requirements and limitations of each exception.

EXHIBIT D
SPECIAL RULE (OPTION) FOR SURVIVING SPOUSE BEFORE AND AFTER SECURE 2.0

COMPARISON OF CODE SECTION 401(a)(9)(B)(iv) BEFORE SECURE 2.0

WITH CODE SECTION 401(a)(9)(B)(iv) PER SECURE 2.0

Section 401(a)(9)(B)(iv) Before SECURE 2.0	Modifications To Section 401(A)(9)(B)(iv) Per SECURE 2.0
(iv) Special rule for surviving spouse of employee. If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee— (I) the date on which the distributions are required to begin under clause (iii)(III) shall not be earlier than the date on which the employee would have attained the applicable age, and (II) if the surviving spouse dies before the distributions to such spouse begin, this subparagraph shall be applied as if the surviving spouse were the employee [underline added].	SEC. 327. SURVIVING SPOUSE ELECTION TO BE TREATED AS EMPLOYEE. (a) IN GENERAL.—Section 401(a)(9)(B)(iv), as amended by this Act, is further amended to read as follows: (iv) SPECIAL RULE FOR SURVIVING SPOUSE OF EMPLOYEE.—If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee and the surviving spouse elects the treatment in this clause— (I) the regulations referred to in clause (iii)(II) shall treat the surviving spouse as if the surviving spouse were the employee, (II) the date on which the distributions are required to begin under clause (iii)(III) shall not be earlier than the date on which the employee would have attained the applicable age, and (III) if the surviving spouse dies before the distributions to such spouse begin, this subparagraph shall be applied as if the surviving spouse is the employee [underline added]. An election described in this clause shall be made at such time and in such manner as prescribed by the Secretary, shall include a timely notice to the plan administrator, and once made may not be revoked except with the consent of the Secretary. (b) EXTENSION OF ELECTION OF AT LEAST AS RAPIDLY RULE.— The Secretary shall amend Q&A–5(a) of Treasury Regulation section 1.401(a)(9)–5 (or any successor regulation thereto) to provide that if the surviving spouse is the employee's sole designated beneficiary and the spouse elects treatment under section 401(a)(9)(B)(iv), then the applicable distribution period for distribution calendar years after the distribution calendar year including the employee's date of death is determined under the uniform lifetime table. (c) EFFECTIVE DATE.—The amendments made by this section shall apply to calendar years beginning after December 31, 2023.

EXHIBIT E
DISTRIBUTION CHARTS

Term used in Charts	Definition/Meaning/Comment
327 Election	Referring to Section 327 of SECURE 2.0: An election that P's sole beneficiary SS can make that will enable SS to delay commencing RMDs if P dies before RBD until the year when P would have reached his Applicable Age, will enable SS to use ULT to calculate RMDs once they commence (presumably whether P dies before or after RBD), and will allow SS to be treated as if SS were "the Participant" for purposes of determining the applicable distribution rule for distributions to SS's beneficiaries after SS's death
ALAR Rule	"At least as rapidly rule" (Treas. Reg. § 1.401(a)(9)–5). Per Prop'd Regs, if P dies after RBD, the ALAR Rule requires DBs to take RMDs each year after P's death until limit of 10 year rule is reached (DB also required to withdraw 100% of amount remaining in DB's inherited IRA by 12/31 of year containing 10th ann'y of P's death)
Alt Dist Rule	Alternate Distribution Rule. Per Prop'd Regs, if P dies *before* RBD, P's DCP might require use of 10 year rule instead of otherwise applicable life expectancy distribution rule or might give P (or SS) ability to elect 10 year rule instead of otherwise applicable life expectancy distribution rule
Ann'y	Anniversary
Applicable Age	This is the age component of RBD. Not always called the "Applicable Age." Applicable Age: Age 70-1/2 through 12/31/2019 per the 2002 Final Regs; age 72 through 12/31/22 per the SECURE Act; age 73 through 12/31/32 per SECURE 2.0; and age 75 for individuals who reach age 74 on or after 1/1/33 per SECURE 2.0 (but see outline at IVB1 regarding "Technical Problem" for those born in 1959).
Bene	Beneficiary
Current Beneficiary	A *Current Beneficiary* of a trust is a beneficiary of a trust that was named as the beneficiary of the Participant's plan who could receive amounts in the trust representing the Participant's interest in the plan ("Plan Benefits") that are neither contingent upon, nor delayed until, the death of another beneficiary of the trust who did not predecease (and is not treated as having predeceased) the Participant. Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(A).
D/C Bene	Disabled or Chronically Ill Beneficiary
DB	Designated Beneficiary
DB Determination Date	The DB Determination Date (not an officially defined term) is September 30 of the year following the year of P's death. With exceptions for certain exercises of powers of appointment and trust modifications, this is the date by which all "countable" beneficiaries of P's plan or IRA are finally determined.
DCP	Defined Contribution Plan. This is one of the two broad categories of "qualified plans." Examples of defined contribution plans include the following: 401(k) plans, 403(b) plans, 457(b) plans, profit-sharing plans, and governmental and tax exempt employee plans subject to IRC § 401(a).
EDB	Eligible Designated Beneficiary. Per the SECURE Act, a special type of DB who is entitled to some sort of life expectancy distribution with respect to P's plan benefits after P's death (not the same distribution rule for all EDBs).
"Ghost Life Expectancy"	A deceased Participant's remaining single life expectancy per the Single Life Table, not recalculated.
Inherited IRA	An inherited IRA is the usual form of benefit established for P's beneficiary on P's death (with certain possible exceptions for P's SS if the terms of P's plan allow P's SS to remain in the plan as P's Bene)
LE	Life Expectancy

NMT Bene	Individual not more than 10 years younger than P (Note: individual can be older than P)
Non DB	A beneficiary of P's plan or IRA who is not a DB (such as P's "estate" or a charity)
P (Participant)	Participant: Employee or retiree who participates in a qualified plan and/or the named owner of an IRA
Plan	The term “plan” or “retirement plan” can refer to the qualified plan in which P is a Participant or can refer to the IRA titled in P’s name
PMC	Participant's child who has not reached the “age of majority” (i.e., age 21) by P’s date of death (formerly referred to as “P’s minor child”). For simplicity, "PMC" is used in charts to mean P's child who is under age 21 at time of P's death.
Recalculation of LE	Recalculation of Life Expectancy means that a new Applicable Denominator is obtained from the applicable table each year. A living Participant’s LE is recalculated, whether P uses the ULT or the JLT. The LE of an SS who qualifies as an EDB is recalculated (although, because of SECURE 2.0, it’s not clear of the result if P’s SS does not make the 327 election). The LE of an SS who makes the 327 election is recalculated because of the provisions in that section. The LE of other EDBs and of DBs is <u>never</u> recalculated.
Retirement Plan	See “Plan”
RBD	Required Beginning Date: The date by which a living P must begin taking RMDs from his retirement plan. For named IRA owners and plan participants who own 5% or more of the employer sponsoring the plan, RBD is April 1 of year following the year when P reaches P's Applicable Age. For plan participants who are not 5% or more owners, *if the plan so provides,* RBD is April 1 of year following *the later of* (i) the year when P reaches P's Applicable Age and (ii) the year when P retires.
RMD	Required Minimum Distribution. The RMD is the minimum amount that must be distributed out of (or withdrawn from) the particular plan or IRA (including an Inherited IRA) pursuant to the RMD Rules. Always taking at least the RMD will avoid the under-distribution penalty. There is no penalty for taking *more* than the RMD.
SB	Successor Beneficiary. This term usually refers to the beneficiary of P's beneficiary who receives what remains in the Inherited IRA belonging to P's beneficiary on the death of P's beneficiary.
Secondary Beneficiary	A *Secondary Beneficiary* is a beneficiary *of an accumulation trust* who could receive an interest in Plan Benefits not distributed to Current Beneficiaries.
SLE	Single Life Expectancy. An individual’s life expectancy per the SLT.
SLT	Single Life Table. The table that is used by most beneficiaries who inherit a share of P’s retirement plan to calculate RMDs. This table can be found at § 1.401(a)(9)-9(c)(1).
SS	Surviving Spouse
SS’s Bene	This refers to the beneficiary of P's Surviving Spouse (P’s SS) in cases where P’s SS makes the 327 election. This type of beneficiary is not a “successor beneficiary” because, if P’s SS makes the 327 election, P’s SS is treated as if she is/were the Participant.
ULT	Uniform Lifetime Table. Table for use by a living Participant who reaches his RBD and by the SS of a deceased P who makes the 327 Election. The denominators in this table assume that P (or SS, if applicable) has a beneficiary who is 10 years younger than P (or SS, if applicable). This table can be found at § 1.401(a)(9)-9(c)(2).
YOD	Year of Death

PARTICIPANT ("P") DIES BEFORE RBD				
P's Beneficiary	**P's YOD RMD?**	**Distributions to P's Bene After P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Surviving Spouse (SS): **SS does *not* make the 327 Election** (SS is still an EDB)	N/A	RMDs to SS begin by 12/31 of year after P's death, based on SS's SLE per SLT, *recalculated* each year (likely interpretation assuming prior rule applies) Note: Alt Dist Rule may apply if a DCP	SB of SS takes RMDs, beginning by 12/31 of year after SS's death, based on SS's SLE per SLT, not recalculated (assuming Alt Dist Rule did not apply), subject to outer limit of 12/31 of year containing 10th ann'y of SS's death	1) For SS to be EDB, (a) P must have named as beneficiary *either* SS outright or conduit trust for sole current benefit of SS and (b) if outright, SS did not roll over P's plan or IRA to SS's plan or IRA or assume ownership of P's IRA 2) Alt Dist Rule: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P or SS (if applicable) 3) If SS not sole beneficiary of P's entire plan or IRA, assume separate account timely created for SS's share
Surviving Spouse (SS): **SS makes the 327 Election *and* SS is alive on RMD commencement date** (SS is still an EDB)	N/A	Due to 327 Election, 1) RMDs to SS must commence (by 12/31 of year) when P would have reached P's Applicable Age; 2) SS under 59½ may withdraw amounts from P's plan/IRA before RMDs commence w/out penalty; 3) upon commencement, RMDs are based on SS's LE per ULT (likely interpretation despite heading of 327(b)); and 4) Alt Dist Rule should not apply due to SS's election (*see* outline regarding "12/31" issue, SS's use of ULT when P dies before RBD, and other Section 327 issues)	1) Due to 327 election, SS's Bene is Bene named by SS (if any) ∴ SS's Bene ≠ SB 2) Likely interpretation of 327: Distribution rule for SS's Bene after SS's death depends on status of SS's Bene (apply rules on SS's death *as if SS were P*); 3) If SS's Bene is an EDB, applicable EDB distribution rule applies, with outer limit for SB of that EDB being 12/31 of year containing 10th ann'y of EDB's death; 4) If SS's Bene is a DB, applicable DB distribution rule applies, with outer limit for DB or SB of DB being 12/31 of year containing 10th ann'y of SS's death; and 5) If SS's Bene is a Non DB, applicable Non DB rule applies.	1) For SS to be EDB, (a) P must have named as beneficiary *either* SS outright or conduit trust for sole current benefit of SS and (b) if outright, SS did not roll over P's plan or IRA to SS's plan or IRA or assume ownership of P's IRA 2) Alt Dist Rule: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P or SS (if applicable) 3) If SS not sole beneficiary of P's entire plan or IRA, assume 327 election available as long as separate account timely created for SS's share 4) Per SECURE 2.0, SS is person with right to make 327 election even if P's beneficiary is conduit trust for sole current benefit of SS and someone other than SS is Trustee of conduit trust (possible conflict in "blended family" situation)

PARTICIPANT ("P") DIES BEFORE RBD				
P's Beneficiary	**P's YOD RMD?**	**Distributions to P's Bene After P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Surviving Spouse (SS): **SS makes the 327 Election *but* SS dies before RMDs to SS commence** (SS is still an EDB)	N/A	Due to 327 Election, 1) RMDs to SS must commence (by 12/31 of year) when P would have reached P's Applicable Age; 2) SS under 59½ may withdraw amounts from P's plan/IRA before RMDs commence w/out penalty; 3) if SS dies before RMDs commence, treat SS *as if SS were P*; and 4) Alt Dist Rule should not apply due to SS's election (*see* outline regarding "12/31" issue, SS's use of ULT when P dies before RBD, and other Section 327 issues)	1) Due to 327 election, SS's Bene is Bene named by SS (if any) ∴ SS's Bene ≠ SB 2) Likely interpretation of 327: Distribution rule for SS's Bene after SS's death depends on status of SS's Bene (apply rules on SS's death *as if SS were P*) 3) If SS's Bene is an EDB, applicable EDB distribution rule applies, with outer limit for SB of that EDB being 12/31 of year containing 10th ann'y of EDB's death; 4) If SS's Bene is a DB, applicable DB distribution rule applies, with outer limit for DB or SB of DB being 12/31 of year containing 10th ann'y of SS's death; and 5) If SS's Bene is a Non DB, 5 year rule applies (because SS died before RMDs commenced with no DB).	1) For SS to be EDB, (a) P must have named as beneficiary either SS outright or conduit trust for sole current benefit of SS and (b) if outright, SS did not roll over P's plan or IRA to SS's plan or IRA or assume ownership of P's IRA 2) Alt Dist Rule: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P or SS (if applicable) 3) If SS not sole beneficiary of P's entire plan or IRA, assume 327 election available as long as separate account timely created for SS's share 4) Per SECURE 2.0, SS is person with right to make 327 election even if P's beneficiary is conduit trust for sole current benefit of SS and someone other than SS is Trustee of conduit trust (possible conflict in "blended family" situation)
P's Child Under Age 21 ("PMC") Assume PMC is sole bene of a separate share	N/A	RMDs to PMC begin by 12/31 of year after P's death, based on PMC's SLE per SLT; PMC becomes a DB when reaches age of majority (i.e., age 21); Full distribution to PMC req'd by 12/31 of year containing 10th ann'y of PMC reaching age of majority (i.e., by 12/31 of year when PMC reaches age 31)	If PMC dies prematurely, SB takes RMDs based on PMC's SLE per SLT, subject to outer limit for full distribution of 12/31 of year containing 10th ann'y of *the earlier of* (i) PMC's death or (ii) PMC reaching age of majority	1) For PMC to be EDB, P must have named as bene: (i) PMC outright (could lead to guardianship or court-managed trust if PMC under 18), (ii) conduit trust for PMC as sole bene, or (iii) UTMA custodian for PMC 2) Alt Dist for PMC: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P (if applicable) 3) For conduit pot trust for multiple children of P, *see* next section

PARTICIPANT ("P") DIES BEFORE RBD				
P's Beneficiary	**P's YOD RMD?**	**Distributions to P's Bene After P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Conduit Pot Trust for P's Children Assume *all* Current Beneficiaries of trust qualify as PMCs as of P's date of death	N/A	RMDs begin by 12/31 of year after P's death, based on oldest PMC's SLE per SLT Full distribution req'd (and trust must provide for full distribution) by 12/31 of year containing 10th ann'y of year when oldest PMC reaches age of majority (i.e., by 12/31 of year when oldest PMC reaches age 31)	If oldest PMC dies prematurely, SB continues RMDs based on SLE of oldest PMC, with full distribution req'd by 12/31 of year containing 10th ann'y of *the earlier of* (i) year of oldest PMC's death or (ii) year when oldest PMC reached the age of majority	Can have a conduit pot trust for multiple PMCs Conduit trust for multiple PMCs (i.e., all Current Benes are PMCs) is an EDB Oldest PMC = *the* EDB whose LE is used to calculate RMDs Alt Dist Rule: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P (if applicable)
See-Through Trust with at least one Current Beneficiary who is a PMC and one "countable" beneficiary who is a DB (DB could be child of P not under age of majority as of P's date of death)	N/A	RMDs begin by 12/31 of year after P's death, based on SLE per SLT of oldest "countable" beneficiary of trust (whether the oldest "countable" beneficiary is a DB or a PMC) Full distribution req'd (and trust must provide for full distribution) by 12/31 of year containing 10th ann'y of year when (oldest) PMC reaches age of majority (i.e., by 12/31 of year when (oldest) PMC reaches age 31)	If (oldest) PMC dies prematurely, continue RMDs based on applicable distribution method, subject to outer limit of 12/31 of year containing 10th ann'y of *the earlier of* (i) year of (oldest) PMC's death or (ii) year (oldest) PMC reached age of majority	If have an accumulation pot trust for multiple beneficiaries, as long as no Non DBs are "countable" beneficiaries (including "countable" Secondary Beneficiaries) and at least one Current Beneficiary is a PMC, get "modified" PMC rule instead of standard DB rule

PARTICIPANT ("P") DIES BEFORE RBD				
P's Beneficiary	**P's YOD RMD?**	**Distributions to P's Bene After P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Disabled or Chronically Ill Individual (D/C Bene)	N/A	RMDs to D/C Bene must begin by 12/31 of year after P's death, based on D/C Bene's SLE per SLT Note: Alt Dist Rule may apply if a DCP	SB of D/C Bene takes RMDs, beginning by 12/31 of year after year of D/C Bene's death, based on D/C Bene's SLE per SLT, subject to outer limit of 12/31 of 10th ann'y of D/C Bene's death	1) For D/C Bene to be EDB, P must have named as bene: (i) D/C bene outright (may lead to guardianship or court-managed trust), (ii) conduit trust for D/C Bene, or (iii) AMBT for D/C Bene 2) Alt Dist Rule: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P (if applicable)
Individual Not More Than 10 years Younger Than P (NMT Bene)	N/A	RMDs to NMT Bene must begin by 12/31 of year after P's death, based on NMT Bene's SLE per SLT Note: Alt Dist may apply if a DCP	SB of NMT takes RMDs, beginning by 12/31 of year after year of NMT Bene's death, based on NMT Bene's SLE per SLT, subject to outer limit of 12/31 of year containing 10th ann'y of NMT Bene's death	1) For NMT Bene to be EDB, P must have named as bene: (i) NMT Bene outright or (ii) conduit trust for sole benefit of NMT Bene 2) Alt Dist: 10 year rule may apply or be an option, depending on terms of P's DCP and/or election by P (if applicable)
Designated Beneficiary (DB)	N/A	No RMDs required during years 1 - 9 following year of P's death 100% distribution required by 12/31 of year containing 10th ann'y of **P's** death	SB of DB subject to outer limit of 12/31 of year containing 10th ann'y of **P's** death	P's named beneficiary must qualify as a DB For a trust named as beneficiary to qualify for "DB treatment," the 4 trust regulatory req'ts must be met and all "countable" beneficiaries of trust (including "countable" Secondary Beneficiaries) must be DBs (i.e., no Non DBs can be "countable" beneficiaries of trust)

PARTICIPANT ("P") DIES BEFORE RBD				
P's Beneficiary	**P's YOD RMD?**	**Distributions to P's Bene After P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Age 31 Trust for sole benefit of "Young Beneficiary" "Young Beneficiary" can be any beneficiary under age 31 as of P's date of death In this case, *assume the Young Beneficiary is a DB*	N/A	No RMDs required during years 1 - 9 following year of P's death Full distribution req'd by 12/31 of year that contains 10th ann'y of **P's** death	SB of Young DB subject to outer limit of 12/31 of year containing 10th ann'y of **P's** death	The so-called "Age 31 Trust" (which can be a conduit trust or an accumulation trust) is a trust for the benefit of a single "Young" Current Beneficiary which allows all Secondary Beneficiaries to be ignored as long as the trust is designed to terminate by 12/31 of *the later of* (i) the year containing the 10th ann'y of the year when the Young Beneficiary reaches age 21 (i.e., by 12/31 of the year when the Young Bene reaches age 31) or (ii) the year after the year of P's death BUT NOTE: While use of the Age 31 Trust allows all Secondary Beneficiaries to be ignored, it does not change the rule applicable in the case of DBs→ if the Young Current Bene is a DB, 100% of P's plan or IRA must be withdrawn from the inherited IRA belonging to the Age 31 Trust by 12/31 of the year containing the 10th ann'y of P's death, even if that date is earlier than the date on which the Young DB will reach age 31 (*see* outline for more detail)
No DB (Non DB)	N/A	No RMDs required during years 1 - 4 following year of P's death 100% distribution required by 12/31 of year containing 5th ann'y of **P's** death	SB of Non DB (if any) subject to outer limit of 12/31 of year containing 5th ann'y of **P's** death	P did not name any beneficiary or P's named Bene predeceased P and "default beneficiary" per P's plan or IRA is P's "estate" or P's named beneficiary does not qualify as a DB (e.g., P named a beneficiary P's "estate" or a charity or a trust with both DBs and charity as "countable" beneficiaries)

PARTICIPANT ("P") DIES ON OR AFTER RBD				
P's Beneficiary	**P's YOD RMD To Bene?**	**Distributions to P's Bene after P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Surviving Spouse (SS): **SS does *not* make the 327 Election** (SS is still an EDB)	Yes (to extent not taken by P prior to P's death)	RMDs to SS begin by 12/31 of year after P's death, based on *longer of* SS's SLE from SLT, *recalculated* each year (likely interpretation based on prior rules), or P's ghost life expectancy, subject to "shorter of rule"	SB of SS takes RMDs, beginning by 12/31 of year after SS's death, based on distribution method SS was using, subject to outer limit of 12/31 of year containing 10th ann'y of SS's death	1) For SS to be EDB, (a) P must have named as beneficiary either SS outright or conduit trust for sole current benefit of SS and (b) if outright, SS did not roll over P's plan or IRA to SS's plan or IRA or assume ownership of P's IRA 2) If SS not sole beneficiary of P's entire plan or IRA, assume separate account timely created for SS's share 3) "Shorter of rule" provides: outer limit for distrib'n period is final year of P's ghost life expectancy or year when SS's LE becomes ≤ 1, whichever comes first

PARTICIPANT ("P") DIES ON OR AFTER RBD				
P's Beneficiary	**P's YOD RMD To Bene?**	**Distributions to P's Bene after P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Surviving Spouse (SS): **SS *does* make the 327 Election** (SS is still an EDB)	Yes (to extent not taken by P prior to P's death)	RMDs to SS begin by 12/31 of year after P's death, based on SS's LE per ULT, recalculated each year	1) Due to 327 election, SS's Bene is Bene named by SS ∴ SS's Bene ≠ SB 2) Distribution rule for SS's Bene depends on status of SS's Bene (apply rules on SS's death *as if SS were P*) 3) If SS's Bene is an EDB, use applicable EDB distrib'n rule, with RMDs beginning by 12/31 of year after SS's death, subject to outer limit of 12/31 of year containing 10th ann'y of EDB's death; 4) If SS's Bene is a DB, RMDs after SS's death based on SS's SLE (no recalculation), subject to outer limit of 12/31 of year containing 10th ann'y of SS's death; 5) If SS's Bene is a Non DB, use SS's ghost life expectancy, with outer limit of 12/31 of year containing 10th ann'y of SS's death	1) For SS to be EDB, (a) P must have named as beneficiary either SS outright or conduit trust for sole current benefit of SS and (b) if outright, SS did not roll over P's plan or IRA to SS's plan or IRA or assume ownership of P's IRA 2) If SS not sole beneficiary of P's entire plan or IRA, assume separate account timely created for SS's share
P's Child Under Age 21 ("PMC") Assume PMC is sole bene of separate share	Yes (to extent not taken by P prior to P's death)	RMDs to PMC begin by 12/31 of year after P's death, based on PMC's SLE per SLT; PMC becomes DB when reaches age of majority (age 21); Full distribution to PMC by 12/31 of year containing 10th ann'y of PMC reaching age of majority (i.e., by 12/31 of year when PMC reaches age 31)	If PMC dies prematurely, SB of PMC continues RMDs based on PMC's SLE per SLT, with full distribution to SB by 12/31 of year containing 10th ann'y of *the earlier of* (i) PMC's death or (ii) PMC reaching the age of majority	1) For PMC to be EDB, P must have named as bene: (i) PMC outright (could lead to guardianship or court-managed trust if PMC under 18), (ii) conduit trust for PMC as sole bene, or (iii) UTMA custodian for PMC. 2) For pot trust for multiple children of P, *see* next section

PARTICIPANT ("P") DIES ON OR AFTER RBD				
P's Beneficiary	**P's YOD RMD To Bene?**	**Distributions to P's Bene after P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Conduit Pot Trust for P's Children Assume all Current Beneficiaries of trust qualify as PMCs as of P's date of death	Yes (to extent not taken by P prior to P's death)	RMDs begin by 12/31 of year after P's death, based on SLE per SLT of oldest PMC Full distribution req'd (and trust must provide for full distribution) by 12/31 of year containing 10th ann'y of year when oldest PMC reaches age of majority (i.e., by 12/31 of year when oldest PMC reaches age 31)	If oldest PMC dies prematurely, SB continues RMDs based on SLE of oldest PMC, with full distribution req'd by year containing 10th ann'y of *the earlier of* (i) year of oldest PMC's death or (ii) year when oldest PMC reached the age of majority	Can have a conduit pot trust for multiple PMCs Conduit pot trust for multiple PMCs (i.e., all Current Benes are PMCs) is an EDB Oldest PMC = *the* EDB (whose LE is used to calculate RMDs)
See-Through Trust with at least one Current Beneficiary being a PMC and one "countable" Beneficiary being a DB	Yes (to extent not taken by P prior to P's death)	RMDs begin by 12/31 of year after P's death, based on SLE per SLT of oldest "countable" beneficiary of trust (whether that bene is a DB or a PMC)	Full distribution by 12/31 of year containing 10th ann'y of *earlier of* (i) oldest PMC's death or (ii) oldest PMC reaching age of majority (i.e., when oldest PMC reaches age 31)	If have an accumulation trust for multiple beneficiaries, as long as no Non DBs are "countable" beneficiaries (including "countable" Secondary Beneficiaries) and at least one Current Beneficiary is a PMC, get "modified" PMC rule instead of standard DB rule
Disabled or Chronically Ill Individual (D/C Bene)	Yes (to extent not taken by P prior to P's death)	RMDs to D/C Bene begin by 12/31 of year after P's death, based on *longer of* D/C Bene's SLE per SLT or P's ghost life expectancy, subject to "shorter of rule"	SB of D/C Bene takes RMDs beginning by 12/31 of year after D/C Bene's death, based on D/C Bene's distribution method, subject to outer limit of 12/31 of 10th ann'y of D/C Bene's death	1) For D/C Bene to be EDB, P must have named as bene: (i) D/C bene outright (may lead to guardianship or court-managed trust or 1st party SNT), (ii) conduit trust for D/C Bene, or (iii) AMBT for D/C Bene 2) "Shorter of rule" provides that outer limit for distribution period is final year of P's ghost life expectancy or year when D/C Bene's life expectancy becomes ≤ 1, whichever comes first

PARTICIPANT ("P") DIES ON OR AFTER RBD				
P's Beneficiary	**P's YOD RMD To Bene?**	**Distributions to P's Bene after P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Individual Not More Than 10 years Younger Than P (NMT Bene)	Yes (to extent not taken by P prior to P's death)	RMDs to NMT Bene begin by 12/31 of year after P's death, based on *longer of* NMT Bene's SLE per SLT or P's ghost life expectancy, subject to "shorter of rule"	SB of NMT Bene takes RMDs beginning by 12/31 of year after NMT Bene's death, based on NMT Bene's distribution method, subject to outer limit of 12/31 of 10th ann'y of NMT Bene's death	1) For NMT Bene to be EDB, P must have named as bene: (a) NMT Bene outright or (b) conduit trust for NMT Bene 2) "Shorter of rule" provides that outer limit for distribution period is final year of P's ghost life expectancy or year when NMT Bene's life expectancy becomes ≤ 1, whichever comes first
Designated Beneficiary (DB)	Yes (to extent not taken by P prior to P's death)	RMDs to DB begin by 12/31 of year after P's death based on *longer of* DB's SLE per SLT or P's ghost life expectancy, with full distribution to DB req'd by 12/31 of year that contains 10th ann'y of **P's** death	SB of DB takes RMDs, beginning by 12/31 of year after DB's death, continuing DB's distribution method, subject to outer limit (if not already exhausted) of 12/31 of year containing 10th ann'y of **P's** death	P's named beneficiary must qualify as a DB For a trust named as beneficiary to qualify for "DB treatment," the 4 trust regulatory req'ts must be met and all "countable" beneficiaries of trust (including "countable" Secondary Beneficiaries) must be DBs (no Non DBs can be "countable" beneficiaries of trust)

PARTICIPANT ("P") DIES ON OR AFTER RBD				
P's Beneficiary	**P's YOD RMD To Bene?**	**Distributions to P's Bene after P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
Age 31 Trust for sole benefit of "Young Beneficiary" "Young Beneficiary" can be any beneficiary under age 31 as of P's date of death In this example, *assume the Young Beneficiary is a DB*	Yes (to extent not taken by P prior to P's death)	RMDs to Age 31 Trust begin by 12/31 of year after P's death based on *longer of* Young DB's SLE per SLT or P's ghost life expectancy (Secondary Beneficiaries of Age 31 Trust are ignored in terms of calculating RMDs) Trust must be designed so that Young DB is sole Current Beneficiary and must be designed to terminate by *the later of* (i) the year containing the 10th ann'y of the year the Young DB reaches the age of majority (i.e., by 12/31 of the year when the Young DB reaches age 31) or (ii) the year after the year of P's death Because the Young Bene is a DB in this example, full distribution of P's Plan Benefits req'd by 12/31 of the year containing the 10th ann'y of P's death	SB of Age 31 Trust takes RMDs, beginning by 12/31 of year after Young DB's death, continuing DB's distribution method, subject to outer limit (if Plan Benefits not already exhausted) of 12/31 of year containing 10th ann'y of **P's** death WARNING: Due to the multiple beneficiary rules and separate account rules, until regulations provide otherwise, the Age 31 Trust should be designated in P's beneficiary designation to receive its own share as a beneficiary of P's plan or IRA (do not name P's revocable trust or the Trustee in P's Will as the beneficiary of P's plan or IRA with separate share for Age 31 Trust created within P's revocable trust or Will)	The so-called "Age 31 Trust" is a trust for the sole benefit of a Young Current Beneficiary which allows all Secondary Beneficiaries to be ignored as long as the trust is designed to require full distribution of P's Plan Benefits by 12/31 of *the later of* (i) the year containing the 10th ann'y of the year the Young Bene reaches the age of majority (i.e., by 12/31 of the year when the Young Bene reaches age 31) or (ii) the year after the year of P's death BUT NOTE: While use of the Age 31 Trust allows all Secondary Beneficiaries to be ignored (i.e., the LE of the oldest Secondary Beneficiary is *not* used to calculate RMDs), it does not change the rule applicable to DBs→ if the Young Bene is a DB, 100% of P's plan benefits must be withdrawn from the inherited IRA belonging to the Age 31 Trust by 12/31 of the year containing the 10th ann'y of P's death, even if that date is earlier than the date on which the Young Bene will reach age 31

PARTICIPANT ("P") DIES ON OR AFTER RBD				
P's Beneficiary	**P's YOD RMD To Bene?**	**Distributions to P's Bene after P's Death**	**Successor Beneficiary (SB) Distribution Rule/Outer Limit**	**Notes/Comments**
No DB (Non DB)	Yes (to extent not taken by P prior to P's death)	RMDs must begin by 12/31 of year after P's death based on P's "ghost life expectancy" (P's SLE per SLT not recalculated)	SB of Non DB (if any) takes RMDs, beginning by 12/31 of year after Non DB's death (if applicable—this won't apply in cases where Non DB is an entity) based on P's ghost life expectancy, subject to outer limit for full distribution (if not already exhausted) of 12/31 of year containing 10th ann'y of **P's** death	P did not name any beneficiary or P's named Bene predeceased P and "default beneficiary" per P's plan or IRA is P's "estate" or P's named beneficiary does not qualify as a DB (e.g., P named as beneficiary P's "estate" or a charity or a trust with both DBs and charity as "countable" beneficiaries)

EXHIBIT F
BENEFICIARY DESIGNATION CONSIDERATIONS

I. Preliminary Matters

A. Defined Terms

Terms used in the Chart	Definition/Meaning/Comment
P	"P" or "Participant" refers to the employee or retiree who participates in a qualified plan and the named owner of an IRA
Plan	The term "plan" or "retirement plan" can refer to the qualified plan in which P is a participant and can refer to an IRA titled in P's name
Bene	Beneficiary
DB or "Plain Old DB"	A "DB" or "Designated Beneficiary" is an individual who has been named as a beneficiary of P's Plan. Only individuals can be Designated Beneficiaries. In the case of a "see-through trust" named as the beneficiary of P's Plan, the individual beneficiaries of the trust whose interests in P's Plan must be taken into account (i.e., the "countable beneficiaries") are the beneficiaries of P's Plan. If all countable trust beneficiaries are DBs, then the trust will qualify for "DB treatment." A "Plain Old DB" (not an official term) is a DB who is *not* an "eligible designated beneficiary" or EDB
EDB or "Eligible Designated Beneficiary"	An "EDB" is special type of Designated Beneficiary who is entitled to some sort of life expectancy distribution with respect to inherited Plan Benefits (the applicable distribution rule is not the same for all types of EDBs)
Inherited IRA	An inherited IRA is the usual form of benefit established for P's beneficiary on P's death (with certain exceptions for P's spouse as beneficiary) NOTE: If a trust is named as the beneficiary of P's Plan, an inherited IRA will be established for that trust and the inherited IRA will "belong to" that trust
LE	Life Expectancy
Non DB	A Non DB is a beneficiary of P's Plan who is *not* a DB (examples: P's "estate," a charity, and a trust that does not qualify for "DB treatment")
Plan Administrator	This term is used to refer to the administrator of a qualified plan and also to the custodian (or trustee) of an IRA
Plan Benefits	Participant's interest in a qualified plan distributable upon Participant's death or Participant's IRA distributable upon Participant's death (as applicable)
Plan Documents	All "official" documents relating to an employee benefit plan and all "official" documents relating to an IRA, including "default" beneficiary provisions
PMC	A child of the Participant who has not reached the "age of majority" (age 21) by the Participant's date of death
Separate Shares/ Separate Accounts	If P names multiple beneficiaries *of a single Plan* <u>in the beneficiary designation</u> capable of being divided pursuant to the wording used in the beneficiary designation and the Plan is actually divided into separate shares or separate accounts by December 31 of the year following the year of P's death, then "separate account treatment" is available

B. 2024 Federal Income Tax Top Bracket Thresholds

Taxpayer	Top bracket (37%) reached when taxable income is over:
Married Filing Jointly/Surviving Spouses	$731,200
Single Individual	$609,350
Accumulation Trusts (Non Grantor Trusts)	$15,200

II. Beneficiary Designation Considerations for Qualified Plans and Pre-Tax IRAs*

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
Individual who is Disabled or Chronically Ill (D/CI)	AMBT (Applicable Multi-Beneficiary Trust) *or* Participant's Revocable Trust if it qualifies as a Type I AMBT	1. Qualifies for EDB treatment (even though an AMBT is an accumulation trust) 2. Compatible with properly drafted SNT 3. Lifetime trust (no "premature" termination of trust or “premature” distribution of Plan Benefits) 4. Life expectancy (LE) distribution for RMDs, which must commence by 12/31 of year after P’s death[1] 5. Otherwise "countable" remainder beneficiaries ignored in terms of calculating RMDs while D/CI is alive 6. During lifetime of D/CI, no distributions can be made to anyone other than D/CI (except other D/CIs who are current beneficiaries of the trust) 7. Can name a revocable trust that splits into separate shares on Participant's death and still obtain separate account treatment for AMBT (this is an exception to the separate account rule) 8. Trustee has discretion to accumulate RMDs in trust (no mandatory distribution to D/CI beneficiary) 9. RMDs retained in trust taxable to trust at trust's tax rate 10. Charity can be remainder beneficiary of AMBT per SECURE 2.0 and trust will still qualify for EDB treatment
Individual Not More than 10 Years Younger than P (NMT)	Outright[2]	1. Qualifies for EDB treatment 2. Simple 3. Life expectancy (LE) distribution for RMDs, which must commence by 12/31 of year after P’s death[1] 4. RMDs taxable at NMT's tax rate 5. NMT names successor beneficiary/ies
	Conduit Trust	1. Qualifies for EDB treatment 2. Life expectancy (LE) distribution for RMDs, which must commence by 12/31 of year after P’s death[1] 3. RMDs taxable at NMT's tax rate 4. Control of inherited IRA by Trustee 5. P names remainder beneficiary/ies
	Accumulation Trust	1. Does not qualify for EDB treatment 2. Assuming no Non DBs are “countable” beneficiaries of trust, Trust will qualify for DB treatment and applicable 10 Year Rule[3] 3. RMDs retained in trust taxable at trust’s tax rate 4. RMDs distributed out of trust taxable to recipient 5. Control of inherited IRA by Trustee 6. P names remainder beneficiary/ies

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
Spouse - Traditional Marriage	Outright[2]	1. Qualifies for EDB treatment 2. Simple 3. Preserves rollover option for Spouse 4. Qualifies for applicable life expectancy (LE) distribution if no rollover[1] 5. Spouse names successor beneficiary/ies
	Conduit Trust	1. Qualifies for EDB treatment 2. No rollover option for Spouse (usually) 3. Qualifies for applicable life expectancy (LE) distribution[1] 4. RMDs taxable to Spouse at Spouse's tax rate 5. Lower RMDs if Section 327 election made by Spouse[4] 6. Control of P's Plan Benefits by Trustee 7. P names remainder beneficiary/ies
	Accumulation Trust	1. Does not qualify for EDB treatment 2. No rollover option for Spouse (usually) 3. Assuming no Non DBs are “countable” beneficiaries of trust, Trust will qualify for DB treatment and applicable 10 Year Rule[3] 4. RMDs retained in trust taxable at trust’s tax rate but RMDs distributed to Spouse taxable to Spouse at spouse’s tax rate 5. Trust can have other current beneficiaries, such as children--RMDs distributed to them taxed to them 6. Control of P’s Plan Benefits by Trustee 7. P names remainder beneficiary/ies
Spouse - Blended Family	Outright[2]	1. Qualifies for EDB treatment 2. Simple 3. Preserves rollover option for Spouse 4. Qualifies for applicable life expectancy (LE) distribution if no rollover[1] 5. Spouse controls P’s plan and names successor beneficiary/ies - P may not want this
	Conduit Trust	1. Qualifies for EDB treatment 2. No rollover option for Spouse (usually) 3. Qualifies for applicable life expectancy (LE) distribution[1] 4. RMDs taxable to Spouse at Spouse's tax rate 5. Control of P's Plan Benefits by Trustee 6. P names remainder beneficiary/ies 7. Spouse may be able to elect 10 year rule if P participates in a DCP and dies before RBD, which means no amount of P’s Plan Benefits will remain for distribution to remainder beneficiaries after 12/31 of year containing 10th anniversary of P’s death

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
	Accumulation Trust	1. Does not qualify for EDB treatment 2. Assuming no Non DBs are "countable" beneficiaries of trust, Trust will qualify for DB treatment and applicable 10 Year Rule[3] 3. RMDs retained in trust taxable to trust at trust's tax rate, but RMDs distributed to Spouse taxable to Spouse at Spouse's tax rate 4. Trust can have other current beneficiaries, such as children--RMDs distributed to them taxed to them 5. Control of P's Plan Benefits by Trustee 6. P names remainder beneficiary/ies
P's Adult Responsible Child (PAC)	Outright[2]	1. Applicable 10 year rule[3] (PAC is *not* an EDB) 2. Simple 3. RMDs and other distributions to PAC taxable to PAC at PAC's tax rate 4. Inherited IRA has creditor protection in Texas and in approximately 22 – 25 other states 5. Only 3 states (TX, LA, ID) provide that income earned inside PAC's inherited IRA is community property ("CP income"); if all CP income is distributed out of inherited IRA to PAC each year, inherited IRA will be PAC's separate property (and there is no CP income issue if PAC lives in one of the other 47 states or Washington, D.C.) 6. PAC names successor beneficiary/ies
	Conduit Trust	1. Applicable 10 year rule[3] (PAC is *not* an EDB) 2. RMDs and other distributions to PAC taxable to PAC at PAC's tax rate 3. Creditor protection for inherited IRA belonging to trust per spendthrift trust provision (even if PAC lives in state with no statute protecting inherited IRAs from creditors' claims) 4. Income earned inside inherited IRA belonging to trust should not be community property per Texas law - *see Sharma v. Routh*[5] 5. Control of inherited IRA by Trustee 6. P names remainder beneficiary/ies 7. Is it worth having P's Plan Benefits go into a trust for only 10 years' worth of creditor protection (assuming creditor protection not otherwise available per applicable state law)?

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
	Accumulation Trust	1. Applicable 10 year rule[3] (PAC is *not* an EDB) 2. Creditor protection for inherited IRA belonging to trust per spendthrift trust provision (even if PAC lives in state with no statute protecting inherited IRAs from creditors' claims) 3. Income earned inside inherited IRA belonging to trust should not be community property per Texas law – *see Sharma v. Routh*[5] 4. Assuming no Non DBs are "countable" beneficiaries of trust, RMDs during PAC's life (if applicable) based on LE of oldest "countable" beneficiary of trust (including "countable" remainder beneficiaries of trust) 5. RMDs retained in trust taxable at trust's tax rate, but RMDs distributed to one or more permissible current beneficiaries of trust taxed to each recipient at recipient's tax rate
P's Child Under Age 21 (PMC)	Outright[2]	1. Qualifies for EDB treatment 2. Can be the result of a "default beneficiary" per Plan Documents 3. Not recommended if PMC is under age 18 because a legal guardianship of PMC's estate (expensive, cumbersome) may need to be created to receive P's Plan Benefits 4. RMDs commence by 12/31 of year after P's death, based on LE of PMC, subject to possibility of 10 Year Rule if P dies before RBD participating in a DCP[3] 5. RMDs taxable to PMC at PMC's tax rate (subject to "Kiddie Tax," if applicable) 6. Full amount remaining in PMC's inherited IRA distributable to PMC by 12/31 of year when PMC reaches age 31 7. PMC may not be financially prudent to handle annual RMDs and/or final distribution at age 31

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
	Custodian per TUTMA	1. Qualifies for EDB treatment 2. TUTMA "better" than legal guardianship of PMC's estate (simpler, not expensive), but TUTMA arrangement terminates when PMC reaches age 21 (still young) 3. Using a TUTMA designation for PMC in beneficiary designation may be more readily accepted by Plan Administrators than naming a trust for PMC as beneficiary 4. RMDs to PMC begin by 12/31 of year after P's death and continue until 12/31 of year when PMC reaches age 31[1] 5. Prior to PMC reaching age 21, custodian controls inherited IRA 6. RMDs taxable to PMC at PMC's tax rate (subject to "Kiddie Tax," if applicable) 7. After termination of TUTMA arrangement, PMC may not be financially prudent to handle annual RMDs and/or final distribution at age 31 8. Creditor protection based on applicable state law
	Conduit Trust	1. Qualifies for EDB treatment 2. RMDs to PMC begin by 12/31 of year after P's death and continue until 12/31 of year when PMC reaches age 31[1] 3. RMDs can be distributed to *or for the benefit of* PMC (Proposed Regulations approved facility of payment for conduit trusts) 4. RMDs taxable to PMC at PMC's tax rate (subject to "Kiddie Tax," if applicable) 5. Creditor protection during period when inherited IRA still held in trust 6. Trustee controls inherited IRA belonging to trust 7. P names remainder beneficiary/ies 8. Full amount remaining in inherited IRA distributable to PMC by 12/31 of year when PMC reaches age 31 – PMC may not be financially capable of managing full distribution received upon reaching age 31

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
	Accumulation Trust to age 31: "Age 31 Trust"	1. Must be a single beneficiary trust 2. Safest course is to provide for separate trusts in the beneficiary designation itself rather than naming revocable trust that splits on P's death (because the only stated exception to separate accounts rule is for AMBTs) 3. Trust instrument must provide that trust terminates when PMC reaches age 31 and full amount remaining in inherited IRA belonging to trust must be distributed to PMC by 12/31 of year when PMC reaches age 31 4. Qualifies for EDB treatment because sole current beneficiary of trust (PMC) is an EDB and the remainder beneficiaries of the trust are not "counted" for purposes of the RMD Rules (therefore, the remainder beneficiaries can be older than the PMC and can even be a Non DB) 5. RMDs to PMC begin by 12/31 of year after P's death based on LE of PMC and continue until 12/31 of year when PMC reaches age 31 (remainder beneficiaries are ignored for purposes of calculating RMDs during the term of the trust)[3] 6. During the term of the trust, Trustee can retain RMDs in the trust but trust will pay income taxes on those retained RMDs at trust's tax rate (trusts have very low threshold to reach 37% rate) 7. RMDs distributed to PMC taxable to PMC at PMC's tax rate (subject to "Kiddie Tax," if applicable) 8. PMC may not be financially capable of handling final distribution from inherited IRA upon reaching age 31
	Accumulation Trust for Life	1. Trust does not qualify for EDB rule – assuming the trust does not have a "countable" Non DB, trust would qualify for DB treatment and the applicable 10 Year Rule[3] 2. Creditor protection for distributions from inherited IRA retained in trust - may be the best choice if P's Child is a spendthrift, although the cost is very high - trust will pay income taxes on nearly 100% of retained distributions at 37% 3. Oldest "countable" beneficiary of the trust (including oldest "countable" remainder beneficiary) is individual whose LE is used to calculate RMDs if P dies after RBD[3] 4. Control of inherited IRA by Trustee 5. P names remainder beneficiary/ies 6. Distributions from inherited IRA retained in trust should not be considered CP income per Texas law – see *Sharma v. Roth*[5]
"Pot Trust" for Multiple PMCs or for at least one PMC plus at least one DB – *See* Exhibit E		

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
"Young Individual" who is not a child of P (YI)	Outright[2]	1. This is OK if YI is not a minor 2. Applicable 10 Year Rule[3] (YI is *not* an EDB—just a DB) 3. Depending on YI's age when P dies, full amount in inherited IRA may be distributed while YI is still a minor (due to 10 Year Rule) 4. Creditor protection for YI's inherited IRA depends on applicable state law 5. If YI is married and living in Texas, whether or not RMDs are required (RMDs not required if P dies before RBD-just final distribution per 10 year rule), YI can withdraw income earned inside inherited IRA to remove that CP income from inherited IRA (but, eventually, entire inherited IRA will have to be withdrawn by YI)
	TUTMA Custodian	1. If YI us under age 21 when P dies, this approach can be used 2. Applicable 10 Year Rule[3] (YI is *not* an EDB—just a DB) 3. Using a TUTMA designation for YI in beneficiary designation may be more readily accepted by Plan Administrator than naming a trust for YI as beneficiary 4. Depending on YI's age when P dies, full amount in inherited IRA may have to be withdrawn while YI is still a minor (due to 10 year rule), but custodian can control withdrawn amounts prior to YI reaching age 21
	Conduit Trust	1. Applicable 10 Year Rule[3] (YI is *not* an EDB—just a DB) 2. If P dies after RBD, RMDs based on LE of YI 3. RMDs can be distributed to *or for the benefit of* YI (Proposed Regulations approved facility of payment for conduit trusts) 4. RMDs and final distribution taxable to YI at YI's tax rate 5. Creditor protection for inherited IRA belonging to trust per spendthrift trust provision (even if PAC lives in state with no statute protecting inherited IRAs from creditors' claims) 6. Income earned inside inherited IRA should not be community property per Texas law - *see Sharma v. Routh*[5] 7. Control of inherited IRA by Trustee 8. P names remainder beneficiary/ies
	Accumulation Trust to age 31: "Age 31 Trust"	1. Applicable 10 Year Rule[3] (YI is *not* an EDB—just a DB) 2. Must be a single beneficiary trust to qualify 3. Safest course is to provide for separate trusts in the beneficiary designation itself rather than naming revocable trust that splits on P's death (because the only stated exception to the separate accounts rule is for a Type I AMBT) 4. Trust instrument must provide that trust terminates when YI reaches age 31 and full amount remaining in

BENEFICIARY	BENEFICIARY DESIGNATION	COMMENTS
		inherited IRA must be distributed to YI by 12/31 of year when YI reaches age 31 5. If P dies after RBD, RMDs during years 1 – 9 based on LE of YI because the remainder beneficiaries of the trust are not "counted" for purposes of the RMD Rules (therefore, the remainder beneficiaries can be older than the PMC and can even be a Non DB) 6. During the term of the trust, Trustee can retain RMDs in the trust, but trust will pay income taxes on those retained RMDs at trust's tax rate (very low threshold to reach 37% rate) 7. RMDs distributed to YI taxable to YI at YI's tax rate (subject to "Kiddie Tax," if applicable) 8. YI may not be financially capable of handling full distribution upon reaching age 31

*A Roth IRA (or a Roth 401(k) plan or other Roth qualified plan) is an "after-tax" asset and can be distributed to an irrevocable, complex trust without the income tax concerns applicable when a pre-tax IRA (or pre-tax qualified plan) is distributed to an irrevocable, complex trust; however, the non tax considerations in the above charts still apply.

END NOTES

[1] Distribution rules applicable to EDBs: If P dies before RBD and Bene is an EDB, RMDs normally based on EDB's LE, commencing by December 31 of year after P's death, except that, if P's plan is a DCP, 10 year rule may apply or be an option instead of distribution based on EDB's LE; P's spouse can delay commencement of RMDs if P dies before RBD and P's spouse makes the Section 327 election per SECURE 2.0; if P dies on or after RBD and Bene is an EDB, RMDs based on longer of P's LE or EDB's LE, subject to "shorter of rule" (*see* Exhibit E)

[2] Do not name a D/CI individual as an outright beneficiary — if individual is D/CI, name a Type I or Type II AMBT as bene; do not name P's minor child as an outright beneficiary

[3] Distribution rules applicable to DBs: If P dies *before* RBD, no RMDs required in years 1 through 9 following year of P's death, but 100% of inherited IRA distributable to DB by 12/31 of year containing 10th anniversary of P's death; if P dies *on or after* RBD, RMDs commence by 12/31 of year following year of P's death based on longer of DB's LE or P's LE, with 100% of inherited IRA distributable to DB by 12/31 of year containing 10th anniversary of P's death (*see* Exhibit E)

[4] If spouse makes the Section 327 election per SECURE 2.0, RMDs calculated using Uniform Lifetime Table (ULT) instead of Single Life Table (SLT) — ULT adds 10 years to spouse's LE and, therefore, results in lower RMDs.

[5] *Sharma v. Routh*, 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.], 2009, no pet.).