The Estate Planner's Guide to

The Treasury's Proposed Regulations Regarding SECURE's Changes to the Minimum Distribution Rules (and a Few Other Things)

Natalie B. Choate, Esq.
Law Office of Natalie B. Choate/Ataxplan Publications
Wellesley, Massachusetts
www.ataxplan.com

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Preface

On February 23, 2022, the Treasury issued a Notice of Proposed Rulemaking regarding required distributions from IRAs and certain other retirement plans. It can be found at: https://www.federalregister.gov/documents/2022/02/24/2022-02522/required-minimum-distributions

The 275-page Notice contains proposed changes to the Treasury regulations dealing with required minimum distributions (RMDs) from defined contribution plans, primarily to deal with changes made in the Tax Code by the SECURE Act (December 2019), but also covering other retirement plan issues more or less related to RMDs such as rollovers, as well as matters primarily of interest to plan administrators. Some of the changes are in the form of a proposed amendment to an existing regulation; others would replace an existing regulation.

This Outline covers only the updates to the minimum distribution rules.

This Outline assumes the reader is generally familiar with the "minimum distribution rules" of the Internal Revenue Code of 1986 as amended through 2021 (the "Code") and regulations thereunder. For fuller explanations, see the applicable sections (indicated by the "¶" symbol) of the author's book *Life and Death Planning for Retirement Bene fits* (8th ed. 2019; www.ataxplan.com).

What is not covered in this Outline

The following matters dealt with in the Proposed Regulations and/or SECURE are not covered in this outline:

- QDROs
- QLACs
- Defined benefit plans and annuities
- The delayed SECURE effective date for certain collectively bargained and government retirement plans.
- TEFRA 242(b) elections
- The applicability of SECURE to annuities purchased prior to SECURE's effective date.
- How the minimum distribution rules apply to an annuity contract purchased inside an IRA or other defined contribution plan account. See Prop. Reg. § 1.401(a)(9)-5(a)(5).
- Lifetime RMDs to a participant whose sole beneficiary is more than 10 years younger spouse.
- Treatment of nonvested amounts in the employee's account.
- Rollovers.
- Parts of the minimum distribution rules that *appear at first glance* not to be modified from the existing regulations, such as how to compute the account balance

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Abbreviations, Symbols, and Terms Used in this Outline

The following terms and abbreviations are used throughout this Outline. Fuller definitions are provided in the Outline section, law or regulation cited. In the Outline, terms are sometimes abbreviated as shown below, and sometimes written out fully with or without being capitalized.

§ Refers to a section of the Code, unless otherwise indicated.
¶ Refers to a section of the author's book *Life and Death Planning for Retirement Benefits* (8th ed. 2019), www.ataxplan.com or (ebook version) www.retirementbenefitsplanning.us.

Accumulation Trust A see-through trust that is not a conduit trust. Prop. Reg. § 1.401(a)(9)-4(f)((1)(ii)(B). PART X(A).
Applicable Denominator The amount to be divided into the account balance to determine the RMD. Would replace the term "Applicable distribution period." See PART II.
AMBT Applicable multi-beneficiary trust. § 401(a)(9)(H)(v). PART XVIII.
BFD Beneficiary Finalization Date; September 30 of year after year of participant's death.
Code Internal Revenue Code of 1986, as amended through February 28, 2022.
Conduit Trust See PART X(A).
DB Designated Beneficiary. PARTs II(C), X(B).
D/CI individual Disabled or chronically ill individual. PART VIII.
Distribution Year Called a "Distribution Calendar Year" in the regulations, a year in which a distribution is required to be made from the retirement account. Prop. Reg. § 1.401(a)(9)-5(a)(2).
EDB Eligible Designated Beneficiary. PART V.
IRA Individual retirement account or individual retirement trust under § 408.
IRS Internal Revenue Service.
NoMoTTYY Not more than 10 years younger (category of EDB). See PARTs II(A) and IX.
Non-DB A beneficiary who is not a designated beneficiary.
Outer Limit Year See explanation in "Introduction: Terminology..."
QRP Qualified retirement plan under § 401(a), such as a 401(k) plan.
Participant In the case of an IRA, the IRA owner. In the case of employer-created retirement plans, the employee. See "Introduction."
PODB Plain old designated beneficiary. A designated beneficiary who is not an EDB.
PLR IRS private letter ruling.
Reg. Treasury Regulation.
RBD Required Beginning Date.
RMD Required minimum distribution under § 401(a)(9).
See-through trust. A trust that complies with the "4 RMD trust rules." PART X(A).
Treasury The United States Treasury Department.

Introduction: Terminology: Theirs and Mine

I have had to add some invented non-official terminology in hopes of making the Proposed Regulations as accessible as possible. The unofficial terms used in this Outline include "participant,""Annual Distributions Track," "Outer Limit Year," and "First Tier," "Second Tier," and "Third-Tier" beneficiaries.

Employee = IRA Owner = Participant

This Outline deals with "individual account"-type retirement benefits, of which the best known are individual retirement accounts (IRAs, including Roth IRAs) and "401(k)" accounts, but which also include "403(b) accounts," 401(a) money purchase pension plan and profit-sharing plan accounts, 457 plans, and some others. All of these are tax-favored accounts first funded by contributions from the compensation of a worker, whether the contributions are made by the worker himself or by the worker's employer on his behalf. In Treasury regulations governing distributions from these accounts, the worker is referred to as the "**employee**"—with the regulations specifying that the term employee means the IRA "owner" when applied to IRAs.

The **"IRA owner**" means "the individual for whom an IRA is originally established by contributions for the benefit of that individual and that individual's beneficiaries." Prop. Reg. § 1.408-8(a)(2).

But it is too cumbersome to constantly refer to the "employee or IRA owner as the case may be." And the term "IRA owner" can mislead the reader because after the death of the "IRA owner" the account is (in terms of familiar legal concepts) "owned" by the beneficiary. But if the beneficiary reads the regulations and thinks the word "IRA owner" or "employee" describes HIM, things will go astray. And even the term "worker" doesn't quite cover the situation, because contributions can be made to an IRA based on income that is not derived from "work" of the IRA owner, such as compensation earned by the IRA owner's spouse (living or deceased), alimony payments, military payments, oil spill reparations, etc. See ¶ 5.4.01 of *Life and Death Planning for Retirement Benefits*.

Trying to avoid these confusions, I sometimes the term **participant** to describe the individual who first establishes and owns an IRA (funded by his compensation income or other permitted source) or on whose behalf a 401(k) or other retirement plan account is established by his employer. "Participant" as used in this Outline is not a "legally correct" term. It is never used in the Code, regulations, or anywhere else to have the meaning given it here. I merely use it for convenience for reasons above stated. If you can think of a better term to describe the individual from whose compensation [or other permitted source] the retirement account is first established, and therefore to whom the lifetime minimum distribution rules apply, please let me know. Meanwhile, "participant," "employee," and "IRA owner" are used interchangeably in this Outline.

See-through trust, conduit trust, accumulation trust

The proposed regulations have a simple nomenclature for trusts named as beneficiary of a retirement plan. A trust can be a see-through trust by complying with certain administrative rules–valid under state law, irrevocable, etc. If it is a see-through trust, it is then tested to see whether

its countable beneficiaries qualify as designated beneficiaries. Whether it does or not depends on whether countable beneficiaries are individuals, and who is "countable" depends on whether the trust is a conduit or accumulation trust, with certain simple "disregard" rules created for determining which beneficiaries are countable. See PART X.

First-, Second-, and Third-Tier Beneficiaries

See "The New RMD Trust Rules" for these terms I made up to describe the Proposed Regulations' elegant system for testing trust beneficiaries for "designated beneficiary" status. See PART XI.

The Outer Limit Year

The IRS had its work cut out for it, to come up with minimum distribution rules for seven categories of beneficiaries (plain old designated beneficiary; non-designated beneficiary; and five types of eligible designated beneficiaries with four different RMD patterns), with, for each type, differences between participant death before vs. after the required beginning date, and then layer on different combinations of multiple beneficiaries (through trusts or otherwise). The Proposed Regulations' approach to this difficult problem is to lay out, for each beneficiary/participant death combination, rules for annual distributions (I call it the "annual distributions track") and a separate overriding rule about when the final distribution must occur (I call it the "outer limit year").

Prop. Reg. § 1.401(a)(9)-5(e) provides an Outer Limit Year [my term] or end cap for each minimum distribution pattern. Beneficiary X is required to take the following distributions [X% per year or whatever it is] but regardless of what that beneficiary's annual distribution requirement is, there is an Outer Limit Year in which the beneficiary must withdraw 100% of the account.

For example, if a Roth IRA is payable to a Plain Old Designated Beneficiary, the annual distribution pattern is zero required distributions per year, and the Outer Limit Year is the year that contains the 10th anniversary of the Roth IRA owner's death (100% of remaining funds must be withdrawn in that year). Sometimes, as in the Roth IRA example, the Outer Limit Year is the only year there is an RMD. In most cases the Outer Limit Year is the 10th year after something happened (the participant died, the eligible designated beneficiary died, the minor reached majority). But in effect in many cases the distributions must all come out by the end of someone's life expectancy or by the Outer Limit Year, whichever is earlier.

The Estate Planner's Guide to The Treasury's Proposed Regulations Regarding SECURE's Changes to the Minimum Distribution Rules (and a Few Other Things)

I. How SECURE changed planning for retirement benefits. Planners and their IRA-owning clients did not welcome SECURE's drastic changes to the minimum distribution rules, eliminating the life expectancy payout for most beneficiaries that so many had counted on. It appeared that SECURE might have one possible silver lining—by imposing a 10-year rule for most beneficiaries (for participant deaths either before or after the "required beginning date" or RBD), maybe at last the rules would get a little....simpler? No such luck.

A. Death before or after RBD matters more than ever. Though SECURE seemed to reduce the differences between the RMD rules for "death before the RBD" and "death after the RBD," the Treasury regulations continue and even increase that difference—with a vengeance. For example, the EDB of a participant who died before his RBD can elect to use the 10-year rule instead of the life expectancy payout. SECURE did not necessitate or even suggest that wrinkle. The EDB of a participant who died after his RBD? ...can't elect the 10-year rule (sorry).

B. Plan administrator full employment act. For some of the changes made by the Treasury's own proposed regulations, the Treasury needed to introduce still more complications. For example, since the proposed regulations allow an EDB to opt for the 10-year rule instead of the life expectancy payout (in cases of death before the RBD), the Treasury needed to then add rules about how the EDB's election would continue to apply to any IRA to which the original account was transferred after the election had been made. For example if the EDB inherited a 401(k) plan and elected the 10-year rule, then opted to have that plan transferred into an inherited IRA, the election would automatically apply to the transferee inherited IRA as well. This makes lots of work for plan administrators and IRA providers who need to revise all their forms. This opens the door for lots of future mistakes needing to be fixed as elections get lost, changed, or forgotten about when funds are transferred from one account to another.

C. Where to find the new minimum distribution rules. The RMD rules for the beneficiary of a participant who died on or after the RBD are in Prop. Reg. § 1.401(a)(9)-5(d)(1). If the participant died before the RBD, the rules are in two places: Prop. Regs. § 1.401(a)(9)-3(c) and § 1.401(a)(9)-5(d)(2).

II. Definitions and more new terminology. The proposed regulations provide definitions for some of SECURE's important terms, including "reaches majority" and other elements of the "eligible designated beneficiary" category. They also define some already-widely-used terminology, including "see-through trust," "conduit trust," and "accumulation trust," for the first time. The proposed regs would change some existing terms: For example, the terms

"applicable distribution period" and "divisor" would mostly be replaced with "applicable denominator" or just "denominator." See Prop. Reg. § 1.401(a)(9)-5(d) and proposed amendments to Reg. § 1.401(a)(9)-9.

A. Not more than 10 years younger ("NoMoTTYY"): The proposed regulations define this category of EDB based on the actual dates of the parties' birth, not the *year* of birth: "Prop. Reg. § 1.401(a)(9)-4(e)(6): "Individual not more than 10 years younger than the employee. Whether a designated beneficiary is not more than 10 years younger than the employee is determined based on the dates of birth of the employee and the beneficiary. Thus, for example, if an employee's date of birth is October 1, 1953, then the employee's beneficiary is not more than 10 years younger than the employee if the beneficiary was born on or before October 1, 1963."

- **Comment:** In determining lifetime required distributions, the participant uses the "Uniform Lifetime Table" unless his sole Designated Beneficiary (DB) is his spouse, in which cases his distribution period or divisor is the "longer of" the factor determined by the Uniform Lifetime Table or the joint life expectancy of himself and his spouse-DB. This effectively means that he will have a longer "distribution period" if his spouse was born in a year more than 10 years later than the participant's birth-year, and is commonly referred to, including by the IRS as a tax break (because there will be smaller required distributions) for a participant with a "more than 10 years younger" spouse. Is it inconsistent for the IRS to use actual birth *days* to determine "more than 10 years younger" for purposes of determining EDB status, while in effect using birth *years* to determine the distribution period for a participant with a "more than 10 years younger" spouse? Not at all: The "break" for lifetime RMDs sometimes known as the "much younger spouse rule," is based on birth *years* not birth *days*. If your spouse's birth *year* was more than 10 years after your birth year, your RMD factor will be larger than that produced by the ULT. This gets abbreviated to saying the spouse is "more than 10 years younger" than you (and in fact if your spouse was born in a year more than 10 years after your birth-year he/she must by definition be more than 10 years younger than you), but in fact your spouse could be more than 10 years younger than you and NOT produce smaller lifetime RMD: If your spouse's birth year was only 10 years later than yours, he/she could be as much as almost 11 years younger than you and still count as "only" 10 years younger for this purpose.

- SECURE specifies that, to be an EDB, the designated beneficiary must be more than 10 years younger than the participant. It did not say the beneficiary must have been "born in a year more than 10 years later than" the participant's birth year. Thus the proposed regulations have properly used the

beneficiary's actual birthdate to determine whether he/she is more than 10 years younger than the participant.

B. **Reaches majority.** The proposed regulations adopt attaining age 21 as the definition of "reaching majority" regardless of whether applicable state law may have an earlier or later definition (though the Preamble avers that no state has an older age than 21 at this time). An exception is allowed for defined benefit plans that had a pre-SECURE different definition of "majority" based on an old minimum distribution regulation that rarely applied (tying "reaching majority" to completing a specified course of education but not later than age 26); these plans may continue to use that definition. This "grandfather" exception would rarely if ever be encountered by estate planners.

C. **Designated beneficiary.** The Code mandates different RMDs for the beneficiary who inherits a retirement account based on whether the beneficiary is or is not a "designated beneficiary." The Code defines "designated beneficiary" as "any individual designated as a beneficiary by the employee." § 401(a)(9)(E)(I). The IRS must work within that requirement and that definition.

D. **Conduit trust.** "The term conduit trust means a see-through trust, the terms of which provide that, with respect to the deceased employee's interest in the plan, all distributions will, upon receipt by the trustee, be paid directly to, or for the benefit of, specified beneficiaries..." Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

E. **Accumulation Trust.** "The term accumulation trust means any see-through trust that is not a conduit trust." Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

III. **The 10-year rule: How it works and when it applies.** The proposed regulations confirm the general understanding of how the 10-year rule works, but add some unexpected wrinkles. While SECURE appeared to reduce the differences between death "before the RBD" vs. death "after the RBD," the proposed regulations come right back in and widen that gap. Under the proposed regulations, there are new and unexpected differences between the RMD rules for death before vs. after the RBD. The parts of the proposed regulation dealt with here deal only with defined contribution plans, not defined benefit plans.

A. **Author's Mea Culpa.** MY INTERPRETATIONS OF SECURE'S 10-YEAR RULE WERE INCORRECT WITH RESPECT TO THREE SITUATIONS: As this outline will explain in detail, my prior summaries about how and when the 10-year rule applies were substantially "overruled" by the proposed regulations in three situations: Participant's death after the RBD, death of an EDB, and attainment of majority by a minor child of the participant. I had confidently written that, whenever SECURE placed a 10-year "final limit" on distributions, it meant that there would be a period of nine years (first nine years after the applicable event) of no required distributions

at all, followed by a 100%-of-the-account RMD in the year that contained the 10th anniversary of the applicable event. Those statements were not correct in cases of payments to plain old designated beneficiaries of a participant who died after his RBD, or in the case of a minor child who reached majority, or of the successor beneficiary to a deceased EDB. In all those cases, the proposed regulations (rightly, in my opinion, in at least two of the cases) provide for RMDs to continue during the nine years leading up to the year-10 deadline—which in some cases will mean the account is liquidated well before the end of 10 years.

B. **How does the 10-year rule work?** The proposed regulations confirm the general understanding that the "10-year rule" introduced by SECURE (inserting § 401(a)(9)(H)(i) into the Code) works the same way as the 5-year rule (on which the 10-year rule is modeled) has always worked: No distributions are required until the 10th year at which time the entire account becomes the RMD. Prop. Reg. § 54.4974-1(c)(2). "(3) 10-year rule. Distributions satisfy this paragraph (c)(3) if the employee's entire interest is distributed by the end of the calendar year that includes the tenth anniversary of the date of the employee's death. For example, if an employee dies on any day in 2021, the entire interest must be distributed by the end of 2031 in order to satisfy the 5-year rule in section 401(a)(9)(B)(ii), as extended to 10 years by section 401(a)(9)(H)(i)." Prop. Reg. §1.401(a)(9)-3(c)(3). Then come the new wrinkles and shocking surprise:

C. **Death *before* the RBD: EDB may elect 10-year rule.** If the employee dies before his RBD, and has no designated beneficiary, all benefits must be distributed by the end of the year that contains the fifth anniversary of the employee's death. § 401(a)(9)(B)(ii). This is called the 5-year rule. Under the 5-year rule, 100% of the account must be distributed by the end of the year that contains the fifth anniversary of the employee's death (sixth anniversary if the employee died in years 2015-2019), with no distributions required prior to that year. If benefits are left to a "plain old designated beneficiary" (PODB), benefits are payable under the 10-year rule. This operates the same as the 5-year rule—no distributions are required until the year that contains the 10th anniversary of the employee's death. If the beneficiary is an Eligible Designated Beneficiary, the benefits are payable to the EDB in annual instalments over the life expectancy of the EDB—unless the EDB elects to use the 10-year rule instead. (Under the Proposed Regulations, that election could also be made FOR the EDB by the employee or by the plan itself.) That election (not part of SECURE—this was added by the Proposed Regulations) is permitted by the Proposed Regulations provided the applicable retirement plan permits the election: "(iii) *Elections.* A defined contribution plan may include a provision, applicable to an employee who dies before the employee's required beginning date and who has an eligible designated beneficiary, that permits the employee (or eligible designated beneficiary) to elect whether the 10-year rule in paragraph (c)(3) of this section or the life

expectancy rule in paragraph (c)(4) of this section applies..." Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii).

D. Shocker: Death *after* the RBD: Annual payouts required even if the 10-year rule applies. The 10-year rule isn't the only RMD rule that applies! In a surprise move, the proposed regulations assert that annual RMDs must continue to be made after the participant's death if he dies after his RBD—even when the 10-year rule applies. Treasury is not saying this is how the 10-year rule is to be interpreted—Treasury agrees there are no distributions required *under the 10-year rule* until the 10th year. Rather, Treasury is saying that in enacting SECURE Congress did not repeal § 401(a)(9)(B)(i), so § 401(a)(9)(B)(i) is still in force and applicable and still must be complied with—even when the 10-year rule also applies! Here is how that would work, along with a walk-through of the complicated process by which Treasury arrives at and implements this dual RMD requirement in case of death after the RBD:

- **Payout for PODB**: If the ALAR rule is to apply alongside the 10-year rule, the proposed regulation would require a plain old designated beneficiary (PODB) to take annual RMDs based on such DB's life expectancy annually beginning the year after the participant's death. Prop. Reg. § 1.401(a)(9)-5(d)(1)(i), (ii) ("applicable denominator is the greater of—(A) the designated beneficiary's remaining life expectancy; and (B) the employee's remaining life expectancy"). Such RMDs must continue "up to and including the calendar year that includes the beneficiary's date of death." Prop. Reg. § 1.401(a)(9)-5(d)(1)(i). And in any case 100% of the account must be distributed in the 10th year. Prop. Reg. § 1.401(a)(9)-5(d)(1)(i) (last sentence), -5(e)(1), (2). Here is the detail behind this summary:

- § 401(a)(9)(B)(i) provides that "if—(I) the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), and (II) the employee dies before his entire interest has been distributed to him, the remaining portion of such interest will be distributed ***at least as rapidly*** as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death." Emphasis added. This is popularly [among ERISA people] known as the "at least as rapidly rule," hereinafter the ALAR rule. The following is from Prop. Reg. § 1.401(a)(9)-5, "Required minimum distributions from defined contribution plans":

- Prop. Reg. § 1.401(a)(9)-5(d): **"Applicable denominator after employee's death--(1) Death on or after the employee's required beginning date**--(i) In general. If an employee dies after distribution has begun as determined under §1.401(a)(9)-2(a)(3) (generally, on or after the employee's required beginning date), distributions must satisfy section 401(a)(9)(B)(i) [the ALAR rule]. In order to satisfy this requirement, the applicable denominator after the

employee's death is determined under the rules of this paragraph (d)(1). The requirement to take an annual distribution in accordance with the preceding sentence applies for distribution calendar years up to and including the calendar year that includes the beneficiary's date of death...." Pause, ok, so far so good: The ALAR rule applies to the deceased participant's beneficiary *along with* whatever other post-death RMD rule applies to such beneficiary, apparently. So if the beneficiary is a "PODB" (subject to the 10-year rule), the PODB must take annual distributions for years one through nine, then 100% of any remaining balance in year 10. How much are these annual distributions such PODB must take?

- "The distributions also must satisfy section 401(a)(9)(B)(ii) [the 5-year rule] (or, if applicable, section 401(a)(9)(B)(iii) [the exceptions to the 5-year rule] [this is puzzling because the 5-year rule never applies in cases of death after the RBD which is supposedly what Prop. Reg. § 1.401(a)(9)-5(d)(1) is about; this reference to the 5-year rule and its exceptions seems to be an error in this regulation], taking into account sections 401(a)(9)(E)(iii) [minor child of participant ceases to be an EDB upon attaining majority....what has THIS got to do with it?], and 401(a)(9)(H)(ii) and (iii) [the life expectancy payout for EDBs and the 10-year cap after death of the EDB]). In order to satisfy those requirements, in addition to determining the applicable denominator under the rules of this paragraph (d)(1), the distributions also must satisfy any applicable requirements under paragraph (e) of this section [i.e. the outer limit for distribution of 100% of the account in the 10th year after the death of the participant if the beneficiary is a PODB, death of the eligible designated beneficiary, attainment of majority of a minor-child EDB, etc. whichever is applicable]."

- What annual distributions are required to satisfy the ALAR rule? Prop. Reg. § 1.401(a)(9)-5(d) says this: "(ii) Employee with designated beneficiary. If the employee has a designated beneficiary as of the date determined under §1.401(a)(9)-4(c) [that would be ANY DB, whether such DB is an EDB or a PODB], the applicable denominator is the greater of--(A) The designated beneficiary's remaining life expectancy; and (B) The employee's remaining life expectancy. (iii) Employee with no designated beneficiary. If the employee does not have a designated beneficiary as of the date determined under §1.401(a)(9)-4(c), the applicable denominator is the employee's remaining life expectancy."

- Under this rule, if the DB or EDB is younger than the decedent, the minimum distribution under the ALAR rule will be determined using the beneficiary's life expectancy, though such life expectancy payout will "run out" in the 10th year (the Outer Limit Year under the 10-year rule) in the case of a PODB, as

100% distribution is required in that year. If the DB is older than the decedent, then he/she can't be a PODB because any DB older than the decedent is an EDB. See PART IX of this outline dealing with NoMoTTY beneficiaries.

E. Is Treasury right about the ALAR rule? Though practitioners generally assumed that the 10-year rule was the only rule that applied to PODBs in case of the participant's death, Treasury obviously came to a different conclusion. Treasury as above discussed concluded that the ALAR rule was not repealed and therefore still applies. Are they right about that?

- § 401(a)(9)(B)(i) provides that, when an employee dies after lifetime RMDs have begun (i.e., after his RBD), "the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death." This is the "at least as rapidly rule" (ALAR rule), which has been part of the Code since forever. Though Treasury's own regulations have applied the ALAR rule "creatively" (to say the least), Treasury raises a valid question. Did Congress intend the 10-year rule to "overrule" the ALAR rule or not?

- In the Committee Report that provides background for SECURE's changes to the RMD rules, the drafter noted the existence of the ALAR rule in the description of the existing (pre-SECURE) rules; see Committee Report Note 231. Then, in describing SECURE's proposed changes, the Report states that "The proposal changes the after-death required minimum distribution rules applicable to defined contribution plans, as defined, with respect to required minimum distributions to designated beneficiaries....Ten-year after-death rule for defined contributions plans: In general: Under the proposal, the five-year rule is expanded to become a 10-year period instead of five years ("10-year rule"), such that *the 10-year rule is the general rule for distributions to designated beneficiaries after death (regardless of whether the employee (or IRA owner) dies before, on, or after the required beginning date)* unless the designated beneficiary is an eligible beneficiary.... Thus, in the case of an ineligible beneficiary, distribution of the employee (or IRA owner's) entire benefit is required to be distributed by the end of the tenth calendar year following the year of the employee or IRA owner's death." See https://www.govtrack.us/congress/bills/116/hr1994/text. Emphasis added.

- The Committee Report does not directly address "repeal" of the ALAR rule. Treasury's interpretation of that omission is that Congress did not intend the 10-year rule to replace BOTH the life expectancy payout AND the ALAR rule, only the life expectancy payout (since the ALAR rule was not omitted from the Code by SECURE, or specifically referenced in § 401(a)(9)(H)(i),

the section that inserts the 10-year rule). However, the interpretation that Congress intended the 10-year rule to replace both rules (the life expectancy payout and ALAR rule) in the case of "ineligible beneficiaries" would appear to be comparably valid, in view of the Committee Report's emphasis that the 10-year rule applies for these beneficiaries "whether or not the employee (or IRA owner) dies before, on, or after the required beginning date" [sic], and the statute's wording that the 10-year rule "shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (A)."

F. **10 year limit applies after death of an EDB.** Prior to SECURE, the "life expectancy of the beneficiary" was the required distribution period generally for any designated beneficiary. See § 401(a)(9)(B)(iii) ("(iii) Exception to 5-year rule for certain amounts payable over life of beneficiary. If—(I) any portion of the employee's interest is payable to (or for the benefit of) a designated beneficiary, (II) such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary..."), as interpreted in Treasury regulations finalized in 2002. SECURE changed this by providing that the above-quoted "(B)(iii)" life expectancy payout rule would apply only to "Eligible Designated Beneficiaries" (EDBs). § 401(a)(9)(H)(ii) ("Subparagraph (B)(iii) shall apply only in the case of an eligible designated beneficiary."). SECURE also provided that, upon the death of an EDB,"the exception under clause (ii) [granting life expectancy payout to the EDB] *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." § 401(a)(9)(H)(iii). Emphasis added. Note that this wording ("remainder....shall be distributed within 10 years after the death of..."), though it creates a 10-year rule of sorts, is not the same as the wording applying the "10-year rule" as the general rule for designated beneficiaries. Some people including me assumed the 10-year limit applicable on death of an EDB would work the same way as the old 5-year rule: The year of the EDB's death would be the final year of the life expectancy payout, with no further payouts required until the year containing the 10th anniversary of the EDB's death, at which time 100% of the account would become the RMD. Although that would appear to be a reasonable interpretation of the statute's statement that the life expectancy payout "shall not apply" to the successor beneficiary, the Proposed Regulations have a different interpretation: The life expectancy payout based on the life expectancy of the now-deceased EDB *continues*, with annual RMDs in years one through nine after the EDB's death, and a final payout of 100% of the account due in the year containing the 10th anniversary of such death. Prop. Reg. § 1.401(a)(6)-(F)(6)(i) (Example 1).

G. **One more appearance of the 10-year rule in the Proposed Regs.** One part of the proposed regulations would restate Treas. Reg. § 1.402(c)(2) to provide an up to date list of what constitutes a qualified rollover distribution from a qualified (§ 401(a))

retirement plan, and various rules applicable to such rollovers. Though this information is relevant to everyone involved in rollovers, this regulation is primarily addressed to plan administrators who must know what "rollover" contributions they can accept into their plans, which distributions from their plans they may or must transfer to another retirement plan via direct rollover, which distributions are subject to mandatory withholding, etc. Part "(j)" of the Proposed Regulation addresses "Treatment of distributions to beneficiary" with respect to these rollover issues. Subsection (j)(1) deals with distributions to a "spousal distributee," and (j)(2) with a "Non-spousal distributee." Of course a distribution to a non-spouse beneficiary generally "does not constitute an eligible rollover distribution." However, the Proposed Regulation points out, if the distributee is a Designated Beneficiary and is not the surviving spouse, he/she is entitled to have the distribution transferred to an inherited IRA—but only to the extent the distribution is not a minimum required distribution. Prop. Reg. § 1.402(c)(2)(j)(3)(i)(A). So how is the Plan Administrator to know whether the distribution to the nonspouse beneficiary is a nonrollable RMD? Here's how:

- First, the first money paid out of an account in any year is applied to the RMD (if there is an RMD for that year). Prop. Reg. § 1.402(c)(2)(j)(3)(i)(A), first sentence.

- Next: "If the employee dies before the employee's required beginning date (within the meaning of §1.401(a)(9)-2(b)), then no amount is a required minimum distribution for the year in which the employee dies." Prop. Reg. § 1.402(c)(2)(j)(3)(i)(A), last sentence.

- Finally, "If an employee dies on or after the employee's required beginning date, then the amount that is not an eligible rollover distribution because it is a required minimum distribution for a calendar year is determined under paragraph (j)(3)(i)(F) of this section." Prop. Reg. § 1.402(c)-2(j)(3)(i)(B), last sentence. Here is what "(j)(3)(i)(F)" provides, in relevant part: "(F) Employee dies on or after required beginning date. If the employee dies on or after the employee's required beginning date, then, in the calendar year of the employee's death, the amount treated as a required minimum distribution and not eligible to be rolled over is determined in accordance with §1.401(a)(9)-5(c).... For each subsequent calendar year, the amount treated as a required minimum distribution and not eligible to be rolled over is determined in accordance with [Prop. Reg.] § 1.401(a)(9)-5(d) and (e)..." Prop. Reg. § 1.401(a)(9)-5(d) spells out the ALAR rule. Prop. Reg. § 1.401(a)(9)-5(e) sets out when the 10-year rule applies. So this part of the proposed regulation is consistent with the rest—the PODB is subject to the ALAR rule as well as the 10-year rule.

- And, here is the proposed regulations' description of how the 10-year rule works if it is applicable for the purposes of determining whether a distribution to a nonspouse beneficiary subject to the 10-year rule is eligible for direct rollover to an inherited IRA: "(D) Ten-year rule. If the 10-year rule described in §1.401(a)(9)-3(c)(3) applies to the beneficiary, then no amount is required to be distributed until the end of the tenth calendar year following the calendar year of the employee's death. In that year, the entire amount to which the beneficiary is entitled under the plan must be distributed, and because it is treated as a required minimum distribution, it is not an eligible rollover distribution. Thus, if the 10-year rule applies with respect to a designated beneficiary, then any distribution made before the tenth calendar year following the calendar year of the employee's death is eligible for rollover if it otherwise meets the requirements of this section." Prop. Reg. § 1.402(c)-2(j)(3)(i)(D). The plan administrator needs to remember that *other subsections of this proposed regulation* make some distributions during the 10-year period non-rollable RMDs despite this Prop. Reg. § 1.402(c)-2(j)(3)(i)(D).

H. Reminder: What happens if you miss the 10-year deadline. As is true under existing regulations, if the beneficiary fails to take the 100% distribution in year 10, then that "missed RMD" will continue to be the RMD from that account every year after that until it is distributed....accruing the 50% excise tax annually. Prop. Reg. § 54.4974-1(e).

IV. Other SECURE (and non-SECURE) questions answered by the Proposed Regulations.

A. Reaches majority. See above. The Preamble states the IRS's wise observation that a definition of "reaches majority" that depended on definitions under 50 potentially different state laws and/or on a subjective or hard to determine status such as completing a specified course of education would be unworkable for the administrators of plans and IRAs required to interpret or apply the minimum distribution rules. In view of which the IRS wisely adopted a single objective definition to apply to all plans in all states.

B. Whose life expectancy is the Applicable Denominator for an AMBT? SECURE's provision allowing a life expectancy payout for an AMBT had a little mistake in it. SECURE provided that the "life expectancy payout" would apply to such a trust but did not specify WHOSE life expectancy would be the measuring period for required distributions. Under the [pre-SECURE] existing regulations, the oldest countable beneficiary of the trust is the "designated beneficiary" whose life expectancy becomes the distribution period. But it was assumed that Congress meant to say the disabled beneficiary's life expectancy would be the ADP for an AMBT, even if other trust beneficiaries were older. The proposed regulations would fix this: Though the

"General rule" would apply the "life expectancy of the oldest designated beneficiary," the proposed regulation would apply the life expectancy of the *oldest disabled beneficiary* of the trust. Prop. Reg. § 1.401(a)(9)-5(f)(1)(i).

C. **Whose life expectancy/outer limit year applies for a trust for multiple minor children of participant?** If the only countable beneficiaries are all minor children of the participant, then the applicable denominator is the life expectancy of the oldest minor child of the participant who is a beneficiary of the trust. Prop. Reg. § 1.401(a)(9)-5(f)(2)(ii). If the trust also has older beneficiaries who are designated beneficiaries but *not* minor child-EDBs, the annual RMDs would be based on the life expectancy of the oldest countable DB, but those older DBs are disregarded in determining the Outer Limit Year (and the 10-year rule does not apply merely because there are such "PODBs" in the trust). See PART VII.

D. **"Disabled" status for beneficiary under age 18.** One category of EDB under SECURE is a "disabled" individual, with disability defined by reference to § 72(m)(7). Since § 72's definition of disability is defined by reference to the individual's inability to "engage in any substantial gainful activity," it is not apposite for determining the disability of a young child. The proposed regulations would cure this by adding this definition of "disabled" if the designated beneficiary is under age 18: "an individual is disabled if, as of the date of the employee's death, the individual is described in paragraph (e)(4)(ii) or (iii) of this section, or paragraph (e)(4)(iv) of this section applies." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iii). See PART VIII.

E. **Will the "no separate accounts rule for subtrusts rule" be "repealed?"** The answer is apparently "no." Treas. Reg. § 1.401(a)(9)-4, A-5(c) provides that "separate accounts" treatment cannot be allowed for multiple subtrusts created under a single trust unless the subtrusts were named directly as beneficiaries of the retirement plan. See discussion at ¶ 6.3.02(A) of *Life and Death Planning for Retirement Benefits*. Since SECURE essentially "overruled" this regulation as it would apply to an Applicable Multi-Beneficiary Trust (AMBT), there was some hope that the Treasury would repeal the regulation altogether. The proposed regulations have their own new definition of separate accounts.

F. **Will the IRS drop the "oldest person" requirement from the "identifiable" beneficiaries RMD trust-rule?** Answered: Yes. See Part X(D) of this Outline.

G. **Conduit trust for multiple beneficiaries is ok.** Before these proposed regulations, it was uncertain whether the IRS would recognize a conduit trust for more than one individual beneficiary. The Proposed Regulations remove this uncertainty—a conduit trust can be for "specified beneficiaries," plural. Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

H. Defined benefit plans vs. defined contribution plans (also called "individual account plans"). Prior to SECURE, the Code's minimum distribution rules made no distinction between defined benefits plans and defined contribution plans. After years of wrestling with § 401(a)(9), the IRS (appropriately—in fact of necessity) came up with entirely different sets of minimum distribution rules for the two types of retirement plans. SECURE for the first time inserted Code-level differences between the distribution requirements for defined contribution plans and defined benefit plans. This Outline covers only the defined contribution/individual account plan minimum distribution rules.

I. RBD for a participant who died before SECURE's effective date. SECURE changed the starting age for lifetime RMDs from 70½ to 72. SECURE's effective date was generally January 1, 2020 . How did this change affect someone who died before reaching either age and before 2020? You might wonder–what difference would this change make to that person–he is deceased so does not have to worry about lifetime RMDs at all, so who cares what *would* have been his RBD? Here is why it sometimes matters: If the participant dies leaving his IRA to his surviving spouse as sole beneficiary, the spouse's required commencement date (under § 401(a)(9)(B)(iv)) for RMDs to be taken as beneficiary is the later of the year after the participant's death or the year the participant would have had to commence taking distributions had he not died. There was some question whether a surviving spouse whose deceased spouse was born after June 30, 1949, but who died before 2020, was entitled to take advantage of the delayed RBD that would have applied to the deceased spouse had he not died. The Preamble states that "This effective date provision could be interpreted to require the employee to survive until age 70½ in order to have the amended definition apply (that is, if the employee died before attaining age 70½, then the amended definition would not apply with respect to distributions to that employee's beneficiary, even if the employee would have attained age 70½ on or after January 1, 2020, had the employee survived). Instead, for ease of administration, these proposed regulations interpret the effective date language to apply the amendments made by section 114 of the SECURE Act to an employee who died before attaining age 70½ if the employee would have attained age 70½ on or after January 1, 2020 (that is, the employee's date of birth is on or after July 1, 1949). This interpretation also extends to a surviving spouse who is waiting to begin distributions pursuant to section 401(a)(9)(B)(iv). Thus, for example, if an employee who was born on June 1, 1952, died in 2018, and the employee's sole beneficiary is the employee's surviving spouse, then the surviving spouse may wait until 2024 (the calendar year in which the employee would have attained age 72) to begin receiving distributions."

J. What is the treatment of a trust all of whose countable beneficiaries are EDBs? Prop. Reg. § 1.401(a)(9)-4(f)(6)(ii) (Example 2) indicates that the answer to this question is: The oldest EDB's life expectancy will be the Applicable Denominator

for the trust. In the example, the life beneficiary of the trust is the participant's surviving spouse (an EDB), but it is not a conduit trust because she is entitled only to income of the trust, not to receive all distributions the trust receives from the plan (as would be the case if this were a conduit trust).After the surviving spouse's death, the trust is to pass outright to the deceased participant's sibling who is younger than the surviving spouse and who is less than 10 years younger than the decedent—so the sole remainder beneficiary is also an EDB. A charity takes the trust on the surviving spouse's death if the sibling has predeceased her; but this nonindividual beneficiary is not countable because it takes only if it survives the second-tier beneficiary (the sibling), and accordingly the charity is third-tier, and accordingly it is disregarded. Even though the oldest EDB is the surviving spouse, however, the trust will not get the special spousal RMD deals such as recalculation of life expectancy because the surviving spouse must be "sole" designated beneficiary to get those deals. Upon the death of the surviving spouse, RMDs will continue to be made to the trust based on the life expectancy of the surviving spouse [assuming she died before that LE payout period ended], with a final RMD of 100% of the account due in the year of the 10th anniversary of the surviving spouse's death. Prop. Reg. § 1.401(a)(9)-5(e)(3).

V. General rules for EDBs. SECURE provides that only an "eligible designated beneficiary" (EDB) is entitled to the "life expectancy payout exception" of IRC § 401(a)(9)(B)(iii). § 401(a)(9)(H)(iii). The definitions of the five types of EDBs (participant's surviving spouse or minor child, disabled or chronically ill individual, individual not more than 10 years younger than the participant) are found in Prop. Reg. § 1.401(a)(9)-4, and are set out in the applicable section of this Outline for each category. SECURE further provides that after the death of the EDB the life expectancy payout terminates and 100% distribution is required, 10 years after such EDB's death; and in the case of a minor child of the participant, EDB status ends upon reaching majority so the payout must end 10 years after the earlier of the year of such child's death or the year in which he reaches majority (§ 401(a)(9)(E)(iii)). The Proposed Regulations embroider these EDB payout rules with the following additions:

A. If the participant died before his RBD, leaving benefits to an EDB, the EDB can take the benefits over the EDB's life expectancy or can elect, instead, to take benefits under the 10-year rule, provided such election is permitted by the applicable retirement plan. Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii).

- If the plan has no provision on this point [presumably that situation will be rare], the "default" rule for an EDB is the life expectancy payout. Prop. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

- If an "individual" EDB is defaulted into the life expectancy payout by the preceding rule, there is an *automatic* waiver of the 50% excise tax on such individual's missed life-expectancy RMDs if the individual EDB-"payee elects the 10-year rule...by the end of the ninth calendar year following the

calendar year of the employee's death." Prop. Reg. § 54.4974-1(g)(2). Not clear how the payee makes this election. The fact that this automatic waiver is limit to "individual" EDBs may indicate it is not available to a trust named as beneficiary.

B. **If the participant died after his RBD**, the Applicable Denominator for an EDB is the longer of the EDB's life expectancy and the participant's life expectancy (the "longer of" rule—this is a carryover from pre-SECURE treatment of all DBs). See Prop. Reg. § 1.401(a)(9)-2(a)(4), § 1.401(a)(9)-5(d)(1)(ii). There is no option for the EDB to elect the 10-year rule in cases of death after the RBD.

C. **Annual distributions track vs. Outer Limit Year.** The Proposed Regulations' layout or way of presenting the minimum distribution rules is to provide the payout requirement that will apply to the beneficiary upon the participant's death, followed by a wrap-up section (Prop. Reg. § 1.401(a)(9)-5(e)) that imposes a "notwithstanding anything else" provision—that regardless of what the schedule of annual payments is, the payouts must be completed and end in a certain year—100% distribution is required in that final year. For EDBs generally, it is the tenth calendar year following the calendar year of the EDB's death. Prop. Reg. § 1.401(a)(9)-5(e)(3). For an EDB who is an EDB solely because he or she is the child of the employee who had not reached majority, it is the tenth calendar year following the year the beneficiary reaches majority, i.e., the calendar year of his/her 31st birthday. Prop. Reg. § 1.401(a)(9)-5(e)(4). Presumably this means the earlier of the minor's death or 31st-birthday year.

VI. **EDBs: The Surviving Spouse.** The participant's surviving spouse is an Eligible Designated Beneficiary and as such entitled to a life expectancy payout. The rules for determining who is the surviving spouse, when payouts to her must commence, how such payments are computed, and what happens if she dies before she is required to start taking such distributions appear not to have changed so they are not covered in this outline. Here are some minor comments on this:

- The Proposed Regulations confirm that the surviving spouse of a participant who died before 2020 (i.e., before SECURE's effective date) can wait until the deceased participant would have reached age 72 before commencing required distributions as his beneficiary, IF the deceased spouse was born after June 30, 1049.

- A conduit trust for the surviving spouse will qualify for the life expectancy payout (EDB treatment) as was expected, regardless of who is the "remainder beneficiary" of the trust.

- An accumulation trust for the surviving spouse's life benefit will qualify for the life expectancy payout (but not the other special spousal RMD rules) only if all countable trust beneficiaries are EDBs.

VII. EDBs: Minor Child of the Employee/IRA Owner ("Participant"). A major uncertainty for planners after enactment of SECURE has been the options for structuring a trust for minor children: How can such beneficiaries be provided with the protections of a trust (needed due to their youth) while minimizing the negative tax impacts of a trust? The Proposed Regulations make several generous special rules for trusts for minors. While these special rules are collected here, the full implications are not explored in this Outline due to lack of time.

A. **Planning for minors before SECURE.** Under the pre-SECURE rules, a protected life expectancy payout could easily be established by using a "conduit trust" for the minor, under the assumption that annual RMD payouts to the trust based on the minor's long life expectancy would be small enough (due to the beneficiary's extreme youth) that the trustee would have no problem distributing the annual payouts "for the benefit of" the minor beneficiary, thereby complying with the annual payout requirement of the conduit trust and also benefitting from the minor's lower tax bracket relative to the trust's bracket. But the conduit trust concept did not work well with enormous IRAs (annual distributions too large to be absorbed by expenditures on minor's behalf), and...

- **Could a conduit trust be used for multiple children?** It was unclear whether a "pot trust" for multiple children could qualify as a conduit trust. The Proposed Regulations give a clear YES answer to that question.

- **The who-to-name-as-remainder beneficiary problem.** There was also a problem with "accumulation trusts" for minor children: Typically the trust would hold funds until the minor reached a certain age such as 30, 35, or 40. But then the trust had to specify who would receive what was left in the trust if the minor died before reaching that age...and if this contingent remainder beneficiary was older than the minor, the remainder beneficiary's life expectancy, not the child's, would be the payout period. Or if the remainder beneficiary were a charity, the trust would flunk the RMD trust rules altogether. The Proposed Regulations eliminate this issue PROVIDED the trust calls for outright distribution to any minor no later than age 31.

B. SECURE Made Things Worse; Proposed Regs Make Them Better. SECURE made these planning problems more severe because it limited the "life expectancy payout" for minors to ONLY minor children OF THE PARTICIPANT (not just any old minors); and that so-called "life expectancy payout" could not last past 10 years after the minor "reached majority," meaning 100% had to be distributed by that 10th

year; and "majority" was left to the IRS to define, but in some states is as early as age 18, indicating 100% distribution by age 28; and,, under existing regulations one would conclude that even these reduced benefits were available only for "conduit trusts," not "accumulation trusts" (see Reg. § 1.401(a)(9)-5, A-7(c)(3), Examples 1 and 2) (because the minor would not be deemed the "sole beneficiary" of an accumulation trust). The Proposed Regulations substantially improve the picture with the following new rules.

C. **Reaches majority = age 21.** The proposed regulations define "reached majority" (as in "a child of the employee who has not reached majority," the Code's definition of a minor child-EDB; § 401(a)(9)(E)(ii)(II)) without any reference to state law or subjective factors such as completing a course of education: "(3) Determination of age of majority. An individual reaches the age of majority on the individual's 21st birthday." Prop. Reg. § 1.401(a)(9)-4(e)(3). This makes administration easier for plan administrators: no need to worry about what state's law might apply to a "minor" or whether the beneficiary might have dropped out of school. And it makes planning easier for parents, who can provide continued control (via a trust) until the minor reaches age 31, which is presumably "old enough" for many parents.

D. **A beneficiary if disregarded if he/she gets benefits only if another beneficiary dies to prior by age 31**. Under Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B), a beneficiary who will inherit the retirement benefits only if *another* beneficiary dies before attaining age 31 is ignored in "testing" the trust. For exact wording and drafting suggestions see next subsection. This rule has three important implications:

- First, assume an IRA is left to an accumulation trust for a minor child of the participant (an EDB) under which the child will receive income and principal in the discretion of the trustee, with outright distribution of the remaining balance of the IRA and its distributions to him when he reaches age 31. If he dies before age 31 the trust passes to his older sister who is not an EDB. So under normal rules, the minor would not be considered the sole beneficiary of this trust: Under an accumulation trust, both the first tier (minor child) and the second tier (older sister) would "count," therefore minor would not be the sole beneficiary of the trust. The trust would not be able to use the life expectancy payout since the EDB-child was not the sole beneficiary. As a result of this disregard rule, the minor child IS considered the sole beneficiary and accordingly the trust can use the life expectancy payout.

- Second: It means anyone leaving benefits to an "accumulation trust" for a young beneficiary does not have to worry about naming a charity as the contingent remainder beneficiary of the trust to inherit if the young beneficiary dies before age 31, because if the retirement benefits must (under the trust terms) be entirely distributed outright to that young individual

beneficiary by age 31 the remainder beneficiary-charity "doesn't count." An accumulation trust with those terms will be a designated beneficiary because it has only individual beneficiaries—the charity is disregarded.

- Third, this rule applies to ALL under-age-31 beneficiaries, *not just EDBs*. Thus it can be used to establish trusts for other young beneficiaries such as nieces, nephews, grandchildren—and children of the participant who are younger than age 31 but not still minors at the time of the participant's death. Such trusts will be subject to the 10-year rule, but at least the money will be held in the safety of a trust until age 31.

E. Trusts for multiple children. The Proposed Regulations provide the following special lenient trust rules for trusts where one or more of the trust beneficiaries is/are minor children of the participant and therefore are EDBs.

- If analyzing a see-through trust with one or more minor child/EDB beneficiaries, this rule may apply: "If any of the employee's designated beneficiaries is an eligible designated beneficiary because the beneficiary is the [minor child of employee]...then the employee is treated as having an eligible designated beneficiary even if the employee has other designated beneficiaries who are not eligible designated beneficiaries." Prop. Reg. § 1.401(a)(9)-4(e)(2). Thus, the life expectancy payout is available—because the employee is deemed to have an EDB. (The life expectancy payout will be based on the age of the oldest countable DB of the trust, who may or may not be an EDB.)

- As noted, the RMD rules have an "Outer Limit Year" concept under which (regardless of what annual distributions are or are not being made) 100% of the account must be distributed by a certain year which I call the Outer Limit Year. The Outer Limit Year overrides all other RMD schedules. Prop. Reg. § 1.401(a)(9)-5(e). The general Outer Limit Year rule, if the employee has multiple designated beneficiaries, is that the Outer Limit Year is "applied with respect to the oldest of the employee's designated beneficiaries." Prop. Reg. § 1.401(a)(9)-5(f)(2)(i). However, under Prop. Reg. § 1.401(a)(9)-5(f)(2)(ii), if ANY of the employee's multiple designated beneficiaries is a minor child-EDB, then the trust gets the following three special deals:

  - The Outer Limit Year rule is based on the *oldest minor-child EDB* (not the oldest trust beneficiary). Prop. Reg. § 1.401(a)(9)-5(f)(2)(ii). Thus, the deadline for 100% distribution of the benefits to the trust would be 10 years after such oldest minor child-EDB turns age 21 (or dies if earlier).

- The Outer Limit Year normally applicable to a PODB (i.e., the 10-year rule) does not apply. Prop. Reg. § 1.401(a)(9)-5(f)(2)(B).

- The "shorter of" rule (Prop. Reg. § 1.401(a)(9)-5(e)(5)) also does not apply. Don't ask. I think this would be very unlikely to apply to a trust of which minor children of the participant were beneficiaries. I believe it would (but for this special rule) apply only if the participant died after his RBD [unusual though not unheard of for participant over age 72 to have minor children] and the minor children were co-beneficiaries along with the participant's older siblings or spouse.

- **The Applicable Denominator**. Although the "Outer Limit Year" is based on the oldest beneficiary *who is a minor child/EDB*, the Applicable Denominator (for determining RMDs after the participant's death) would be based on the life expectancy of the oldest designated beneficiary (who may not be the oldest EDB) (see following Example). Prop. Reg. § 1.401(a)(9)-5(f)(1)(i). If the employee died after his required beginning date, the Applicable Denominator would be the *longer of* the life expectancy of the oldest countable trust beneficiary (oldest designated beneficiary) and the participant's life expectancy. Again, this is a rule that can apply only when the deceased parent of the minor child was over age 72 at death.

- **Example:** [This is my example; there is no example in the proposed regulations illustrating these special rules.] Employee dies in 2022 before his RBD leaving his IRA to a trust for the benefit of his four children who are now ages 16, 18, 20, and 22. Three of them are EDBs because they are minor (under 21) children of the deceased employee. The trust provides that the trustee will use income and principal as the trustee deems best for the care, support, health, education and welfare of the children until there is no child living who is younger than age 25, at which time the trust will terminate and be distributed to the then living children equally. Because at least one trust beneficiary is an EDB as a minor child of the participant (three are), the trust gets the following special deals:

  - The oldest child is age 22 (and not disabled or chronically ill) so he is a PODB. Normally the Outer Limit Year for this trust would be the year that contains the 10th anniversary of the participant's death (10-year rule). That rule does not apply to this trust.

  - Instead, the life expectancy payout will apply. The life expectancy of the oldest child (age 22) will be the applicable denominator.

- The Outer Limit Year for this trust will be 10 years after the child who is now age 20 reaches age 21 or earlier dies. So not actually much difference—just one year longer. The entire benefit must be distributed to the trust no later than that Outer Limit Year, but the trust itself does not have to end then.

VIII. EDBs: Disabled or chronically ill individual. Here is the drill the proposed regulations provide for qualifying for a life expectancy payout as an EDB on the basis that the designated beneficiary is disabled (§ 401(a)(9)(E)(ii)(III)) or chronically ill (§ 401(a)(9)(E)(ii)(IV)). First, the beneficiary must meet the definition of "disabled" (there are three paths to this status; see "A") or "chronically ill" (see "B"). Second, the beneficiary must fulfill the "documentation requirement." See "C." For special trusts that can be created for such beneficiaries under the Code see "Applicable Multi Beneficiary Trusts,"PART XVIII of this Outline.

A. Definition of disabled. The definition of "disabled" varies depending on whether, at the time of the participant's death, the beneficiary is over age 18 or not (see #1 and #2). If the beneficiary has already been determined to be disabled for the purposes of qualifying for Social Security disability benefits, the beneficiary does not need to separately convince the IRS or the plan administrator of his disability (#3).

- "An individual who, as of the date of the employee's death, **is age 18 or older** is disabled if, as of that date, 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." Prop. Reg. § 1.401(a)(9)-4(e)(4)(ii).

- "An individual who, as of the date of the employee's death, **is not age 18 or older** is disabled if, as of that date, that individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iii).

- "If the Commissioner of Social Security has determined that, as of the date of the employee's death, an individual is disabled within the meaning of 42 U.S.C. 1382c(a)(3), then that individual will be deemed to be disabled within the meaning of this paragraph (e)(4)." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iv).

B. Definition of chronically ill. "An individual is chronically ill if the individual is chronically ill within the definition of section 7702B(c)(2) and satisfies the documentation requirements of paragraph (e)(7) of this paragraph. However, for purposes of the preceding sentence, an individual will be treated as chronically ill under section 7702B(c)(2)(A)(i) only if there is a certification from a licensed health

care practitioner (as that term is defined in section 7702B(c)(4)) that, as of the date of the certification, the individual is unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for an indefinite period which is reasonably expected to be lengthy in nature (and not merely for 90 days)." Prop. Reg. § 1.401(a)(9)-4(e)(5).

C. **Documentation requirement.** It is not enough for the beneficiary to merely be disabled or chronically ill (D/CI) as of the participant's death. To qualify as an EDB, the D/CI beneficiary must also supply "documentation" to the "plan administrator" by a certain deadline: "(7) Documentation requirements for disabled or chronically ill individuals. This paragraph (e)(7) is satisfied with respect to an individual described in paragraph (e)(1)(iii) [disabled] or (iv) [chronically ill] of this section if documentation of the disability or chronic illness described in paragraph (e)(4) or (5) of this section, respectively, is provided to the plan administrator no later than October 31 of the calendar year following the calendar year of the employee's death. For individuals described in paragraph (e)(1)(iv) of this section, the documentation must include a certification from a licensed health care practitioner (as that term is defined in section 7702B(c)(4))." Prop. Reg. § 1.401(a)(9)-4(e)(7).

IX. **EDBs: Not more than 10 years younger (NoMoTTYY).** SECURE's fifth category of EDB is "an individual not described in any of the preceding subclauses who is not more than 10 years younger than the employee." § 401(a)(9)(E)(II)(v).

A. **Requirements to be in this category**. The Proposed Regulations base the "10 years younger" determination on the respective birth dates of the participant and the beneficiary. "Thus, for example, if an employee's date of birth is October 1, 1953, then the employee's beneficiary is not more than 10 years younger than the employee if the beneficiary was born on or before October 1, 1963." Prop. Reg. § 1.401(a)(9)-4(e)(6). Note that a beneficiary cannot be in this category if he/she qualifies under any other category–for example, as the surviving spouse or a disabled or chronically ill individual.

B. **Participant dies before RBD**. In general this category of EDB will have RMDs determined based on the life expectancy of the EDB. If the participant died before his RBD, the Applicable Denominator will be the EDB's remaining life expectancy, with RMDs starting the year after the participant's death. Prop. Reg. § 1.401(a)(9)-3(c)(4), § 1.401(a)(9)-5(d)(2). However, if permitted by the plan, the EDB can elect the 10-year rule instead. Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii). The Outer Limit Year for this situation is the year that contains the 10th anniversary of the EDB's death. Prop. Reg. § 1.401(a)(9)-5(e)(3). So the final year of RMDs will be the final year of the EDB's life expectancy, or the year that contains the 10th anniversary of the EDB's death, whichever comes first.

C. Participant dies on or after RBD. This situation contains a zinger. The Proposed Regulations' opening bid is that the Applicable Denominator is the "greater of" the beneficiary's life expectancy or the participant's life expectancy. Prop. Reg. § 1.401(a)(9)-5(d)(ii). So far so good—if the beneficiary was older than the participant, the participant's (longer) life expectancy is used to determine RMDs to this EDB. In the past this was nicknamed the "longer of" rule. The zinger is contained in the Outer Limit Year section when the "shorter of" rule (created in these Proposed Regulations) kicks in: If the EDB was older than the participant, 100% of the account must be distributed no later than the final year of the EDB's life expectancy! The "shorter of" rule! Prop. Reg. § 1.401(a)(9)-5(e)(5).

X. The New RMD Trust Rules: A Big Improvement! The Proposed Regulations restate, and substantially expand and improve, the "RMD trust rules." Since a "designated beneficiary" must be an "individual" (§ 401(a)(9)(E)(i)) and a trust is not an individual, the IRS wrote rules in the 2002 regulations under which, if the participant left his retirement account to a trust, the beneficiaries of the trust could be treated as if they had been named directly as beneficiaries of the plan. If the regulation's rules were complied with, the individual trust beneficiary(ies) could qualify as designated beneficiaries and the trust would be entitled to a life expectancy payout. Over the years, some persistent problems developed in applying these rules. In this Part X and the following two Parts we look at those problems and how the Proposed Regulations attempt to eliminate them.

A. Definitions: See-through Trust, Conduit Trust, Accumulation Trust. The Proposed Regulations adopt as official terms See-Through Trust, Conduit Trust, and Accumulation Trust. "Conduit Trust" and "Accumulation Trust" have been in common use for years by practitioners (and have appeared in PLRs) to describe the types of trusts illustrated in Reg. § 1.401(a)(9)-5, A-7(c)(3), Examples 1 and 2. Though the term "See-through Trust" has also been around for years, its meaning has shifted a bit in these Proposed Regulations; see below. Here are the definitions in the Proposed Regulations, along with some additional enlightenment provided by the Proposed Regulations:

- A **See-through Trust** is a trust that is "designated as the beneficiary of an employee under a plan" and which meets the requirements of Prop. Reg. § 1.401(a)(9)-4(f)(2) (the four "trust rules"; see below). The effect of a see-through trust is that "certain beneficiaries of the trust that are described in...[Prop. Reg. § 1.401(a)(9)-4(f)(3)] are treated as having been designated as beneficiaries of the employee under the plan, provided that those beneficiaries are not disregarded under...[Prop. Reg. § 1.401(a)(9)-4(f)(2)]." Prop. Reg. § 1.401(a)(9)-4(f)(1)(i). Having a "see-through trust" is just the first step. It gets you in the door but does not guarantee that the trust will qualify for any life expectancy payout or even the 10-year rule. A TRUST MAY QUALIFY AS A SEE-THROUGH TRUST AND STILL NOT HAVE

THE TRUST BENEFICIARIES QUALIFY AS "DESIGNATED BENEFICIARIES."

- A **Conduit Trust** is a see-through trust that provides, with respect to the deceased participant's interest in the retirement account, that "all distributions will, upon receipt by the trustee, be paid directly to, or for the benefit of, specified beneficiaries." Prop. Reg. § 1.401(a)(9)-4(f)(ii)(A). This definition of conduit trust has not changed from the existing regulations or common understanding, though the existing regulations do not use that term; see Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. For the first time, this definition provides official recognition that a conduit trust can be for more than one designated beneficiary, a question considered unresolved under the existing regulations.

- An **Accumulation Trust** is "any see-through trust that is not a conduit trust." Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

B. **Why do we care about all this?** The post-death minimum distribution rules depend on who is the deceased employee's (or IRA owner's) beneficiary. Such goodies as the 10-year rule and the life expectancy payout are only available to "designated beneficiaries" and "eligible designated beneficiaries," who must be "individuals": "any **individual** designated as a beneficiary by the employee." § 401(a)(9)(e)(i). So our task will be to look through a "see-through trust" and figure out whether its countable beneficiaries are "individuals" or not. "The determination of which beneficiaries of a see-through trust are treated as having been designated as beneficiaries of the employee...depends on whether the see-through trust is a conduit trust or an accumulation trust." Prop. Reg. § 1.401(a)(9)-4(f)(ii). See Part XI in this Outline for how to determine the "countable" beneficiaries of a Conduit Trust or Accumulation Trust.

C. **Trustee, not beneficiaries, owes the excise tax**. Even though, with a see-through trust, the trust beneficiaries are deemed to be the beneficiaries of the retirement plan, the trust is considered the "payee" for purposes of the 50% excise tax on missed RMDs (§ 4974), so the trustee will be responsible for paying that tax. Prop. Reg. § 1.401(a)(9)-8(a)(1)(iii).

D. **The 4 trust rules; "oldest beneficiary" requirement eliminated.** Treasury has retained the sacred "4 rules" that constitute the "minimum distribution trust rules," with one modification—the Proposed Regulations eliminate the requirement of identifying the beneficiary with the "shortest life expectancy" (oldest potential trust beneficiary), since that step is no longer needed to determine the Applicable Denominator. Since the 10-year rule now applies to most designated beneficiaries, and since the life expectancy payout is limited to individuals who are EDBs, it

appeared there was/is no longer a need to be concerned about who is the oldest countable beneficiary of a see-through trust. Under the old regime, this was very important because the oldest beneficiary's life expectancy was the distribution period for benefits payable to the trust. As anticipated, the Proposed Regulations' version of the "RMD trust rules" no longer includes the identifying the beneficiary "with the shortest life expectancy" requirement. Prop. Reg. § 1.401(a)(9)-4(f)(ii)(A). Although the relative ages of trust beneficiaries still matter for some purposes, qualification as a see-through trust is not one of them. Prop. Reg. § 1.401(a)(9)-4(f)(2)(iii), (5)(i); compare Reg. § 1.401(a)(9)-4, A-1. Here are the 4 rules: The trust is valid under state law; it is irrevocable at the death of the participant; the trust beneficiaries are "identifiable"; and required documentation is provided to the plan administrator by October 31 of the year after the year of the participant's death. Prop. Reg. § 1.401(a)(9)-4(f)(2). The "identifiable" definition has changed; see discussion at Part XVII(A). The other rules appear not to have changed and are not further discussed here.

XI. Testing the trust: "Mere potential successor" concept replaced by a three-tier system. The 2002 regulations say that in testing trust beneficiaries for designated beneficiary status, you would ignore a beneficiary who was a "mere potential successor" to another beneficiary (Reg. § 1.401(a)(9)-5, A-7(c)(1)) but the meaning of that term proved elusive. Practitioners struggled with whether to count or ignore remote contingent beneficiaries or potential appointees under a power of appointment. The Proposed Regulations do not mention "mere potential successor." The approach for determining which trust beneficiaries are "countable" or not has been somewhat improved. The mere potential successor approach has been replaced with a tier system. Here is how you test the beneficiaries of a see-through trust for "designated beneficiary" status:

A. **The Three-tier System for Determining which Trust Beneficiaries Count.** In describing which beneficiaries of a trust "count" as beneficiaries and which can be disregarded (all for purposes of determining whether the participant who left his benefits to this trust has a "designated beneficiary" or not, and other trust matters), the Proposed Regulations describe three "tiers" of trust beneficiaries without calling them that or giving a title to each tier. Here are the definitions of the tiers and then how to apply the system to the two types of see-through trusts.

B. First tier: Beneficiary(ies) eligible or entitled upon participant's death. The definition of what I call first-tier beneficiaries is, "Any beneficiary who could receive amounts in the trust representing the employee's interest in the plan that are neither contingent upon, nor delayed until, the death of another trust beneficiary..." Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(A). In other words, a beneficiary who is entitled or eligible to receive distributions upon the death of the participant—this beneficiary does not have to wait until some other beneficiary dies. These "first tier beneficiaries" are always "countable," or, in the Proposed Regulations' language,

"treated as having been designated as beneficiaries. " For example, under a Conduit Trust, all distributions will, upon receipt by the trustee be paid "directly to, or for the benefit of, specified beneficiaries." Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A). The "specified beneficiaries" are first-tier beneficiaries, though that term is not used in the Proposed Regulations.

C. **Second tier: Will or may inherit what's not distributed to first tier.** A "second-tier beneficiary" is a beneficiary "that could receive amounts in the trust representing the employee's interest in the plan that were not distributed to the beneficiaries described in paragraph (f)(3)(i)(A) of this section," i.e., the first-tier beneficiaries. The Proposed Regulations refer to these second-tier beneficiaries as "secondary" beneficiaries later on, in the titling of Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(A): "(A) *Entitlement conditioned on death of secondary beneficiary*..." Are second-tier beneficiaries "countable?" That depends on the type of trust. Always "no" for a Conduit Trust; see, *e.g.*, Prop. Reg. § 1.401(a)(9)-4(f)(6)(i) (Example 1). For a See-Through Accumulation Trust, "yes" with one exception: for the exception see the "disregard" rule discussed in Part VII(D) of this Outline.

- Note that some event *other than death* (such as remarriage of the surviving spouse) that brings a new beneficiary in to sharing the benefits makes that beneficiary a first tier beneficiary; see Part XI, Paragraph I, below.

- Unfortunately, the definition of the second tier beneficiary is a bit spongey. We will have to see examples of actual trusts (beyond the simplistic scenarios in the example in the Proposed Regulations) to see whether it sticks or falters as a dividing line between countable beneficiaries in Tier 2 and disregardable beneficiaries in Tier 3.

D. **Third tier: Will inherit only upon death of a second tier.** A third-tier beneficiary is one "who could receive amounts from the trust that represent the employee's interest in the plan solely because of the death of another beneficiary described in paragraph (f)(3)(i)(B) of this section," i.e., only after the death of a second-tier beneficiary. However if the third-tier beneficiary so described also qualifies as a second-tier beneficiary then the third tier beneficiary counts as a second-tier beneficiary. Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(A).

E. **How to use the tier system.** Using this simple tier system we can figure out which beneficiaries are countable, i.e., "treated as having been designated" by the participant, and which are "disregarded," i.e., not treated as having been so designated (and therefore not countable). This system is an attempt to codify the elusive "mere potential successor" rule contained in the existing regulations.

- First tier beneficiaries are **always** countable.

- Second tier beneficiaries are always disregarded in a conduit trust. See Prop. Reg. § 1.401(a)(9)-4(f)(3).

- Second-tier beneficiaries are countable in an accumulation trust—unless the second-tier beneficiary's rights are conditioned on a first-tier beneficiary's death before age 31. Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B)). See "Disregarding successors who inherit only if beneficiary dies before age 31" in this Outline, in which case such second-tier beneficiary is disregarded.

- Third-tier beneficiaries are always disregarded (but if a beneficiary qualifies as both second-tier and third-tier, he is classified as second-tier).

F. **Always disregard beneficiaries who predeceased the participant.** Even if the individual is named in the trust instrument, he or she is disregarded if he/she predeceased the participant. For example, if the trust says "Pay income to my spouse for life, then upon the death of the survivor of myself and my spouse, distribute the principal to my then living children," if the spouse predeceased the participant then the children are the "first tier" beneficiaries. *The spouse is not a beneficiary at all, he/she is completely disregarded!* This is true even if the spouse actually survived the participant, but (as of no later than September 30 of the year after the year of death—the BFD) is *deemed* to have predeceased due to a simultaneous deaths rule, requirement of survivorship by a certain amount of time, or qualified disclaimer. Prop. Reg. § 1.401(a)(9)-4(c)(2). By the way, if the beneficiary survived the participant, but then died before the BFD, he/she DOES still count as a beneficiary (unless he/she is deemed to have predeceased as the result of e.g. a qualified disclaimer or failure to survive for a certain amount of time decreed by the trust instrument or state law. Prop. Reg. § 1.401(a)(9)-4(c)(3)(vi) (Example 6).

G. **Easy examples: Conduit trust.** See Prop. Reg. § 1.401(a)(9)-(5)(f)(6) for IRS examples of how to use the tier system to test a trust. Example 1 is a conduit trust for "D." All plan distributions received by the trust during D's life must be distributed to D, so D is the only first tier beneficiary. If there is anything left at D's death, it is distributed to E, but E (the second tier beneficiary) is disregarded because this is a conduit trust.

H. **Easy examples, cont.: Spouse for life, remainder outright to somebody else.** An accumulation trust is harder to test because you must count the second tier beneficiaries as well as the first tier. But if you have a simple trust structure like that in Example 2 in Prop. Reg. § 1.401(a)(9)-4(f)(6)(ii), you can test it easily: The trust is for the surviving spouse for life, and on spouse's death the trust terminates and is distributed outright to someone else (in the example, the decedent's sibling). If sibling fails to survive spouse, the trust passes to charity on spouse's death. The

proposed regulation states that both spouse and sibling count as beneficiaries and since both are individuals they are "designated beneficiaries." The charity is disregarded because it is a tier 3 beneficiary—it inherits only if a second tier beneficiary dies. Unfortunately many trusts will not be as simple to analyze as this example.

I. **Getting tougher: "Death or remarriage..."** The Preamble to the proposed regulation notes (regarding the preceding "Example 2") that if "sibling" would succeed to the trust property upon spouse's death *or remarriage*, then sibling would be treated as a first tier beneficiary because his rights were not contingent on the *death* of another beneficiary, and in that case "the charity would be treated as a beneficiary" of the deceased employee (which of course would cause the employee not to have a "designated beneficiary"). The charity would essentially be moved from tier 3 (disregardable) to tier 2 (countable).

J. **Testing system seems to break down?** Some common types of trusts are not readily adaptable to testing under the 3-tier system, such as a "spray" trust for surviving spouse and children. For example, if the trust says "After my death, pay income and principal to or for the benefit of my spouse, my children, and any issue of any deceased child of mine as needed for their health, education, and support." Upon the spouse's death, the trust is to be distributed to the donor's issue by right of representation, with the share of any beneficiary under age 31 held in trust for his/her benefit until reaching that age....and in case of default of issue upon or after spouse's death while any assets are still in the trust, such assets will be distributed to Charity. The spouse and all issue of the participant living at his death are First Tier beneficiaries. Who are the second tier beneficiaries? Is Charity a disregardable Third Tier beneficiary or a countable Second Tier beneficiary??? As before SECURE, it would be wise to continue to designate individuals as "wipe-out" beneficiaries if it is desired that the trust have designated beneficiary status.

K. **In the end: The rules haven't changed.** "At the end of the day" the new trust-testing rules are the same as the old trust-testing rules: As Kathy Sherby, Esq., put it, "you keep counting until you get to someone who can put it in their pocket." The regulation is looking for when the retirement plan money comes out of the trust and *goes into someone's pocket.* Thus, perpetual or multi-generation trusts are not going to fit well with these regulations. If the trust is designed so the money never "goes into someone's pocket" it may not be possible to test the trust under the tier system.

XII. **Disregarding successors who inherit only if beneficiary dies before age 31.** A perennial problem under the existing regulations has been the rule that, with an accumulation trust set up for a young individual (such as the participant's child or grandchild), the remainder beneficiary of the trust is "countable" regardless of how unlikely it is he/she will actually inherit—for example, if the young individual is to receive outright distribution at age 25 and

his 75-year-old great aunt (his next of kin) will inherit the trust if the young beneficiary dies before age 25. Under the existing regulations, the great aunt is a countable beneficiary and since she is the oldest trust beneficiary her life expectancy would have been the distribution period under the old life expectancy payout rules (mostly eliminated by SECURE).

A. Disregard any beneficiary who will inherit only if another beneficiary dies before age 31. The proposed regulations solve this problem, for clients willing to allow outright distribution to the young beneficiary by age 31. If the trust instrument requires complete distribution of the retirement plan benefits to an individual "by the end of the tenth calendar year following the calendar year in which that individual attains the age of majority" (or the end of the year of the year after the year of the participant's death if that would be earlier), any beneficiary who will receive nothing from the benefits unless such individual dies BEFORE that point is disregarded (does not count as a beneficiary for purposes of testing the trust). Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B) ("Entitlement conditioned on death of young individual").

B. This provision is not limited to minor children of the participant. Any accumulation trust for the benefit of any individual younger than age 31 can have a trust for the benefit of such individual, including an accumulation trust, and have remainder beneficiaries "ignored" for purposes of determining the designated beneficiary status of the trust, and for determining DB or EDB status, PROVIDED the retirement benefits-trust for the young individual's benefit must be distributed outright to him or her no later than age 31. This is a major helpful advance in drafting trusts for the benefit of young individuals.

XIII Multiple Beneficiaries of a Single Account. If you have a conduit trust for multiple beneficiaries you have more than one "designated beneficiary." You also have multiple countable beneficiaries if you have an accumulation trust—unless all remainder beneficiaries are "disregarded" [not countable] under the under-age-31 rule. So what is the Applicable Denominator when there are multiple beneficiaries of a single inherited retirement account?

A. General rule: No EDB status unless all countable beneficiaries are EDBs. Generally, if there are multiple designated beneficiaries (whether through a trust or not), and at least one of them is *not* an EDB, the employee is treated as having no EDBs. Prop. Reg. § 1.401(a)(9)-4(e)(2). There are two exceptions to this general rule:

- First exception: "If any of the employee's designated beneficiaries is an eligible designated beneficiary because the beneficiary is the [minor child of employee]...then the employee is treated as having an eligible designated beneficiary even if the employee has other designated beneficiaries who are not eligible designated beneficiaries." Prop. Reg. § 1.401(a)(9)-4(e)(2).

- Second exception: A "Type II" AMBT can have beneficiaries who are not D/CI and the D/CI trust beneficiary(ies) will still be treated as EDBs. Prop. Reg. § 1.401(a)(9)-4(g)(3)(ii).

B. **General rule: Applicable Denominator based on oldest DB.** "Except as otherwise provided in paragraph (f)(1)(ii) of this section [applicable to trusts named as beneficiary] and §1.401(a)(9)-8(a), if the employee has more than one designated beneficiary, then the determination of the applicable denominator under paragraph (d) of this section is made using the oldest designated beneficiary of the employee." Prop. Reg. § 1.401(a)(9)-4(f)(1)(i). The "Outer Limit Year" (my term) is also established by reference to the oldest DB. Prop. Reg. § 1.401(a)(9)-5(f)(2)(i).

- **First exception to the preceding rule**: If the trust is a Type II AMBT (only D/CI beneficiaries have "any right to the employee's interest in the plan until the death of all of" such D/CI beneficiaries), only the D/CI beneficiaries are taken into account for purposes of applying the preceding "oldest designated beneficiary" rule. Prop. Reg. § 1.401(a)(9)-4(f)(1)(ii). See "AMBTs" PART XVIII of this Outline.

- **Second exception to the preceding rule**: If the separate accounts rule applies, the beneficiaries of each separate account are tested separately. See "Separate Accounts" in this Outline. Prop. Reg. § 1.401(a)(9)-8(a)(1).

- **Third exception to the preceding rule:** There is different treatment for a trust with at least one minor-child-of-the-participant beneficiary. See Part VII of this Outline.

C. **Trust with EDBs as only countable beneficiaries.** If all the designated beneficiaries are EDBs, then, by extension of Prop. Reg. § 1.401(a)(9)-4(e)(2), the life expectancy payout applies. The example in the regulations is a trust providing life income to the decedent's surviving spouse "B" (who is an EDB), with remainder after her death to go to the decedent's sibling who is less than 10 years younger than the decedent (so the sibling is also an EDB) and who is also younger than the spouse; all countable beneficiaries are EDBs. Since both beneficiaries are EDBs, the life expectancy payout applies. Prop. Reg. § 1.401(a)(9)-5(f)(6)(i) (Example 1). The Applicable Denominator is B's life expectancy because she is the oldest designated beneficiary. Though not mentioned in this Example, recalculation of the spouse's life expectancy would NOT apply in this situation because she is not the "sole beneficiary." Prop. Reg. § 1.401(a)(9)-5(d)(3)(iv).

D. **Trust with multiple countable EDBs, cont.** Generally for a trust with multiple beneficiaries, with a life expectancy payout applicable, the Outer Limit Year (deadline for final distribution of 100% of the retirement account) is determined with

reference to the trust's oldest designated beneficiary. Prop. Reg. § 1.401(a)(9)-5(e)(3), (f)(1)(ii). I guess this would mean that if participant left his IRA to a trust for his three younger brothers, all of whom were less than 10 years younger than he was, there would be a life expectancy payout based on the oldest brother's life expectancy with the ultimate 100% payout due 10 years after the oldest brother's death—even if he died way prematurely and the other brothers are hale and hearty with many years to go. But the rule is applied differently to a trust for minor child EDBs: If ANY designated beneficiary is a minor child-EDB then the limit of "10 years after death of oldest EDB" for 100% payout does not apply. Prop. Reg. § 1.401(a)(9)-5(f)(2)(ii)(B).

E. **Accumulation trust; not all countable beneficiaries are EDBs**. If all countable beneficiaries are DBs, but not all are EDBs, then (subject to two exceptions) the 10-year rule applies. Prop. Reg. § 1.401(a)(9)-5(f)(6)(iii) (Example 3). The two exceptions pertain to trusts with minor child–EDB beneficiary(ies) and trusts with disabled or chronically ill beneficiaries; see those sections.

XIV. **Multiple Beneficiaries: Separate Accounts**. All is clear if an IRA is left to one human being as a "designated beneficiary." But what if the retirement account is left to multiple beneficiaries? That raises the question of "separate accounts." There are two *separate and unrelated questions* inherent in the separate accounts problem. One is, can each beneficiary be in charge of his own investment and distribution policy for "his share" of the IRA? The second question is whether the determination of the Applicable Denominator is made separately for each beneficiary's "share" of the IRA or for the whole group collectively? The IRS's "separate accounts" rules address these questions.

A. **Defective "old rule" under existing regulations.** Existing regulations dictate that separate accounts treatment is available for the interests of multiple beneficiaries only if the separate accounts are "established" (i.e., "physically" divided up into separate inherited accounts) by December 31 of the year after the year of the participant's death. This rule did not distinguish between the "how do we determine the distribution period" question and the "we just wanna each control our own share" question. As a result, over the years, it became apparent that the December 31 deadline applied to the separate accounts rule ONLY insofar as it related to determination of the distribution period. The distribution period (Applicable Denominator now) became finalized based on the oldest beneficiary of the (undivided) accounts as of December 31 of the year after the year of the participant's death. But despite missing that deadline, multiple beneficiaries (even if they inherited through a trust or estate) could divide up an inherited account ANYTIME for purposes of having each beneficiary do his own investing and distributing.

B. **Proposed regulations fix this.** The proposed regulations recognize that multiple beneficiaries can create "separate accounts" reflecting their separate interests

anytime. Prop. Reg. § 1.401(a)(9)-8(a)(1)(i). If these separate accounts are established by December 31 of the year after the year of the participant's death, they are given effect for purposes of determining the Applicable Denominator. If they are not established until after that date, then the required distribution for each year is determined in the aggregate (without regard to the separate accounts). Prop. Reg. § 1.401(a)(9)-8(a)(1)(ii)(A). However, even though the aggregate RMD is determined based on the combined accounts, each beneficiary's personal RMD is determined with reference to such "beneficiary's share of the total remaining balance of the employee's interest in the plan" and each beneficiary's share must be distributed to that beneficiary.

C. **Accounting for separate accounts.** The Proposed Regulations spell out requirements for how to account for separate accounts, whether or not the accounts are separated by December 31. See Prop. Reg. § 1.401(a)(9)-8(a).

XV. **Separate Accounts for an IRA Inherited Through a Trust**. Since 2002, regulations have provided that "...the separate account rules under A-2 of §1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit." Reg. § 1.401(a)(9)-4, A-5(c).

A. **Separate accounts for separate interests under a single "funding" trust**. While that was a reasonable rule with respect to an ongoing trust with multiple beneficiaries (whether or not their interests were treated as "separate shares" for purposes of allocating distributable net income under § 663), it was applied harshly and unreasonably to multiple beneficiaries who were entitled to immediate outright distributions of their predetermined shares of the trust upon the participant's death, and to multiple subtrusts similarly created by mandatory division of the single "funding" trust upon the participant's death. Prior to publishing the final regulations in 2002 the IRS had allowed separate share treatment for separate interests so established at the participant's death; see PLR 2002-34074 . (In fact this PLR was actually published in May 2002, after the final regulations with this new provision had been published...in other words the PLR was invalid the day it was published!)

B. **Congress dumped this rule for AMBTs.** This IRS interpretation is so unreasonable that Congress specifically "overruled" it in the case of AMBTs: An AMBT can be treated as a separate EDB even if it is carved out of a single trust that was named as beneficiary by the participant. Because the special rule for AMBTs could be seen as a rebuke of the IRS by Congress, some hoped that the IRS would eliminate the no-separate-accounts-for-trust beneficiaries for everyone, not just AMBTs. Did they do so?

C. **...But IRS keeps the rule?** Prop. Reg. § 1.401(a)(9)-8(a)(1)(iii) seems to indicate "no": they did not change the rule. This section provides that, except as provided (in

the proposed regulations, as required by statute) for AMBTs, "section 401(a)(9) may not be applied separately to the separate interest s of each of the beneficiaries of a" see-through trust.

D. **The rule can produce absurd results under SECURE.** If the Proposed Regulation's interpretation is intended to continue the old rule, then there will be absurd results. For example, suppose Jack's IRA is left to his trust. The trust provides that, immediately upon his death, his IRA is to be divided into four shares, transferred respectively to three separate conduit trusts for his surviving spouse, minor child, and adult nondisabled child, and an AMBT for his disabled child. The separate trust so created for the disabled child qualifies for EDB treatment (because of the special Code provision), but the separate trusts for the spouse and minor child apparently do not. The Proposed Regulation should be revised to permit separate accounts treatment for separate independent trusts created, no later than the year after the participant's death, pursuant to a mandatory division of the assets upon the participant's death. It makes no sense to allow separate account treatment for ONE of the shares so created (the AMBT) and not the others.

E. **Planning tip: Name subtrusts on the beneficiary designation form.** The "solution" for this problem is (as before the proposed regulations) for the participant to name, directly as beneficiaries of his retirement account, the separate trusts intended to wind up owning the benefits. For example, instead of naming as beneficiary "The Mary Doe Revocable Trust,' which immediately upon Mary's death is to split up into three subtrusts, to name the subtrusts directly ("I name as my beneficiary the separate trusts established for my children and issue under Article 3 of the Mary Doe Revocable Trust, in the proportions indicated in said Article 3 which is hereby incorporated herein by reference") or something like that.

F. **Can trustees fix this using "decanting?"** Assuming that the funding trust is the only named beneficiary, it would be worth exploring whether the problem can be solved by "decanting" the right to the inherited IRA out of the funding trust and into the separate trusts that are entitled to receive that IRA. The Proposed Regulations have generous terms for recognizing reformations and decantings that occur by September 30 of the year after the year of the participant's death. Prop. Reg. § 1.401(a)(9)-4(f)(iii)(B). See PART XVII of this Outline. However, since the "real problem" is the beneficiary designation (naming the single trust) and not the trust itself, it is not clear whether the post-death changes permitted by the Proposed Regulations can fix this problem.

XVI. **The Applicable Divisor (distribution period) for benefits left to a trust.** Parts X and XI of this Outline explained how to determine whether a trust is a "see-through trust" and who are the countable beneficiaries of a trust. Once you have determined who are the countable beneficiaries, you can determine the minimum distribution requirements for that trust:

A. **Conduit Trust for one beneficiary.** If the trust is a conduit trust for one individual beneficiary, the Applicable Denominator is the same as if the benefits were payable directly to that individual beneficiary. Prop. Reg. § 1.401(a)(9)-4(f)(6)(i) (Example 1). For example, a conduit trust for the benefit of the participant's surviving spouse is entitled to the spouse's full "EDB" treatment—life expectancy payout based on the spouse's life expectancy, delayed commencement of RMDs, recalculation of life expectancy. Upon the spouse's later death, any benefits remaining in the trust would be distributable to the successor beneficiary over the spouse's remaining life expectancy (not recalculated) with an Outer Limit Year of the year containing the 10th anniversary of the surviving spouse's death. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3).

B. **Trust with multiple countable beneficiaries, all EDBs.** A see-through trust is entitled to "EDB" treatment if all countable beneficiaries of the trust are EDBs. Prop. Reg. § 1.401(a)(9)-4(e)(2)(i), (f)(6)(iii) (Example 3(B)). The life expectancy of the oldest EDB is the Applicable Denominator (unless the "D/CI" or "minor child" exception (see below) applies). Following the death of such oldest EDB, the outer limit year will be the end of such oldest EDB's life expectancy or 10 years after the EDB's death if earlier. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3).

C. **Trust with multiple countable beneficiaries, not all EDBs.** If all countable beneficiaries are individuals (DBs), but not all of them are EDBs, the Applicable Divisor is determined by reference to the oldest designated beneficiary, unless the "D/CI exception" applies (see below). Prop. Reg. § 1.401(a)(9)-5(f)(1)(i). The RMDs in this case will be determined under the 10-year rule unless the "Minor child" exception (see below) applies.

D. **Trust had non-designated beneficiary(ies).** If not all countable beneficiaries of the trust qualify as "designated beneficiaries" (i.e. one or more are not individuals), the distribution period is based on the 5-year rule if participant died before his RBD (Prop. Reg. § 1.401(a)(9)-3(c)(2)), or on the ghost life expectancy if he died on or after his RBD (Prop. Reg. § 1.401(a)(9)-5(d)(1)(iii)).

E. **Minor child-EDB exception.** If all countable beneficiaries of the trust are DBs, and at least one of them is an EDB by virtue of being (as of the date of the participant's death) a minor child (under age 21) of the deceased participant, then (notwithstanding the general rule stated at "C" above), the "10-year rule" (Prop. Reg. § 1.401(a)(9)-5(e)(2)) does not apply. Prop. Reg. § 1.501(a)(9)-5(5)((2)(ii)(B). Apparently the life expectancy payout will apply, with annual RMDs based on the life expectancy of the oldest DB who is a countable beneficiary of the trust. Note: Not the oldest *EDB*, the oldest *DB* [who might or might not be an EDB]. Prop. Reg. § 1.401(a)(9)-5(f)(1)(i). The "outer limit year" (year when 100% distribution of the account is required regardless of what "annual track" distributions were ongoing) would be the year that contained the 10th anniversary of the earlier of the death of, or attainment of age 21

by, such minor-child EDB (or of the oldest of such minor-child EDBs if more than one). Prop. Reg. § 1.401(a)(9)-5(f)(2)(ii)(A).

F. **D/CI exception.** For how an AMBT is excepted from some of the above rules, see Part XVIII of this Outline.

XVII. Post-death Changes in Trust Terms. Under both the existing and the proposed regulations, a trust is tested for designated beneficiary status at the time of the participant's death, with a "second look" on September 30 of the year after the year of the participant's death. For convenience this deadline is referred to in this Outline as the Beneficiary Finalization Date or BFD. The rest of this section explains how the Proposed Regulations would expand post-death planning options; for a proposed change in the rules that goes in the other direction, see Part XXII of this Outline.

A. **What does "identifiable" mean?** Under both existing and proposed regulations, one requirement of a see-through trust is that the beneficiaries must be "identifiable." From the Proposed Regulations: "The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's interest in the plan are identifiable (within the meaning of paragraph (f)(5) of this section) from the instrument." Prop. Reg. § 1.401(a)(9)-4(f)(2)(iii). The proposed regulations say "Except as otherwise provided in this paragraph (f)(5) trust beneficiaries described in paragraph (f)(3) [the 3-tier trust-testing system] are identifiable if it is possible to identify each person *eligible* to receive a portion of the employee's interest in the plan through the trust. For this purpose, the specificity requirements of paragraph (a)(3) of this section apply." Emphasis added. By referring to Prop. Reg. § 1.401(a)(9)-4(a)(3), the regulation simply incorporates the rule that "a beneficiary need not be specified by name"; for example, it could designate "my children" without naming them and they would still be considered "identifiable."

- But...the fact that you can identify the beneficiary(ies) does not clear this up. How could a trust "pass" the *first* trust rule ("The trust is a valid trust under state law..."; Prop. Reg. § 1.401(a)(9)-4(f)(2)(i)) if it is not possible to identify the persons who will be eligible to receive the benefits?

- We are left to assume that the only purpose of this "identifiable" requirement is that it provides an avenue for the (very welcome) new proposed regulations' treatment of post-death trust modifications via decanting, etc. The "identifiable" requirement provides the gateway to explaining the effects of powers of appointment, decanting and trust reformations on the trust's qualification as a see-through trust and on the question of which beneficiaries "count" for purposes of determining the designated beneficiary.

B. **Removing (and, now, adding) beneficiaries by the BFD**. Under existing regulations, the second look on the BFD allows for "removal" (via, *e.g.*, disclaimer or distribution) of one or more beneficiaries between the date of death and the BFD. A beneficiary who has been so "removed" as of the BFD does not count as a trust beneficiary for purposes of determining whether the participant has a designated beneficiary and if so who his designated beneficiary(ies) is/are with the trust then being "tested" to see if the countable beneficiaries are "designated beneficiaries" or not: "...the employee's designated beneficiary will be determined based on the beneficiaries designated as of the date of death *who remain beneficiaries*..." on the BFD. Reg. § 1.401(a)(9)-4, A-4(a). Emphasis added. The "removed beneficiary" is erased from the picture for purposes of determining post-death RMDs. Under the proposed regulations, beneficiaries can be removed OR ADDED to the trust between the date of death and the BFD.

C. **Effect of post-death changes via decanting, etc., under existing rules**. Since the 2001-2002 adoption of the existing regulations, there has been a growth industry in post-death amendments of trusts via "decanting," reformations, and other forms of post-death modifications of trust terms. The existing regulations do not seem to allow for such changes. For example, one requirement of the trust regulation is that the trust must be irrevocable as of the participant's death. How can a trust be "irrevocable" if it can be amended or terminated at any time in the future via reformation, decanting, etc. under state law even if the trust instrument itself does not authorize such changes? The effect of *the potential* for such changes on an existing "see-through trust" has been a question vexing practitioners. The Proposed Regulations adopt a new and flexible approach to post-death changes in the terms of a trust, an approach that for the first time accommodates the possibility of later change. The Proposed Regulations do this via the requirement that, in order for a trust to qualify as a see-through trust, the trust's beneficiaries must be "identifiable" (4th RMD trust rule).

D. **The approach of the Proposed Regulations: Summary.** Post-death changes may occur via exercise of a power of appointment, decanting, or reformation. The possibility that such a change may occur later (e.g., a power of appointment may be exercised, or the trust may be reformed or decanted) will not cause the trust to flunk the identifiable test—but such change will cause the trust to be "retested" as of the date of the change, and if that results in an accelerated distribution period, the trust's RMDs will be recalculated accordingly. However, such re-testing cannot cause a 100% required distribution until the following calendar year. That is the general idea. More detail follows. Summary so far:

- The trust beneficiaries are "identifiable" (4th RMD trust rule) "if it is possible to identify each person eligible to receive a portion of the employee's interest in the plan through the trust." Prop. Reg. § 1.401(a)(9)-4(f)(i).

- The existence of powers of appointment, or the possibility that a trust might later be reformed or decanted, does not in and of itself make the trust have non-identifiable beneficiaries. Prop. Reg. § 1.401(a)(9)-4(f)(ii)(A), (f)(iii)(A).

- If the power of appointment is exercised or irrevocably restricted, or the reformation/decanting actually occurs, prior to the Beneficiary Finalization Date (BFD; September 30 of the year after the year of the participant's death), then the change seems to be given effect retroactive to the date of death for purposes of determining who are the participant's beneficiaries. See further discussion of each type of event, below.

- If the power of appointment is exercised, or the reformation/decanting occurs, *after* the BFD, the trust will be "re-tested" at that time but will not be retroactively disqualified for flunking the "identifiable" test. Also, the "restesting" cannot *improve* the RMD results. See further discussion of each type of event, below.

E. Powers of appointment: Background. What is a "power of appointment" exactly? In common usage, and as seemingly contemplated by the Proposed Regulations, and as used in this Outline, it is a power held by a trust beneficiary to "appoint" income or principal of the trust to other individuals or to entities such as a charity. Typically the beneficiary/powerholder would have a "power to appoint" trust property to or among some particular class of recipients effective upon the death of the powerholder. It is not normally used (outside the Internal Revenue Code) to refer to a *trustee's* power that is exercisable only in a fiduciary capacity to direct principal or interest to one or more beneficiaries. However, the definition can be extensive and elusive; see Reg. § 20.2041-1(b)(1). It remains to be seen whether the Proposed Regulations' rules for this subject work for all possible trust situations.

- **The dilemma under existing regulations.** Under existing regulations, a trust that provides "life interest to spouse [or other specified individual], and at death of spouse remainder outright to my then living issue [or other specified individual(s)], is "easy" to analyze: There are only "identifiable" individual beneficiaries (spouse and donor's issue living at his death, plus after-born issue living (if any) living at spouse's later death, and therefore the trust passes that test. That form of trust exactly tracks Example 1 in Reg. § 1.401(a)(9)-5, A-7(c)(3). But what if the trust says "income to my spouse for life, remainder to such of my issue and/or such charities as my spouse shall appoint by will, or in default of appointment, to my issue then living?" Do all the potential appointees including charities "count" for purposes of testing this trust? If so, the trust will "flunk" because it has potential nonindividual beneficiaries (the charities that spouse could appoint to). The treatment of the potential appointees is unclear under existing regulations.

- **Different views under the existing system.** The most "conservative" position is that all potential appointees (as well as all takers in default of exercise of the power of appointment) are "countable" beneficiaries; therefore, if the spouse could appoint to charity the trust "flunks" the rules (nonindividual beneficiary) and is not a see-through trust. If the spouse can appoint only to individuals, the trust "passes" and the oldest potential appointee's life expectancy would be the applicable distribution period for the trust. In contrast, a more "liberal" view is that potential appointees do not count as beneficiaries at all unless and until the power is exercised; this view relies on a provision to that effect in a regulation dealing with qualified subchapter S trusts, and on the general view that "things that haven't happened yet" are not considered to have happened for purposes of testing a trust for see-through status. This question has never been resolved under the existing regulations—do potential appointees count or not? The few PLRs that mention powers of appointment in connection with the minimum distribution trust rules provide only little, no, or muddled "guidance."

F. Powers of appointment: Proposed Regulations' Approach.

- The trust does not flunk the identifiable test "merely because an individual (powerholder) has the **power to appoint** a portion of the employee's interest to...beneficiaries that are not identifiable..." Prop. Reg. § 1.401(a)(9)-4(f)(ii)(A).

- Potential appointees under a power of appointment are not countable beneficiaries unless and until they are actually appointed. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii).

- If the beneficiary's power of appointment is disclaimed, exercised, or irrevocably fixed in some fashion by September 30 of the year after the year of the participant's death (the BFD), then such pre-September-30 action is given effect in testing the trust. Otherwise, the takers in default are the countable beneficiaries for purposes of testing the trust. "Takers in default" means the beneficiary(ies) who would inherit the trust if the power-holder does not exercise the power. Prop. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

- If the power is exercised after the September 30 deadline, the trust must be retested—see the discussion of retesting, below.

G. Powers of appointment: Examples, issues. Will the proposed Regulations' approach work? One thing that might need to be made clearer is the difference between a fiduciary power and a beneficiary power. The Proposed Regulations speak

of an "individual" holding the power of appointment. Presumably that is to distinguish from a "trustee" holding the power. In the tax code generally, a fiduciary's power to distribute income or principal to someone is a "power of appointment." But in the Proposed Regulations, a trustee's power to make distributions in its discretion to individuals or charities would seem to make such individuals or charities be treated as countable beneficiaries of the trust, not merely potential future beneficiaries. See Prop. Reg. § 1.401(a)(9)-4(f)(3)(i)(A). Here are power-of-appointment examples from the regulations and elsewhere:

- "Under the terms of Trust Q...[the surviving spouse, G, who is the life beneficiary of the trust]...has a power of appointment to name the beneficiaries of the residual in Trust Q." Prior to the BFD, G irrevocably restricts her own power of appointment so she "may exercise the power to appoint the remainder...only in favor of G's siblings (who all are less than 10 years younger than" the decedent. By thus restricting the remainder interest to only EDBs, and since she herself is an EDB, G's alteration of her power of appointment makes the trust have only EDBs as its countable beneficiaries, thus enabling a life expectancy payout for the trust.

- Comment: There could be gift tax implications if "G" has a general power of appointment and restricts it in some way; such gift tax implications are not discussed in the Proposed Regulations or this Outline. Prop. Reg. § 1.401(a)(9)-4(f)(6), Example 4.

- If "G" did not irrevocably restrict her power of appointment prior to the BFD, then the countable beneficiaries of the trust would have been G and the individuals who were the "takers in default" under the power of appointment. Prop. Reg. § 1.401(a)(9)-4(f)(6), Example 4.

H. Decantings and reformations: Proposed Regulations approach. The Proposed Regulations' approach to potential decantings and reformations (hereinafter "modifications") is similar to the approach for powers of appointment. Yes this might happen in the future; we'll worry about it when it happens: "A trust will not fail to satisfy the identifiability requirements....merely because the trust is subject to state law that permits the trust terms to be modified after the death of the employee (such as through a court reformation or a permitted decanting) and thus, permits changing the beneficiaries of the trust." Prop. Reg. § 1.401(a)(9)-4(f)(5)(iii)(A).

- "A trust beneficiary described in paragraph (f)(3)...may be added through a modification of trust terms (such as through a court reformation or permitted decanting). If the beneficiary is added on or before ...[the BFD], paragraph (c)...[the 3-tier trust-testing system] will apply taking into account the beneficiary that was added." Prop. Reg. § 1.401(a)(9)-4(f)(5)(iii)(C).

"Paragraph (f)(3)" contains the 3-tier trusts-testing system so presumably a "trust beneficiary described in paragraph (f)(3)" means any trust beneficiary who is either counted or disregarded under that system.

- A post-death modification that adds or removes a beneficiary is given effect for minimum distribution purposes if the addition or removal is effective by September 30 of the year after the year of the participant's death (the BFD). Prop. Reg. § 1.401(a)(9)-4(f)(5)(iii)(B), (C).

- If a beneficiary is "added" after that September 30 date, the mere addition does not cause the trust to flunk the "identifiable" requirement, but "Beginning in the calendar year after the calendar year in which the new trust beneficiary was added, the rules of §1.401(a)(9)-5(f)(1) will apply [i.e., testing the trust for see-through status] taking into account the new beneficiary and all of the beneficiaries of the trust that were treated as beneficiaries of the employee before the addition of the new beneficiary..." Prop. Reg. § 1.401(a)(9)-4(f)(5)(iv).

- If this "new" testing as a result of a post-death post-September-30 addition of a new countable beneficiary results causes the trust to become 100% distributable in that year or an earlier year, AND the year the beneficiary was added was not ALREADY a year in which 100% distribution was required, then the 100% distribution will not be required until the year after the change. Prop. Reg. § 1.401(a)(9)-4(f)(5)(iv), (iv).

I. **Decantings and reformations: Comments.** The proposed regulations speak only of adding or subtracting beneficiaries via post-death changes. Why is there is no mention of a post-death change that modifies the trust terms in some other way? Perhaps that is because, in the proposed regulations' approach, all you need to know (in order to determine the RMD regime for a trust) is which beneficiaries are countable vs. disregardable. Therefore perhaps what they mean in this post-death changes section of the Proposed Regulations is that we will count the beneficiaries before and after your change, and a change in the identity of the COUNTABLE beneficiaries is what we will be looking at....so either there are new countable beneficiaries added or old ones subtracted, that's the only kind of "modification" that matters for purposes of the RMD trust rules. If your post-death modification doesn't add or subtract countable beneficiaries (for example, a modification that changed applicable state law, or added new investment powers) we don't care about it.

- **State law aspects.** The Proposed Regulations' generous attitude toward post-death changes in the trust terms do not mean that "anything goes" as far as state law or fiduciary obligations. There is no general rule allowing trustees and beneficiaries to get together to rewrite the trust to suit themselves,

especially if the proposed change would affect the interests of minor, unborn, or charitable beneficiaries. The Proposed Regulations merely describe how changes made *pursuant to applicable law governing the trust* are treated for RMD purposes.

- **Federal tax aspects.** The Proposed Regulation's blanket acceptance of whatever changes get made prior to the BFD would appear to "overrule" some previous tax law precepts. For example, the normal Treasury standard is that a post-death trust modification made solely for the purpose of reducing taxes would not be recognized for tax purposes. And, in at least one PLR, the IRS mentioned that it would not recognize, for purposes of determining required minimum distributions, any post-death trust amendments. These limits seem to no longer apply to any change completed by the BFD, if the Proposed Regulations are adopted.

- **Planning implications.** While the generous treatment of post-death changes (if completed by the BFD) are obviously a godsend for helping survivors clean up a trust to improve RMD outcomes, they also provide a path to allow "toggles" in the planning stage. For example, a trust could give a beneficiary a limited power to appoint to charity. By exercising, disclaiming, or restricting that power prior to the BFD, the beneficiary could facilitate a desired result such as qualifying for the "ghost life expectancy" payout (if that appears more favorable than what would otherwise apply).

J. New restriction on post-death changes. While the changes discussed above are all in the direction of expanding the recognition of post-death changes, one proposed change goes in the other direction:.

XVIII. Applicable Multi-Beneficiary Trusts (AMBTs). SECURE granted special dispensations to what it calls "Applicable Multi-Beneficiary Trusts." The purpose of the dispensations was to facilitate creating a "supplemental needs trust" (SNT) for a disabled or chronically ill (D/CI) beneficiary while still qualifying for the life expectancy payout granted to such beneficiary as an EDB. Under a SNT, the trust provides only for "supplemental needs" of the beneficiary. The trust is not allowed to provide funds for the beneficiary's needs that are paid for through government programs (such as medical care and housing), and the beneficiary has no automatic right to receive "income," or a pass-through of retirement account distributions, or anything else beyond provision for his "supplemental needs." A SNT allows the disabled individual's benefactor to provide financial assistance to the individual without having the trust or its distributions counted as "assets" or "income" of the beneficiary that would disqualify him or her from the government benefit programs. In enacting SECURE, Congress was aware that, under existing regulations, a D/CI beneficiary would not be treated as the sole beneficiary of a trust under which he had no rights to demand much of anything or under a trust that divided (on the employee's death) into separate trusts only one of which was for the D/CI beneficiary. Congress was thus aware that, without special rules, typical

SNTs would not qualify for the life expectancy payout reserved for EDBs, since the D/CI beneficiary would not be considered the sole beneficiary. Congress thus included rules, in the form of the "AMBT," to assure that SNTs could get the life expectancy payout for which the D/CI beneficiary individually was eligible.

A. **Code definition of AMBT.** There is no way to explain an AMBT except to provide the Code's definition: "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 subclause (III) [disabled] or (IV) [chronically ill] of subparagraph (E)(ii)." § 401(a)(9)(H)(v).

B. **Proposed regulations definition of AMBT.** ...and the Proposed Regulations' definition: "An applicable multi-beneficiary trust 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 (as defined in paragraph (e)(1)(iii) of this section) or chronically ill (as defined in paragraph (e)(1)(iv) of this section)." Prop Reg. § 1.401(a)(9)-4(g)(1).

C. **Type I and Type II AMBTs**. The proposed regulations go further and define two types of AMBTs. "Type I" is an AMBT that "is to be divided immediately upon the death of the employee into separate trusts for each beneficiary." A Type II AMBT is an AMBT the terms of which "identify one or more individuals" who are disabled or chronically ill and who are "entitled to benefits during their lifetime," [sic] provided that "no individual (other than...[an individual so identified]) has any right to the employee's interest in the plan until the death of all of the eligible designated beneficiaries described in...[(A), i.e., the D/CI individual(s) "identified" as receiving benefits during "their lifetime"]."

D. **Effect of a Type I AMBT.** The purpose of singling out Type I AMBTs is to exempt such AMBT from the effects of Reg. § 1.401(a)(9)-4, A-5(c), which (controversially) does not allow "separate accounts" treatment (for purposes of determining the applicable distribution period) for subtrusts created out of a single trust upon the death of the participant, even if the creation of such subtrusts is mandated at the employees' death under the terms of the trust. See discussion at ¶ 6.3.02 of *Life and Death Planning for Retirement Benefits*. If the separate subtrust so created qualifies as an AMBT, it is exempt from that regulation. See Prop. Reg. § 1.401(a)(9)-8(a)(iii)(B).

E. Effect of a Type II AMBT. By providing that no beneficiary other than the D/CI beneficiary "has any right to the employee's interest in the plan" so long as the D/CI beneficiary is living (or as long as any D/CI beneficiary of the trust is living, if there are more than one), the trust is allowed to accumulate plan distributions received during the lifetime of the D/CI beneficiary(ies) (i.e., not be a conduit trust) and still use the life expectancy payout applicable to an EDB, even though there are other trust beneficiaries who are not EDBs.

F. Comments on AMBT as a planning tool. The AMBT presumably will achieve its purpose of facilitating SNTs, but it is not a way to "beat" SECURE. Plan distributions received by the trust that are not paid out in the same year for the beneficiary's supplemental needs will be subject to income tax at trust rates. Thus, while, it is helpful for its purpose of providing for supplemental needs over the beneficiary's life expectancy, the AMBT will not be much of a "tax shelter" for a large IRA. Which is presumably consistent with Congressional intent not to allow nondisabled family members to piggyback on the EDB status of the D/CI individual in order to get low taxes through a "stretch" IRA payout.

XIX. Effect of SECURE on beneficiaries of pre-SECURE decedents. Though generally, SECURE's amendments to the post-death minimum distribution rules apply only to beneficiaries of post-2019 decedents, the following language in Section 403(b) of the SECURE Act (part of SECURE's effective date provisions) makes a grab for benefits of pre-2020 decedents also:

"(A) If an employee dies before the effective date [*i.e.*, before 2020] 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 [*i.e.*, the dying-post-2019 designated beneficiary of the died-before-2020 participant] 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)."

The referenced section of § 401(a)(9)(H) provides that, upon the death of an Eligible Designated Beneficiary who was enjoying the life expectancy payout, the payout to the EDB's successor beneficiary ends (100% distribution required) no later than the year that contains the 10th anniversary of the death of the EDB. So SECURE says that for a participant who died prior to 2020 leaving benefits to a Designated Beneficiary, and that DB is taking a life expectancy payout, and the DB dies after 2019, the DB's life expectancy payout must end (100% distribution required) in the year that contains the 10th anniversary of the DB's death.

The proposed regulation applies that rule in the following way:

- First, the general, vanilla situations. The pre-2020 decedent had one designated beneficiary, who was taking a life expectancy payout and then died after 2019. The 10-year limit kicks in and all benefits must be distributed by the end of the year that contains the 10th anniversary of that DB's death (if the DB's remaining life expectancy lasts that long). Prop. Reg. § 1.401(a)(9)-1(b)(2)(iii)(A); Prop. Reg. § 1.401(a)(9)-1(b)(3)(i) (Example 1). In years one through nine, apparently, the successor beneficiary continues taking RMDs based on the life expectancy of the deceased EDB. Or, that sole DB who was taking a life expectancy payout died before 2020: In that case the 10-year rule never kicks in and the successors to that sole DB continue taking over the deceased DB's life expectancy, under the "old rules." Prop. Reg. § 1.401(a)(9)-1(b)(3)(ii) (Example 2). Now to more nuanced situations:

- SECURE had a gap: What if there were MULTIPLE designated beneficiaries of that pre-2020 decedent? Would the new 10-year limit apply just because ONE of those DB's died? Or would ALL of the pre-2020 decedent's DB's have to die before the 10 year limit would be triggered? If any ambiguity in a tax law must be interpreted in favor of the taxpayer, the answer would be "not until all of them have died." The most federal-fisc-favorable interpretation would be "when any of them dies." The proposed regulations come up with an in-between rule: "If [a participant who died before 2020]...has more than one designated beneficiary, then whether section 401(a)(9)(H) applies [i.e. whether the 10-year limit applies upon death of a DB] is determined based on the date of death of *the oldest of the employee's designated beneficiaries.* Thus, section 401(a)(9)(H) will apply upon the death of the oldest of the employee's designated beneficiaries if that designated beneficiary is still alive on or after the effective date of [SECURE]...." Emphasis added. If such oldest DB dies after 2019, any remaining balance must be distributed by the end of the year that contains the 10th anniversary of such oldest DB's death. Prop. Reg. § 1.401(a)(9)-1(b)(2)(iii)(B).

- If the oldest DB of that pre-2020 decedent died before 2020, the 10-year Outer Limit Year will never kick in. Prop. Reg. § 1.401(a)(9)-1(b)(2)(iii)(B).

- If the beneficiary of the pre-2020 decedent was a trust with multiple designated beneficiaries, this same multiple DB rule would apply under the proposed regulations. If the oldest one of them died *before 2020*, the rest of the trust beneficiaries are "home free"—they can continue to use the oldest trust beneficiary's life expectancy as long as it lasts. But if the oldest trust beneficiary dies *after 2019*, the 10-year limit will apply and the trust will have to withdraw 100% of the balance by the end of the 10th year. Prop. Reg. § 1.401(a)(9)-1(b)(3)(iv), (v) (Examples 4 and 5).

- Is the IRS's interpretation fair and reasonable? It will have a harsh effect on beneficiaries of a pre-2020 decedent where the "oldest DB" dies prematurely. For

example, suppose a 2019 decedent left his IRA to a see-through trust for his 10 grandchildren who were then ages 12 to 25. The trust is taking distributions over the life expectancy of the 25-year old, about 60 years. Then at age 26, in 2020, he dies in a car crash. Under the proposed regulations, the trust must now draw down the entire IRA by the end of 2030, according to the Proposed Regulations. That is an extremely harsh result for a supposedly grandfathered trust.

- Here's IRS's answer to a question that would just about never arise: Before SECURE, the DB of a participant who died before his RBD would be entitled to the life expectancy payout (of course, everybody knows that) but also had the option instead, if permitted by the plan, to elect the 5-year rule. I never heard of any DB electing the 5-year rule but for someone who did elect it, can he now switch to a 10-year payout? No. He is stuck with the 5-year rule because his benefactor (the deceased participant) died before 2020. Prop. Reg. § 1.401(a)(9)-1(b)(iii) (Example 3). The Example reminds us that the 5-year rule would be a 6-year rule if 2020 was one of the five years because of the "suspension of RMDS" that occurred in 2020 under the CARES Act.

XX. **Anti-gaming provisions**. Since SECURE's enactment clever tax practitioners have flooded the internet [or at least their tiny corner of it] with ideas for gaming the new rules. Not surprisingly, the IRS read some of these brilliant ideas. The proposed regs put a stop to some of them, and also patch up some holes that had previously only been blocked by notices or rulings (not regulations).

A. **Surviving spouse deferred rollover.** The proposed regulations permit the surviving spouse, if she is sole beneficiary of a participant who died before his RBD, to elect the 10-year rule instead of the life expectancy payout. Suppose surviving spouse was age 74 when participant died before his RBD naming her as sole beneficiary. What would stop her from electing the 10-year rule; then, in year nine say, taking distribution of the entire amount and rolling it into her own IRA? The distribution would not be an RMD because it was taken prior to the 10th year...and she would have avoided any RMDs for nine years, then presumably get a fresh start with this rolled over amount. No she can't says the proposed regulation. A surviving spouse's rollover, if it occurs in any year after the year she turns age 71, must be reduced by a deemed RMD amount—the cumulative total of what would have been RMDs if the account had belonged to her. See Preamble, and Prop. Reg. § 1.402(c)-2(j)(3)(iii). This would be a complicated calculation so the bottom line is, this great planning idea is going nowhere.

B. **Special lump sum distribution tax treatment** does not survive rollover from plan to IRA. We already knew this, but this may be the first time it's appeared in regulations. If a participant or beneficiary is entitled to special income tax treatment (such as "NUA" stock treatment) for an "eligible rollover distribution" from a

qualified plan distribution, and any part of such distribution is rolled into an IRA, that special treatment does not carry over to the IRA and can no longer apply to the eligible rollover distribution. By requesting a direct rollover, the distributee is deemed to have elected to treat the IRA contribution as a rollover contribution. In the case of an indirect rollover, the person making the contribution must irrevocably elect at the time of the contribution to treat the contribution as either a rollover contribution or a regular contribution. Prop. Reg. § 1.402(c)-2(k).

XXI. Non-SECURE Matters dealt with; miscellaneous cleanups. The proposed regulations provide welcome detail regarding rollovers of distributions to *beneficiaries* from qualified retirement plans. Reg. § 1.402(c)(2), dealing primarily with rollovers of distributions from qualified plans, would be restated in its entirety. As restated it would include the following provisions of interest to estate planners:

A. Distributions to surviving spouse. The proposed regulation states that the surviving spouse has the same rollover options for a distribution he/she receives, as beneficiary, from a qualified plan as the employee would have had if living. Prop Reg. § 1.402(c)-2(j)(1)(i). This is not news of course.

B. Direct rollover of inherited qualified plan. For the first time, the IRS would officially acknowledge that qualified retirement plans MUST offer a designated beneficiary the option of direct rollover of distributions from the plan to an IRA. See Prop. Reg. § 1.402(c)-2(j)(2), third sentence. When this "direct rollover" option for beneficiaries was first added to the Code in 2006, the IRS issued "guidance" indicating that the rollover was simply an option a QRP could offer to a beneficiary. In 2009, Congress amended the Code to clarify that the direct rollover was the beneficiary's right, not merely an optional benefit a plan could offer or not, but (until now) the IRS never officially revoked its "optional" guidance. As a reminder, the direct rollover option is not available for RMDs or any other distribution that is not otherwise an "eligible rollover distribution," and is not available to a beneficiary who or which does not qualify as a "designated beneficiary" (such as the participant's estate or a non-see-through trust). See ¶ 4.4.02 of *Life and Death Planning for Retirement Benefits* for more background and details.

C. Relief for beneficiaries who miss the year-of-death RMD. It has always been true that the beneficiary of an inherited IRA must take the RMD for the year of the participant's death to the extent the participant had not taken it prior to death. Reg. § 1.401(a)(9)-5(c)(1), last two sentences. The problem was that, especially if death occurred late in the year, the beneficiary might very well not know whether the decedent had taken the year-of-death RMD, or even that there was an IRA and that the beneficiary had inherited it. It would be, "Congratulations you have an inherited an IRA from your favorite uncle! Too bad you are already liable for a 50% penalty because you didn't take the RMD for the year of his death." It has always been easy

to qualify for a waiver of the 50% excise tax in this situation because it was obviously a legitimate valid reason to not take the RMD (you didn't even know there was an IRA let alone an RMD etc.), but the beneficiary did have to file form 5329 requesting that waiver. The proposed regulations grant a BIT of relief here: If the beneficiary misses the year-end deadline, then, "Unless the Commissioner determines otherwise" (???), there is an automatic waiver of the 50% excise tax normally assessed on a missed RMD (§ 4974(a)) if the beneficiary satisfies the year-of-death distribution requirement by taking the distribution "no later than the tax filing deadline (including extensions thereof) for the taxable year of that beneficiary that begins with or within that calendar year." Prop. Reg. § 54.4974-1(g)(3).

D. Clear statement of no-rollover rule for RMDs in first distribution year. Required minimum distributions are not eligible rollover distributions, and the first money that comes out of the plan in a year in which an RMD is required is applied to the RMD and accordingly may not be rolled over. And this applies in the year the employee attains age 72 (or later retires, if applicable): Even though the "RMD" for that year is not required to be distributed until April 1 of the following year, it is still a "required distribution" for the age 72/retirement year and accordingly, if distributed in that year, may not be rolled over. Prop. Reg. § 1.402(c)(2)(f)(1).

E. Clear statement that rollovers ok before first distribution year. But any amount distributed before the age 72/retirement year (i.e., before the first "distribution year," the first year for which distributions are required) is not an RMD and accordingly is an eligible rollover distribution (unless blocked by some other factor, such as being a "hardship distribution"). Prop. Reg. § 1.402(c)(2)(f)(2).

XXII. Proposed Regulations on the "Beneficiary Finalization Date." Prop. Reg. § 1.401(a)(9)-4 tells us how to determine who is the employee's beneficiary. As has long been true, the beneficiary is determined as of the date of death "minus" beneficiaries who were "removed" prior to the beneficiary finalization date (BFD) of September 30 of the year after the year of the participant's death. The Prop. Reg. continues this approach with more detail added. The Prop. Reg. states that a countable beneficiary "is a beneficiary designated under the plan as of the date of the employee's death and none of the events described in paragraph (c)(2) of this section has occurred with respect to that person by September 30 of the calendar year following the calendar year of the employee's death." Prop. Reg. § 1.401(a)(9)-4 (c)(1). I think the grammar/diction in that sentence is "off," but the meaning is clear nevertheless. Here is (c)(2)'s list of these "events" with my comments inserted:

- "(2) Circumstances under which a beneficiary is disregarded as a beneficiary of the employee. With respect to a beneficiary who was designated as a beneficiary under the plan as of the date of the employee's death (including an individual who is treated as having been designated as a beneficiary pursuant to paragraph (f) [dealing with trusts named as beneficiary—see separate discussion] of this section), if any of the

following events occurs by September 30 of the calendar year following the calendar year of the employee's death, then that beneficiary is not treated as a beneficiary–

- "(i) The beneficiary predeceases the employee; [Comment: In my opinion if the named beneficiary predeceased the employee he/she is not properly described as being "designated as of the date of the employee's death." Any such designation would be contingent on the nominated beneficiary's having survived the employee. The beneficiary's death prior to the death of the employee is not properly classed with "events" that occur between the date of the employee's death and September 30 of the following year. But this quibble does not affect the outcome—the meaning of the proposed regulations is clear.]

- "(ii) The beneficiary is treated as having predeceased the employee pursuant to a simultaneous death provision under applicable State law or pursuant to a qualified disclaimer satisfying section 2518 that applies to the entire interest to which the beneficiary is entitled; or

- "(iii) The beneficiary receives the entire benefit to which the beneficiary is entitled."

- More comments: The existing regulations have the same concept—the beneficiaries are the participant's beneficiaries as of the date of death "minus" beneficiaries "removed" prior to the BFD, but the existing regulations do not provide a finite list of recognized "removal" events as the proposed regulation does. If the proposed regulation becomes law, advisors will need to be a bit more creative to make sure beneficiary-removal "events" fit into the above list of (i)–(iii). For example, a simultaneous death provision (requirement of survival for a certain period) should be just as effective as a "state law" provision in removing a beneficiary who fails to meet the condition. The advisor would probably conclude that, since state law gives effect to the provisions of the trust instrument, the instrument's survival requirement clause is part of "applicable State law." Or, if the beneficiary's failure to meet some other condition prior to the BFD, with the result that he/she loses his/her right to any benefits under the trust, we could conclude that he/she has "received" the "entire benefit to which" he/she was entitled i.e. zero.

XXIII. Grand Finale: Case Study: Helping John Doe Survivors Compute RMDs

On April 1, 2022, Advisor is on the phone with the executor of John Doe. The task is to help John Doe's survivors compute their RMDs based on the proposed regulations.

Advisor is told the following:

- John Doe was born October 1, 1949, and died in March, 2022. John was unmarried and childless.

- He had three traditional IRAs, which he left to three different beneficiaries.
  - IRA "A" was left to his cousin Danny Doe. Danny was born October 2, 1959.
  - IRA "B" was left to his beloved older sister Daisy Doe. Her DOB was 5/1/1937.
  - IRA "C" was left to his estate—John forgot to fill out the beneficiary form for this account, and the IRA agreement says if no beneficiary is named the account will be payable to the IRA owner's estate.

- Neither Danny or Daisy Doe is disabled or chronically ill (and of course neither is the surviving spouse or minor child of John Doe).

Here is advisor's "first" report:

April 1, 2022

Dear Executor:

The late John Doe was born in 1949, so he turned age 72 in 2021. That means his "required beginning date" or "RBD" is actually *today*, 4/1/22! However, I understand that he died earlier this year, so he died "before his RBD." His age in the year of death (2022) would be 73 (age he reached or would have reached on his 2022 birthday).

Now here are the "required minimum distributions" (RMDs) for each of his IRAs, bearing in mind that he died before his RBD leaving each IRA to a different category of beneficiary.

Start with **IRA C.** Leaving your IRA to your estate, everybody knows that's a bad thing to do, an estate IS NOT and CANNOT BE a "designated beneficiary" because it is not an "individual." § 401(a)(9)(E)(i); Prop. Reg. § 1.401(a)(9)-4(b). So obviously IRA C is going to get the worst treatment because it is left to a "non-designated beneficiary" or "Non-DB."

A Non-DB that inherits the IRA of someone who died before the RBD is subject to the "5-year rule." Under this rule, the entire account must be distributed by the end of the year that contains the fifth anniversary of the date of death, in other words, by December 31, 2027. The estate may, but is not required to, take any distributions it wants to take during the years 2022–2026, as long as it withdraws 100% of the balance by 12/31/2027. That's how the family is "punished" for John Doe's failure to name a beneficiary for this account.

I understand that the sole beneficiaries of the estate are Cousin Danny and Sister Daisy, but that makes no difference. We can't "look through" the estate, sorry.

Next we turn to **IRA B,** which is left to the "middle" category of beneficiary. The "lowest" (worst) category is the Non-DB (like the estate), and the "highest" category are the glorified "Eligible Designated Beneficiaries" (EDBs) who are protected by SECURE and supposedly given the same great life expectancy payout deal that all beneficiaries received before SECURE. In the middle is the mere "designated beneficiary" who is not an EDB....what we call the "Plain Old Designated Beneficiary" or PODB.

Cousin Danny Doe is not the surviving spouse of John Doe and is not John Doe's minor child. Danny is neither disabled nor chronically ill. Finally, because he was born on 10/2/1959, he is more than 10 years younger than his cousin John, who was born on 10/1/1949, and therefore does not qualify as an EDB in the "not more than 10 years younger" category (NoMoTTYY). He is *10 years and one day* younger than his cousin John. Cousin Danny Doe who inherited IRA B is in the "middle" category: He is a PODB.

As a PODB, cousin Danny's IRA B is subject to the "10-year rule." In this case, the 10-year rule works just like the 5-year rule except it's for 10 years. So the entire account must be distributed by the end of the year that contains the tenth anniversary of the date of John Doe's death, in other words, by December 31, 2032. Danny may, but is not required to, take any distributions he wants to take during the years 2022–2031, as long as he withdraws 100% of the balance by 12/31/2032.

Finally we come to sister Daisy and **IRA A**. Daisy is an EDB; since she is older than her deceased brother John (and she is not disabled or chronically ill etc.), she is in the NoMoTTYY category. Therefore under SECURE she is entitled to the life expectancy payout, just as all designated beneficiaries were before SECURE came along.

Hurray! That's a great deal for her, right? Ummm....not really. Being born in 1937 means she will turn age 86 on her birthday in 2023 (year after the year of John Doe's death). The life expectancy for age 86 under the IRS's new life expectancy tables effective for 2022 and later years is 7.6 years. So starting next year (2023) she will have to withdraw the 12/31/2022 account balance divided by 7.6, about 13% of the entire account! And this life expectancy would go down by one each year, indicating 100% distribution would be required in just 8 years, i.e., by 2030 (when the "divisor" drops below one). So that's not such a great deal.

BUT WAIT!!!! As an EDB, where the IRA owner died before his RBD, Daisy has the option to elect the 10-year rule if permitted by the IRA agreement. Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii). Presumably all IRAs will permit this; if not she can quickly transfer the account by direct transfer to another IRA in the same name ("John Doe, deceased, fbo Daisy Doe") with a company (IRA provider) that does permit it. By electing the 10-year rule Daisy would not only get a longer payout period (10 years instead of 8) she would not have to take any RMDs during years one through nine. She can take out as much or as little as she wants during those years, as long as she takes out 100% by 12/31/2032. That gives her two years more than her own single life expectancy, with no annual distributions required before the10th year.

So we end up with both cousin Danny and sister Daisy (by election) using the 10-year rule and the estate stuck with the 5-year rule.

Advisor: "Ok, that's the end of my report, so we're all set? I'll send my bill. But, you know, dear Executor, it's pretty amazing this guy John Doe died just before his RBD. I understand he died just a couple of days ago, right?

"Oh, he died YESTERDAY? You mean he actually died on March 31, 2022? The day before his RBD? No, you say he died LAST NIGHT? Hold on a minute Mr. Executor.....what TIME last night did he die? ***Could you please read me the time and date of death from the death certificate?*** He died at *THREE MINUTES AFTER MIDNIGHT*???? So the date of death is actually *APRIL 1, 2022, AT 12:03 A.M., NOT MARCH 31????*"

There is a pause in the conversation. The Advisor goes crazy for a minute, running around the room and foaming at the mouth. When he finally calms down he says:

"THAT CHANGES EVERYTHING! This means John Doe died ON OR AFTER HIS RBD, not BEFORE it! Tear up the report I just gave you! We have to do everything over, and I have to charge you double the fee! Here is my NEW report based on this new information!"

Advisor's Revised Report

The year of death RMD.

The year of death RMD, to the extent not taken by the decedent prior to his death, must be taken by the beneficiary(ies). This is not a concern for deaths BEFORE the RBD because there are no lifetime RMDs yet accrued, but it always must be investigated in cases of death on or after the RBD.

So, first of all, there is an RMD for the year 2022, actually potentially TWO RMDs, because John died after his RBD, therefore there are RMDs for both 2021 and 2022.

The RMD for **2021** would be computed using the Uniform Lifetime Table based on the account balance as of 12/31/2020 and John's age on his 2021 birthday which was 72; the RMD for **2022** would be computed using the Uniform Lifetime Table based on the account balance as of 12/31/2021 and John's age on his 2022 birthday which was 73.

HOWEVER, two different Uniform Lifetime Tables must be used for these two years, because the IRS adopted new life expectancy tables effective for RMDs in 2022 (and later years). The age 72 factor under the "old" table (through 2021) is 25.6. The age 73 factor under the "new" table (2022 and later) is 26.5. Got that?

Now the *2021 RMD*, to the extent John had not taken it before 4/1/2022, is already late. I would advise the beneficiaries to take that 2021 RMD as soon as possible, and there's no reason to delay the other "year of death" RMD, the 2022 distribution either. Even though one of these RMDs is already late, it appears the IRS will automatically waive the 50% penalty as long as that RMD is taken by the due date of each beneficiary's 2022 tax return. See Prop. Reg. § 54.4974-1(g)(3). However, I wouldn't push them on this, so just get those distributions out of the IRAs as soon as possible.

Now let's turn to the RMD payout period for each IRA beneficiary for the post-2022 years.

Post-2022 RMDs

Start with **IRA C.** Leaving your IRA to your estate, everybody knows that's a bad thing to do, an estate IS NOT and CANNOT BE a "designated beneficiary" because it is not an "individual." § 401(a)(9)(E)(i); Prop. Reg. § 1.401(a)(9)-4(b). So obviously IRA C is going to get the worst treatment because it is left to a "Non-DB"....right? Let's see...

The payout period for a Non-DB that inherits the IRA of someone who died on or after the RBD is the "ghost life expectancy," i.e., what would have been the decedent's life expectancy if he hadn't died. Based on his age in the year of his death (age 73 on his 2022 birthday), John's life expectancy would have been 16.4 years. The estate must withdraw the funds in annual instalments

starting in 2023 over 15.4 years. The first post-death-year (2023) RMD will be the 12/31/2022 account balance divided by 15.4. The next year, 2024, will be the 12/31/2023 account balance divided by 14.4, and so on until the divisor goes to "equal or below one" which will be in 2038 when it goes to 0.4. Thus the final year will be 100% distribution in 2038. Prop. Reg. § 1.401(a)(9)-5(d)(3)(ii). Hmmm. That's not actually so terrible, is it?

Moving on to **IRA B**, inherited by Cousin Danny, the "PODB." Once again, as a PODB, Danny is subject to the 10-year rule, but this time with a twist: Because death occurred ON OR AFTER the RBD, Danny must take annual distributions in years one through nine (2023-2031) based on HIS (Danny's) single life expectancy! The single life expectancy is computed based on Danny's age in 2023 (the year after the year of death), reduced by one year each year thereafter. Prop. Reg. § 1.401(a)(9)-5(d)(3)(iii). Born in 1959, he will turn 64 in 2023. The single life expectancy for age 64 under the new Single Life Table is 23.7. So in 2023 he must withdraw the 12/31/2022 account balance divided by 23.7. In each succeeding year through year 9 (2031) he must withdraw the prior year end account balance divided by the preceding year's Applicable Denominator reduced by one, with a final overriding requirement of 100% distribution in 2032.

Just for the record note this tiny difference for computing a beneficiary's life expectancy vs. computing the "ghost" life expectancy. For the ghost life expectancy, you start with the life expectancy of the decedent *in the year of death*, reduced by one per year thereafter. For a designated beneficiary's life expectancy, you start with the beneficiary's life expectancy *in the year after the year of death*, reduced by one per year thereafter. This is what makes life so fun and exciting for us Advisors.

Just for the sake of curiosity, Danny might want to sharp pencil and figure out whether his "deal" as a "designated beneficiary" (life expectancy payouts for 9 years followed by 100% distribution in year 10) is or is not a "better deal" than the estate got for IRA C (ghost life expectancy payout over 14.4 years).

Finally we come to sister Daisy and **IRA A**. As a NoMoTTYY, she is the exalted "EDB" in the crowd so she must really get the best deal of anybody right? She gets to use a real life expectancy payout! But wait we already figured out, her life expectancy in the first life-expectancy-payout year (2023) at age 86 will be only 7.6 years, requiring 100% distribution by 2030. That's not so great.

Can she fix this by electing the 10-year rule—as she could have done if John Doe had died BEFORE his RBD? Nope. The proposed regulation allowing the EDB to elect the 10-year rule (Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii)) applies only in cases of employee death before the RBD; the proposed regulation covering distributions to beneficiaries of employees who die after the RBD (Prop. Reg. § 1.401(a)(9)-5(d)) contains no such provision.

Wait a minute...there's a "longer of" rule, right? Yes there is, sort of. The proposed regulations say that if the employee died on/after the RBD, annual distributions are computed using as the "applicable denominator," the "greater of-- (A) The designated beneficiary's remaining life expectancy and (B) the employee's remaining life expectancy." Prop. Reg. § 1.401(a)(9)-5(d)(ii). So for years 2022-2029 she takes RMDs computed using the "ghost life expectancy" under this "greater of" rule.

However, under the proposed regulations, such "annual track" distributions (that's my term for it) are over-ridden by an "Outer Limit Year" (also my term) in which 100% distribution is required regardless of what was going on under the annual distributions track. The Outer Limit Years

and that rule are contained in Prop. Reg. § 1.401(a)(9)-5(e). If the designated beneficiary is an EDB, and the Applicable Denominator is being determined under Prop. Reg. § 1.401(a)(9)-5(d)(ii)(B) [the employee's life expectancy under the "greater of" rule], then the FINAL year in which 100% distribution is required is the final year of the BENEFICIARY'S life expectancy ("the calendar year in which the applicable denominator would have been less than or equal to one if it were determined" based on the beneficiary's life expectancy).

In other words, annual distributions are determined by the *longer-of* life expectancy but a final distribution year is based on the *shorter-of* the two life expectancies!

EDBs Now Worse off than Before SECURE

The general understanding has been that the purpose of SECURE was to retain the existing life-expectancy payout rules for (only) "eligible designated beneficiaries"—the participant's surviving spouse, minor children, etc.—while shortening (in some cases drastically shortening) the payout period for other designated beneficiaries and for the "successor beneficiaries" of the EDBs. Nothing in SECURE indicated any intent to make things WORSE for EDBs—they are supposed to be the protected class for whom the pre-SECURE rules are preserved (or, in the case of disabled and chronically ill beneficiaries, even made more favorable).

But with the "shorter of" rule of Prop. Reg. § 1.401(a)(9)-5(e)(5), the IRS is making things decidedly WORSE for EDBs. Under the existing regulations (pre-SECURE) the distribution period for the designated beneficiary of an employee who died after his RBD is "the longer of—(i) The remaining life expectancy of the employee's designated beneficiary...; and (ii) The remaining life expectancy of the employee..." Reg. **§** 1.401(a)(9)-5, A-5(a)(1). The proposed regulations swap a "shorter of" rule for the existing "longer of" rule for (effectively) all EDBs who are older than the decedent.

SECURE did not get into the fine points of existing regulations when it simply stated that the beneficiary's-life-expectancy payout would apply to EDBs. Either Congress didn't notice the little ways in which existing regulations extended the "life expectancy of the beneficiary" (such as the "longer of" rule of Reg. **§** 1.401(a)(9)-5, A-5(a)(1)) or (is this really likely?) Congress wanted to clamp down on elderly EDBs who were piggybacking on the longer life expectancy of their deceased benefactor. Since the deceased benefactor was by definition over age 72, the longest possible ghost life expectancy he/she could generate would be 17.2 years, and the only people negatively affected by this switch are beneficiaries who are even older than age 72. But if the decedent leaves his IRA to his 119-year-old grandmother, the proposed regulations follow SECURE literally and required her to liquidate the account within a year after her grandson's death.

So to conclude my second report, because John Doe died after his RBD, the (revised) RMD picture is as follows. Note it is topsy-turvy—the bad non-DB estate gets the BEST deal, the supposedly favored EDB gets the WORST deal! Of course the PODB stays in the middle...

Estate: 14-year payout under ghost life expectancy.
Danny the PODB: 10-year rule, with annual RMDs in years 1-9 based on his life expectancy.
Daisy the EDB: An 8-year payout over her life expectancy (though using the decedent's life expectancy rather than her own to compute the payments in the years 2023-2029).

Appendix A: Charts: The New RMD Rules

How to determine a beneficiary's RMDs under the Proposed Regulations

by Natalie B. Choate, Esq.

These two charts summarize the minimum distribution requirements for one individual beneficiary of a decedent **who dies in 2022** according to the proposed Treasury regulations issued in February 2022. The regulations are not final, and so may change. Effective date issues are not covered here. These charts simply outline the required minimum distribution (RMD) rules for various types of individual beneficiaries (and the participant's estate) under the proposed regulations *as if* such regulations were final and effective in 2022. These charts apply only to defined contribution (individual account) plans, not defined benefit plans or annuities. These charts do not cover trusts named as beneficiary, only individuals and the employee's estate.

The new RMD "system" for beneficiaries generally has two parts. First, there is an annual distributions track: What annual distributions are required after the participant's death, if any? Second, there is an "Outer Limit Year" in which 100% of the account becomes the RMD, regardless of what the "annual distributions track" says. To advise a beneficiary you'll need to explain both the annual distributions requirement and the Outer Limit Year requirement. See Prop. Reg. § 1.401(a)(9)-5(e). The post-death payout must be completed in the Outer Limit Year if the account was not previously exhausted by the annual distributions.

To use the charts you need the following information:

1. Did the decedent die **before or after** his required beginning date (RBD)? To determine the RBD, see ¶ 1.4 of *Life and Death Planning for Retirement Benefits* (but change "age 70½" to "age 72"). You can NOT figure out any beneficiary's RMDs without knowing whether the decedent died before or on/after his RBD.

2. What category is the beneficiary?

   ...an **Eligible Designated Beneficiary** (EDB)? If so which type— participant's surviving spouse, minor child of the participant, disabled or chronically (D/CI) ill individual, or not-more-than-10-years-younger beneficiary?

   ...a **plain old designated beneficiary** (PODB)? Or,

   ...a **non-designated beneficiary** (Non-DB), such as the participant's estate?

3. The "beneficiary's life expectancy" (and the decedent's or "ghost" life expectancy) are calculated using the Single Life Table found at Treas. Reg. § 1.401(a)(9)-9(b). The applicable factor ("Applicable Denominator") is divided into the prior year end account balance. For how to calculate the prior year end account balance, see ¶ 1.5.05 of *Life and Death Planning for Retirement Benefits*.

Chart I: Post-death Required Minimum Distributions
...if Participant Died BEFORE his/her Required Beginning Date

Beneficiary	RMD for year of Participant's death	Annual distributions required in succeeding years	Outer Limit Year (100% distribution required in this year)
EDB: Participant's surviving spouse	None	Annual distributions over spouse's life expectancy (Notes 1, 3, 4).	Year that contains the 10th anniversary of EDB's death (if that comes earlier than the final year of the life expectancy payout). (Notes 5, 6)
EDB: Minor child of participant	None	Annual distributions over beneficiary's life expectancy (Notes 2, 3)	Year that contains the 10th anniversary of the earlier of the child's death or the child's 21st birthday. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3), (4).
EDB: Disabled or chronically ill individual; or not more than 10 years younger individual	None	Annual distributions over beneficiary's life expectancy (Notes 2, 3)	Year that contains the 10th anniversary of EDB's death (if that comes earlier than the final year of the life expectancy payout) (Note 5)
PODB	None	None	Year that contains the 10th anniversary of participant's death. Prop. Reg. § 1.401(a)(9)-3(c)(3).
Non-DB (participant's estate)	None	None	Year that contains the 5th anniversary of participant's death. Prop. Reg. § 1.401(a)(9)-3(c)(2).

Notes to Chart I:

1. The commencement date for RMDs to the surviving spouse ("S/S") is the later of the year after the year of the employee's death or "the end of the calendar year in which the employee would have reached age 72" (age 70½ if decedent born before 7/1/1949). Prop. Reg. § 1.401(a)(9)-3(d). RMDs are based on the S/S's life expectancy recalculated annually. Prop. Reg. § 1.401(a)(9)-5(d)(3)(iv). If the S/S dies "before distributions have commenced" under the preceding rule then the RMD rules (5-year rule, etc.) are applied "as if the S/S were the employee." To determine who is the S/S's "beneficiary" in that case, see Prop. Reg. § 1.401(a)(9)-4(d). The date "distributions have commenced" to S/S is the end of either (1) the year after the year in which the employee died or (2) the year in which the employee would have reached age 72 (or 70½ if applicable), whichever is later. Prop. Reg. § 1.401(a)(9)-3(e)(1), (3). Any distribution to the S/S in that later-of calendar year would be a nonrollable RMD until the RMD for such year (based on S/S as beneficiary) was satisfied. Prop. Regs. § 1.402(c)-2(j)(3)(i)(A), § 1.401(a)(9)-5(a)(2)(ii). If the S/S dies *after* RMDs have commenced (i.e., on or after the last day of the calendar year in which distributions to him/her were required to begin), RMDs to the successor beneficiary (based on S/S's life expectancy) continue until the year that contains 10th anniversary of S/S's death (100% distribution required) or until the life expectancy payout exhausts the account if earlier. According to the Preamble to the Proposed Regs, recalculation of S/S's life expectancy ends with year of S/S's death, and thereafter RMDs to the successor beneficiary continue based on that year-of-death remaining life expectancy minus one each year. I have not found that rule in the Proposed Regulations, only in the Preamble. Compare Prop. Regs. § 1.401(a)(9)-5(d)(3)(iv), (3)(ii).

2. Life-expectancy RMDs to non-spouse EDB commence year after year of employee's death. Prop. Regs. § 1.401(a)(9)-3(c)(4), § 1.401(a)(9)-5(a)(2)(iii). [Why does this rule appear twice?] Life expectancy of a non-spouse EDB is not recalculated annually. Prop. Reg. § 1.401(a)(9)-5(d)(3)(iii).

3. The retirement plan may require that the 10-year rule "will apply" to some or all EDBs in place of the life expectancy payout; OR allow the EDB to elect 10-year rule instead of life expectancy payout; OR allow the employee to elect that 10-year rule shall apply to the EDB instead of life expectancy payout. Prop. Reg. § 1.401(a)(9)-3(c)(5)(iii). If 10-year rule applies under these provisions, see "PODB" instead of S/S or EDB. Possible use of 10-year rule instead of life expectancy payout applies *only* if employee died before RBD.

4. The S/S also has the option to "roll over" distributions from the decedent's account into the S/S's own retirement account. Prop. Reg. § 1.402(c)-2(j)(1). Following such rollover, the S/S's RMDs will be calculated using the Uniform Lifetime Table, not the Single Life Table applicable to beneficiaries. This rollover option does not apply to any distribution to the S/S that is a Required Minimum Distribution. Prop. Reg. § 1.402(c)-2(j)(3).

5. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3).

6. Unlike other EDBs, the S/S cannot outlive her own life expectancy—unless she lives to be age 120. Because the S/S's life expectancy is recalculated annually, the S/S (while living) will not be required to withdraw 100% of the inherited account until he/she reaches age 120. If the S/S dies earlier than that age, his/her life expectancy is "frozen" and thereafter reduced by one each year. [That's according to the *Preamble* to the Proposed Regulations; I could not find this rule in the Proposed Regulations. See Prop. Reg. § 1.401(a)(9)-5(d)(3)(iv); compare (3)(ii).] Thus if S/S dies after approximately age 81 (when life expectancy drops to about 10 years), his/her successor beneficiary (who must continue to withdraw life expectancy RMDs) will be required to withdraw 100% in less than 10 years after S/S's death.

Chart II: Post-death Required Minimum Distributions
...if Employee Died ON OR AFTER his/her Required Beginning Date

Beneficiary	RMD for year of Employee's death	Annual distributions required in succeeding years	Outer Limit Year (100% distribution required in this year)
EDB: Employee's surviving spouse (S/S)	Yes if not taken by employee (Note 3)	Annual distributions over longer of spouse's life expectancy or decedent's ("ghost") life expectancy (Notes 1, 2, 4).	Earliest of: Year that contains 10th anniversary of S/S's death, final year of S/S's life expectancy; or final year of ghost life expectancy. (Notes 5, 6, 7)
EDB: Minor child of employee	Yes if not taken by employee (Note 3)	Annual distributions over beneficiary's life expectancy (Note 2)	Year that contains the 10th anniversary of the earlier of the EDB's death or the EDB's 21st birthday. (Note 9)
EDB: Disabled, Chronically ill, or not more than 10 years younger individual	Yes if not taken by employee (Note 3)	Annual distributions over longer of EDB's life expectancy or decedent's ("ghost") life expectancy (Note 2).	Earliest of: Year that contains 10th anniversary of EDB's death; final year of EDB's life expectancy; or final year of ghost life expectancy. (Notes 5, 7)
PODB	Yes if not taken by employee (Note 3)	Annual distributions over greater of beneficiary's life expectancy or ghost life expectancy. Prop. Reg. § 1.401(a)(9)-5(d)(1)(ii).	The earlier of: (1) The year that contains the 10th anniversary of the employee's death or (2) the final year of the beneficiary's life expectancy. (Notes 2, 8)
Non-DB (employee's estate)	Yes if not taken by employee (Note 3)	Annual distributions over ghost life expectancy. Prop. Reg. § 1.401(a)(9)-5(d)(1)(iii).	Final year of ghost life expectancy. Prop. Reg. § 1.401(a)(9)-5(d)(1)(iii).

Notes to Chart II:

1. RMDs to the S/S are based on the longer of S/S's life expectancy or the employee's life expectancy (sometimes called the "ghost life expectancy"). Prop. Reg. § 1.401(a)(9)-5(d)(1)(ii). The S/S's life expectancy is recalculated annually; the employee's is not. Prop. Reg. § 1.401(a)(9)-5(d)(3)(ii), (iv). [What happens if they cross? Not covered here...]

2. Life-expectancy RMDs to a beneficiary continue through the year of the beneficiary's death (if the account was not fully distributed earlier). Prop. Reg. § 1.401(a)(9)-5(d)(1)(i). When are such distributions required to commence? Presumably the year after the year of the employee's death; it appears that the limitation "in the case of an employee who dies before the required beginning date" should be removed from the definition of "First distribution calendar year for beneficiary" in Prop. Reg. § 1.401(a)(9)-5(a)(2)(iii), since the rule obviously applies regardless of whether death was before or after the RBD. Life expectancy of a nonspouse EDB is not recalculated annually. Prop. Reg. § 1.401(a)(9)-5(d)(3)(iii).

3. If the decedent had not taken the full RMD for the calendar year of his death, the beneficiary must withdraw whatever portion the decedent failed to take by December 31 of the year of the employee's death. Prop. Reg. § 1.401(a)(9)-5(c)(1), last two sentences. If the beneficiary misses that deadline, then, "Unless the Commissioner determines otherwise" (???), there is an automatic waiver of the 50% excise tax normally assessed on a missed RMD (§ 4974(a)) if the beneficiary satisfies the year-of-death distribution requirement by taking the distribution "no later than the tax filing deadline (including extensions thereof) for the taxable year of that beneficiary that begins with or within that calendar year." Prop. Reg. § 54.4974-1(g)(3).

4. The S/S also has the option to "roll over" distributions from the decedent's account into the S/S's own retirement account. Prop. Reg. § 1.402(c)-2(j)(1). Following such rollover, the S/S's RMDs will be calculated using the Uniform Lifetime Table, not the Single Life Table applicable to beneficiaries. This rollover option does not apply to any distribution to the S/S that is a Required Minimum Distribution. Prop. Reg. § 1.402(c)-2(j)(3).

5. Prop. Reg. § 1.401(a)(9)-5(e)(1), (3).

6. According to the *Preamble* to the Proposed Regulations, recalculation of S/S's life expectancy ends with year of S/S's death. Thereafter annual RMDs continue based on that year-of-death remaining life expectancy minus one each year, until S/S's life expectancy runs out. I could not find this rule in the Proposed Regulations. See Prop. Reg. § 1.401(a)(9)-5(d)(3)(iv); compare (3)(ii).

7. The "Shorter of" Rule: If the EDB was older than the decedent, then the ghost life expectancy will be longer than the EDB's life expectancy. The Proposed Regulations provide that in cases of death after the RBD, the Outer Limit Year for the EDB's "life expectancy

payout" is the final year of the ghost life expectancy or of the EDB's life expectancy *whichever comes first*. Prop. Reg. § 1.401(a)(9)-5(e)(5). As the Proposed Regulation puts it, the Outer Limit Year will be the year the beneficiary's remaining life expectancy becomes "less than or equal to one," if that happens before the final year of a payout based on the ghost life expectancy (and before the 10-year limit). This "shorter of" rule applies even if, prior to such year, the EDB was enjoying the longer payout period of the ghost life expectancy under the "longer of" rule! The shorter-of rule applies only to EDBs who were older than the employee, not to PODBs or Non-DBs. The shorter-of deadline is presumably complicated to calculate if the EDB is/was the S/S, because the surviving spouse's life expectancy is recalculated annually until the year of his/her death so it's a moving target. The "shorter of" rule wins the first annual award for Nastiest Most Mean-Spirited Proposed Regulation of the Year. It "attacks" only elderly surviving spouses, disabled or chronically ill, and other individual beneficiaries who by definition are older than age 73 and therefore have at most a 15-year payout to look forward to (though a surviving spouse's life expectancy payout could stretch to age 120, due to recalculation). Is it really necessary to force the 85-year old sibling of the deceased 80-year old employee to withdraw the entire balance within 8 (approximately) years rather than (approximately) 11 years?

8. The rule for PODBs in case of employee's death after the RBD is the 10-year rule limit, unless the payout ends earlier under the "longer of" (PODB's or employee's life expectancy) rule. I believe the longer-of rule could not apply to an individual PODB: If the PODB had a same-as-or-shorter life expectancy than the employee, the PODB would be an EDB! ("Not more than 10 years younger..."). So for practical purposes, in case of employee's death after the RBD leaving benefits to one individual PODB, the beneficiary must take the balance of decedent's year of death RMD (if not taken by the decedent), then take annual RMDs based on the *beneficiary's* life expectancy for the next nine years, then withdraw 100% of the account in year 10. The "longer of" rule might somehow come into play for a PODB if the beneficiary is a see-through accumulation trust with multiple designated beneficiaries; this Chart does not cover trusts or multiple beneficiary situations.

9. The "shorter of" rule normally applicable to an EDB under Prop. Reg. § 401(a)(9)-5(e)(5) (see Note 7) cannot come into play for benefits left to a minor-child EDB because (I'm pretty sure) the decedent cannot have been younger than his/her own child.

Appendix B: The New Life Expectancy Tables

For effective dates and how to use these tables, see the end of this Appendix.

1. Uniform Lifetime Table

Table for Determining Applicable Distribution Period (Divisor)			
Age	**Distribution period**	**Age**	**Distribution period**
70	n/a	95	8.9
71	n/a	96	8.4
72	27.4	97	7.8
73	26.5	98	7.3
74	25.5	99	6.8
75	24.6	100	6.4
76	23.7	101	6.0
77	22.9	102	5.6
78	22.0	103	5.2
79	21.1	104	4.9
80	20.2	105	4.6
81	19.4	106	4.3
82	18.5	107	4.1
83	17.7	108	3.9
84	16.8	109	3.7
85	16.0	110	3.5
86	15.2	111	3.4
87	14.4	112	3.3
88	13.7	113	3.1
89	12.9	114	3.0
90	12.2	115	2.9
91	11.5	116	2.8
92	10.8	117	2.7
93	10.1	118	2.5
94	9.5	119	2.3
		120+	2.0

This table must be used by all taxpayers to compute lifetime required distributions after 2021, unless the sole beneficiary is the participant's more-than-10-years-younger spouse. See ¶ 1.3.01. This table may not be used: by beneficiaries of a deceased participant (except in the year of the participant's death); or for years prior to 2022.

For each Distribution Year, determine: (A) the account balance as of the prior calendar year end (see ¶ 1.2.05–¶ 1.2.08); (B) the participant's age at the end of the Distribution Year (¶ 1.2.04); and (C) the Applicable Distribution Period (divisor) for that age from the above table. "A" divided by "C" equals the required minimum distribution (RMD) for the Distribution Year.

2. Single Life Expectancy Table. **FOR 2022 AND LATER YEARS ONLY**

For computing RMDs after the participant's death.

Ages 0 to 59

Age	Life Expectancy	Age	Life Expectancy
0	84.6	30	55.3
1	83.7	31	54.4
2	82.8	32	53.4
3	81.8	33	52.5
4	80.8	34	51.5
5	79.8	35	50.5
6	78.8	36	49.6
7	77.9	37	48.6
8	76.9	38	47.7
9	75.9	39	46.7
10	74.9	40	45.7
11	73.9	41	44.8
12	72.9	42	43.8
13	71.9	43	42.8
14	70.9	44	41.9
15	69.9	45	41.0
16	69.0	46	40.0
17	68.0	47	39.0
18	67.0	48	38.1
19	66.0	49	37.1
20	65.0	50	36.2
21	64.1	51	35.3
22	63.1	52	34.3
23	62.1	53	33.4
24	61.1	54	32.5
25	60.2	55	31.6
26	59.2	56	30.6
27	58.2	57	29.8
28	57.3	58	28.9
29	56.3	59	28.0

Single Life Table, cont. **FOR 2022 AND LATER YEARS ONLY**

Ages 60 to 120

Age	Life Expectancy	Age	Life Expectancy
60	27.1	95	4.0
61	26.2	96	3.7
62	25.4	97	3.4
63	24.5	98	3.2
64	23.7	99	3.0
65	22.9	100	2.8
66	22.0	101	2.6
67	21.2	102	2.5
68	20.4	103	2.3
69	19.6	104	2.2
70	18.8	105	2.1
71	18.0	106	2.1
72	17.2	107	2.1
73	16.4	108	2.0
74	15.6	109	2.0
75	14.8	110	2.0
76	14.1	111	2.0
77	13.3	112	2.0
78	12.6	113	1.9
79	11.9	114	1.9
80	11.2	115	1.8
81	10.5	116	1.8
82	9.9	117	1.6
83	9.3	118	1.4
84	8.7	119	1.1
85	8.1	120+	1.0
86	7.6		
87	7.1		
88	6.6		
89	6.1		
90	5.7		
91	5.3		
92	4.9		
93	4.6		
94	4.3		