Estate Planning for Retirement Benefits 2024-4

Under SECURE (2019), final Treasury Regulations (2024), SECURE 2.0 (2022), and Proposed Treas. Regulations (2024)

Natalie B. Choate, JD
Ataxplan Publications, Wellesley, Massachusetts
www.ataxplan.com

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PRELIMINARY MATTERS

What this Outline covers

This Outline explains how to do estate planning for clients' retirement benefits, and how to compute "required minimum distributions" (RMDs) for inherited retirement benefits, in 2024, in light of the changes made by the SECURE Act of 2019; the Treasury's final regulations issued July 2024 ("Final Regulations"), restating the minimum distribution regulations and incorporating SECURE's changes, and proposed regulations (also issued July 2024) interpreting/applying "SECURE 2.0" [2022] ("Proposed Regulations"); IRS Notices 2022-53, 2023-54, and 2024-35 granting RMD relief for some beneficiaries and stating 2025 as the earliest effective date of the final RMD regulations.

This Outline assumes the reader is generally familiar with the "minimum distribution rules" of the Internal Revenue Code of 1986 as amended (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 Benefits* (8th ed. 2019; www.ataxplan.com; for electronic edition, visit www.retirementbenefitsplanning.us). *The book is not yet updated for the new developments covered in this Outline*, but most basic RMD concepts (such as how to compute life expectancy payouts, account balance, etc.) have stayed the same.

Matters not covered in this Outline

The following matters related to the above subjects and dealt with in the Final and Proposed Regulations and/or SECURE or SECURE 2.0 are not covered in this outline or are covered only briefly to mention changes:

- QDROs
- QLACs
- Defined benefit plans
- Varying effective dates for the two statutes and rules contained in the final and proposed regulations.
- TEFRA 242(b) elections
- The applicability of SECURE and SECURE 2.0 to annuities.
- How the minimum distribution rules apply to an annuity contract purchased inside an IRA or other defined contribution plan account.
- Lifetime RMDs; only post-death RMDs are covered
- Treatment of nonvested amounts in the employee's account
- Rollovers
- Parts of the minimum distribution rules that appear not to be modified from the existing regulations, such as how to compute the account balance

About the Author

Natalie B. Choate, JD, is a nonpracticing estate planning lawyer. Her profession now is explaining the tax treatment of retirement accounts to other estate planning professionals via writing and lectures. Her book *Life and Death Planning for Retirement Benefits* (8th ed. 2019) is a leading resource for tax and investment professionals who advise clients regarding the tax treatment of their retirement accounts. She writes frequently for Leimberg Information Services and Ed Slott's IRA Advisor. She has lectured in all 50 states, and received the Distinguished Accredited Estate Planner designation and the Hartman Axley Lifetime Service Award from the National Association of Estate Planners and Councils. For information about Natalie's publications and upcoming seminars, or to book a seminar, or contact Natalie for any reason, visit her website www.ataxplan.com.

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PART 1: ABBREVIATIONS, SYMBOLS, AND TERMS USED IN THIS OUTLINE

The following symbols, terms and abbreviations are used throughout this Outline; not all are "official" terms (defined by statute or regulations).

§ Refers to a section of the Code, unless preceded by "Reg." (for Treasury regulation) or "Prop. Reg." (for proposed Treasury regulation).

¶ Refers to a section of the author's book *Life and Death Planning for Retirement Benefits* (8th ed. 2019). The book can be purchased in print form at www.ataxplan.com or in electronic format via subscription (ebook version) at www.retirementbenefitsplanning.us. The book is not yet updated for SECURE. This Outline substitutes for an update to the book for now.

5-year rule. See PART 3, #2.

10-year rule. See PART 3, #3.

Accumulation Trust. A See-through Trust that is not a conduit trust. See PART 4, #2.

AD; Applicable Denominator. The number that is divided into the prior year-end account balance to produce the RMD for the current year. Formerly (and sometimes still) called the "Applicable Distribution Period." See PART 2, #3.

ADP. Applicable Distribution Period; this term has mostly been replaced by "Applicable Denominator."

ALAR Rule. "At least as rapidly" rule. See PART 3, #3(C-E).

AMBT. Applicable multi-beneficiary trust. § 401(a)(9)(H)(v). See PART 3, #7(D-G).

Annual distributions track. Not an official term. Used in this Outline to refer to the annual RMDs (if any) required after the death of the participant, in contrast to the final year in which 100% of the account must be distributed, which is called the Outer Limit Year in this Outline.

Applicable Age. The age at which a participant becomes subject to lifetime RMDs from traditional IRAs and (generally) employer retirement plans. Prior to enactment of SECURE (2019), the Applicable Age was "always" 70½. SECURE changed it to 72, and SECURE 2.0 completed the chart as follows:

* Born before 7/1/1949: Age 70½ (i.e., no change for these individuals)

* Born 7/1/1949–12/31/1950: Age 72

* Born in 1951-1959: Age 73

* Born after 1959: Age 75

BDOT. Beneficiary deemed owner trust. Not an official term. See PART 9, Case #3(G).

Beneficiary. A person or entity who inherits an IRA or other retirement account upon the death of the Participant (the original owner, the person for whom the account was created).

BFD. Beneficiary Finalization Date. Not an official term. September 30 of year after year of participant's death. See PART 7, #2.

Code. Internal Revenue Code of 1986, as amended through August 31, 2024.

Conduit trust. See PART 4, #2.

Countable beneficiary. Not an official term. A beneficiary or potential beneficiary of a trust who is "countable" in determining whether the trust qualifies as a DBT. See PART 4, #10.

DAF. Donor advised fund. See PART 9, Case #7.

DB; Designated Beneficiary. See PART 3, #1(B).

DBT or Designated Beneficiary Trust. Not an official term. A see-through trust whose countable beneficiaries are all DBs. See PART 4, #6.

D/CI individual. A beneficiary who is an EDB by virtue of being a disabled or chronically ill individual within the meaning of § 401(a)(9)(E)(ii)(III), (IV). See PART 3, #7.

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 under § 401(a)(9) of the Code. Reg. § 1.401(a)(9)-5(a)(2).

EDB. Eligible designated beneficiary as defined in § 401(a)(9)(E)(ii). See PART 3, #4.

EDB Treatment. In this Outline, "EDB treatment" indicates that the trust in question is entitled to a life expectancy payout of some type. See PART 5, #1.

Funding trust. Not an official term. A trust that is named as beneficiary of a retirement account but will be required, upon the participant's death, to transfer such benefits to one or more individuals or subtrusts. See PART 4, #4.

Ghost life expectancy. What would have been the remaining life expectancy of a participant who died after his RBD. See PART 3, #2.

IRA. Individual retirement account or individual retirement trust under § 408.

IRS. Internal Revenue Service.

Life expectancy payout. Not an official term. A way of determining annual RMDs based on the life expectancy of a beneficiary. See PART 3, #1(D).

NoMoTTYY. Not an official term. An EDB by virtue of being not more than 10-years-younger than the deceased participant. See PART 3, #8.

Non-DB. A beneficiary who is not a Designated Beneficiary. See PART 3, #2.

Outer Limit Year. Not an official term. Reg. § 1.401(a)(9)-5(e) provides what this Outline calls an "Outer Limit Year" in which the RMD is 100% of the account, regardless of what "annual distributions track" the inherited retirement plan was subject to in the preceding years.

Participant. Not an official term. For convenience this word is sometimes used in this Outline to represent the worker/earner from whose compensation (or as part of whose compensation) the IRA or qualified plan account was created. The Code and regulations refer to this person as the "employee" (with reference to qualified retirement plans and other "workplace" retirement plans) and "the IRA owner" or "the individual" with respect to IRAs.

PODB. Plain old designated beneficiary. A beneficiary who is a "designated beneficiary" but not an "ELIGIBLE designated beneficiary." See PART 9, Case #1.

Potential beneficiary. Not an official term. See PART 4, #8.

Primary (trust) beneficiary. Not an official term, but used in the regulations and this Outline to refer to a trust beneficiary who is entitled, or eligible, to receive distributions as a result of the death of the participant, without being required to wait until after the death of some other beneficiary. Compare "residual beneficiary." See PART 4, #9.

PLR. IRS private letter ruling.

Prop. Reg. Proposed Treasury Regulation.

QRP. Qualified retirement plan under § 401(a), such as a 401(k) plan. An employer-created retirement plan that meets the requirements of § 401(a).

QTIP trust. Qualified terminable interest property trust; a type of trust for the benefit of the decedent's surviving spouse that qualifies for the federal estate tax marital deduction under § 2056(b).

Reg. Treasury Regulation.

RBD. Required beginning date. The date by which the participant must commence taking lifetime RMDs from the retirement account. See PART 2, #1(A); PART 3, #1(A).

Residual beneficiary. Not an official term, but used in the regulations to refer to a trust beneficiary who is not a "primary beneficiary." See PART 4, #9.

RMD. Required minimum distribution from a retirement plan under § 401(a)(9).

SECURE. The SECURE Act of December 2019. See PART 2, #2, for citation.

SECURE 2.0. Enacted at the end of 2022 with various effective dates. See PART 2, #2.

See-through Trust. A trust that complies with the "4 RMD trust rules." See PART 4, #7.

Separate accounts. See PART 6, #1.

SNT. Supplemental Needs Trust. See PART 9, Case #4.

Trusteed IRA. See PART 2, Case #2(D).

PART 2: INTRODUCTION TO THE RMD RULES

Tax-favored retirement accounts covered in this Outline include individual retirement accounts (IRAs) under § 408, including Roth IRAs under § 408A, defined contribution plans that are "qualified" under § 401(a) (such as 401(k) plans), and to some extent "403(b)" accounts. These accounts cannot hold tax-deferred funds forever. § 401(a)(9) and § 408(a)(6) dictate that distributions must commence to the account owner (called the "employee" in the regulations, which are aimed at qualified employer plans, or the "IRA owner" when applied to IRAs; in this Outline, "participant" is used to cover both categories) at a certain point in time. § 401(a)(9) also dictates that distributions must be made from the account after the participant's death to the beneficiaries of the account. For more on the background of the RMD rules see Chapter 1 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019).

Preface: Background; SECURE, et seq.

Once upon a time, estate planners had a wonderful surprise gift for clients. When the client showed up with a large IRA asset, an "ugly duckling" that came laden with the indebtedness for unpaid income taxes, the planner could turn the asset into a swan. The swan was called the "stretch IRA"—deferring those taxes for decades after the client's demise with a "life expectancy payout" to the client's children or grandchildren. And the client and the family and the estate planner lived happily ever after.

The rest of this Outline contains the horror story about the monster that took away the happy ending: The SECURE Act (and its successor developments). Signed into law December 20, 2019, SECURE has radically changed the estate planning landscape for clients' retirement benefits. This was accomplished primarily by amending § 401(a)(9) of the Internal Revenue Code. Except for a few types of beneficiaries, the life expectancy payout is gone with the wind, replaced by a maximum 10-year post-death payout period for most retirement benefits. Planners' new message for clients: You shouldn't have accumulated so much money in your retirement plans. Your children will be punished for this mistake. In the meantime, you will be paying me for damage control.

IRS early-2002 proposed regulations under SECURE made things even worse in some respects but also restated the entire set of RMD regs in a mostly positive way, making planning easier for practitioners and clients. In December 2022, "SECURE 2.0" threw lots of changes into the mix making the RMD rules even more tangled and complicated, though providing new tax-reduction and deferral opportunities. In July 2024 the IRS issued FINAL regulations under SECURE (clearing up many vexing RMD problems) and proposed regulations under SECURE 2.0 (that look pretty likely to become final).

Where we are now: Unless Congress throws another curve ball, we now know have 99% settled RMD and trust rules. Unfortunately the RMD rules are now incredibly complicated—for no good policy reason. But they are at least clear. It's time for planners to help clients navigate those rules and come up with the estate plans that will best achieve the client's goals.

1. Estate planning for retirement benefits: The new landscape

Planners and their IRA-owning clients did not welcome the drastic changes to the minimum distribution rules made by SECURE, eliminating the life expectancy payout for most beneficiaries that so many had counted on. But it appeared at first 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. Instead the opposite happened. The rules have gotten even more complicated than before—while the potential rewards for complying with them shrank.

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. For example:

- A designated beneficiary who is subject to the 10-year rule does not have to take any annual RMDs in years 1-9, just a 100% distribution in Year10, if the participant died before his RBD. Reg. § 1.401(a)(9)-3(c)(3). But if the participant died on or after the RBD, such beneficiary DOES have to take annual RMDs in years 1-9 over his life expectancy. Reg. § 1.401(a)(9)-5(d)(1).

- If the participant dies before his RBD, leaving the account to an EDB, the 10-year rule may apply to the EDB instead of the life expectancy payout, if so elected by the plan, the participant, or the beneficiary. Reg. § 1.401(a)(9)-3(c)(5)(ii), (iii). SECURE did not require or even suggest that wrinkle. But that option is not available for the EDB of a participant who died after his RBD.

B. New age at which lifetime RMDs must begin

An individual's RBD is generally April 1 of the year after the year in which he reaches his "Applicable Age." An individual's "Applicable Age" depends on what year he was born.

* Born before 7/1/1949: April 1 of year after the year the participant turned age 70½

* Born 7/1/1949–12/31/1950: April 1 of year after the year the participant turned age 72

* Born in 1951–1959: April 1 of year after the year the participant turns age 73

* Born after 1959: April 1 of year after the year the participant turns age 75.

For the required beginning date for each type of retirement account, see PART 3, #1(A).

2. Where to find the law

SECURE Act: See § 401, in TITLE V—REVENUE PROVISIONS of "DIVISION O" ("SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT") of the "Further Consolidated Appropriations Act, 2020." § 401(a) of this TITLE V [confusingly numbered, since the existing minimum distribution rules are in § 401(a) of the *Tax Code*] adds new subparagraph (H) to § 401(a)(9) of the Code and adds new definitions in § 401(a)(9)(E). § 401(b) of TITLE V provides the effective date of the new provisions—and contains some more minimum distribution rules which cannot be found in the Code itself.

SECURE 2.0: SECURE 2.0 is "Division T" of the Consolidated Appropriations Act , 2023, enacted 12/29/2022. Pub. L. 117–328.

Proposed regulations (SECURE): On February 23, 2022, the Treasury issued a Notice of Proposed Rulemaking regarding required distributions from IRAs and certain other retirement plans. https://www.federalregister.gov/documents/2022/02/24/2022-02522/required-minimum-distributions The 275-page Notice provides a complete proposed restatement of the Treasury regulations dealing with required minimum distributions (RMDs) from defined contribution plans (not just the sections changed by SECURE), and provides guidance on 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.

Final regulations (SECURE): July 2024: 26 CFR Parts 1, 31 and 54.

Proposed regulations (SECURE 2.0): July 2024: 26 CFR Part 1 RIN 1545-BQ66.

Notice 2002-53: 2002-2 CB 187, 7/26/2022.

Notice 2003-54, 2023-31 IRB 382, 7/14/2023.

Notice 2024-35, 2024-19 IRB 1051, 04/16/2024.

3. Important definitions and terminology

The regulations provide definitions for some of SECURE's important terms, including "reaches majority" (see PART 3, #6(A)) and other elements of the "eligible designated beneficiary" category. They also adopt and define some already-widely-used terms, including "see-through trust," "conduit trust," and "accumulation trust," for the first time; see PART 4, #2; and change some existing terms: For example, the terms "applicable distribution period" and "divisor" would mostly be replaced with "applicable denominator" or just "denominator." See, *e.g.*, Reg. § 1.401(a)(9)-5(d).

PART 3: THE RMD RULES FOR ONE BENEFICIARY

1. The RMD rules: Basics

A. Is death before or after the RBD? This matters a LOT

Step one in determining RMDs to the beneficiary of an inherited retirement account is determining whether the participant died before or after his "Required Beginning Date" (RBD). The RBD is the deadline for starting to take RMDs from the retirement account during the account owner's lifetime. Reg. § 1.401(a)(9)-2(a)(1). YOU CANNOT DETERMINE POST-DEATH RMDS FOR ANY BENEFICIARY UNTIL YOU KNOW WHETHER THE PARTICIPANT DIED BEFORE OR ON/AFTER THE RBD.

Unfortunately, the RBD is a moving target and is different for different types of retirement accounts. Not only is the "Applicable Age" different for people born in different years (see definition of "Applicable Age" in PART I), an individual can have different "RBDs" for his various retirement accounts—one for his traditional IRA (strictly age-based), another for his Roth IRA (there is no RBD for Roth IRAs), another for his 401(k) plan (where he is still working past the "Applicable Age" and does not own more than 5% of the employer). A DRAC may have either of two RBDs!

- For a traditional IRA, the RBD is April 1 of the year after the IRA owner reaches his Applicable Age. Reg. § 1.401(a)(9)-2(a)(1), § 1.408-8(a)(1). For definition of Applicable Age, see Reg. § 1.401(a)(9)-2(b)(2).

- For a traditional account in a qualified retirement plan (such as a 401(k) plan) the RBD is the same as for an IRA *if* the participant owns more than 5% of the employer ("5% owner"). Reg. § 1.401(a)(9)-2(b)(3). See ¶ 1.4.03, ¶ 1.4.04 for definition of "5% owner."

- For a non-5%-owner, it is April 1 following the *later of* [1] the year the employee reaches his Applicable Age or [2] the year the employee retires from the employer that sponsors the plan. Reg. § 1.401(a)(9)-2(b)(1).

- If an employee who owns a designated Roth account (DRAC) also owns a "traditional" account in the same retirement plan, then his "RBD" will be the same for the DRAC as for the traditional account. Note: This determination will be SOLELY for the purpose of determining whether the employee died before or after his RBD (for purposes of determining post-death RMDs), since lifetime RMDs are no longer required from a DRAC (for 2024 and later years). Reg. § 1.401(a)(9)-5(b)(3); Prop. Regs. § 1.401(a)(9)-5(g)(2)(iii), 1.402(c)-2(f)(3). See SECURE 2.0 s. 325.

- If an employee who owns a designated Roth account (DRAC) does not own any "traditional" account in the same retirement plan, then his death will always be "before the RBD," just as is the case with a Roth IRA. Reg. § 1.401(a)(9)-3(a)(2). This rule is SOLELY for the purpose

of determining whether he died before or after his RBD for the applicable retirement plan; see explanation in preceding subparagraph.

- Roth IRAs have no RMDs during the account owner's life so death is *always before the RBD* regardless of age.

For more details and citations regarding the RBD, see Chapter 1 of *Life and Death Planning for Retirement Benefits* (but substitute "the Applicable Age" for age 70½); regarding designated Roth accounts see Chapter 5, ¶ 5.07.

B. Designated beneficiary (DB) vs. Non-DB; "PODB" vs. "EDB"

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" (DB) as "any *individual* designated as a beneficiary by the employee." § 401(a)(9)(E)(I). Emphasis added. The IRS must work within that requirement and that definition. The Regulations define DB as "an individual who is a beneficiary designated under the plan." Reg. § 1.401(a)(9)-4(a)(1).

If the beneficiary of the decedent's account is not an "individual" (for example, if it is a charity), the decedent has "no designated beneficiary." A non-individual beneficiary is called in this Outline a Non-DB. The participant's own estate is always considered a Non-DB, according to the IRS (though the same is not true for the estate of a designated beneficiary).

Within the DB category, some are "Eligible" Designated Beneficiaries (EDBs; see PART 3, #4). The rest are "plain old designated beneficiaries" (PODBs).

C. Required annual distributions and the Outer Limit Year

The Regulations provide, for each type of beneficiary, in effect, an annual distributions track plus a final payout year. To determine RMDs for any beneficiary you must determine both the annual distributions track and the final payout year.

For example, an "eligible designated beneficiary" (EDB) is entitled to a "life expectancy payout," meaning annual distributions from the inherited retirement account over his or her single life expectancy until it ends, right?. Sounds simple so far! And it is...generally...but there are many wrinkles, such as:

- Under the 5-year rule for non-DBs and 10-year rule for PODBs, in case of participant death prior to the RBD, there are no annual distributions—just an Outer Limit Year.

- If participant's death was before his RBD, the EDB might be subject to the 10-year rule instead of the life expectancy payout—again, no annual distributions.

- For 2024 and later years, if the surviving spouse (an EDB) is the sole beneficiary of the account, his/her life expectancy will be determined under the Uniform Lifetime Table (i.e.

using a JOINT life expectancy) instead of the Single Life Table. See PART 3, #5. See PART 3, #5, regarding this change (made by SECURE 2.0), which is a radical shift in post-death distribution requirements.

- Whenever the sole EDB is the surviving spouse, his/her life expectancy is "recalculated annually." Reg. § 1.401(a)(9)-5(d)(3)(iv). The life expectancy of other beneficiaries (and of the spouse, if the spouse is just the oldest of multiple countable beneficiaries) is determined once, at the time of the account owner's death. Reg. § 1.401(a)(9)-5(d)(3)(iii). In both cases the beneficiary's initial life expectancy is determined based on his/her age as of his/her birthday in the year after the year of the participant's death.

- If the participant died after his RBD, and the beneficiary is older than the participant, annual distributions are determined by the participant's life expectancy, a/k/a the "ghost life expectancy" rather than the EDB's life expectancy ("greater of rule"). See PART 3, #4, (D), (F).

A "life expectancy payout" normally keeps paying out until the end of the life expectancy (unless the account is depleted earlier through extra distributions or investment losses). So the opening bid for the "final payout year" is the last year of the applicable life expectancy.

However, under SECURE and the Regulations, there is another, separately-determined, "final payout year," and when that arrives, it overrides any life expectancy payout then in progress and thus may cut short that life expectancy payout. For each type of beneficiary, there may be different rules not only for the annual payout requirements but also for the Outer Limit Year—with both being different depending on whether the participant died before or after his RBD!

Of course the life expectancy could run out before the overriding "Outer Limit Year" arrives...And under two payout rules that may apply if the participant dies before his RBD (the "5-year rule" and the "10-year rule") there are no annual distributions prior to the Outer Limit Year, so the annual payout track is "zero" per year.

The wrap up year, which is called the Outer Limit Year in this Outline (not an official term) is provided by Reg. § 1.401(a)(9)-5(e) which 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. This Outline sometimes refers to the RMDs preceding the Outer Limit Year as the "Annual Track" or "Annual Track Distributions."

Here is an overview of certain "Outer Limit Year" requirements:

For an EDB who is an EDB solely because he or she is the child of the employee who had not reached majority ("minor child-EDB"), the Outer Limit Year is the tenth calendar year following the year the beneficiary reaches majority, i.e., it is the calendar year of his/her 31st birthday (or the 10th anniversary of his death, if he dies before his age 21-birthday year). Reg. § 1.401(a)(9)-5(e)(4). The minor-child EDB is the ONLY EDB who faces an "Outer Limit Year" while he is still living—i.e., the year he/she reaches age 31. As applied, it means the calendar year that contains the earlier of [1] the 10th anniversary of the minor's death or [2] the minor's 31st birthday. So for the

minor child him/herself, the Outer limit year is the year he/she reaches age 31. For the successor beneficiary of a minor child-EDB, the Outer Limit Year is the year the child would have reached age 31, or, if earlier, the year that contains the 10th anniversary of the minor child's death. See PART 9, #3, case study for how to interpret and apply the "minor beneficiary" EDB rules.

For all other EDBs, the general Outer Limit Year is the final year of the EDB's life expectancy or (if later, and if the participant died after his RBD, the final year of the participant's life expectancy). Reg. § 1.401(a)(9)-5(d)(1)(ii). [This is new in the final regs; it was not in the proposed regs.] The override to this "greater of" payout is, (if earlier) the tenth calendar year following the calendar year of the EDB's death. In other words the 10-year Outer Limit Year concept generally *does not apply to the EDB himself*, it applies to the successor beneficiary of the EDB. Reg. § 1.401(a)(9)-5(e)(3). (The exception is a minor-child EDB; see above). Note that if the participant died after his RBD and the ghost life expectancy was longer than the EDB's life expectancy, so the "ghost" is used, the 10-year limit for payouts after the death of the EDB could last longer than 10 years after the EDB's death.

This 10-year limit for successor beneficiaries of a deceased EDB was somewhat unclear in the statute, and some interpreted it to mean that, upon the death of the EDB, the life expectancy payouts would stop and the payout period would "flip" to a 10-year rule, with no further distributions required until the 10th year after the EDB's death. **That interpretation was INCORRECT**.

Because the Proposed Regulations' interpretation was a surprise to some and/or unclear, the IRS has issued several notices (most recent 2024-35), announcing that, for years prior to 2025, it will NOT enforce the excise tax for missed RMDs (§ 4974) against the successor beneficiary of an EDB who died in 2020–2024. These Notices also apply to successor beneficiaries of "grandfathered" beneficiaries of pre-2020 decedents; see PART 3, #3(F).

D. The life expectancy payout: Then and now

A life expectancy payout refers to a method of calculating RMDs: The annual RMD is determined by dividing the prior year-end account balance by the remaining life expectancy of the individual from the applicable table (see Appendix). For a young beneficiary, the method produces small RMDs because the divisor is so large. For an old beneficiary, the opposite is true. Either way, annual RMDs tend to get larger over the years as the beneficiary's life expectancy (formerly called the divisor, now called the Applicable Denominator) gets smaller. See the (new—effective for 2022 and later years) IRS life expectancy tables in the Appendix of this Outline and "E" below.

Prior to SECURE the life expectancy payout method was utilized in estate planning by making a client's retirement benefits payable to a young designated beneficiary. SECURE took away that option for most clients, as explained throughout this Outline. However, the "old" life expectancy payout method still exists for disabled beneficiaries, surviving spouses, and other "EDBs" as well as (strangely) for PODBs for the first nine years after the participant's death if the participant died after his RBD. For how to calculate RMDs using the life expectancy payout method, see ¶ 1.2 of *Life and Death Planning for Retirement Benefits* and "transition rule to the new tables" in the following subsection.

E. IRS tables revised in 2022; how to transition if needed

The IRS updated its tables for determining life expectancy for RMD purposes effective for 2022 and later years. See Appendix for the current tables. Anyone computing RMDs in 2022 for a participant who is over the Applicable Age, or for the surviving spouse-sole beneficiary of a deceased participant, or for the designated beneficiary of a decedent who died in 2021 or later, will simply use the new tables to compute the RMD for the applicable year.

However, in computing the RMD for the nonspouse designated beneficiary of a participant who died in *2020 or earlier*, it will be necessary to apply a transition rule to determine the RMD for 2022 and later years. There is a one-time reset of the payout period, starting in 2022: You go back to the original year-after-participant's death and determine what WOULD HAVE BEEN the designated beneficiary's life expectancy in such year-after-death under the NEW tables. Then deduct one year for each year that has passed since then, and apply that as your Applicable Denominator for 2022. Continue to deduct one year from that new adjusted remaining life expectancy in each following year.

For example, suppose the IRA of a 2014 decedent is being paid out to Junior, the designated beneficiary. The life expectancy payout started in 2015, the year after the participant's death. Junior turned 35 in 2015, so his applicable distribution period (ADP) (starting in 2015, under the old table) was 48.5 years. This is reduced by one each year, so under the old rules, the divisor for 2022 would be 41.5 (48.5 minus 7 years). Under the regulation's one-time reset, we go back to 2015 and look up what Junior's life expectancy would have been under the *new* table and find it would have been 50.5 years. Now deduct the 7 elapsed years from that and we get a 2022 divisor of 43.5. His RMD for 2022 will be the 12/31/2021 account balance divided by 43.5. For 2023, the RMD will be the 12/31/22 account balance divided by 42.5. For subsequent years Junior will just keep deducting one more year from the prior year's divisor get each subsequent year's divisor.

Note: Junior is using the life expectancy payout, even though he is not disabled, minor, etc., just a "PODB," because he is the designated beneficiary of a *pre-2020 deceased participant*. His payout is "grandfathered" from the SECURE changes. If Junior dies before his 43+-year life expectancy runs out, his successor beneficiary will step into his shoes and keep withdrawing over what is left of Junior's life expectancy, but will be subject to a cap/100% distribution requirement in the year that contains the 10th anniversary of Junior's death—and will also be excused from taking RMDs in certain years—see (F) below. See also PART 8, #1A-#1E.

F. Notices 2022-53, 2023-54, and 2024-35: RMD penalty waived on certain 2021-2024 RMDs

If a participant or beneficiary fails to take an RMD by the applicable deadline, the Code imposes an excise tax on the missed amount. § 4974(a). For how to compute the excise tax, see Reg. § 54.4974-1.

The IRS has announced it will not enforce this tax (popularly referred to as a "penalty") for CERTAIN missed RMDs from inherited retirement accounts in the years 2021–2024. So if one of these specially protected beneficiaries failed to take any or all of those years' RMDs, he now does not have to take them. They can just be left in the account and ignored. There will be no penalty.

These distributions are still RMDs...but since there will be no penalty for not taking them, they are....nonrequired RMDs.

An extremely important point about these notices is that, contrary to the impression created to some individuals, these notices did NOT waive RMDs for ALL inherited retirement accounts. In fact they have absolutely no effect on most beneficiaries! Here are the ONLY beneficiaries entitled to "skip" RMDs for 2021–2024 under these Notices:

- A "plain old designated beneficiary" who inherited from a participant who died [1] after his RBD and [2] in 2020–2023. See PART 3, #3(C). Such PODB must take the year-of-death RMD payable to the participant, if the participant had not taken it prior to death. And the PODB must also take annual distributions over the PODB's life expectancy for years one through nine AFTER the participant's death, *except for the years 2021–2024.* The PODB can simply skip annual payouts for those years.

- The successor beneficiary of an EDB, where the EDB inherited from a participant who died after 2019 and the EDB later died in 2020–2023. This successor beneficiary must take the year-of-death RMD payable to the now-deceased EDB (based on the EDB's life expectancy), if the EDB had not taken it prior to death, and must *also* take annual distributions over the EDB's remaining life expectancy *except he can skip 2021-2024.* The PODB must resume taking RMDs over the EDB's remaining life expectancy in 2025 (with such payout ending in the final year of that remaining life expectancy, or in the year that contains the 10th anniversary of the EDB's death, whichever comes first).

- The successor beneficiary of the designated beneficiary of a pre-2020 decedent where such "grandfathered" DB died in 2020–2023. See PART 8, #1A-#1F and See PART 3, #4(E)(1). Such successor beneficiary must take the year of death RMD (to the extent the "grandfathered" DB had not taken it), and then continue taking RMDs over the life expectancy of the original DB until the earlier of the end of such DB's life expectancy or 10 years after the death of such DB whichever comes first—except he can skip 2021-2024 with respect to these post-year-of-death RMDs.

The following beneficiaries are NOT exempted from taking any life expectancy (or other) RMDs in 2021-2024:

♦ The EDB of any 2020–2023 deceased participant, regardless of whether participant died before or after his RBD. EDBs knew they were subject to the life expectancy payout, there was no confusion about that, therefore they are NOT excused from taking ANY RMDs.

♦ For the same reason the Notices do not apply to the designated beneficiary of a participant who died before 2020, and:

♦ It does not apply to any beneficiary of a participant who died before his RBD.

For the beneficiaries who are "excused" from taking their RMDs in 2021-2024, there is no need to file form 5329 or any other report about the missed distribution, no need to request a waiver, and no need to take any "makeup" distribution: From the Preamble to final regulations, "This relief does not require taxpayers to make up missed required minimum distributions nor does it permit taxpayers to extend the 10-year deadline by which a full distribution is required to be made. For example, if an employee died in 2020, then in 2025, there are six years remaining in the 10-year period without regard to whether the designated beneficiary took distributions in 2021, 2022, 2023, or 2024. In 2030, the designated beneficiary must take a distribution of the remaining account balance." RMDs for 2025 and later are to be calculated as usual—using the prior year-end account value divided by the applicable denominator, with no "adjustments" of any type for the missed years.

Someone who already took the RMD for any of the years 2021–2024 cannot put it back in to the account however. The distribution he took was not an eligible rollover distribution.

Also, if the inherited account is a qualified retirement plan, and the designated beneficiary wants to have it transferred into an inherited IRA, it would appear that the missed RMDs would have to be distributed first, because RMDs are not eligible rollover distributions. In that case the beneficiary would have to take the RMDs because he can't do the rollover until those RMDs have been distributed. However, the IRS has not commented one way or the other on this aspect.

2. RMDs for a Non-designated beneficiary (Non-DB)

The determination of RMDs for a Non-DB is unchanged by SECURE and unchanged by the Regulations. SECURE did not change the definition of Non-DB or the payout rules for Non-DBs. The 10-year rule, all varieties of the life expectancy payout, and the privilege of post-death direct rollovers from a qualified plan to an IRA [Reg. § 1.402(c)-2(j)(2)(ii)] are reserved for "designated beneficiaries" (DBs) and therefore are never available for a Non-DB

A Non-DB is a beneficiary who does not qualify as a DB. That would mean a beneficiary that is not an individual, such as the participant's own estate, charities, and any trust that does not qualify as a "Designated Beneficiary Trust" (DBT). Here are the payout periods that apply to a Non-DB:

♦ **5-year rule.** If the participant dies before his RBD, the 5-year rule applies. All benefits must be distributed by the end of the year that contains the fifth anniversary of the participant's date of death (or sixth anniversary, if such death occurred in the years 2015–2019). No payments are required before the final payout year. In the final year, 100% of the account becomes the RMD.

♦ **Ghost life expectancy.** If the participant dies on or after his RBD, the Non-DB must take annual distributions over what would have been the *participant's* life expectancy if he hadn't died. This has been nicknamed the "ghost life expectancy." For details on how to compute the ghost life expectancy, see ¶ 1.5.08 of *Life and Death Planning for Retirement Benefits*. As in all cases of participant's death after the RBD, the beneficiary must also take the distribution for the year of death if the participant had not taken it prior to death.

3. RMDs for a Plain old designated beneficiary (PODB): The 10-year rule

A PODB is subject to the 10-year rule regardless of whether the participant died before or after the RBD. § 401(a)(9)(H)(i). The "10-year rule," created by SECURE, is explicitly based on the "5-year rule" (applicable to non-DBs when the participant dies before his RBD). Under SECURE, it applies to any Designated Beneficiary (DB) who is not an Eligible Designated Beneficiary (EDB). Under the Regulations, the 10-year rule can *also* apply to an EDB in some cases if the participant died before his RBD; see PART 3, #4(C). Here is how the 10-year rule works:

A. 10-year rule distinguished from other 10-year RMD periods

The 10-Year Rule discussed here is not to be confused with other 10-year limits in the post-SECURE RMD rules, namely, the requirement that all benefits be distributed no later than 10 years after the death of an EDB (see PART 3, #4(E)), or after a minor-child EDB reaches majority (PART 3, #6(B)), or after the post-2019 death of the designated beneficiary of a pre-2020 decedent. Those 10-year periods are NOT "the 10-year rule"—they are merely outer limits on a Life Expectancy Payout already in progress. In contrast, the 10-Year Rule discussed here is a separate RMD rule applicable to PODBs which (1) requires no distributions prior to the 10th year and (2) is not connected to any life expectancy payout—HOWEVER, be aware that in both respects a DIFFERENT rule, the ALAR rule explained below, requires annual life-expectancy payments within the 10-year rule period in cases of Participant death after the RBD!

B. How the 10-Year Rule works

The regulations confirm 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 explicitly based) has always worked: No distributions are required until the 10th year at which time the entire account becomes the RMD. Reg. § 54.4974-1(c)(3). Unfortunately, the rare clarity and simplicity of this concept is erased by the IRS's interpretation of ANOTHER RMD rule, the "at least as rapidly rule," which (under Treasury's interpretation) annual distributions during the first nine years of the 10-Year Rule payout period, in cases of death after the RBD:

C. Death *after* RBD: Annual RMDs combined with 10-year Rule

If the participant dies after his RBD, the10-year rule <u>isn't the only RMD rule that applies</u>. The designated beneficiary must take annual distributions in years1-9 after the participant's death. This obligation derives from the "at least as rapidly" rule of § 401(a)(9)(B)(i): In cases of participant's death after RBD, distributions must continue to be made (to his beneficiary) "at least as rapidly" as before the participant's death (the "at least as rapidly" or "ALAR" rule).

Because the IRS's interpretation (applying the "ALAR rule" to require annual RMDs under the 10-year rule, if participant died after the RBD) was a surprise to practitioners, beneficiaries and plan administrators, the IRS has waived the excise tax (§ 4974) for any "plain old" designated beneficiary who: (1) inherited from a participant who died in 2020–2023, after his RBD; and (2) is

subject to the 10-year rule, with respect to RMDs required in 2021–2024. Notices 2022-53 2023-54, and 2024-35. See PART 3, #1(F).

To apply the ALAR rule alongside the 10-year rule, the regulations require a plain old designated beneficiary (PODB) to take annual RMDs, based on "the greater of" such PODB's life expectancy and the employee's life expectancy, beginning the year after the year of the participant's death. Reg. § 1.401(a)(9)-5(d)(1)(i), (ii). HOWEVER, if the participant's life expectancy were longer than the beneficiary's life expectancy, then such beneficiary (being older than the participant) would necessarily be an "EDB" (not more than 10 years younger). In other words, the "longer of" part of this regulation cannot possibly apply to a PODB.

So why does the regulation talk about the "longer of" with reference to PODBs? Because the regulation setting out distribution rules for participant-death-after-the-RBD covers all types of beneficiaries at one go, rather than setting out each type of beneficiary's payout period separately. You need to pick out the statements that actually apply to your particular beneficiary.

These annual distributions must continue "until the employee's interest is fully distributed." Reg. § 1.401(a)(9)-5(d)(1)(i) (third sentence). In the year that contains the 10th anniversary of the participant's death, the 10-year rule takes over and 100% distribution must be made no later than that year, no matter how many years may be left in the beneficiary's life expectancy. Reg. § 1.401(a)(9)-5(d)(1)(i), (e)(1), (2).

If the PODB dies before year 10, such RMDs must continue "up to and including the calendar year that includes the ..[PODB's] date of death." The RMD for the year of the PODB's death would be distributed to "any beneficiary of the deceased beneficiary to the extent it has not already been distributed to the deceased beneficiary." Reg. § 1.401(a)(9)-5(d)(1)(i). Then what? Presumably, the successor beneficiary continues to withdraw over the deceased PODB's life expectancy, with 100% distribution required in year that the contains the 10th anniversary of the participant's death.

D. Outer limit year for a PODB

If the participant died after his RBD, a PODB is subject to the ALAR Rule (see PART 3, #3(C)-(E)), meaning annual distributions over his life expectancy are required in Years 1-9, with 100% payout required in Year 10. So at first it appears his payout period is, (i) annual payments = annual distributions over his life expectancy, (ii) final payout year is the 10th anniversary of the participant's death (10-year rule) or end of the beneficiary's life expectancy payout if less than 10 years. However, I believe the final year will always be year 10, for the following reason: The final regulations say the annual payout requirement for all designated beneficiaries in case of participant death after the RBD is the "greater of" the beneficiary's life expectancy or the ghost life expectancy [this is new in the final regs; it was not in the proposed regs]. Reg. § 1.401(a)(9)-5(d)(1)(ii). However, if the participant's life expectancy was greater than the designated beneficiary's life expectancy, that would mean the DB was older than the participant....in which case the "DB" would actually be an "EDB" (NoMoTTYY; PART 3, #8) and we would not be looking at the PODB rule at all. A PODB *must be* more than 10 years YOUNGER than the participant (otherwise he's not a PODB), therefore, his LE cannot be shorter than the participant's "ghost" life expectancy!

E. 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 excise tax for missed RMDs annually. Reg. § 54.4974-1(e).

4. EDB: General RMD rules for EDBs

The Code, as amended by SECURE, provides that only an "eligible designated beneficiary" (EDB) is entitled to the "life expectancy payout" described in § 401(a)(9)(B)(iii). § 401(a)(9)(H).

The definitions of the five types of EDBs (participant's surviving spouse or minor child, a disabled or chronically ill individual, or an individual who is none of the above and is not more than 10 years younger than the participant) are found in § 401(a)(9)(E)(ii) and Reg. § 1.401(a)(9)-4(e), and are set out in the applicable section of this Outline for each category.

This section discusses the general RMD rules for the EDB category; particular variations for each type of EDB are discussed in the Outline section for that category.

A. Background: Where does the life expectancy payout come from?

If you're interested, carefully read § 401(a)(9) of the Code, the section that creates the "required distributions" rules applicable to qualified plans and (by extension via other Code sections) IRAs and 403(b) plans. You will see that § 401(a)(9)(A) sets out the requirement for distributions that are required *during the employee's lifetime*, beginning on a "required beginning date" (RBD) set out in § 401(a)(9)(C).

§ 401(a)(9)(B) provides the post-death RMD rules if the employee still has money in the plan when he dies. "(B)(i)" provides the post-death RMD rule that applies if the employee dies after the RBD—the (B)(i) rule is known as the "at least as rapidly" rule, see PART 3, #3(C)-(E).

Then "(B)(ii)" provides a general rule for what happens if the employee dies *before* that RBD: "the entire interest of the employee will be distributed within 5 years after the death of such employee"—the infamous "5-year rule." That's a bit harsh on the aggrieved widow/er, orphaned children, and other dependents of the deceased employee, so the Code next provides a generous exception in "(B)(iii)": If there is a designated beneficiary, benefits are to be distributed over the life expectancy of such designated beneficiary. (B)(iii) created the life expectancy payout and, for planners and clients, the entire industry of "stretch IRAs."

As we know, SECURE stepped in to end stretch IRAs. It attempted to do so by adding a "notwithstanding"-type rule in new Code subsection § 401(a)(9)(H): (H)(ii) provides that "Subparagraph (B)(iii) [the life expectancy payout section] shall apply only in the case of an eligible designated beneficiary." In other words, the life expectancy payout previously available under (B)(iii) to ANY designated beneficiary would now be available only to EDBs.

But the (B)(iii) exception that SECURE put restrictions on is an exception to the 5-year rule...and the 5-year rule only applies in cases of death *before the RBD*. **The life expectancy payout for any beneficiary in cases of death *after* the RBD is not specifically set out in the Code at all.** It came into existence entirely through IRS regulations interpreting the "at least as rapidly rule"

(§ 401(a)(9)(B)(i)) and the rule that the employee's interest must be distributed either entirely before the RBD or, "beginning not later than the required beginning date, in accordance with regulations, over the life of such employee *or over the lives of such employee and a designated beneficiary* (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary)." § 401(a)(9)(A)(ii). Emphasis added.

SECURE seemed to assume that the life expectancy payout for EDBs under the "(B)(iii) exception" would apply regardless of whether death is before or after the RBD even though (B)(iii) does not apply to deaths after the RBD. The Regulations go along with that assumption.

B. RMDs for EDBs during the EDB's life

Generally, RMDs to an EDB are calculated using the life expectancy payout, just as was done for all designated beneficiaries prior to SECURE, but there are some other options (see "C") and variations (see "D").

Here is the explanation of the life expectancy payout method as it applies to a nonspouse designated beneficiary:

Life expectancy is calculated as a fixed term of years. The method of calculating RMDs under the life expectancy payout is not changed from before SECURE. Annual RMDs for a nonspouse EDB are computed (starting the year after the year of the participant's death) by dividing the prior year end account balance by the life expectancy factor ("applicable denominator") for the beneficiary's age on his/her birthday in that year after the death, and repeating the process annually, reducing the divisor by one each year until the factor drops to one or below. See Chapter 1 of *Life and Death Planning for Retirement Benefits* and Reg. § 1.401(a)(9)-5(a)(i). If the surviving spouse is the sole designated beneficiary, there are totally different rules regarding when distributions start and how they are computed; see PART 3, (#5).

Example: Rita dies in 2024, before her RBD, leaving her IRA to her twin sister Lolita. Lolita is a NoMoTTYY and so is an EDB. Lolita will turn 67 in 2025, the year after Rita's death. The life expectancy at age 67 is 21.2 years, so the RMD for 2025 is [the account balance of the IRA as of 12/31/24] divided by 21.2. The RMD for 2026 will be the account balance as of 12/31/25 divided by 20.2, and so on every year until 2045 when the divisor drops to .2, requiring 100% distribution of the account in that year.

One thing that has changed since before SECURE: If the EDB dies before his life expectancy has run out, the successor beneficiary will continue to take RMDs on the same schedule the EDB was using—that rule applied before SECURE and continues to apply. What's changed: The successor beneficiary must withdraw 100% of the account in the year that contains the 10th anniversary of the EDB's death even if the "life expectancy payout period" has not run out yet [though he/she can skip years before 2025; see PART 3 (F)(5)]. See "E."

C. Participant dies before RBD: 10-year rule may apply to EDB

The Code's bare assertion is that the life expectancy payout "shall apply only in the case of an eligible designated beneficiary." Under the regulations, however, the life expectancy payout may not be the EDB's only option or may not even BE an option under the applicable plan! This wrinkle seems to have been entirely invented by the Treasury, there is no hint of it in the Code.

Under the regulations, the 10-year rule would apply to the EDB instead of the life expectancy payout in the following cases; as a reminder, the "retirement plan" could be an IRA, or an employer-sponsored qualified retirement plan like a 401(k) plan, or any of the other tax favored retirement plans subject to the minimum distribution rules.

- The applicable plan document requires it: The plan can make the 10-year rule applicable with respect to all EDBs, or to EDBs of certain categories of employees, or to certain categories of EDBs. Reg. § 1.401(a)(9)-3(c)(3), (5)(ii).

- The applicable plan document permits the participant to elect the 10-year rule for his/her EDB and the employee does so elect. Reg. § 1.401(a)(9)-3(c)(3), (5)(iii).

- The applicable plan document permits the EDB to elect the 10-year rule and the EDB does so elect. Reg. § 1.401(a)(9)-3(c)(3), (5)(iii).

In the case of a beneficiary election, the election must be made no later than the end of the *earlier* of: the year that contains the 10th anniversary of the employee's death, or the year the EDB would have to start taking RMDs under the life expectancy method. Reg. § 1.401(a)(9)-3(c)(5)(B). Since all EDBs other than the surviving spouse have to take RMDs starting the year after the year of the participant's death, the end of that year is the deadline for all non-spouse EDBs. For the surviving spouse, it would be the *earlier of* the year that contains the 10th anniversary of the participant's death or the year that the participant would have attained his Applicable Age.

If the plan allows has no provision on this point, the "default" rule for an EDB is the life expectancy payout. Reg. § 1.401(a)(9)-3(c)(5)(i).

If an EDB fails to take life expectancy RMDs, he MAY qualify for a waiver of the 25% excise tax on missed RMDs by "electing" the 10-year rule by the end of year 9 after the employee's death; see Reg. § 54.4974-1(g)(2).

The Regulations contain provisions dealing with an EDB's ability to transfer funds from a plan that requires the 10-Year rule to another plan or IRA that permits the life expectancy payout. **This aspect is not covered in this Outline.**

The option to elect the 10-year rule is not available to the DB of a pre-2020 decedent. Reg. § 1.401(a)(9)-1(b)(iii) (Example 3).

D. Participant dies after RBD: The "greater of" rule

If the participant died after his RBD, the Applicable Denominator for determining annual RMDs to an EDB is the longer of the EDB's life expectancy and the participant's life expectancy

(the “greater of” rule). Reg. § 1.401(a)(9)-5(d)(1)(ii). The “greater of” rule is good news for older EDBs. They will get at least as good a “deal” as a Non-DB would get—namely, the ghost life expectancy payout.

Example: The designated beneficiary of Tommy’s IRA is his mother Lucy who is 22 years older than Tommy. If Tommy dies at age 73 (before his RBD), so Lucy inherits at age 95, Lucy’s life expectancy is only 4.0 years....but as an EDB [NoMoTTYY], she can elect the 10-year rule and so withdraw the IRA gradually over that period of time if the plan permits that election. If Tommy dies at age 74, *after* his RBD, Lucy is now 96 with a life expectancy of 3.7 years....and no more option to elect the 10-year rule! Under the “greater of” rule, the distribution period for Lucy will be Tommy’s “ghost life expectancy” (15.6 years at age 74).

The plain old designated beneficiary (PODB),on the other hand may get a better deal than some EDBs: A younger PODB (whose life expectancy is longer than 10 years) gets the 10-year payout even if the participant’s “ghost” life expectancy was less than 10 years.

E. Outer Limit Year for EDB payouts

There are the following possible “outer limits” applicable to EDB payouts.

(1) **10 years after death of EDB**. One is a limit introduced by SECURE which puts a limit on how long a life expectancy payout can continue *after the death of the EDB*. Prior to SECURE, the designated beneficiary’s successor beneficiary would step into the shoes of the deceased DB and simply keep taking RMDs over the remaining life expectancy of the DB until it was reduced to one year or less. Even if that remaining life expectancy was 30 or 40 years!

Under the Code as amended by SECURE, that process still partly happens—the successor beneficiary of an EDB steps into the shoes of the deceased EDB and keeps taking RMDs based on the remaining life expectancy of the deceased EDB—but now there is a cap on how long that payout can continue: 100% of the account must be distributed no later than the year that contains the 10th anniversary of the death of the EDB. § 401(a)(9)(H)(iii); Reg. § 1.401(a)(9)-5(e)(3).

If the EDB dies more than 10 years prior to the end of his life expectancy, this limit will cap the post-death payout to the successor beneficiary at the 10th year. If the EDB dies within less than 10 year prior to the expiration of his life expectancy this 10-year limit will never come into play because the EDB’s remaining life expectancy will run out before the 10th year. Because of confusion about this rule see IRS Notices “forgiving” certain RMDs for 2021-2024 in certain cases, explained at PART 3(#1)(F).

(2) **EDB’s life expectancy**: The second type of Outer Limit Year is the final year of the EDB’s life expectancy. Generally a “life expectancy payout” to an EDB will make its final payout in the final year of that life expectancy, even if the EDB lives beyond that year. Note that if

the "greater of" rule applies, the Outer Limit Year will be the last year of whichever life expectancy applies (EDB's or ghost), or 10 years after EDB dies, whichever is earlier.

(3) **Ghost life expectancy.** If the participant died after his RBD, and the EDB is taking RMDs based on the greater of rule over the *participant's* life expectancy, the final year of that life expectancy would be the Outer Limit Year.

(4) **10-year rule possible in rare cases (in death before the RBD situation).** If the EDB's life expectancy was less than 10 years, but the participant died before his RBD and the 10-year rule applies—see "C" above. Reg. § 1.401(a)(9)-5(d)(2).

(5) **For a Minor-child EDB, 10 years after year of age-21 birthday (or of earlier death).** In the case of a minor child of the participant, EDB status ends upon reaching majority, so the payout must end in the year that contains the 10th anniversary of the earlier of such child's death or the year in which he such child reaches majority. § 401(a)(9)(E)(iii). See PART 3(#6)(F).

5. EDB: Participant's surviving spouse (S/S): New good but complicated deal

The participant's surviving spouse (S/S) is an Eligible Designated Beneficiary (EDB) and as such entitled to a life expectancy payout. For convenience, the deceased participant is referred to as "he" and the S/S as "she."

There are two sets of special rules for the surviving spouse. One is the minimum distribution rules, just as there are special RMD rules for other EDBs. 5(A) explains the RMD rules for the surviving spouse if the participant dies before his RBD; 5(B) covers the RMD rules if the participant dies on or after his RBD. 5(C) covers a different special deal for the surviving spouse, which is NOT a minimum distribution rule at all: The spouse's ability to roll over the inherited account or elect to treat an inherited IRA as her own.

There are and always have been special RMD rules for determining how to compute life expectancy payments to the surviving spouse-beneficiary and when such payments must commence. The special rules for determining when payouts to the S/S must commence, how such payments are computed, and what happens if she dies before she is required to start taking such distributions were not significantly changed by SECURE or by the 2022 Proposed (SECURE) Regulations (except that the age at which the deceased spouse would have had to commence distributions was changed from age 70½ to the Applicable Age and the 10-year rule entered the picture). However, SECURE 2.0 made **substantial changes** in the surviving-spouse RMD rules. The new version is now primarily in the form of Final and Proposed Regulations issued July 19, 2024.

The following explanation is based on the Proposed Treasury regulations issued July 2024, as well as on the Code, the final regulations issued July 2024, and section 327 of The SECURE 2.0 Act of 2022 (P.L. 117-328, Div. T).

Section 327 of SECURE 2.0 "shall apply to calendar years beginning after December 31, 2023." The Proposed Regulations are still just proposed regulations so may be modified before they become final. They propose to be effective as to all surviving spouse-beneficiaries whose first RMD

year would be 2024 or later. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(E); Preface, p. 10. That would mean, it is applicable to surviving spouses of participants who were born in 1951 or later and died before the end of the year they would have reached age 73. Note that it is effective for these surviving spouses even if the deceased employee died many years ago:

Example: Clark, born in 1957, died in way back in 2017 at age 60, leaving his IRA to his wife Lois. He would have reached his Applicable Age (73) in 2030. If she is still holding the IRA as an inherited IRA, she will start RMDs no later than 12/31/2030 using the Uniform Lifetime Table—even though SECURE 2.0 had never even been dreamed of back when Clark died.

However it is not effective for spouses whose RMDs from their deceased spouse's account began in 2023 or earlier:

Example: Mary died in 2017 at age 75, leaving her IRA to her husband William. Since she died after her RBD, William had to start taking RMDs in 2018, the year after her death. His RMDs are not affected by the new law and he does not get to take advantage of the SECURE 2.0 changes.

The treatment of the surviving spouse is different depending on whether the deceased spouse died before or on/after his required beginning date (RBD) under the applicable retirement plan, so the advisor must know which applies before attempting to assist/advise the surviving spouse.

A. Participant died before his required beginning date (RBD)

Although the general rule is that a beneficiary who is required to take life-expectancy-based RMDs must commence such RMDs the year after the year of the participant's death (Reg. § 1.401(a)(9)-3(c)(4)), there are and always have been special rules for the surviving spouse. SECURE 2.0 made substantial changes in these special rules. The good news is that the new regime is more favorable to surviving spouses than was the prior regime.

Although the following (i) through (v) describe the new version of the traditional life-expectancy-payout rule for a surviving spouse, there is a spanner thrown into the works, a different deal from left field, that MAY apply instead of the life expectancy payout rule described in (i) through (v): In some cases the 10-year rule may apply to the surviving spouse! See (vi)–(vii) for that important wild card. Subsections (i) through (v) assume the 10-year rule does NOT apply.

(i) Introduction; summary

The punch line is, under the new deal, the surviving spouse can delay RMDs until the participant would have reached his Applicable Age [that's not new actually] AND (more importantly) when she starts taking RMDs she will use the Uniform Lifetime Table, not the Single Life Table (SLT). You will probably wonder why it takes so long to explain that rule....

The RMD treatment described here will apply whenever the participant died before his RBD and the surviving spouse is the "sole beneficiary" of the account for RMD purposes. "Sole beneficiary" means either (1) she is named as sole beneficiary outright, or (2) the named beneficiary

is a "conduit trust" of which the surviving spouse is the sole life beneficiary. See Reg. § 1.401(a)(9)-4(f)(6)(i) [Example 1].

Under the Code and 7/24 final regulations, the spouse would need to elect to use this special spousal treatment ("surviving spouse may elect to be treated as the employee for purposes of determining" the RMD). § 401(a)(9)(B)(iv); Reg. § 1.401(a)(9)-3(d); Reg. § 1.401(a)(9)-5(g)(3)(i). Under the 7/24 proposed regulations, the "spouse is treated as having made that election." Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(A). In other words, it's the automatic treatment (if the participant died before his RBD). How this proposed rule change will affect surviving spouses of participants who die before the 7/24 proposed regulations become "final" remains to be seen.

Should practitioners be upset that this "election" would be taken away from the surviving spouse by this Proposed Regulation? Presumably not: She is deemed to have elected a later starting date with smaller RMDs. The alternative is to default her into an earlier starting date with larger RMDs. Who would ever elect that treatment ?

But, CAN the spouse elect OUT of this treatment? There is nothing said about this point, except as provided regarding electing the 10-year rule (see PART 3, #4(C)). For many surviving spouse-beneficiaries there would be little reason to leave the money in the decedent's plan—rolling over to the spouse's own IRA would provide the same results with more convenience; so she "elects out" by rolling to her own IRA. Leaving benefits in the decedent's account could be a good deal for the older surviving spouse (if decedent died long before his RBD) and also for some young surviving spouses. A spouse who is beneficiary through a conduit trust might like to elect OUT to get larger RMD distributions. .

Note: Unlike some other special spouse deals, it is NOT required (for the RMD treatment described here) that the surviving spouse have unlimited power to withdraw from the account. The special spousal RMD deals will apply even if a trust is the named beneficiary—provided it is a conduit trust for the spouse's sole life benefit. Compare "Spousal rollover or election" at (C) below.

(ii) When payments must begin

Generally, if the participant died before his RBD, an EDB using the life expectancy payout must take RMDs commencing the year after the year of the participant's death. § 401(a)(9)(B)(iii)(III); Reg. § 1.401(a)(9)-3(a)(4). The spouse gets a special deal—she is not required to commence distributions until the year in which the participant would have reached his Applicable Age. § 401(a)(9)(B)(iv)(II).

Though it appears the surviving spouse is getting a delayed start date, this "later start date for spouse" will produce an *actual* later start date if (and only if) the participant died two or more years before his Applicable Age-year. With the Applicable Age now being 73, and since most Americans fortunately die after that age, the delayed start date will benefit only some spouses.

Example: Ron was born in the 1951–1958 range, so his Applicable Age is 73. He will turn age 73 in 2026, so his RBD will be April 1, 2027. He dies in 2025, leaving his IRA in equal shares to his wife Linda and his sister Lucy, both age 72. Sister Lucy as an EDB (not more than 10 years younger) will have to start taking RMDs in 2026 (the year after Ron's death). Spouse Linda can delay her RMDs until the year Ron would have reached his Applicable Age—but that is also 2026. So there

is no difference. If he dies in 2026, or in 2027 (before April 1), the result is the same—both Linda and Lucy will have to start RMDs the year after Ron's death. If Ron had died in 2024, then sister Lucy would have to commence RMDs in 2025 (year after Ron's death)—but spouse Linda could delay another year until 2026 (year Ron would have reached Applicable Age).

Is this delayed starting date a great deal for the surviving spouse? That may depend on how old the surviving spouse is relative to the decedent and also what kind of account it is:

- **Great deal:** Spouse Linda is much older than Ron and he died many years before his RBD...that scenario would mean she could postpone the start of RMDs until what would have been Ron's RBD, giving her multi years with no RMDs from this inherited account. If she then rolls over to her own IRA will she have to take catchup distributions? Apparently not. Compare treatment of electing 10-year rule then rolling over in year 9 (catchup distributions required in Example at Prop. Reg. § 1.402(c)-2(j)(4)(vii).

- **Not so great deal:** Spouse Linda is much younger than Ron...In that case, Ron's RBD would have been much earlier than Linda's own RBD, so if she leaves the account as an inherited account she will have to take RMDs much sooner (when Ron would have reached Applicable Age) than if she rolled it over to her own IRA (her own RBD would apply).

- **Neutral deal:** Once Linda hits Ron's Applicable Age, she has to take RMDs from the inherited account at the same rate as from her own IRA (Uniform Lifetime Table), so at that point ***there is no difference between the RMDs from the inherited account vs. from her own IRA.***

- **Definitely a bad deal:** As applied to an inherited Roth IRA, this is definitely a bad deal for the surviving spouse, because if (instead of taking RMDs as beneficiary) she rolled the account over to own Roth IRA (see "C") she would not have to take any RMDs at Ron's Applicable Age OR her own Applicable Age, since there are no lifetime RMDs for Roth IRAs. The same is true now for Designated Roth Accounts. This is not to say SECURE 2.0 made things worse for the surviving spouse—it was always better tax-wise for the surviving spouse to become an "owner" of the deceased spouse's Roth IRA (via rollover) than for her to keep holding the account as a mere beneficiary.

THEY COULDA BUT THEY DIDN'T...

§ 401(a)(9)(B)(iv) as amended by SECURE 2.0 provides that "the date on which the distributions are required to begin under clause (iii)(III) shall **not be earlier than** the date on which the employee would have attained the Applicable Age..." So the Treasury COULD have provided that the spouse's starting date for RMDs from the inherited account would be the *later of* the employee's attaining the Applicable Age or the surviving spouse's attaining such age. But Treasury did not go that way—the Proposed Regulation specifies the employee's Applicable Age year will be the outer limit–RMD commencement date for the surviving spouse who has elected [or who is "deemed" to have elected] to be treated as the employee.

(iii) How RMDs to spouse are computed: ULT + recalculation

Life expectancy annual RMDs are computed by dividing the prior year end account balance (revalued annually) by a denominator (divisor). For nonspouse EDBs, the divisor for the first RMD year is the beneficiary's life expectancy as of his birthday in the year after the year of the participant's death. The denominator is reduced by one annually for subsequent years. Reg. § 1.401(a)(9)-5(d)(2). The effect is that the life expectancy will run out eventually, if the beneficiary lives longer than the table predicted.

The surviving spouse as EDB gets a totally different deal. Unlike other EDBs, the surviving spouse's life expectancy is recalculated annually. Reg. § 1.401(a)(9)-5(d)(3)(iv). The effect of this is to extend the life expectancy, since "real" life expectancy is not reduced by one year each year; life expectancy extends as the individual lives longer. Because the S/S's life expectancy is recalculated annually, the S/S (while living), if taking RMDs over her single life expectancy recalculated annually, would not be required to withdraw 100% of the inherited account until she reached age 120, when the life expectancy finally drops to one year or less. Thus, unlike other EDBs, the S/S cannot outlive her own life expectancy—unless she lives to age 120.

And now, thanks to SECURE 2.0, the life expectancy table she uses is not even the Single Life Table, it's the Uniform Lifetime Table, effectively giving her the "life expectancy" of someone 10 years younger than herself. The distribution each year will be based on the joint life expectancy (recalculated annually) of the surviving spouse and a hypothetical individual who is 10 years younger than the surviving spouse.

Linda's single life expectancy at age 73 would be 16.4 years, but the factor for age 73 under the Uniform Lifetime Table is 26.5. For a $1 million inherited IRA, that would be the difference between an RMD of $60,965 vs. $37,736.

Wait, what if the S/S is only 60 years old? The Uniform Table starts at age 70! Not to worry...the IRS has published (for a different purpose) a Uniform Lifetime Table starting at age 10, in Notice 2022-6, 2022-5 IRB 460; it is republished in the Proposed Regulations § 1.401(a)(9)-9(c).

(iv) It's still an inherited retirement account, so...

Under the new RMD regime described above, it will "look like" the spouse-beneficiary is now the "owner" of the account (i.e., she is the "participant"), since she will be using the Uniform Table to compute her RMDs. But that is not the case—she is still just a beneficiary, holding an inherited retirement account. That means at least these two things (see Preface to Proposed Regulations, Explanation of Provisions, (F), p. 11):

- Distributions to her are NOT subject to the § 72(t) 10% tax on pre-age 59½ distributions even if she is under age 59½ (distributions from an inherited plan are not subject to that tax). This provides motivation for *not* voluntarily ending beneficiary status until she is past age 59½.

- For purposes of computing the account balance, if this is a qualified retirement plan that contains a designated Roth account (DRAC), the DRAC balance will be included in the

"account balance" used in computing her RMDs. Reg. § 1.401(a)(9)-5(b)(3). This provides motivation for *ending* beneficiary status if there is a substantial DRAC balance by rolling that over to her own Roth IRA (since if she holds the Roth account "owner" there are no RMDs during her lifetime; Reg. § 1.401(a)(9)-5b)(3)).

There are two ways the surviving spouse's "I'm just a beneficiary" status can end. One is her death before the end of the year in which the first deceased spouse (participant) would have reached his Applicable Age, upon which occurrence she is automatically treated as "the participant." See next section [(iv)]. The other way is to roll over the inherited account to her own IRA or any other plan account that is her own (i.e., she is the participant); see (C).

(v) What happens when the surviving spouse later dies

I hope you are wishing for more complications because I have plenty left.

We have a participant who died before his RBD, and his surviving spouse as sole beneficiary is now going to start RMDs in the year the participant would have reached his Applicable Age. What if she dies while there is still money in this inherited account?

Since she is just holding it as a beneficiary, you would expect the applicable rule would be, the successor beneficiary (whether or not a DB) would continue to take RMDs over what was left of the deceased surviving spouse's life expectancy (but not more than 10 years). That expectation would be correct— *if and only if* the surviving spouse dies AFTER the end of the year in which her deceased spouse would have reached his Applicable Age.

If she dies BEFORE the end of that year, however, completely different result: Upon her death, the surviving spouse-beneficiary's status instantly changes from "beneficiary" to "participant." Just as in pre-SECURE days this can have a bad result for the family (which bad result can be completely avoided by proper planning). Here's what happens if the surviving spouse...

- Dies "before distributions have commenced" (i.e., before the end of the year in which the deceased spouse would have reached his Applicable Age...if she lives past that date, this subparagraph doesn't apply even if she dies before what would have been the first spouse's RBD). In this case, the RMD rules will be applied *as if she were the participant and died before her RBD*. Reg. § 1.401(a)(9)-3(e)(1). So if she hasn't named a designated beneficiary, the 5-year rule will apply to whoever succeeds to ownership of the account.

- If she dies on or after the last day of the year in which the deceased spouse would have reached his Applicable Age, the rules will be applied exactly as if she were a participant who died after his RBD—i.e., 10-year rule for a PODB, life expectancy payout for an EDB, or her "ghost" life expectancy for a non-DB.

This "guess what, you're the participant now!" treatment of the surviving spouse-DB upon her death (but only if she dies before her required commencement date) makes the following two steps extremely important:

1. Spouse should name a designated beneficiary to inherit the account if she dies before her required commencement date. For example, if she designates her adult children as outright beneficiaries, they will be subject to the 10-Year Rule upon her death. If she does not designate any beneficiary, the default beneficiary under the plan document (*e.g.* the IRA agreement) will be "the" beneficiary. Often the default beneficiary is the spouse's estate (resulting in the 5-year rule), though in some cases it may be heirs at law.

2. As she approaches the required commencement date (if not before) she should consider rolling over the account to her own IRA so she can name a designated beneficiary that will get the 10-year rule (or better) even if she lives beyond the required commencement date.

Last tidbit here: What if the surviving spouse remarried before her required commencement date? I'm glad you asked! This is not too likely, so you can probably skip this paragraph, but: If the surviving spouse remarries and then dies before the end of the year the participant would have reached his Applicable Age, i.e., before the deceased surviving spouse reached HER required commencement date, the delayed commencement date under § 401(a)(9)(B)(iii)(III) "is not available to" the new surviving spouse. Reg. § 1.401(a)(9)-3(e)(2). Thus, the surviving spouse's surviving spouse (if he is her designated beneficiary) must start RMDs the year after the deceased surviving spouse's death just like all other EDBs. Though he doesn't get a new required commencement date, however, he apparently does get the "use the ULT instead of the SLT" deal because: If the original surviving spouse dies before she is required to start RMDs from the deceased participant's account, she is treated for RMD purposes as the "employee" and the payout to her designated (or non-designated) beneficiaries is determined based on the rules for death before the RBD.

It's all so simple when you know how!

(vi) But wait...The 10-year rule might apply!

As we know, an Eligible Designated Beneficiary (EDB) is entitled to a life expectancy payout when the participant dies, and the 10-year rule applies to designated beneficiaries who are NOT eligible designated beneficiaries (i.e., "plain old designated beneficiaries" or PODBs).

But when the participant dies before his RBD, the regulations provide three pathways by which the 10-year rule may apply to an EDB after all: The IRA plan document may impose the 10-year rule on all or some categories of EDBs; or may permit the participant (the employee or IRA owner) to elect to impose the 10-year rule on his/her EDBs; or may permit the EDBs themselves to elect it. Reg. § 1.401(a)(9)-3(c)(5)(ii), (iii).

At this time we don't know what any plan or IRA will do about this subject.

If the 10-year rule applies, 100% of the account must be distributed to the spouse by the end of the year that contains the 10th anniversary of the participant's death. Reg. § 1.401(a)(9)-3(c)(3). The delayed starting date for the surviving spouse that applies to a life expectancy payout does not apply to the 10-year rule. Reg. § 1.401(a)(9)-3(d).

A participant who plans to leave his account to a conduit trust for the benefit of his surviving spouse (or any other EDB) presumably does not want to have the 10-year rule apply to the conduit trust. The whole point of the conduit trust is to keep the IRA in the trust for the EDB's lifetime, with

the EDB limited to RMDs plus whatever additional amounts the trust instrument directs the trustee to withdraw from the IRA and pay to the beneficiary. Thus for openers the participant will not want his retirement benefits to be in a plan that *requires* the 10-year rule for EDBs.

If the retirement account is payable to a trust, and all countable beneficiaries of the trust are EDBs, then the election in or out of the 10-year rule (if the election is available under the applicable retirement plan) would be in the hands of the trustee. Reg. § 1.401(a)(9)-4(f)(6), Examples 2, 3, 5.

The cited examples deal with a trust that has multiple EDB-beneficiaries, and all countable beneficiaries are EDBs, and the trust is not a conduit trust. The one example dealing with a conduit trust for one single EDB does not mention who makes the election. The regulation permits the plan to allow the "employee" to forbid the election of the 10-year rule; if the applicable plan permits this, the participant should take advantage of that to prohibit use of the 10-year rule for the account payable to the conduit trust.

Beware of unexpected10-year rule!

If a participant is planning to leave his retirement account to a conduit trust for his spouse or any other EDB, the participant will need to be sure that either the applicable retirement plan prohibits the 10-year rule option for EDBs, or, if the plan allows the participant to elect out of it, that the participant DOES elect out of it, or if the plan imposes the 10-year rule for all EDBs, that the participant moves his account to a different company! This is not a concern once the participant is past his RBD, since the election applies only in cases of death before the RBD...but remember the participant may be over the "Applicable Age" but still "before" his RBD in some retirement plans, for example a Roth IRA and/or a company retirement plan where he has not yet retired and is not a 5% owner.

(vii) How (and if) spouse can get out of the 10-year rule

If the 10-year rule is imposed on the surviving spouse either by the plan document or (presumably unlikely) by the deceased spouse's direction, can the surviving spouse do anything to resurrect her life expectancy payout? Or, if she herself elected the 10-year rule, can she change her mind and switch back to the life expectancy payout?

Generally, if she is the sole outright beneficiary of the account she has the right to roll over or transfer that account to another plan more to her liking, i.e., one that permits the life expectancy payout. She can roll over or arrange transfer to another account still in her name as beneficiary of the decedent. [citation not provided.] Or she can roll over or transfer to her OWN IRA (or elect to treat an inherited IRA as her own); see generally (C), below, for this spousal option.

There are several particular issues involved in using the rollover to her own IRA, or election to treat an inherited IRA as her own IRA, to escape from the 10-year rule:

- A required minimum distribution (RMD) is not an eligible rollover distribution. Reg. § 1.402(c)-2(c)(2)(ii). Accordingly, once year 10 of the 10-year rule arrives, it is too late—nothing can be rolled over because for an account subject to the 10-year rule, the entire account is an RMD in that year. Reg. § 1.402(c)-2(j)(3)(i)(D).

- In year 9 or before, she can roll over the entire amount to her own IRA provided such step is taken BEFORE the year in which the surviving spouse has reached her own Applicable Age. Thereafter, RMDs will be determined based on her being the "owner" beginning the year she reaches her Applicable Age.
- However, if the rollover is made in the year the surviving spouse attains her Applicable Age or later, she will have to take "catchup" or "makeup" distributions that cannot be rolled into the new account. These nonrollable distributions will be, the RMDs the surviving spouse would have had to take from the inherited account in Years 1-9 if the account had not been subject to the 10-year rule. Reg. § 1.402(c)-2(j)(4), § 1.408-8(c)(1)(iv). In other words she can't use the 10-year rule to skip RMDs when she is at or above her Applicable Age, then roll over to her own IRA in year 9 to get back on the life expectancy payout track. Reg. § 1.402(c)-2(j)(4). See Example at Prop. Reg. § 1.402(c)-2(j)(4)(vii) for how to calculate the "make-up" distribution of missed RMDs.

For exactly what types of plans she can roll (or transfer) benefits into, and whether such recipient retirement account will be in her name as owner as beneficiary, see (C) below.

B. If the participant dies on or after his RBD (a little simpler)

The spouse's options in case of participant death after his RBD are the same as applied for participant death before the RBD, except without the 10-year rule wild card and without the question of when distributions as beneficiary begin (they begin right away).

Meet the Death-after-RBD RMD regulation structure

Required minimum distributions (RMDs) in case of participant's death BEFORE the required beginning date (RBD) get their own regulation, Reg. § 1.401(a)(9)-3, "Death before the required beginning date." But there is no regulation titled "Death AFTER the required beginning date." In the IRS view, the beneficiary who inherits a retirement account from a participant who died after his RBD is merely continuing the decedent's RMDs (though at a different rate), not starting a new payout. The post-death RMD rules are accordingly contained in Reg. § 1.401(a)(9)-5 [-5(d)(1)], "Required minimum distributions from defined contribution plans."

The participant's RMDs continue through the year of his death. So if at the time of his death he had not yet taken the RMD for the year of his death, that will be the first RMD the beneficiary must take (whether the beneficiary is the spouse or someone else). See Reg. § 1.401(a)(9)-5(d)(1)(i).

The year after the year of the participant's death is when the beneficiary must start taking RMDs based on his/her status as beneficiary rather than merely taking the distribution the decedent was supposed to take in the year he died. Reg. § 1.401(a)(9)-5(d)(1)(i). There is no possibility of delayed starting date for the spouse in case of participant death after the RBD.

The surviving spouse as beneficiary has two options with respect to RMDs. The first is the same as other EDBs—a life expectancy payout based on the greater of her life expectancy or the decedent's. The second is the special spouse-only deal added by SECURE 2.0. She also may have non-RMD options—the spousal rollover or election-to-treat-as-own (see C).

- **First RMD option:** Because the surviving spouse is an eligible designated beneficiary (EDB), she can take a life expectancy payout, beginning the year after the year of the participant's death. § 401(a)(9)(B)(i), (E)(i), (ii)(I); Reg. § 1.401(a)(9)-5(d)(1). The "life expectancy" would be the spouse's life expectancy (recalculated annually) or the decedent's remaining life expectancy ("ghost life expectancy," not recalculated), whichever is longer. Reg. § 1.401(a)(9)-5(d)(1)(i), (ii); (3)(iv). Note that if the decedent was younger than the surviving spouse, so the ghost life expectancy is the longer one, the surviving spouse's annually recalculated ("redetermined") life expectancy will eventually be longer than the deceased spouse's fixed "ghost" life expectancy...if she lives that long, she will switch over to her own life expectancy at that time.

- **Second RMD option.** Alternatively, the surviving spouse can elect "to be treated as the employee." § 401(a)(9)(B)(iv); Reg. § 1.401(a)(9)-5(d), (g)(3). In this case (as laid out in the proposed regulations) the election is truly an election, i.e., she can elect that treatment or NOT elect that treatment (compare death before the RBD where the spousal election is to be automatically applied so it's not really an election). However, the "elective" treatment could be the default provision under the plan, meaning, unless some affirmative action is taken, treatment "as the employee" will be automatic. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(B).

Treatment "as the employee" means the spouse would use the Uniform Lifetime Table to determine her RMDs as the employee's beneficiary, instead of the greater-of-his-or-hers single life expectancy described at #1 above, so RMDs would be based on the joint life expectancy of the surviving spouse and a hypothetical 10-years-younger designated beneficiary (recalculated annually). As intended by SECURE 2.0, the surviving spouse gets this benefit of the "spousal rollover" without having to actually do the spousal rollover. As with participant death before the RBD, it's not clear why the spouse would ever elect not to use the second option, though a surviving spouse who inherited through a conduit trust might like to elect it—so she would get larger annual distributions.

But there is one more wrinkle—if the first-to-die spouse (the participant) was much more than 10 years younger than the surviving spouse, the deceased participant's fixed-term "ghost life expectancy" would be longer (at least for a while) than the Uniform Lifetime Table–life expectancy of the surviving spouse and her hypothetical 10-years younger beneficiary! Not to worry—in that case, the Proposed Regulations say the "greater of" rule will apply (i.e., the surviving spouse's RMD will be determined by the ghost life expectancy as long as it stays longer than her Uniform Lifetime Table expectancy). Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), last sentence.

So when the participant dies after his RBD, the annual distributions "deal" is pretty good for the surviving spouse, as long as she lives. However, once she dies, there is no possibility of "flipping" over to a new designated beneficiary—the payout to spouse's successor beneficiary will be the same as it would have been under pre-SECURE-2.0-rules, namely, the remaining single life expectancy of the spouse but not more than 10 years. The Uniform Lifetime Table applies only through the year of the surviving spouse's death. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C). Thereafter, annual distributions are made to the successor beneficiary over the spouse's remaining (single) life expectancy (not recalculated), through the earlier of the last year of such life expectancy or the year

that contains the 10th anniversary of the surviving spouse's death, at which time 100% of the account must be distributed. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D)(1); Reg. § 1.401(a)(9)-5(d), (e).

Suppose the sole beneficiary of the account is a conduit trust for the surviving spouse. Can the trustee make the election in or out of "treated as owner" status for RMD purposes? Or is that option only available to the surviving spouse personally? Unknown.

Bottom line: The "new (B)(iv) rule" definitely gives the surviving spouse, or a conduit trust for the spouse, a longer payout period (smaller RMDs) during the surviving spouse's "overlife." So if that is the only consideration, the difference between a rollover vs holding as an inherited account is small to nil in many cases. After the surviving spouse's death, however, there can be a dramatic difference between the payout period for a "successor beneficiary" to spouse vs. a payout period to a "designated beneficiary of spouse" if the surviving spouse dies later than what would have been the participant's Applicable Age or RBD. Thus the rollover option needs to be considered as early as possible after the participant's death.

C. **Spouse can change from "beneficiary" to "owner" via rollover or election**

The surviving spouse has more options than other beneficiaries to move the inherited retirement account to another retirement account. Within limitations,

- The surviving spouse can elect to treat an inherited IRA as her own IRA, thus changing her status from beneficiary to owner. See C(ii).

- She can roll over amounts from an inherited account into her own retirement account, changing her status from "beneficiary" to "owner."

- Or, she can transfer or "roll" the inherited account to "inherited" IRA in the name of the decedent payable to her as beneficiary. Reg. § 1.408-8(d)(1)(ii).

(i) **Why would a surviving spouse want to do this?**

Since, as a result of SECURE 2.0, the surviving spouse's RMDs are determined as if she were the owner of the account (i.e., using the Uniform Lifetime Table based on her age as "owner"), why would she want to bother to change ownership so she actually IS the owner? Here are several reasons:

- If the participant died before his RBD, and the plan the spouse inherited makes her subject to the 10-year rule [see 5(A)(vi) above)], she may wish to get OUT of that plan and into one that permits life expectancy payouts.

- As beneficiary, she must start withdrawals no later than the year the deceased spouse would have reached his Applicable Age (or the year after his death, if later). If she is younger than the decedent she may get a later (even much later) starting date by becoming *owner* of the account instead of mere beneficiary. E.g., Romeo dies in 2025 at age 75, after taking his

RMD for 2025, leaving his IRA to his spouse Juliet, age 60. Since Romeo had reached his Applicable Age, Juliet as beneficiary would have to start RMDs the year after his death. Using the Uniform Lifetime Table for age 60, her applicable denominator would be 38.7, so she would have to withdraw 1/38.7th of the account the first year. Prop. Reg. § 1.401(a)(9)-9(c). By becoming owner instead of beneficiary she can postpone the start of RMDs altogether until she reaches her own Applicable Age.

- If the inherited account is a Roth IRA, she must take annual RMDs as beneficiary—whereas if she held the account as owner there would be no RMDs during her lifetime. [NOTE: At least one RMD expert disagrees with this statement, having concluded that the surviving spouse can now totally eliminate RMDs on an inherited Roth account until her own death, just as the participant was exempt from RMDs during his life.]

- If the inherited account is a designated Roth account (DRAC) within the decedent's 401(k) again, there will be RMDs to her as beneficiary, just as with an inherited Roth IRA—RMDs that could be postponed until after her death if she transfers this account to her own Roth IRA. [See "NOTE" in preceding paragraph]

(ii) Election to treat inherited IRA as spouse's own IRA.

The surviving spouse's right to elect to treat an IRA inherited from her spouse as her own IRA is created by the regulations. It does not appear in the Code. The election is available whether the first spouse died before or after his RBD, but a special rule may apply if he died before the RBD (see "C").

(a) Requirements and mechanics

"The surviving spouse of an individual may elect, in the manner described in paragraph (c)(2) of this section, to treat the surviving spouse's entire interest as a beneficiary in the individual's IRA (or the remaining part of that interest if distributions have begun) as the surviving spouse's own IRA..... In order to make the election..., the surviving spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a trust is named as beneficiary of the IRA, this requirement is not satisfied even if the surviving spouse is the sole beneficiary of the trust." Reg. § 1.408-8(c)(1)(i), (ii). [Note: The reference in the regulation is presumably to a "conduit trust," where the surviving spouse is entitled to all distributions taken from the retirement account during her lifetime, but the trustee controls when such distributions are taken (subject to the RMD rules and the terms of the trust). Presumably the "ban" on spousal election if a trust is named as beneficiary does not apply if the spouse has the right to demand that the trustee withdraw all of the IRA and pay it to her, but this is not stated .]

In determining whether the spouse is "sole beneficiary" of the retirement account, the separate accounts rule of Reg. § 1.408-8(a) is applied: If the spouse is just one of multiple designated beneficiaries, but separate accounts are timely established for the multiple beneficiaries per the regulation, she need only be sole beneficiary of her "separate account" in the inherited IRA, not of the entire IRA, and the election of course applies only to her separate account. Reg. § 1.401(a)(9)-8(a). See PART 6.

Example: Nora leaves her IRA equally to her husband Nick and her son Ned as beneficiaries. They establish separate inherited IRAs, each funded with half of Nora's IRA, by December 31 of the year after the year of Nora's death. Nick can elect to treat his inherited separate account as his own solely-owned inherited account. RMDs to each beneficiary will be based on such beneficiary as sole beneficiary of his separate account.

In the real world, once the spousal election is made (or discovered, in the case of an inadvertent election; see "B"), the deceased spouse's account ("Nora, f/b/o Nick") is closed and its assets transferred into a new account in the surviving spouse's own name ("Nick" only), since the IRA provider can't simply cross out the participant's name on the old account documents and write in the surviving spouse's name instead.

Unlike a spousal rollover, which could apply to a partial distribution, the spousal election must apply to the entire account (or the entire remaining account if distributions had been made prior to the election). Reg. § 1.408-8(c)(1).

Note the requirement that, in order to be eligible to make this election, the spouse must have an unlimited right to withdraw from the IRA. The regulation explicitly states that a trust named as beneficiary cannot meet that requirement, even if (for RMD purposes) the spouse is deemed to be the sole beneficiary of the trust (i.e., the trust is a conduit trust).

If a trusteed IRA is used, the client could enable the benefits of the spousal election and also the benefits of having the investments and distribution schedule in the hands of a professional (bank) trustee.

Example: Felix, husband of Kitty, has Alzheimer's disease and is not capable of managing his financial affairs. Kitty has her trusteed IRA at Biggole Bank and Trust Co. The trust agreement establishing and governing the IRA names Felix as beneficiary on Kitty's death and provides that Felix has the unlimited right to withdraw from the IRA. Felix can act only through his legal guardian, so withdrawals will be made by cooperation of the guardian and the trustee. Felix's rights, benefits, and tax options are preserved and the IRA is protected by professional management and cooperation of the trustee and guardian.

Use of a trusteed IRA for this type of sophisticated planning is currently usually found only among the most wealthy and tax-savvy clients and their advisors. At this time it is not an available option for the "middle class" "mass affluent"-type client since customizable trusteed IRAs are not marketed to the general public.

(b) How the election is made; when it takes effect

There are three ways the spouse can make this election—one is intentional, the other two are "deemed" elections triggered by the spouse's action or inaction:

- The spouse can voluntarily "redesignate" the account as an account in her name as owner rather than as beneficiary. Check the IRA agreement to determine if the IRA provider provides specific instructions for how to do this.

- She can fail to take an RMD she was required to take as beneficiary (for any year AFTER the year of the owner's death), thus triggering a deemed election. An RMD shortfall in the year of the first spouse's death does not trigger the deemed election.

- She can make a contribution to the account. Unless the contribution is merely a rollover contribution from another account inherited from the deceased spouse, the contribution triggers the election. Reg. § 1.408-8(c)(2).

The election is effective starting in the year it occurs—unless the election is made in the year of the first spouse's death, in which case the election doesn't apply for purposes of determining RMDs until the following year. Reg. § 1.408-8(c)(3).

Example: Nick is holding, as beneficiary, the IRA he inherited from Nora in 2025. His RMD for 2026 is $3,678. Due to a math error, he withdraws only $3,677 in 2026. Because of this $1 shortfall, he is deemed to have elected to treat the inherited IRA as his own IRA. Since it occurred after the year of Nora's death, the election is effective for the year it occurs (2026) and subsequent years. Now here is the very odd effect: The RMD schedule applicable to Nick in 2026 (as beneficiary) was (as a result of SECURE 2.0) the Uniform Lifetime Table applied as if he were owner of the account (see PART 3, #5). But that's the same RMD schedule that applies to him after he makes the deemed election! The effect of Nick's deemed election in 2026 is that he still owes a 25% "penalty" for missing part of his RMD!

D. Spousal rollover or election

To escape the 10-year rule applicable in the plan she actually inherited, and salvage a life expectancy payout, the surviving spouse can roll over the inherited account to an IRA still in her name *as beneficiary* but to which the life expectancy payout rule applies. The general rule is that if the 10-year rule applied to the spouse in the original inherited plan, it will apply to any "inherited IRA" into which the original account is transferred or "rolled." Reg. § 1.408-8(d)(2)(i) ("Carryover of election..."). However, if the distribution being rolled over was made before the deadline that would have applied had the distributing plan allowed the spouse to elect out of the 10-year rule, the spouse can elect to have the life expectancy apply to the recipient account. Reg. § 1.408-8(d)(2)(ii). See regulation for possibly required catchup distributions in that case.

The preceding applies if the original inherited plan imposed the 10-year rule. However, if the spouse herself made the election to use the 10-year rule instead of the life expectancy payout (as opposed to having the 10-year rule imposed by the plan itself), that election becomes irrevocable at the end of the year after the year of the employee's death: "As of the last date the election may be made, the election must be irrevocable with respect to the beneficiary (and all subsequent beneficiaries) and must apply to all subsequent calendar years." Reg. § 1.401(a)(9)-3(c)(5)(ii)(C). Thus, a beneficiary who has *elected* the 10-year rule can't change her mind...even the spouse, who normally can roll over to another account still held as beneficiary, can't use that transfer to escape the 10-year rule. But she has an ace up her sleeve—she can roll over to an account in her OWN name

(not held as beneficiary) and thus free herself from the 10-year rule, provided she does so before year 10.

The surviving spouse's right to roll over retirement benefits payable to her from an inherited plan or IRA was not changed by SECURE. Briefly, as a reminder, the spousal rollover is not a "minimum distribution" rule; it is a totally separate Code section and concept, so it is not subject to various limitations that can arise under the minimum distribution rules.

E. Anti-Gaming provision targets delayed spousal rollovers

Suppose the surviving spouse is approaching or past age 73. If the participant-spouse died before his RBD, and the S/S elects the 10-Year Rule, then the S/S could effectively delay RMDs for about nine years, then in year 9 of the 10-year payout roll over the inherited account to the S/S's own IRA, thus sidestepping several years of RMDs! Unfortunately the Treasury thought of this great idea. Reg. § 1.402(c)-2(j)(4) blocks this maneuver: A S/S's rollover, if it occurs in the year she reaches her Applicable Age or any later year, must be reduced by a deemed RMD amount—the cumulative total of what would have been RMDs if the account had belonged to her during the delayed rollover period.

6. EDB: Participant's minor child

SECURE provides that a minor child of the participant ("employee") is an EDB. However, unlike with other EDBs, such child's EDB status does not last for life. Instead it terminates when the child "reaches majority." The account must be fully distributed 10 years after that point (or 10 years after the child dies, if he dies before reaching majority). § 401(a)(9)(E)(ii)(II), (E)(iii), (H)(iii).

For definition of "child of the employee" see § 152(f)(1), which includes not only the participant's "blood" and legally adopted children but also stepchildren and certain foster children. Reg. § 1.401(a)(9)-4(e)(1)(ii). This precise and expansive definition was a gift of the final RMD regulations.

A. "Reaches majority" means the 21st birthday.

SECURE left it to the IRS to define "reaches majority," which the IRS has defined as the date the child reaches his 21st birthday. § 401(a)(9)(E)(ii)(II); Reg. § 1.401(a)(9)-4(e)(3). There is no need to refer to state law or educational status.

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.

B. Outer Limit Year for minor child-EDB

A minor child-EDB has his own Outer Limit Year in the Code, namely 10 years after "reaching majority." § 401(a)(9)(E)(iii). As an EDB, the minor child is apparently ALSO subject to the 10-years-after-death-of-an-EDB deadline in § 401(a)(9)(H)(iii). The Regulations smooth out these deadlines a bit to being *the year in which such event occurs*, not the actual birthday or death day.

So, the entire account payable to a minor child-EDB must be distributed by the end of the year that contains the minor's 31st birthday (or 10th anniversary of date of minor's death, if death occurred before age 21). Reg. § 1.401(a)(9)-5(e)(3), (4). If multiple minor child EDBs are beneficiaries of the same account, see "Steinmetz" case study, Part 9, Case #3.

C. Trusts for minor-child EDBs: pre- and post-SECURE problems

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 Regulations make several generous special rules for trusts for minors.

Under 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).

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 in the (actuarially unlikely) event the minor died before reaching that age...and if this contingent remainder beneficiary were 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 because it had a countable non-individual beneficiary. The Regulations provide an easy way to eliminate this problem for benefits left directly to a trust for a minor—just specify that the minor will receive his share outright by age 31. Any beneficiary who will take the share only if the child dies BEFORE age 31 is disregarded in applying the RMD rules to the trust, if the child is a "primary" beneficiary of the trust (see PART 4(#9)). However, the age-31-rule does not help with this problem if the minor is a residual beneficiary; see PART 4, #9, #10(B).

D. Omitted.

E. Life expectancy payout based on oldest DB (not oldest minor child)

If the retirement account is left to a trust of which ANY countable beneficiary is a minor child-EDB, that trust will receive "eligible designated beneficiary" treatment, which means, in Regulations-speak, that it will use a life expectancy payout (not be subject to the 10-year rule)—because the employee is deemed to have an EDB: "If any of the employee's designated beneficiaries is an eligible designated beneficiary because the beneficiary is the [minor child of the 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*." Reg. § 1.401(a)(9)-4(e)(2)(ii). Emphasis added.

The Applicable Denominator for determining RMDs after the participant's death would be based on the life expectancy of the oldest countable beneficiary of the trust—who may or may not be an EDB. Reg. § 1.401(a)(9)-5(f)(1)(i). For example, suppose there is a trust for the participant's children as a group, and some of the children are over 21 and some are under. The payout period is based on the oldest child's life expectancy even though (being over age 21) she is not an EDB.

If the employee died after his required beginning date, the Applicable Denominator would be the *greater of* the life expectancy of the oldest countable trust beneficiary (oldest designated beneficiary) and the participant's life expectancy. Note: this rule can apply only when the deceased parent of the minor child was over age 73 at death which would be unusual.

F. Outer Limit Year: 10 yrs after all minor-child EDBs are over 21 or deceased

The Outer Limit Year is the 10th year after the youngest minor child reaches age 31. In the unlikely event any minor child-EDB dies before reaching age 21, the Outer Limit would be 10 years after the point at which there is no minor child-EDB living who is under age 21.

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 then in progress. 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." Reg. § 1.401(a)(9)-5(f)(2)(i). However, under 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 *youngest minor-child EDB* (not the oldest trust beneficiary). 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 youngest 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 even if some trust beneficiaries are PODBs or even if the oldest trust beneficiary is a mere PODB. Reg. § 1.401(a)(9)-5(f)(2)(ii).

G. Minor child-EDB trust example

Example: Employee dies in 2024 before his RBD leaving his IRA to a trust for the benefit of his four children who are now ages 14, 16, 18, and 22. No child is disabled or chronically ill. Three of them are EDBs because they are minor (under age 21) children of the deceased participant. 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 all the children, based on relative need, until there is no child living who is younger than age 35, at which time the trust will terminate and be distributed to the then living children equally, or if none is then living, to the neighbor's child (now age 3).

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 so he is a PODB. Normally the Outer Limit Year for a trust for a PODB 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 because the trust has a minor child-EDB as a countable beneficiary. Reg. § 1.401(a)(9)-5(f)(2)(ii).

- Instead, the life expectancy payout will apply. The life expectancy of the oldest child (age 22) will be the applicable denominator, even though that child is not an EDB.

- The Outer Limit Year for this trust will be 10 years after all three of the minor children have either attained age 21 or earlier died. So assuming no untimely deaths, that would be 17 years from now 2041) when the youngest child (now age 14) reaches age 31. The entire retirement account must be distributed to the trust no later than that Outer Limit Year.

Reminder: Just because the IRA is fully distributed no later than the Outer Limit Year, that does not mean the trust must terminate. The IRA is gone, the trust now holds all the distributions from the IRA (minus amounts paid out to or for the children, and minus income taxes paid on distributions retained in the trust, and minus trust expenses), but <u>the trust itself does not have to end then</u>. It continues as long as the trust instrument dictates, administering those net IRA proceeds (and any other assets that were placed in this trust) until all four children have either reached age 35 or died, at which time the trust terminates and is distributed to the living children (or the neighbor's baby)..

7. EDB: Disabled or chronically ill ("D/CI") individual

Here is the what the 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"). In either case the status must exist as of the date of the participant's death. A beneficiary who does not become disabled or chronically ill until some later

time (even if it is only one day after the participant's death) is not disabled or chronically ill for EDB purposes: See, *e.g.*, the Preamble to the 2022 Proposed Regulations (p. 26), where it is stated that "the employee's 10-year-old child who is not disabled but who becomes disabled 5 years after the employee's death" is not "disabled" for purposes of determining EDB status **because EDB status must exist as of the employee's death**, therefore, the outer limit for payout to this minor child will be the 10th year after he or she attains age 21 (or earlier dies).

Second, the beneficiary must fulfill the "documentation requirement." See "C."

If the beneficiary passes those two tests, see "D"-"G" for favorable RMD treatment granted to certain trusts ("AMBTs") that can be created for such beneficiary.

A. Definition of disabled.

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 a different definition of "disabled" if the designated beneficiary is under age 18.

If the beneficiary has 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.

Thus, Reg. § 1.401(a)(9)-4(e)(4)(i) offers three paths to disabled status: "Subject to the documentation requirements of paragraph (e)(7)...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."

- "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." 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." 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)." Reg. § 1.401(a)(9)-4(e)(4)(iv).

B. Definition of chronically ill

The term "chronically ill" is used in the Code, in § 7702B(c)(2), for purposes of defining qualified long-term care insurance. The insurance-related Code definition is slightly altered for purposes of establishing EDB status: A beneficiary is chronically ill for EDB status purposes if he or she is "a chronically ill individual (within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(I) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature)." § 401(a)(9)(E)(ii)(IV).

Here is the definition as expanded in the Regulations: "An individual is chronically ill if the individual is chronically ill within the definition of section 7702B(c)(2) [of the Internal Revenue Code] 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)." Reg. § 1.401(a)(9)-4(e)(5). Emphasis added.

NOTE: The Regulation definition leaves out the Code's alternative definition of chronically ill, which is (regardless of whether the individual can perform activities of daily living) "requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment," even though this is also part of § 7702B(c)(2)(A), last sentence.

The Code's list of "activities of daily living": Eating, Toileting, Transferring, Bathing, Dressing, Continence. § 7702B(c)(2)(B).

The Code's definition of "licensed health care practitioner": "The term "licensed health care practitioner" means any physician (as defined in section 1861(r)(1) of the Social Security Act) and any registered professional nurse, licensed social worker, or other individual who meets such requirements as may be prescribed by the Secretary." § 7702B(c)(4).

Presumably for some beneficiaries it will be easier to qualify as an EDB under the "chronically ill" category than the "disabled" category.

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...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 (or October 31, 2025, if later).** 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))." Reg. § 1.401(a)(9)-4(e)(7).

D. "AMBTs" facilitate trust planning for D/CI beneficiaries

SECURE granted special dispensations to what it calls "Applicable Multi-Beneficiary Trusts." § 401(a)(9)(H)(iv), (v). The apparent purpose of these 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, typically, medical care or 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 by contributing to the trust without having the trust or its distributions counted as "assets" or "income" ("countable resource") of the beneficiary that would disqualify him from the government benefit programs.

See PART 9, Case #4, for an example of how to use an AMBT and for comments on why, despite the special dispensations granted to AMBTs, SNTs are still generally "worse off" under SECURE than before in terms of reducing income taxes on a large IRA.

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" of the trust under existing (pre-SECURE) regulations. Congress thus included rules, in the form of the "AMBT," overriding certain aspects of existing RMD trust regulations to assure that SNTs could get the life expectancy payout for which the D/CI beneficiary individually was eligible.

E. Definition of AMBT; charity can count as a "designated beneficiary"

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).

...and the 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 [see Note]; and (ii) the trust terms identify one or more individuals, each of whom 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), who are described in paragraph (f)(3)(i)(A) of this section and (iii) the terms of the trust provide that no beneficiary (other than an individual described in paragraph (g)(1)(ii) of this section) has any right to the employee's interest in the pan until the death of all of

the eligible designated beneficiaries described in paragraph (g)(1)(ii) of this section." Reg. § 1.401(a)(9)-4(g)(1).

NEW: Normally, the requirement that "all trust beneficiaries must be designated beneficiaries" would mean that all countable beneficiaries of the trust must be *individuals* (§ 401(a)(9)(E)(1)). But (for 2023 and later years, as a result of "SECURE 2.0"), certain charities are deemed to be "designated beneficiaries" with respect to an AMBT, even though they are not "individuals." Specifically, for an AMBT, "any beneficiary which is an organization described in section 408(d)(8)(B)(i) shall be treated as a designated beneficiary..." § 401(a)(9)(H)(v) (second sentence). The permitted organizations are the same as for qualified charitable donations from an IRA, *i.e.,* all charitable organizations for which the maximum income tax deduction is 50% of adjusted gross income is allowed (see § 170(b)(1)(A)), *other than* "donor advised funds" and "supporting organizations."

F. Types of AMBTs

The Code gives two special RMD breaks to AMBTs; the breaks apply to two different situations or types of AMBTs described in the Code. One is an AMBT that "is to be divided immediately upon the death of the employee into separate trusts for each beneficiary." The other 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"]."

However, the final regulations make the Code's distinction of two different types of AMBT no longer necessary. The "break" the Code offers for first above-mentioned "type" of AMBT is now (under the final regulations) allowed for ALL trusts that break into "subtrusts" upon the employee's death, whether or not there is a D/CI beneficiary involved. See "Separate Accounts," PART 6 (4).

The important exclusive break remaining for an AMBT is the one that applies to a trust under which the retirement account and proceeds thereof may not be paid to or for the benefit of anyone other than the D/CI beneficiary(ies) of the trust during the lifetime(s) of such beneficiaries. This type of trust (formerly called, in the Proposed Regulations, a "Type II AMBT"; see Prop. Reg. § 1.401(a)(9)-4(g)(3)), is now just called "an AMBT." Reg. § 1.401(a)(9)-4(g).

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 Code allows a trust 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 the D/CI EDB*, even though there are other "countable" trust beneficiaries who are not EDBs. For the annual RMDs and Outer Limit Year applicable to an AMBT, see PART 5, #2.

8. EDB: 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). This category is referred to in this Outline as NoMoTTYYs (Not More Than Ten Years Younger).

To qualify as this category of EDB, the individual must meet two requirements. One, he/she does not fit into any of the other EDB categories (*e.g.,* he/she is not the participant's spouse). Two, he/she must be either *older than* the participant; or *the same age as* the participant; or *younger—but not more than 10 years younger—than* the participant.

A. Based on birth days, not birth years

The regulations define this category of EDB based on the actual dates of the parties' birth, not the *year* of birth: 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."

B. NoMoTTYY RMDs if 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. Reg. § 1.401(a)(9)-3(c)(4), § 1.401(a)(9)-5(d)(2). The Outer Limit Year for this situation is the year that contains the 10th anniversary of the EDB's death. 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. See PART 3, #4(E).

However, if permitted by the plan, the EDB can elect the 10-year rule instead of the life expectancy payout—or the 10-year rule may be imposed on the EDB by the plan or by the participant. Reg. § 1.401(a)(9)-3(c)(5)(iii). If the 10-year rule applies, the Outer Limit Year would be the year that contains the 10th anniversary of the participant's death. See PART 3, #4(C).

C. NoMoTTYY RMDs if Participant dies on or after RBD.

If the participant died on or after his RBD, the Applicable Denominator for the NoMoTTYY beneficiary is the "greater of" the beneficiary's life expectancy or the participant's life expectancy. Reg. § 1.401(a)(9)-5(d)(ii). So if the beneficiary is older than the participant, the participant's (longer) life expectancy is used to determine annual RMDs to this EDB. This is usually called the "longer of" or "greater of" (the two life expectancies) rule. The Outer Limit Year will accordingly be the final year of whichever of those two life expectancies is longer (but not later than the 10th year after the year of death of the EDB).

Note: This system represents a SUBSTANTIAL IMPROVEMENT in the final regulations; the proposed regulations applied a "shorter of" rule for the Outer Limit Year for NoMoTTYYs in this situation.

9. Double qualification as EDB

What if the beneficiary qualifies as an EDB in more than one category?

This subject is addressed only once in the Code, which requires (in connection with qualifying for EDB status as a NoMoTTYY) that the individual must not be "described in any of the preceding subclauses." § 401(a)(9)(E)(ii)(V). The Regulations add no further enlightenment.

An individual could be both Disabled and Chronically Ill, presumably, but that would make no difference since both categories receive identical RMD treatment. (Presumably if the beneficiary qualifies as both Disabled and Chronically Ill, he should claim whichever status is easier for him to document.)

Therefore, it appears that the only way an EDB can "double qualify" is if he is both the surviving spouse and D/CI, or both a minor child-EDB and D/CI. Here is the apparent effect of such double qualification:

A. Minor child who is also D/CI

If the individual qualifies as both a minor child of the participant AND as D/CI, then his EDB status would not terminate at the age 21 birthday—it would last for life.

A *trust* for the benefit of this child could be an AMBT if the child is the sole permissible beneficiary (with respect to the trust's retirement benefits) for his/her entire life. In that case the annual distributions would be based on the *child's* life expectancy (not the life expectancy of the oldest countable trust beneficiary) because AMBT status "overrules" any other status.

If the D/CI minor child-EDB is just one of multiple (two or more) countable beneficiaries of the AMBT, all of whom are D/CI (though not necessarily minors), then the payout period is the life expectancy of the oldest countable D/CI beneficiary, and the Outer Limit Year would be 10 years after the death of the last surviving D/CI trust beneficiary. Reg. § 1.401(a)(9)-5(f)(2)(iii).

If the trust does not qualify as an AMBT, then annual distributions would be based on the life expectancy of the oldest countable trust beneficiary (as always for non-AMBT trusts that have a minor-child EDB as a countable beneficiary). When would the Outer Limit Year be? That is not entirely clear. For an AMBT, the Outer Limit Year is 10 years after the death of the last surviving D/CI beneficiary, but what if the trust does not qualify as AMBT? The normal Outer Limit Year for an IRA payable to a trust for the benefit of a minor child-EDB is 10 years after such child reaches 21 (or earlier dies). In order for this trust to qualify for the later Outer Limit Year trust would have to qualify as an AMBT.

B. Surviving spouse who is also D/CI

If the surviving spouse is disabled or chronically ill, the question is whether she can somehow benefit from dual qualification. In my opinion the answer is no.

Clearly she could choose "either/or"—for example, if there is a conduit trust for the surviving spouse's benefit, it can use the applicable life expectancy [presumably the Uniform Lifetime Table; see PART 3, #5] recalculated annually because with a conduit trust the spouse is deemed to be the "sole beneficiary," a requirement of spousal-EDB perks. Or if there is an AMBT for her sole life benefit, remainder beneficiaries of the trust can be disregarded for purposes of determining RMDs during her lifetime, because that is a "perk" of an AMBT.

However, suppose the trust is an AMBT of which the D/CI surviving spouse is the sole life beneficiary, but she is NOT entitled necessarily to any distributions from the trust or retirement plan—for example because the trust is a "supplemental needs" trust and distributions are made to the spouse only if needed for her supplemental needs in the judgment of the trustee. In my opinion, such trust would not be entitled to recalculation of the surviving spouse's life expectancy (even if she is the oldest trust beneficiary and/or the oldest D/CI beneficiary and/or sole life beneficiary) because she is not the SOLE beneficiary any way you cut it. Recalculation of life expectancy (and delayed commencement date) apply only if the surviving spouse is the sole beneficiary. That status cannot be achieved by a trust unless it is a conduit trust.

PART 4: RMD RULES FOR TRUSTS; HOW TO TEST A TRUST

1. If a trust is named as beneficiary: The 2024 IRS RMD trust rules

The Code dictates that certain (generally favorable) minimum distribution outcomes are available only to a "designated beneficiary," and that a "designated beneficiary" must be an "individual." § 401(a)(9)(E)(i); see PART 3, #1, of this Outline.

Since a trust is obviously not an "individual," the IRS created rules under which, if the decedent named a trust as his beneficiary, you can "see through" the trust and treat the trust beneficiaries as if they had been named directly as beneficiaries on the beneficiary designation form. Then, if the beneficiaries you are looking at are all individuals, the decedent has a "designated beneficiary."

Ok, but WHICH trust beneficiaries count for this "see through" process? Almost every trust has a long chain of potential beneficiaries who COULD inherit the trust property if some prior beneficiary dies before a certain age, dies without issue, dies before some other beneficiary, etc. No problem! You can *disregard* certain contingent or successor beneficiaries in making your "designated beneficiary" test. But exactly which beneficiaries can you "disregard?" The 4-step testing process described below will give you the answer to that question.

In the meantime, here is the new landscape of trusts named as beneficiaries of retirement accounts:

2. Definitions: See-through Trust, Conduit Trust, Accumulation Trust

The Regulations adopt as official terms See-through Trust, Conduit Trust, and Accumulation Trust. The terms "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 the post-SECURE Regulations. Here are the definitions in the 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 Reg. § 1.401(a)(9)-4(f)(2) (*i.e.,* it complies with the four "trust rules"; see PART 4, #7). The effect of a See-through Trust is that "certain beneficiaries of the trust that are described in...[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...[Reg. § 1.401(a)(9)-4(c)(2)]." Reg. § 1.401(a)(9)-4(f)(1)(i).

Having a See-through Trust therefore 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."

Also note: 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 25% excise tax on missed RMDs (§ 4974), so the trustee will be responsible for paying that tax. Reg. § 1.401(a)(9)-8(a)(1)(iii).

"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." Reg. § 1.401(a)(9)-4(f)(ii).

- A **Conduit Trust** is a See-through Trust that provides, with respect to the deceased participant's interest in the retirement plan account, that "all distributions [from such retirement account] will, upon receipt by the trustee, be paid directly to, or for the benefit of, specified trust beneficiaries." Reg. § 1.401(a)(9)-4(f)(1)(ii)(A). This definition of conduit trust has not changed from the prior regulations or common understanding, though the prior regulations did not use that term; see [superceded] Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. This definition provides official recognition that a conduit trust can be for more than one designated beneficiary, a question considered unresolved under prior regulations.

Giving the "conduit beneficiary" the right to withdraw the IRA distributions from the trust, instead of having the trust require *actual* automatic distributions from the conduit trust to the beneficiary of all amounts the trust withdraws from the IRA, does NOT satisfy the definition of a conduit trust, according to the preface of the final RMD regulations issued July 2024.

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

3. Some trust beneficiaries are countable, some are disregarded

The payout period for RMDs after the participant's death depends on the identity of the beneficiary of the account, as we have seen...there is one payout period for an EDB, another for a PODB, another for a Non-DB, and so forth. A trust has multiple potential beneficiaries—current beneficiaries, remainder beneficiaries, contingent remainder beneficiaries, etc. To determine the Applicable Denominator (*i.e.*, the payout period under the minimum distribution rules) for a trust named as beneficiary of a retirement account, you need to know **which of those trust beneficiaries are "countable" (counted as beneficiaries) and which are ignored ("disregarded") if any.**

Summarized, the regulations (found in **Reg. § 1.401(a)(9)-4(f)**) analyze a trust by, first, dividing the list of potential trust beneficiaries into two tiers. The first tier, "primary," beneficiaries are always countable. Some (or in some cases all) second tier or "residual" beneficiaries may be disregardable. By threading these rules, you end up with your list of "countable" trust beneficiaries.

And why do we care which beneficiaries are "countable?"

- Designated beneficiary status requires that all countable beneficiaries must be individuals. If a nonindividual is a potential beneficiary anywhere in the trust instrument, you will lose designated beneficiary status unless that beneficiary is "disregardable" under these rules (or unless the trust is an AMBT and the nonindividual is a qualifying charity—see PART 3, #7(D)).

- Sometimes the ages of the countable beneficiaries matter. For example, the life expectancy of the oldest countable beneficiary will be the applicable distribution period (applicable denominator) in some cases. See, *e.g.,* "Steinmetz" case study (PART 9, Case #3).

- Whether some or all of the "countable beneficiaries" are "eligible designated beneficiaries" (EDBs) (and if so which KIND of EDB) also may matter for determining the distribution period (see PART 5).

The rest of this PART 4 lays out the process, as contained in the Regulations, by which we analyze a trust and determine which beneficiaries are counted and which are disregarded in testing the trust. Once you determine the countable beneficiaries using these steps you can determine the distribution period ("Applicable Denominator") for the trust based on their identity (see PART 5). Special terminology (mostly theirs, some mine) is used in this testing process.

4. But first: Which trust are you testing? Multiple trusts; subtrusts

The 4-step process is applied to a single trust named as beneficiary of a retirement account. Please note the following situations involving multiple trusts:

One trust pays to another trust: If the beneficiary of the retirement account is a trust that at some point distributes to one or more other trusts, all such trusts are tested as if they were one combined trust. For example, Ann leaves her IRA to a trust for her spouse, which provides that "upon the death of my spouse, the remaining property of this trust shall be paid over to the trust dated 4/1/2017 which I previously established for my daughter Grace." The trust for spouse and the trust for Grace are tested as if they formed one combined trust. Reg. § 1.401(a)(9)-4(f)(4).

Subtrusts: Often, the trust named as beneficiary on the beneficiary designation form is required by its terms to divide up into separate trusts following the trust grantor's death. A separate trust so created is called a subtrust. A "subtrust" is not in any legal or tax way different from a plain old "trust," it's just a convenient term to denote a trust that was created out of another trust. Once the subtrust is calved out of the "funding" trust, it's treated just like any other trust for all legal and tax purposes.

But do you test each subtrust separately to determine the *distribution period*? Or do you test them collectively, as one single trust? If the separate subtrusts were named separately as beneficiaries *on the beneficiary designation form*, you test each subtrust separately. Thus, if one of the subtrusts so named as beneficiary has a countable nonindividual beneficiary that would not contaminate the other subtrusts if each subtrust was named directly as beneficiary.

If the subtrusts are NOT named separately on the beneficiary designation form, they will still be tested separately PROVIDED several requirements are met: (see PART 6, #4, for details).

5. Summary of the four steps to test a trust

Here, in summary form, are the four steps needed to test the trust in order to determine the trust's "countable" beneficiaries. This summary of the four steps is followed by a detailed explanation with citations, and examples. "STEP 5" will be to use the results of the 4-step test to determine the payout period for RMDs to this trust.

STEP 1: Does the trust pass the four trust rules? If not, you've finished the test. Your trust is not a designated beneficiary. Go to STEP 5.

STEP 2: List ALL potential beneficiaries of the trust (including the participant's estate in some cases), but omit beneficiaries who are disregarded under any of the following seven (!) "disregard rules":

The first three of these disregard rules apply to every trust:

- Disregard individuals who predeceased the participant
- Disregard individuals who do not exist

- Disregard permissible appointees under a power of appointment unless and until that power is exercised; in the meantime, include the "takers in default of appointment" in your list of potential beneficiaries.

The next four rules may or may not apply depending on whether certain events occur after the participant's death and before the "beneficiary finalization date" (BFD), which is September 30 of year after the year of participant's death:

- Disregard any beneficiary who disclaims his interest in the benefits by means of a qualified disclaimer prior to the BFD

- Disregard any beneficiary who, by virtue of a distribution prior to the BFD, has no further interest in the benefits as of the BFD.

- Disregard any beneficiary who is "removed" prior to the BFD by means of a reformation or decanting of the trust in a manner permissible under applicable state law.

- ...but ADD any beneficiary who is "added" to the trust by means of a reformation or decanting of the trust in a manner permissible under applicable state law prior to the BFD.

STEP 3: Divide your list of potential beneficiaries into "primary" beneficiaries (who must or might receive benefits as a result of the participant's death) and "residual" beneficiaries" (who may receive benefits not distributed to primary beneficiaries, but cannot receive benefits after the participant's death until someone else has also died).

STEP 4: Apply three more disregard rules to winnow down your list of POTENTIAL beneficiaries into a list of COUNTABLE beneficiaries: These three rules are: the conduit trust rule, the age 31 rule, and the "second-choice-residual guy" rule.

STEP 5: You now have your list of "countable" beneficiaries. Determine the distribution period using the list A-E in STEP 5.

6. When are these tests applied?

The tests are applied, first, as of the date of the participant's death. However the results can be modified by events that occur by two other dates, the "Beneficiary Finalization Date" (BFD) which is September 30 of the year after the year of the participant's death, and the Trust-copy-to-plan deadline, which is October 31 of the year after the year of the participant's death (see STEP 1). So the test you perform as of the date of death is not carved in stone—results can change depending on what happens (or not) by those two other dates.

Also note: Even though we are testing the trust by looking into the future to see who gets the benefits when certain trust beneficiaries die, the tests are NOT reapplied later, when such beneficiaries ACTUALLY die. The only things that cause a trust to be re-tested after the date of

death are, certain changes made *before* the BFD (as discussed above), or a modification, reformation, or decanting of the trust at some later date (or exercise of a power of appointment at some later date). If such changes made *after* the BFD add or subtract any beneficiary(ies) from the trust, the Regulations provide for retesting the trust at that time. Such a change after the BFD cannot improve the minimum distribution picture (it's too late for that) but could make it worse, prospectively. See PART 7.

7. STEP 1: Does the trust "pass" the four trust rules?

The trust must qualify as a "see-through trust" as the first step towards qualifying for designated beneficiary (DB) treatment. Only a DB is entitled to the 10-year rule or (if the DB is also an "eligible designated beneficiary" or EDB) to some variety of life expectancy payout.

The four trust rules that a trust must pass to qualify as a "see-through trust" are: the trust is valid under state law; a copy of the trust (or summary of its provisions meeting various requirements) has been given to the plan administrator by October 31 of the year after the year of the participant's death; the trust is irrevocable as of the participant's death; and all the trust beneficiaries are "identifiable." See Reg. § 1.401(a)(9)-4(f)(1)(ii), (h) (documentation requirements for trusts).

These four rules are almost the same as in the existing (pre-SECURE) regulations which have been in effect since 2002. For the documentation requirement, the trustee may supply either a certified list of the beneficiaries or a copy of the trust (the plan administrator may require one or the other). Also, the meaning of *one* of the tests has changed in the 2024 Regulations: "Identifiable" now means only that it is possible to identify the beneficiaries who will or may be entitled to share in the retirement benefits through the trust: "each person eligible to receive a portion of the employee's interest in the plan through the trust." The new definition of "identifiable" is made even easier to comply with by some of the new "disregard" rules—you disregard potential appointees under a power of appointment (until it is exercised), and you disregard the fact that the trust might be reformed or decanted in the future in a way that adds or subtracts beneficiaries; see STEP 2.

Under the old (2002) regulations, "identifiable" required identifying the beneficiary with the "shortest life expectancy" (*i.e.*, the oldest countable beneficiary of the trust); the oldest potential beneficiary's life expectancy would be the Applicable Denominator for distributions to the trust. That step is generally 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.

For detailed discussion of the other three rules, see ¶ 6.2 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019; www.ataxplan.com).

A trust that passes these four rules is called a See-through Trust. If the trust flunks any of these rules, it is a "non-designated beneficiary" (Non-DB). In that case you can skip Steps 2, 3, and 4 and go directly to Step 5. A trust that passes these four rules is called, in the Regulations, a "**See-through Trust**." Reg. § 1.401(a)(9)-4(f)(1)(i), last sentence. A See-through Trust *may or may not* qualify as a Designated Beneficiary, however. Such qualification will depend on whether all "countable" beneficiaries of the trust are individuals (or, in the case of an AMBT, qualifying charities). See STEPS 2-4.

The 2024 Regulations use the "identifiable" requirement as a springboard to explain whether potential post-death changes in the identity of the trust beneficiaries (*e.g.*, via exercise of a power of appointment, or a trust reformation or decanting) will or will not affect the trust's qualification as a Designated Beneficiary Trust (and if so how and when); see PART 7.

8. STEP 2: List all *potential* beneficiaries of this trust

Next we compile a list of every person or entity who *is entitled* or *eligible* to receive money from this trust or *who might possibly become so entitled or eligible*. I call this list the "potential beneficiaries" (not an official term). This list is compiled as of the date of the participant's death. In SOME situations, you may need to make adjustments for changes that occur between the date of the participant's death and the Beneficiary Finalization Date; see "uncommon situations," at Step 4(C) below, for these possible post-death adjustments.

Trap for the unwary: According to the Preamble to the Proposed Regulations (Feb. 2022), if the "trust could be liable for expenses of administering and distributing the deceased employee's estate at death," "the decedent's estate is treated as a beneficiary of the employee...because some portion of the employee's interest in the plan may be used for the payment of those administration expenses, thus satisfying an obligation of the estate." Since the participant's own estate is a nonindividual, this would be a bad thing to happen if you want the trust to be a designated beneficiary. The way to avoid that bad result, according to the Preamble to the Proposed Regulations, is for the trust to specify that retirement benefits may not be used for this purpose (or may not be so used after the Beneficiary Finalization Date).

Do you have to list absolutely every name or category of potential beneficiary? Almost, but there are some "disregardable" beneficiaries. At this level, seven "Disregard Rules," listed below, are applied! Each disregard rule listed below is followed by an example. But first:

EXAMPLE 1: VANILLA TRUST; NOBODY TO DISREGARD (for STEP 2 purposes)**:** Trust says "Pay income to my spouse for life, and on my spouse's death distribute the principal to my issue then living by right of representation, or if no issue of mine is then living, to Charity X." Participant is survived by his spouse, three children, and four grandchildren. The "potential beneficiaries" list is as follows: Spouse, three children, four grandchildren, and Charity X. There is nobody to "disregard" in this list under the seven disregard rules *that apply at this level* (STEP 2). When we get to STEP 4, there will be another round of "disregard" rules and we will re-test this vanilla trust at that time.

Common-situation disregard rules applicable at STEP 2:

These first three disregard rules (A, B, C) are regularly encountered situations. The examples illustrating disregard rules 2-A, 2-B, and 2-C assume that there are no post-death changes that would affect the outcome; if there are post-death changes, see 2-D through 2-G.

A. **Disregard people who predeceased participant**. Disregard any beneficiary who doesn't exist on the date of the participant's death because he died before the participant—or who is deemed to have predeceased the participant due to operation of a "simultaneous deaths" provision in state law. Reg. § 1.401(a)(9)-4(c)(2)(i)

EXAMPLE 2-A: PREDECEASED PERSON**:** Trust says "On my death, pay $1000 to my sister Susie, then pay all income of the trust to my spouse for life, and on my spouse's death distribute the principal to my issue then living by right of representation, or if no issue of mine is then living, to Charity X." Participant is survived by his spouse, three children and four grandchildren but sister Susie predeceased him. The potential beneficiaries list is as follows: Spouse, three children, four grandchildren, and Charity X. Susie is not on the list because she predeceased the participant. NOTE: If Susie survived the participant, then died before the BFD, her death would NOT eliminate her as a listable beneficiary because Susie's estate would take her share of the retirement account.

B. **Disregard people who don't exist yet.** Disregard any beneficiary who doesn't exist on the date of the participant's death because he hasn't been born yet.

This rule does not appear in the Regulations. It is my interpretation of the rule that trust beneficiaries must be "identifiable." Reg. § 1.401(a)(9)-4(f)(5). You do not "count" as beneficiaries any potential future/not-yet-born issue even though "issue" may be named as beneficiaries as a class in the trust instrument. This rule creates results you may not like, but there are ways to fix the problem at the drafting stage; see the continuation of this Example 2-B under Step 4-C later in this PART 4. Or you can ignore this rule because it does not appear in the Regulations.

EXAMPLE 2-B: PERPETUAL FAMILY TRUST**:** Trust says "The trustee shall pay income and principal to or for the benefit of such persons as the trustee shall select from the then living members of the class consisting of my spouse and my issue living at the time of such payment for their health, education, support, and welfare in such amounts as the trustee deems advisable. At the end of 200 years, or at any earlier time when there is no issue of mine living, and my spouse is deceased, the trust shall terminate and be distributed to Charity X." Participant is survived by his spouse, three children, and four grandchildren. The potential beneficiaries list is as follows: Spouse, three children, four grandchildren, and Charity X. Though the trust is intended to benefit the participant's present and future issue for 200 years, you cannot (I believe) "count" issue who do not exist yet. For purposes of testing this trust, you can look only at people who are actually living when the participant dies. For what happens to this trust under the minimum distribution rules IF my interpretation is correct, see STEPS 3 and 4!

C. **Disregard permitted appointees under a power of appointment unless and until such power is exercised**. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

EXAMPLE 2-C: PERMITTED APPOINTEES**:** Trust says "Pay all income of the trust to my spouse for life, and on my spouse's death distribute the principal to such charity(ies) or

individual(s) as my spouse may appoint by her last will, or in default of such appointment, pay the principal to my issue then living by right of representation." Participant is survived by his spouse, three children, and four grandchildren. The potential beneficiaries list is: Spouse, three children, and four grandchildren. The potential appointees under spouse's will are NOT countable unless and until the power is exercised. Since that cannot happen until spouse's death (because the power can be exercised only by will, which cannot be effective until the testator/power holder has died), this power is ignored for now. Instead, the "takers in default" (i.e. the beneficiaries who will inherit if the power of appointment is not exercise) are treated as the beneficiaries who will inherit on spouse's death.

Uncommon-situation disregard rules applicable at STEP 2: The next four "disregard" rules involve events that may occur AFTER the participant's death. In most cases there will be no need to tangle with these rules, since these situations are uncommon.

The designated beneficiary is determined as of the date of the participant's death. However, you take a second look on September 30 of the year after the year of the participant's death, known as the Beneficiary Finalization Date or BFD. There are four situations in which your list of potential beneficiaries may need to change for events that occur between the date of death and the BFD. Any of these adjustments, if applicable, would change the list of potential beneficiaries *retroactively to the date of death*. These are:

D. Disregard beneficiary who disclaims his or her interest in the benefits by means of a qualified disclaimer prior to the BFD. Reg. § 1.401(a)(9)-4(c)(2)(ii), (3)(i).

EXAMPLE 2-D: QUALIFIED DISCLAIMER PRIOR TO BFD: Trust says "On my death, pay $1000 to my sister Susie, then pay all income of the trust to my spouse for life, and on my spouse's death distribute the principal to my issue then living by right of representation, or if none of my issue is then living, to Charity X." Participant is survived by his sister Susie, his spouse, and his three children and four grandchildren. Susie disclaims her bequest by means of a qualified disclaimer prior to the BFD. The potential beneficiaries list is as follows: Spouse, three children, four grandchildren, and Charity X. NOTE: A "nonqualified disclaimer" would NOT eliminate Susie as a beneficiary.

E Disregard beneficiary who, as of the BFD, has received the entire interest to which such beneficiary was entitled. Reg. § 1.401(a)(9)-4(c)(2)(iii).

EXAMPLE 2-E: BEQUEST DISTRIBUTED BY BFD: Trust says "On my death, pay $1000 to Saint Mary's Church, then pay all income of the trust to my spouse for life, and on my spouse's death distribute the principal to my issue then living by right of representation, or if no issue of mine is then living, to Charity X." Participant is survived by his spouse, three children, and four grandchildren. The $1,000 bequest is distributed to Saint Mary's Church in full prior to the BFD. The Church is no longer a potential beneficiary. The potential beneficiaries list is as follows: Spouse, three children, four grandchildren, and Charity X (we will get to whether Charity X can be disregarded in a later Step).

F. Disregard beneficiary removed by reformation or decanting of trust before BFD

If a trust is named as beneficiary of the retirement plan, and such trust is modified after the participant's death (for example, by means of "decanting" or reformation permitted under state law) to remove a beneficiary effective by the BFD, the removed beneficiary is disregarded—he, she, or it does not count as a beneficiary of the trust. Reg. § 1.401(a)(9)-4(f)(iii)(B).

EXAMPLE 2-F: REMOVAL OF BENEFICIARY PRIOR TO BFD VIA DECANTING OR REFORMATION: Trust says "After my death, use income and/or principal of the trust for the health, education, care and support of my three children A, B, and C. In addition, the trustee may in its discretion pay income and/or principal to or for the benefit of my Aunt Phyllis if the trustee determines in its discretion that such amounts are not required for the care, support, etc. of my children and that Aunt Phyllis's other resources are not sufficient for her health, care, and support. When there is no child of mine living who is under the age of 25 years, the trust shall terminate and all remaining principal and income shall be distributed outright to my then living children in equal shares." The participant's three children are now under age 21 and are all accordingly EDBs. Aunt Phyllis is also an EDB; she is 83 and not disabled or chronically ill, so she qualifies as a "not more than 10 years younger" (NoMoTTYY) beneficiary. Phyllis is living in her own home, in good health, with financial resources that appear more than adequate to provide for all her foreseeable needs for the rest of her life. Having her as a discretionary beneficiary would mean she would be the oldest trust beneficiary and the trust would have to take distributions over her life expectancy, which is just 9.3 years. Removing her as a beneficiary would mean the IRA could be distributed to the trust over the life expectancy of the oldest child (who is 10 years old, so his life expectancy is 74+ years) until 10 years after the last child has attained age 21 or earlier died. Aunt Phyllis would have disclaimed her interest in the trust if someone had asked her to, but nobody noticed this problem until it was too late for a qualified disclaimer. (Participant died 1/1/2024 and the nine-month qualified disclaimer deadline was 10/1/2024.) The trust is reformed before 9/30/2025 (the BFD) to remove Phyllis as a discretionary beneficiary with respect to the retirement benefits. If the reformation is proper under state law, Phyllis will not be counted as a potential trust beneficiary with respect to the IRA.

Trust reformations to improve RMD results may become a common occurrence in future years, as individuals die without having updated their trusts for the SECURE rules. The Regulations allow room for such reformations to be effective retroactive to the date of death for minimum distribution purposes, to either add or remove a beneficiary. Reg. § 1.401(a)(9)-4(f)(5)(iii). Such retroactive reformations were not possible under the existing regulations.

G. Add any beneficiary who is *added* by virtue of a reformation or decanting of the trust, or the exercise of a power of appointment, prior to the BFD.
Reg. § 1.401(a)(9)-4(f)(5)(iii)(C).

This would presumably be a very unusual event.

EXAMPLE 2-G: ADDITION OF BENEFICIARY PRIOR TO BFD VIA DECANTING OR REFORMATION: Trust says "After my death, pay income in equal shares to my beloved nephews Arthur, Bill, Charlie, David, Fred, and George, or the surviving member(s) of said group, as long as they live, then distribute the principal to their then-living issue per stirpes." After the participant's death, the trust is reformed in accordance with applicable state law to correct a scrivener's error which eliminated one of the intended nephews (Edward) from the beneficiary list. The reformation is completed properly under applicable state law before the BFD. Edward is added to the list of potential trust beneficiaries.

Note that the Regulations make no allowance for a post-death reformation of the *beneficiary designation form*—only a trust reformation will be recognized for RMD purposes apparently.

Congratulations! You've completed Step TWO and have your list of "potential" trust beneficiaries. You are now are ready for....

9. STEP 3: Divide the potential beneficiaries into primary and residual

Now that you have your list of "potential" beneficiaries from Step Two, it's time to divide that list into two groups or levels: Once you determine who are your "primary" and "residual" beneficiaries, you can apply the next set of "disregard rules" and determine who, among the possibly long list of potential beneficiaries achieved in Step 2, are the "countable" beneficiaries, and which potential beneficiaries are "disregarded." The countable beneficiaries will determine the distribution period for the trust (STEP 5).

Note: The terms "primary" and "residual" do not appear in the Regulations. These terms are used in the Preamble to the Regulations in the same way as in this Outline—as shorthand for explaining the process laid out in Reg. § 1.401(a)(9)-4(f)(3)(i)(A) ["primary"] and (B) ["residual"].

A primary beneficiary is any beneficiary who either MUST or MIGHT receive benefits from the trust following the death of the participant, without having to wait for some other beneficiary to die: "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 who did not predecease (and is not treated as having predeceased) the employee." Reg. § 1.401(a)(9)-4(f)(3)(i)(A). The Regulation calls these "beneficiaries described in paragraph 1.401(a)(9)-4(f)(3)(i)(A)." This Outline calls them "primary beneficiaries."

A residual beneficiary is "Any beneficiary of an accumulation trust that could receive amounts in the trust representing the employee's interest in the plan that were not distributed to beneficiaries described in paragraph (f)(3)(i)(A)," i.e., that were not distributed to primary beneficiaries. Reg. § 1.401(a)(9)-4(f)(3)(i)(B).

Primary beneficiaries are always countable. Some or all residual beneficiaries are disregardable in some cases.

EXAMPLE 3-A: Isabelle's trust says "Pay all income to my husband Oliver for life, and upon his death pay the principal to my son Angier if living otherwise to Hillsdale College." Both Oliver and Angier survive Isabelle. Oliver is a primary beneficiary because he gets benefits from the trust upon Isabelle's death—he doesn't have to wait until someone else dies. Angier is a residual beneficiary because he has to wait until Oliver dies before he will get anything. The College is *also* a residual beneficiary for the same reason.

Wait a minute...Why isn't the College some third category, since it won't get anything unless BOTH Oliver and Angier, i.e., all the primary and residual beneficiaries, die? Because there is no third category or level...only primary and residual. The College may be "disregardable" at a later point in the process (see STEP 4-C) but for now it is just another residual beneficiary.

The hard case:

EXAMPLE 3-B: Julia's trust says "Pay all income to my husband Harold until his death or remarriage. Upon his death or remarriage, pay the principal to my daughter Charlotte if living otherwise to Morgan Memorial." Both Harold and Charlotte survive Julia. Harold is clearly a primary beneficiary because he gets benefits from the trust upon Julia's death; he doesn't have to wait until someone else dies. It would appear that Charlotte is ALSO a "primary beneficiary" because her right to benefits is "neither contingent upon, nor delayed until, the death of another trust beneficiary"—she would get the benefits while Harold is still alive, if he remarries. This conclusion is supported by language in the Preamble to the *Proposed* Regulations, p. 32... but there is no further elucidation on this point in the final regulations and no mention of it in the Preamble to the final regulations. If this interpretation is correct, then the charity is the only "residual" beneficiary in the picture, and none of the disregard rules (see STEP 4) would allow the charity to be disregarded, so the trust would not be a designated beneficiary trust. It is disappointing that this type of provision ("until death or remarriage") is not mentioned in the final regulations or the Preamble. Also frustrating is that potential future events that could but may never happen (exercise of a power of appointment, decanting, trust reformation) are DISREGARDED in applying the "countable beneficiaries" of a trust named as beneficiary, but other potential future events (remarriage of a beneficiary) may be treated as if they definitely will happen.

But that distinction is not irrational: Disclaimers, exercise of a power of appointment, and reformation/decanting are formal recognized legal events. If the door is opened to all contingent future events (graduation from college....divorce, marriage, bankruptcy...severe illness...real need...) the trust rules would become too amorphous and unmanageable.

EXAMPLE Z: Steve's trust says "Upon my death, pay income and principal to or for the benefit of such persons as the trustee shall select from the class consisting of my surviving spouse and all my issue living from time to time for their health and support. Upon my spouse's death, distribute the entire trust to my issue then living by right of representation or if none is then living, to My Favorite Charity." Steve is survived by his spouse, two children, and five grandchildren. All eight of those individuals are primary beneficiaries, since all of them are eligible to receive distributions as a result of Steve's death: They don't have to wait for someone else to die. The

Charity is the only residual beneficiary. Preview of coming attractions: It appears that none of the disregard rules (see STEP 4) would allow the Charity to be disregarded, so this is probably not an advantageous way to draft the trust—the regulations are "prejudiced" against spray trusts. The problem can be cured by naming an individual as the wipeout beneficiary in place of the Charity, or by using a last man standing approach; see the continuation of Example 2-B in Step 4-C below.

10. STEP 4: Apply three more disregard rules

Once you have divided all your potential beneficiaries into primary and residuals, you can apply this final set of disregard rules. The result of applying this final round of disregard rules is to whittle down your list of "potential beneficiaries" so you are left with only "countable beneficiaries."

A. Conduit trust rule: Disregard all residual beneficiaries. With a conduit trust, only primary beneficiaries count. All residual beneficiaries are disregarded. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A), (3)(i)(B), (6)(i)(B) [Example (1)].

EXAMPLE 4-A: CONDUIT TRUST: Trust says, "Every time the trustee takes a distribution from my IRA, the trustee shall forthwith distribute such distribution to my husband Larry or apply it for his benefit. On Larry's death, any amounts remaining in the IRA shall be paid to Baypath Humane Society." Larry is the primary beneficiary. The Humane Society is the residual beneficiary and it is disregarded (not treated as a "countable" beneficiary of the trust) because this is a conduit trust. A conduit trust is a See-through Trust [see STEP 1] that provides, with respect to the deceased participant's interest in the retirement plan account, that "all distributions [from such retirement account] will, upon receipt by the trustee, be paid directly to, or for the benefit of, specified beneficiaries." Reg. § 1.401(a)(9)-4(f)(1)(ii)(A); see PART 4, #2.

B. Primary inherits by age 31 rule. Disregard any residual beneficiary who will inherit only if a primary beneficiary who would have inherited the property outright at a certain age (age 31 or younger) [or by end of year after year of participant's death, if later] dies before reaching that age [or such year-end]. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B).

EXAMPLE 4-B: AGE 31 RULE**.** Regina's trust says, "Use income and principal of the trust for the benefit of my niece Sophie, for her health, education, and support, until she reaches age 30, at which time the trust shall terminate and be distributed outright to her. If she dies before reaching that age the trust shall terminate and be distributed to Charity X." The primary beneficiary is Sophie. The residual beneficiary is Charity X. The charity is disregarded because (1) it is a second-tier beneficiary and (2) it will receive funds from this trust only if a primary beneficiary who would inherit the funds outright upon reaching age 31 (or any younger age) dies before reaching such age.

Although "age 31" is the same age as the final year of distribution to a minor child of the deceased participant (i.e., a category of eligible designated beneficiary or EDB) (10 years after attaining majority), the age 31-disregard rule in Reg. § 1.401(a)(9)-4(f)(3)(ii)(B) applies to ANY

primary beneficiary who is to receive outright distribution at or before that age, even if such beneficiary is not a minor child of the participant, as in the preceding Regina/Sophie example.

However, keep in mind that the permitted delay in trust distribution (to any age up to 31) does NOT delay distribution of the retirement plan itself. Assuming the 10-year rule applies to Regina's trust, and Sophie is only 15 when Regina dies, the IRA will have to be distributed fully to the trust no later than the 10th year after Regina's death, when Sophie will be only about 25 years old. The trust will have to pay income taxes on those IRA distributions when received, to the extent they are not passed out to niece Sophie (or for her benefit), and only the after-tax remnant of the IRA will be left for distribution to Sophie.

The age-31 rule has another "trap": It works only for primary beneficiaries:

Example: Harvey leaves his IRA to a trust that provides income to his wife Hilda, with principal passing equally to their then living children on Hilda's death. Each child's share is to be held in trust until the child reaches age 31, at which time it is to be distributed outright to such child. If a child survives Hilda but dies before age 31, such child's share goes to the child's issue per stirpes, or if there are no such issue, outright to the other children (in trust if under age 31), or, if all the other children are then deceased without issue, to charity. Harvey and Hilda have four children, all of whom survive Harvey. Assume at all applicable times no child has any issue.

The distribution period for this trust depends on who survives whom and when.

If Hilda *predeceases* Harvey, then the trust qualifies as a designated beneficiary: The countable beneficiaries are the four children all of whom are under age 31. The charity is a remainder beneficiary, but it is ignored because each child will receive his or her share outright at age 31—the "age 31 rule" applies.

But if Hilda survives Harvey, then dies a year later, while the four children are still under age 31, the countable beneficiaries are the four children—and Hilda. Because Hilda is the only primary beneficiary, the children are all residual beneficiaries and *the "age 31 rule" does not apply*. The IRS's method of testing this trust would be: primary beneficiary is Hilda. Fine. Residual beneficiaries are the four children and charity. Charity is not disregarded either because of the age 31 rule (because that never applies to residual beneficiaries) or because of the 2d-choice-residual-guy rule [see "C" below] (because even if three of the children die immediately after Harvey, the 4th child does not get his/her share immediately-outright. He she has to wait to age 31 and if he/she dies before that age it goes to charity). So, rely on the age-31 rule with caution—it's only for primary beneficiaries!

C. Disregard the second choice-residual guy. Disregard any residual beneficiary who will inherit only if some *other* residual beneficiary (who was supposed to inherit outright on death of a primary beneficiary) fails to survive such primary beneficiary. Reg. § 1.401(a)(9)-4(f)(3)(ii)(A). This is the new Regulations' version of the old "mere potential successor rule."

This is the hardest rule to grapple with. This rule does not merely require that one person survives another person while someone else fails to survive such person. Both the "first choice guy who failed to survive" and the "second choice guy who actually did survive" must be residual

beneficiaries who inherit the property outright (or *would have* inherited it outright in the case of the guy who didn't survive) upon death of a primary beneficiary. The survivor-residual beneficiary must be getting something that the other residual-beneficiary-guy who DIDN'T make it would have received outright.

Here is how this rule applies to some "vanilla" type trusts we have already looked at:

EXAMPLE 1, VANILLA TRUST, continued: Trust says "Pay income to my spouse for life, and on my spouse's death distribute the principal to my issue then living by right of representation, or if no issue of mine is then living, to Charity X." Participant is survived by his spouse, three children, and four grandchildren. The potential beneficiaries list is as follows: Spouse, three children, four grandchildren, and Charity X. The primary beneficiary is spouse. The children, grandchildren, and Charity X are all residual beneficiaries, who must wait until not only the participant but also the spouse dies before they might inherit something.

But the "first choice residual guys" are the participant's issue. They will inherit 100% outright upon the death of spouse. Charity X is disregardable because it is the "second choice residual guy": It is a residual beneficiary, *but* it will not receive anything from the trust unless *another* residual beneficiary (actually a whole bunch of them—the issue) fail to survive the primary beneficiary (spouse). When the spouse/primary beneficiary dies, the participant's issue then living will inherit the trust outright. The charity won't get anything if *any* other residual beneficiary survives the spouse. So the charity gets something only if "the first-choice residual guys" [the participant's issue] don't survive the primary beneficiary [the spouse].

Now contrast that with this other example from earlier in this Outline:

EXAMPLE 2-B: PERPETUAL FAMILY TRUST, continued: Trust says "The trustee shall pay income and principal to or for the benefit of such persons as the trustee shall select from the then living members of the class consisting of my spouse and my issue living at the time of such payment for their health, education, support, and welfare in such amounts as the trustee deems advisable. If at any time there is no issue of mine living, and my spouse is deceased, the trust shall terminate and be distributed to Charity X." Participant is survived by his spouse, three children, and four grandchildren. The potential beneficiaries list is as follows: Spouse, three children, four grandchildren, and Charity X. Though the trust is *intended* to benefit the participant's present and future issue in perpetuity, you cannot "count" issue who do not exist yet—I believe (although as noted the regulations do not explicitly so state). For purposes of testing this trust, you can look only at people who are living (in existence) when the participant dies.

What are the tiers or layers of beneficiaries? The spouse, children, and grandchildren are all primary beneficiaries because they are all eligible to receive benefits once the participant dies....they don't have to wait until someone else dies to be eligible to receive $.

Charity X is the residual beneficiary; it only inherits when all the primary beneficiaries die (actually only when all the primary beneficiaries and all issue of such primary beneficiaries die—but presumably we can't count those future unborn issue).

But the Charity is NOT disregardable! There is *no other beneficiary* who will inherit the trust outright upon the deaths of the [currently existing] primary beneficiaries. *The only beneficiary who inherits outright under this trust is the Charity!* And because the Charity is therefore a countable beneficiary and it is not an individual, this trust flunks. It is a "Non-DB."

If drafting this trust, and wishing to assure that designated beneficiary treatment will apply, there are two approaches practitioners use to cure this problem.

- One is to use a "last man standing" provision: If at any time in the future there is only ONE living member of the class consisting of the donor's spouse and the donor's issue of all generations, the trust will terminate and be distributed outright to that one. This eliminates the charity and means all countable beneficiaries are individuals so you have a designated beneficiary. It does not carry out the participant's original charitable intent....but if the participant really expects the trust to last for 1,000 years for the benefit of his descendants, charitable intent is not a high priority for him.

- The other way is to choose some other individual(s) to be the wipeout beneficiary if all the participant's issue die, such as the participant's "heirs at law determined as of the date of the last issue to die, as if the participant had died on such date, based on the laws of the state of XYZ as they exist on the date this trust is signed, for distribution of real estate of an intestate." Again, this assures that all countable trust beneficiaries will be individuals and the trust can qualify as a designated beneficiary (but eliminates the charitable goal).

Do those wipe-out provisions make any sense? Not really. In order to qualify for as a "designated beneficiary trust" the client is eliminating the "sensible" wipeout beneficiary (the charity) for essentially a totally random relative. How much tax money will be saved by this change?

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"At the end of the day" the new trust-testing rules are almost the same as the old trust-testing rules, with lots more detail filled in: As leading IRA-estate planning expert Kathy Sherby, Esq., of St. Louis put it, "you keep counting beneficiaries until you get to someone who can put the retirement plan benefits 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 have a Designated Beneficiary Trust.

Another approach to this dilemma (pointed out by another leading IRA-estate planning expert from St. Louis, Steve Gorin) is to rely on the regulations' generous treatment of post-death trust amendments. Under this approach the expectation would be build in to the estate plan, that the trust would be reformed at some point AFTER the retirement benefits had been fully distributed (for example, about 11 years after the participant's death, if the 10-year rule applied to the trust) to eliminate the undesired human wipeout beneficiary provision and perhaps substitute a charity as wipe-out beneficiary.

11. STEP 5: Determine the applicable denominator

Here is your reward for completing the first four steps: You now know who are your countable beneficiaries. Find the description of your countable beneficiaries in paragraph A, B, C, D, or E below and that paragraph will lead you to the distribution period applicable to your trust. Full details on the distribution period for a trust are found in PART 5 of this Outline.

A. If any of your countable beneficiaries is a nonindividual (such as the participant's estate or a charity) your trust is a nondesignated beneficiary (Non-DB)—with one exception: If the trust is an AMBT, and the participant died after 2022, and the non-individual countable beneficiary is a certain type of charity (see PART 5, #2, for details), that countable charitable beneficiary does not make the trust a Non-DB. But for any other type of trust, or if the charity is not the "right type," or if the participant died before 2023, having a countable nonindividual beneficiary means the trust is a Non-DB. Ditto if the trust flunked Step 1. The distribution period for a Non-DB is the 5-year rule if the participant died before his RBD, otherwise the "ghost life expectancy." See PART 5, #1.

B. If the trust is a conduit trust, the distribution period for the trust is exactly the same as it would have been for the conduit beneficiary(ies) if named directly as beneficiaries—e.g., 10-year rule for a plain old designated beneficiary if the participant died before his RBD. See PART 5, #1.

C. If the trust is an "Applicable Multi-Beneficiary Trust" (AMBT), see PART 5, #2.

D. If any countable beneficiary of the trust is a minor child of the participant, see PART 5, #3.

E. If all countable beneficiaries of the trust are EDBs (but none is a minor child-EDB), see PART 5, #4.

F. If none of the above applies:

- If the participant died before his RBD, the 10-year rule applies, with no distributions required in years 1-9. All funds must be distributed no later than the year that contains the 10th anniversary of the participant's death. Reg. § 1.401(a)(9)-5(e)(2).
- If the participant died on after his RBD, the payout period is the longer of the ghost life expectancy (with annual payments over such ghost life expectancy) or the 10-year rule. If the 10-year rule applies, annual distributions over the life expectancy of the oldest countable beneficiary are required in years 1-9. Reg. § 1.401(a)(9)-5(d)(1)(i), (ii).

PART 5: DETERMINING THE APPLICABLE DENOMINATOR FOR A TRUST

After completing all the steps in PART 4 above, you have the list of "countable" beneficiaries of your trust. These will determine the payout period for the trust—what the Regulations call the Applicable Denominator. All you need to do now is figure out which one of the following sections 1-5 describes your trust and you will know your Applicable Denominator (including annual track required distributions and Outer Limit Year).

1. Trusts that get "EDB treatment" or not; trusts that are Non-DBs

"EDB treatment" is used in this Outline to indicate that the trust is entitled to a "life expectancy payout" based on the life expectancy of one of the trust beneficiaries (which one varies depending on the type of trust as we shall see).

The approach of the Regulations is to allow such "EDB treatment" for three types of trusts: an AMBT (see PART 5, #2); a trust that has at least one countable beneficiary who is a minor child-EDB (see PART 5, #3); and any trust all "countable" beneficiaries of which are EDBs (see PART 5, #4). "EDB treatment" for a trust means the trust is entitled to some type of life expectancy payout. Reg. § 1.401(a)(9)-4(e)(2) indicates by process of elimination that if the beneficiary of the retirement account is one of the above three types of trust, "then the employee is treated as having an eligible designated beneficiary." If the account is left to any other type of trust "then the employee is treated as not having an eligible designated beneficiary."

So, clearly this "EDB treatment" applies to these trusts for purposes of determining the Applicable Denominator. It presumably also extends to allowing the trust to use the 10-year rule instead of the life expectancy payout if the participant died before his RBD (see PART 3, #4(C)), though this point is not explicitly stated in the Regulations (and the regulations allowing an EDB to elect the 10-year rule in cases of death before the RBD do not indicate whether such election would be made by the trustee or the EDB when the trust is the named beneficiary).

With one significant exception, a trust that has any countable beneficiary (PART 4, #10) that is not an individual (*i.e.*, the participant's estate or a charity), is automatically a Non-DB. (The new and significant exception is that an AMBT may have a charity as beneficiary without losing DB status; see PART 5, #2.) The distribution period for a Non-DB (UNCHANGED by SECURE) is the 5-year rule if the participant died before his RBD, otherwise the "ghost life expectancy." See PART 3, #2 for details. Since the ghost life expectancy would be longer than 10 years if the participant died between ages 73 and 80, it is not always bad to be a Non-DB!

The final regulations have "fixed" this anomaly by providing that the "ghost life expectancy" is the minimum payout period allowed for PODBs and EDBs in cases where the participant dies after the RBD. Reg. § 1.401(a)(9)-5(d)(1)(ii).

If the trust is not a Non-DB, and does not "qualify for EDB treatment," it will be a PODB.

2. Applicable Multi-beneficiary Trust (AMBT)

Under an AMBT, there is a disabled or chronically ill (D/CI) beneficiary and during the lifetime of such D/CI beneficiary no distributions from the retirement plan may be paid to anyone other than such D/CI beneficiary. See PART 3, #7(E). That includes reinvestments and "proceeds" of such retirement plan distributions. Plan distributions (and proceeds thereof etc.) may be applied to or for the benefit of the D/CI beneficiary, or held for such use in the future, but may not (so long as the D/CI beneficiary is living) be paid to or applied for the benefit of anyone else.

This provision of SECURE was apparently created especially having in mind supplemental needs trusts for the benefit of a disabled individual who was receiving means-tested government benefits for the disabled. The goal of such a trust is to supplement, not replace, government benefits, meaning the trust must be structured so that the trust does not become a "countable resource" for purposes of the beneficiary's qualification for the applicable government programs.

Sometimes it becomes necessary to prohibit all payments from the trust to or for the benefit of the D/CI beneficiary to avoid having it be counted as a "resource." To accommodate that situation, the regulations provide that the interest of the D/CI beneficiary can be terminated during the life of such beneficiary, without forfeiting AMBT status, provided the trust continues to prohibit distributions to any person other than the D/CI beneficiary as long as he or she lives. In that case, the beneficiaries who receive the trust upon the death of the D/CI beneficiary will be treated as new beneficiaries "added to" the trust in that year (see rules for post-death trust modifications). Reg. § 1.401(a)(9)-4(g)(2).

An AMBT gets the following special breaks under the RMD rules:

First, as a result of "SECURE 2.0" (enacted at the end of 2022), the normal requirement of a designated beneficiary trust that all countable beneficiaries of such trust must be individuals is softened: SECURE 2.0 allows an AMBT to have a charity as a remainder beneficiary while still qualifying as a "designated beneficiary."§ 401(a)(9)(H)(v) (last sentence), effective for participants dying after 2022: "any beneficiary which is an organization described in section 408(d)(8)(B)(i) shall be treated as a designated beneficiary described in subclause (II)." The organizations described in 408(d)(8)(B)(i) are all "50%" charities (charities listed in § 170(b)(1)(A)) OTHER THAN donor-advised funds and supporting organizations. See § 408(d)(8)(B)(i).

Note: § 170(b)(1)(A) lists charities donations to which qualify for an income tax deduction for individual donors, up to 50% of the donor' income. There are other types of charities (see § 170(b)(1)(B)) donations to which are allowed only up to 30% of income. These "30% charities" are NOT allowed "designated beneficiary" status under the Code for AMBTs.

The Applicable Denominator for this type of trust is:

Generally, the life expectancy of the oldest countable D/CI beneficiary of the trust. (If there is only one D/CI beneficiary, then his or her life expectancy.) Reg. § 1.401(a)(9)-5(f)(1)(ii). For example, for an AMBT for the life benefit of a D/CI individual, with remainder to another individual who is not D/CI, the payout period will be the life expectancy of the D/CI individual even if the residuary beneficiary is older.

Generally, the Outer Limit Year for this type of trust is: The last year of the life expectancy of the D/CI, or if earlier 10 years after the death of the D/CI beneficiary (or of the last D/CI beneficiary to die, if there are more than one). Reg. § 1.401(a)(9)-5(f)(2)(iii).

Note the following wrinkles in the above general rules:

- If the participant died before his RBD, there are situations where the 10-year rule can apply even though the trust is an AMBT. See PART 3, #4(C).

- If the participant died after his RBD, and the participant's life expectancy ("ghost life expectancy") was longer than the oldest D/CI beneficiary's life expectancy, the ghost life expectancy would determine annual distributions. Reg. § 1.401(a)(9)-5(d)(1)(ii).

3. Trust with any minor child-EDB

If at least one countable beneficiary of the trust is a minor child of the participant ("minor-child EDB"), the trust is entitled to the life expectancy payout. The RMD requirements for a trust with multiple minor child-EDBs as "countable beneficiaries" changed significantly between the proposed regulations (Feb. 2022) and the final regulations (issued July 2024). Here are the new rules:

A. Annual payouts based on oldest countable DB

The applicable denominator for annual RMDs will be the life expectancy of the oldest countable beneficiary of the trust. This rule did NOT change from the proposed regs. Reg. § 1.401(a)(9)-5(f)(1)(i). NOTE, this is the oldest countable designated beneficiary, who may or may not be a minor child-EDB....the oldest countable beneficiary may be a mere "PODB." But that's whose life expectancy will be the Applicable Denominator for determining RMDs to this trust.

An example would be, a spray trust for the benefit of the participant's children, three of whom are still minors and one of whom is age 22. Even though one trust beneficiary is not an EDB the trust gets to use the life expectancy payout to determine annual distributions because it has at least one child who is still a minor child-EDB. The life expectancy the trust must use is the life expectancy of the 22-year-old child (if he is the oldest countable beneficiary).

Another example: Trust for the benefit of the participant's 5-year-old child, to be held for the child's benefit until she reaches age 45. If she dies before that age, the trust passes to the child's aunt who is age 43. This is not a conduit trust. The aunt is countable, and she is the oldest trust beneficiary, so her life expectancy determines the annual RMDs. Note: If the trust property were distributable outright to the child by age 31, rather than age 45, then auntie could be disregarded and the trust would use the child's life expectancy as the Applicable Denominator. See PART 4, #10(B).

B. Final payout year for trust with one minor child-EDB

When is final distribution required? Reg. § 1.401(a)(9)-5(e)(1) provides that "the entire interest of the employee must be distributed by the end of the earliest of the calendar years described in paragraph (e)(2), (3), or (4) of this section." Each of those subparagraphs applies to a particular type of beneficiary.

In the case of a minor child-EDB, two subparagraphs apply: 10 years after the death of the minor child ((e)(3)) and 10 years after the minor child attains majority (age 21) ((e)(4)). So in the

case of a trust with one minor child-EDB, annual RMDs are based on the life expectancy of the oldest countable designated beneficiary of the trust (who may or may not be the minor child), but the final payout year (when 100% of the account must be distributed) is based solely on the minor child-EDB—it is 10 years after he attains age 21 (i.e., the year he attains age 31), or, if earlier, 10 years after his death (if he dies before attaining age 21).

C. Final payout year for trust that has more than one minor child-EDB

Here the final regulations have made things much more protective for minor child EDBs than were the proposed regulations: As noted above, the annual payouts will still be based on the life expectancy of the oldest countable DB of the trust (whether or not that is the minor child). But the FINAL payout year will not occur until 10 years after the youngest minor child-EDB reaches age 21. Reg. § 1.401(a)(9)-5(f)(2)(ii)(C). There is an additional provision requiring payout (if earlier) 10 years after ALL the minor child-EDBs have died. Reg. § 1.401(a)(9)-5(f)(2)(ii)(B). This is consistent with the provisions dealing with disabled/chronically ill EDBs, which do not start the 10-year countdown until after all the D/CI EDBs are deceased.

The actual wording of the regulation creates a possible slight gap...if the youngest child dies before reaching age 21, then one could read the regulation as saying that the final payout is not required until 10 years after all the other children are deceased (regardless of how old they are!) because the youngest child never does reach age 21. That would be overcome by interpreting the regulation to mean the earliest date as of which there is no minor child EDB living who is under age 31.

Note: The trust with one or more minor-child EDBs has different "measuring lives" for the annual distributions (life expectancy of the oldest **countable beneficiary** of the trust) vs. the Outer Limit Year (10 years after **all minor-child** EDBs reach age 21 or earlier die). This kind of distinction keeps you on your toes.

Exceptions to the general rules: If the participant died before his RBD, there are cases where the 10-year rule can apply to an EDB (see PART 3, #4(C)) or a trust for an EDB (PART 5, #1). If the participant died after his RBD, and the oldest countable trust beneficiary is older than the participant, the Ghost Life Expectancy would apply. See PART 5, #7.

4. Trust which is neither of the above but all countable beneficiaries are EDBs.

This is complicated (unlike all the preceding material).

A See-through Trust is entitled to "EDB" treatment if all countable beneficiaries of the trust are EDBs. How do we know this? Because, first, Reg. § 1.401(a)(9)-4(e)(2)(i) says that if there are multiple designated beneficiaries and any of them "is not an" EDB, "then the employee is treated as not having an eligible designated beneficiary" [with two exceptions—the special rules for AMBTs and for any trust with a minor-child EDB beneficiary].

This leads to the conclusion that if there are multiple designated beneficiaries and all of them ARE EDBs, the oldest EDB's life expectancy is the Applicable Denominator, unless either the "greater of" rule applies (see PART 3, #4(D)), or the trust is an AMBT (PART 5, #2)]. Reg. § 1.401(a)(9)-5(d)(1)(ii), (2).

See also Reg. § 1.401(a)(9)-4(f)(6)(ii) (Example 2). 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 (he is a NoMoTTYY). Both spouse and sibling survive the participant.

A charity will inherit the trust on the surviving spouse's death if the sibling has predeceased her; but this nonindividual beneficiary is not countable (i.e., it is disregarded) because it takes only if another residual beneficiary (the sibling) predeceases the primary beneficiary (the spouse). See PART 4, #10(C).

Even though the oldest EDB is the surviving spouse, however, the trust will not get the special spousal RMD deals such as delayed commencement of RMDs, recalculation of life expectancy, etc. because the surviving spouse must be the "sole" designated beneficiary to get those deals. See, *e.g.*, Reg. § 1.401(a)(9)-3(d), (e), -5(c)(2), (d)(3)(iv).

Upon the death of the surviving spouse, RMDs will continue to be made to the trust [or to the individual successor beneficiary assuming the trust terminates at that point] based on the life expectancy of the surviving spouse [assuming she died before her fixed-term 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 if the account was not previously exhausted by the life expectancy payout. Reg. § 1.401(a)(9)-5(e)(3).

So the Outer Limit Year for this trust is the year the surviving spouse's life expectancy goes to 1 year or less or (if earlier) the year that contains the 10th anniversary of the surviving spouse's death.

HOWEVER: The above general description is subject to the exceptions noted below....

<u>If participant's death occurred *before* the RBD</u>, the 10-year rule can apply in some cases instead of the life expectancy payout. See PART 3, #4(C).

<u>If death occurred *after* the RBD</u>, and the oldest EDB is *older than* the decedent, the annual distributions track is annual distributions over the *greater of* the life expectancy of the oldest EDB or the ghost life expectancy, with the Outer Limit Year being 10 years after the death of such oldest EDB, or, if earlier, when the applicable life expectancy drops to one or below. [Note: In the proposed regulations, the Outer Limit Year was essentially the "shorter of" the life expectancy of the oldest EDB or the ghost life expectancy. This has been replaced, fortunately for beneficiaries, by the "greater of" rule.]

This multi-EDB rule can work in an unexpected or unfair way: 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. Reg. § 1.401(a)(9)-5(e)(3), (f)(1)(ii). So 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 (so all are NoMoTTYYs), there would be a life expectancy payout based on the oldest beneficiary-brother's life expectancy with the ultimate 100% payout due 10 years after the oldest brother's death—*even if the oldest brother died way prematurely and the other brothers are hale and hearty with many years to go.*

5. Trust which is a DB Trust but is none of the above

If all countable beneficiaries are individuals (DBs), but not all of them are EDBs (and the special rules for AMBTs or trusts with a minor-child EDB do not apply) the trust has "PODB" status and the 10-year rule will apply.

If the participant died before the RBD, the annual track is zero distributions through the ninth year (trustee can withdraw as much or as little as it wants to), with 100% distribution required in the year that contains the 10th anniversary of the participant's death.

If the participant died after the RBD, the trust is required to withdraw annual distributions over the life expectancy of the oldest countable beneficiary of the trust through year 9 (or the ghost life expectancy if longer), and to withdraw the entire remaining balance in the year that contains the 10th anniversary of the date of the participant's death. Reg. § 1.401(a)(9)-5(e)(1), (2), (f)(1)(i). See PART 3, #3(C).

6. Conduit trust for one beneficiary

This is the easiest one. If the trust is a conduit trust for one individual beneficiary, that individual is the "primary" beneficiary, and all "residual" beneficiaries are completely disregarded—they don't count at all. Accordingly, the Applicable Denominator and Outer Limit Year are the same as if the benefits were payable directly to that individual as sole beneficiary. Reg. § 1.401(a)(9)-4(f)(3)(i)(A), (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 determined using the Uniform Lifetime Table instead of the Single Life Table, with life expectancy recalculated annually, and commencement of RMDs delayed until the participant would have reached his Applicable Age (if participant died before his RBD). Risk: The spouse who is sole beneficiary of a conduit trust could elect the "10-year rule" instead of the life expectancy payout (or perhaps the trustee is the one who would elect it or not), if the participant died before his RBD unless that election is not permitted by the terms of the plan or the beneficiary designation. See PART 3, #4(C).

A conduit trust for a PODB gets the 10-year rule, with or without annual RMDs required in years 1-9 depending on whether the participant died before or after his RBD. See PART 3, #3.

There are reasons to name a conduit trust as beneficiary—some "RMD reasons" and some other reasons. The non-RMD reason would normally be that the participant does not want to leave a lump sum to the beneficiary. The participant would rather have a trustee control the investment of the account and the rate of distributions from the IRA (subject to the RMD rules of course)—even if the maximum payout period is only 10 years.

The two main "RMD reasons" would be to guarantee DBT [designated beneficiary trust] status for the trust without so much worry about whether your accumulation trust passes all the tests and to enable a trust to have a charitable remainder beneficiary and still have DBT status.

7. Weird effects: Minor's trust: Death after RBD, oldest DB older than participant

Ages in this example refer to "age as of birthday in the year of the participant's death."

Under some very unusual circumstances the "ghost life expectancy" could be longer than the general "Outer Limit" date provided by Reg. § 1.401(a)(9)-5(e).

The participant dies in his age-74 birthday year, after his RBD, leaving his IRA to a trust for the benefit of his one minor child who is age 10, with distribution to go outright to that child at age 40, but if the child dies before age 40 without issue the trust passes to participant's sister who is age 78. Since the 10-year old has no issue yet, the only countable beneficiaries are the child and the sister, so the oldest countable beneficiary is the sister age 78 with a life expectancy of 12.6 years.

Since there is a minor-child EDB, the Applicable Denominator for annual distributions would be the life expectancy of the oldest trust beneficiary (under Reg. § 1.401(a)(9)-5(f)(1)(i)) if the participant died before his RBD. However, since he died *after* his RBD, it is the "greater of" the "designated beneficiary's" life expectancy (12.6) and the "employee's remaining life expectancy" (the ghost life expectancy) which at age 74 is 15.6 years. So annual distributions are made over the ghost life expectancy, 15.6 years.

PART 6: MULTIPLE BENEFICIARIES; SEPARATE ACCOUNTS

1. Multiple beneficiaries designated: the concept of "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." An inherited IRA can be split into multiple inherited IRAs and this is normally what is done when an IRA is left outright to multiple beneficiaries.

Example: Mitchell dies in 2024, after his RBD, leaving his $600,000 IRA, invested all in cash, "in equal shares to my three children Huey, Dewey, and Louie." At the boys' request, the IRA provider opens three new "inherited IRAs" in the names of "Mitchell, FBO [for benefit of] Huey," "Mitchell FBO Dewey," etc. [or "Huey, as beneficiary of Mitchell," "Dewey as beneficiary of Mitchell," etc.] and transfers $200,000 of the cash into each account. Assume all three sons are PODBs and the account is subject to the 10-year rule. This raises three RMD questions:

- **How will the Applicable Denominator be determined for these accounts?** The entire account must be 100% distributed by December 31, 2034, because of the 10-year rule, but in the meantime (under the Regulations' interpretation of the ALAR rule; see PART 3, #3(C)-(E)), annual RMDs will be required based on the life expectancy of the Designated Beneficiary. Will each son's RMD be based on his own life expectancy? or is the life expectancy of the oldest son controlling for all three accounts?
- Regardless of what the Applicable Denominator is, can distributions from any one account count towards the RMD requirement for all three?

- And is the "applicable numerator" determined based on the combined value of all three accounts, or is it determined separately for each account?

2. "Old" regulation: What it says and how it is actually applied

The 2002 regulations (superceded in 2024) stated that separate accounts treatment is available for the interests of multiple beneficiaries *for all purposes of the minimum distribution rules* only if the separate accounts are "established" by December 31 of the year after the year of the participant's death. [prior] Reg. § 1.401(a)(9)-8, A-2(a)(2). This rule does not distinguish between the "how do we determine the distribution period" (applicable denominator) question and the questions of what was the applicable prior year end account balance ("applicable numerator") and whether each beneficiary is responsible for taking the RMD only for his separate account.

Despite this plain wording in the existing regulation, it became apparent over the years, through private letter rulings, that the December 31 deadline for creating "separate accounts" applied *ONLY insofar as it related to determination of the distribution period.* See ¶ 1.8.01 of *Life and Death Planning for Retirement Benefits*. No matter how many separate inherited IRAs the single inherited account was divided into, the distribution period for ALL such accounts became finalized based on the life expectancy of the oldest beneficiary of the (undivided) accounts as of December 31 of the year after the year of the participant's death.

...But even if they missed that deadline, multiple beneficiaries who 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...and following such division, even though all the divided accounts had the same "denominator" for determining each year's RMD, each separate account's RMD (1) was computed based on the prior year end value of *that separate account* (as the "numerator") and (2) had to be distributed from that separate account. See rulings collected at ¶ 6.3.02(B) of *Life and Death Planning for Retirement Benefits* (8th ed. 2019; www.ataxplan.com.

3. 2024 Regulations continue the old rule, but fix the anomaly

The 2024 final regulations fix this anomaly and recognize that multiple beneficiaries can create "separate accounts" reflecting their separate interests *anytime*. 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 for each such account. Otherwise....

If they are established *after* that date, then (beginning the year after such division/establishment) the required distribution for each such account is determined based on the prior year-end value of that separate account (and the distribution must come out of that separate account), but such RMD must be determined using the Applicable Denominator that was finalized (based on the single account with multiple beneficiaries) on December 31 of the year after the year of the participant's death. Reg. § 1.401(a)(9)-8(a)(1)(ii)(A). Or, rather, the way it's written in the regulation, the RMD for the entire (collective) group of accounts is determined "without regard to the separate accounts rule," then the total distribution requirement is apportioned among the late-

created separate accounts in accordance with "each respective beneficiary's share of the total remaining balance of the employee's interest in the plan."

The separate accounting requirement must always be complied with. Since this rule is not changed from prior regulations (see ¶ 1.8.01(D)), it is not covered further in this Outline.

4. Separate Accounts for retirement account inherited through a trust

Starting in 2002, IRS regulations 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." [Prior] Reg. § 1.401(a)(9)-4, A-5(c). In other words, "separate accounts" treatment would not be allowed for multiple subtrusts (or even separate shares distributed outright to different beneficiaries) created under a single trust (called the "funding trust" in this Outline) unless the subtrusts (or shares) were named directly as beneficiaries of the retirement plan. See discussion of this rule at ¶ 6.3.02(A) of *Life and Death Planning for Retirement Benefits*.

SECURE (2019) essentially "overruled" this regulation *as it would apply to an Applicable Multi-Beneficiary Trust* (AMBT) (see PART 6, #4(B)). In proposed regulations (2022), the Treasury recognized separate accounts treatment for subtrusts within an AMBT (as mandated by SECURE), but not for other trusts. Now, however, the final regulations (2024) have eliminated the difference between AMBTs and other trusts on this issue. Accordingly it is now possible for "subtrusts" to qualify for separate accounts treatment for RMDs, even if there is no disabled or chronically ill beneficiary, and even if the subtrusts are not named directly as beneficiaries on the beneficiary designation form—PROVIDED certain requirements are met.

Although these requirements are perfectly predictable and sensible, the new rules will require SHARP ATTENTION by estate planners—the "problems" with subtrusts have NOT vanished!

A. Generally, no separate accounts for separate interests under one "funding" trust. Reg. § 1.401(a)(9)-8(a)(1)(iii)(A) provides that "generally" the RMD rules cannot be applied separately to the separate interests of beneficiaries of a trust. To beat that general rule, the following requirements must be met:

B. The funding trust is "terminated" and divided upon the death of the participant. First, the trust must be "divided immediately upon the death of the employee," into separate see-through trusts (the "subtrusts"). Reg. § 1.401(a)(9)-8(1)(iii)(B).

- "Immediately upon the death" essentially means "as of" the date of death—the regulation affirms that "administrative delays" do not violate the requirement (provided "amounts received" during the administrative period are allocated "as if" the trust were divided on the date of the employee's death). Reg. § 1.401(a)(9)-8(a)(1)(iii)(C).

- Although the regulation requires that the divided retirement account be "held in separate see-through trusts," this does not mean trusts must be

ongoing—the retirement account that is payable to the "funding trust" can be transferred or retitled to either an individual beneficiary *or* to a see-through trust for individual beneficiary(ies). See PLR 200432027 for an example.

C. **There must be "no discretion as to the extent to which of the separate trusts post-death distributions attributable to the employee's interest in the plan are allocated."** Reg. § 1.401(a)(9)-8(a)(1)(iii)(B). This requirement may (but should not) take practitioners by surprise: Separate accounts treatment will NOT be allowed for a trust that divides into subtrusts unless the share of each subtrust is fixed in the trust instrument. In other words, the trust must say something like "each retirement account will be allocated equally to the subtrusts for my children" or "any retirement account payable to this trust shall be allocated to the subtrusts created under Article 987 in the following proportions...."

This last requirement mimics the requirement of naming the subtrusts directly in the beneficiary designation form—the beneficiary designation form would say something like "I leave my IRA in equal shares to my four children," not "I leave my IRA to my children, and Uncle Fred will decide exactly which child gets how much of it." It is perfectly sensible for the regulation to impose this requirement to obtain separate accounts treatment for subtrusts—you can't "designate a beneficiary" then leave it up to someone else to decide which of your nominees will actually be the beneficiary(ies). Rather, you CAN do so, but that approach would NOT be consistent with the concept of separate accounts for retirement accounts inherited by different beneficiaries.

D. **Tip #1: To assure separate accounts treatment, do this.** One solution for this problem is (as before the new regulations) for the participant to name, directly as beneficiaries of his retirement account, the separate subtrusts or beneficiaries 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, 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"). If the separate shares or subtrusts are named directly as beneficiary on the beneficiary designation form, then they can qualify for separate accounts treatment, provided the accounting requirements (Reg. § 1.401(a)(9)-8(a)(2)) and deadline requirement (Reg. § 1.401(a)(9)-8(a)(1)(ii)) are met.

E. **Tip #2: Or do this.** Name the funding trust as beneficiary, BUT be sure that the funding trust specifies which subtrusts will inherit the retirement account in what proportions. ***If your trust instrument contains a standard "pick and choose funding" provision, make sure the retirement benefits are excepted from this provision***.

PART 7: POST-DEATH CHANGES TO THE TRUST TERMS

Under both the 2002 and 2024 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. See ¶ 1.8.03 of *Life and Death Planning for Retirement Benefits* for more explanation of this term. The rest of this section explains how the Regulations recognize post-death planning options.

1. What does "identifiable" mean?

One requirement of a See-through Trust is that the beneficiaries must be "identifiable." From the 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." Reg. § 1.401(a)(9)-4(f)(2)(iii). Then: "Except as otherwise provided in this paragraph (f)(5) trust beneficiaries described in paragraph (f)(3) [the 2-tier trust-testing system; see PART 4, #8] 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 the "specificity requirements" of 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."

The "identifiable" requirement provides an avenue for the Regulations' treatment of post-death modifications in the terms of the trust that are made via powers of appointment, decanting, and trust reformations and how the potential for (and actual occurrence of) such post-death changes affect the trust's qualification as a See-through Trust ?true? and on the question of which beneficiaries "count" for purposes of determining the designated beneficiary.

2. Removing (or adding) beneficiaries by the BFD

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 in certain ways does not count as a beneficiary for purposes of determining whether the participant has a designated beneficiary and if so who his designated beneficiary(ies) is/are. Reg. § 1.401(a)(9)-4(c)(2). The "removed beneficiary" is erased from the picture for purposes of determining post-death RMDs.

A person who is named as a beneficiary does not "count" as a beneficiary if he/she predeceased the participant or is deemed to have predeceased the decedent by virtue of (for example) a simultaneous deaths provision under applicable state law. Reg. § 1.401(a)(9)-4(c)(2)(i), (ii). But the death of a beneficiary *after* the date of the participant's death generally does NOT remove that person as a beneficiary even if such beneficiary died before the BFD. Reg. § 1.401(a)(9)-4(c)(3)(vi), Example 6. Both of these rules are unchanged from pre-SECURE regulations.

The Regulations make the following changes in the rules regarding changes in the identity of beneficiaries taking place between the date of the participant's death and the BFD; for more detail on these changes, see PART 8, #4.

- The (now superceded) 2002 regulations listed qualified disclaimer and distribution as possible ways to "remove" a beneficiary between the date of death and the BFD. These were presented apparently as examples, not exclusive means, in the *2002* regulations. See [superceded] Reg. § 1.401(a)(9)-4, A-4(a). In the 2024 Regulations, however, the examples (distribution and qualified disclaimer) are presented as an "exclusive list" of means of "removing" a beneficiary prior to the BFD. Reg. § 1.401(a)(9)-3(c)(1), (2).

- *Prior regulations* (2002) made no distinction, with respect to changes in the identity of the beneficiaries, between beneficiaries designated on the beneficiary designation form and beneficiaries of a trust that is named as beneficiary on the beneficiary designation form. The *new Regulations* (2024), in contrast, provide liberal rules for changing the identity of the countable beneficiaries under a trust that is named as beneficiary: beneficiaries can be not just REMOVED from the trust but also ADDED to the trust between the date of death and the BFD; and the means of removing a beneficiary are not restricted to qualified disclaimer or full distribution: Exercise of a power of appointment, decanting, or reformation will be similarly given effect. See PART 4, #8(F, G).

3. Effect of post-death changes via decanting, etc., under existing rules

After adoption of the 2002 edition of the regulations, there was a growth industry (unrelated to retirement benefits) in post-death amendments of trusts via "decanting," reformations, and other forms of post-death modifications of trust terms. The 2002 regulations did not seem to allow for such changes. For example, one requirement was 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 a trust named as beneficiary was a question that vexed practitioners.

The 2024 Regulations adopt a 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:

4. The approach of the 2024 Regulations

Post-death changes in the identity of trust beneficiaries (either adding new beneficiaries or removing existing ones) may occur via exercise of a power of appointment, decanting, or reformation. The mere *possibility* (as of the date of death or BFD) that such a change may occur later (*i.e.*, 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. If such change later actually occurs, such change will cause the trust to be "retested" as of the date of the change. If at that time the change is made the addition or removal of one or more countable beneficiary(ies) would have shortened the distribution

period (required a faster rate of distributions) had it been in effect on the BFD, the trust's RMDs will be recalculated accordingly for subsequent years. However, such re-testing cannot cause a 100% required distribution earlier than the calendar year after such change occurs, or (if it occurs after the BFD) lengthen the distribution period. That is the general idea. More detail follows. Summary so far:

- The trust beneficiaries are "identifiable" (3rd 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." Reg. § 1.401(a)(9)-4(f)(5)(i).
- The existence of powers of appointment, or the possibility that a trust might later be reformed or decanted (potentially causing beneficiaries to be added or removed), does not in and of itself cause the trust to have non-identifiable beneficiaries. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A), (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 is apparently 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 irrevocably restricted, or the reformation/decanting occurs, *after* the BFD, the trust will be "re-tested" at that time but will not be retroactively disqualified. The "new" terms will be effective for RMD purposes the following year; however, the "retesting" cannot *improve* the RMD results. See further discussion of each type of event, below.

5. Powers of appointment: Background

What is a "power of appointment" exactly? In common usage, and as seemingly contemplated by the 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/power holder would have a "power to appoint" trust property to or among some particular class of recipients effective upon the death of the power holder. [What about powers held in a fiduciary capacity? See #8 below.]

6. Dilemma under old regulations: Are potential appointees countable?

Under the "old" (2002) regulations, a trust that provided "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), and therefore the trust passes that test. That form of trust exactly tracks Example 1 in [now superceded] 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).

7. 2024 Regs: Potential appointees don't count until POA exercised

Under the 2024 final Regulations, the trust does not flunk the beneficiaries-must-be-identifiable test "merely because an individual (power holder) has the power to appoint a portion of the employee's interest to...beneficiaries that are not identifiable..." Reg. § 1.401(a)(9)-4(f)(5)(ii)(A).

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 apparently given effect in testing the trust retroactive to the date of death. 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 benefits if the power-holder does not exercise the power. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A), last sentence.

If the power is exercised after the September 30 deadline, the trust must be retested at the time of such exercise. Reg. § 1.401(a)(9)-4(f)(5)(ii)(B), (iv). See discussion of retesting, below.

8. Powers of appointment: Examples, issues.

One thing that might need to be made clearer is the difference between a fiduciary power and a beneficiary power. The 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." under the Internal Revenue Code, for transfer tax purposes the term power of appointment also applies to a trustee's power to "appoint" principal or income; see, *e.g.* Reg. § 20.2041-1(b)(1). But in the RMD 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 Reg. § 1.401(a)(9)-4(f)(3)(i)(A).

Here is the power-of-appointment example from the regulation:

> "Under the terms of Trust Q...[the surviving spouse, G, who is the life income beneficiary of the trust]...has a testamentary power of appointment to name the beneficiaries of the remainder 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 deceased participant. By thus restricting the remainder interest to only EDBs, and since she herself is an EDB, G's alteration of her POA makes the trust have only EDBs as its countable beneficiaries, thus enabling a life expectancy payout for the trust. 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.

9. Decantings and reformations

The Regulations' approach to potential future 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." Reg. § 1.401(a)(9)-4(f)(5)(iii)(A).

- "If a trust beneficiary described in paragraph (f)(3)...is 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 2-tier trust-testing system] will apply taking into account the beneficiary that was added." Reg. § 1.401(a)(9)-4(f)(5)(iii)(C). "Paragraph (f)(3)" contains the 2-tier trust-testing system (PART 4, #8) 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). 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..." 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 would cause 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. Reg. § 1.401(a)(9)-4(f)(5)(v).

A. Trust changes other than adding or subtracting beneficiaries

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? Possibly the reason may be, 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 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.

The problem: The "separate accounts" requirements may necessitate post-death modifications to bring the trust into compliance that do not either add or subtract beneficiaries. See PART 6.

B. What about "reforming" the beneficiary designation?

The regulations permit post-death trust changes as noted, but do not recognize post-death "reformations" of the beneficiary designation form. In the past, post-death changes in the beneficiary designation have been recognized for tax purposes when there are "traditional" grounds for invalidating a beneficiary designation form (or change in such a form) such as scrivener's error or undue influence, and not otherwise.

C. State law aspects.

The Regulations' generous attitude toward post-death changes does 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, incompetent, unborn, or charitable beneficiaries. The Regulations merely describe how changes made *pursuant to applicable law governing the trust* are treated for RMD purposes. And the IRS is not bound by a court determination of what "state law" is unless it is the highest court in the state, under the *Bosch* case.

D. Federal tax aspects.

The Regulation's apparent blanket acceptance of whatever trust changes get made prior to the BFD, applied retroactively to the date of death, would appear to "overrule" some previous tax law precepts. For example, the normal Treasury standard is that a post-death trust modification is not effective to change the tax consequences of a completed transaction. *Estate of La Meres v. Commissioner*, 98 T.C. 294 (1992). 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. See PLR 2010-21038. **These limits seem to no longer apply to any change completed by the BFD, to the extent specified in the regulations.** But see #11 below regarding how this generous new standard is limited to RMD issues and NOT other federal tax issues.

10. Limitations on post-death modifications

Nothing in the Regulations addresses (or can be interpreted to "bless") other types of tax-motivated post-death modifications to the trust, beyond the addition or subtraction of beneficiaries. For example the following rulings regarding post-death modifications relating to tax treatment of retirement benefits did not involve the minimum distribution rules and are not affected (i.e., would not be "reversed") by the Regulations:

- **Qualifying for spousal rollover.** In PLR 2009-44059, the IRS refused to accept the result of a state court order which gave the surviving spouse the right to distribute to herself, outright, the retirement benefits payable to a discretionary trust for her benefit of which she was sole trustee. The goal of the proposed distribution was to enable her to roll the benefits over to her own IRA. The state court order interpreted state law and the trust instrument as validating the spouse-trustee's right to make this distribution to herself, but the decision was not an interpretation of state law by the state's highest court. The IRS made its own interpretation and (pursuant to *Bosch*) was not bound by the lower court decision, and disallowed the rollover. This was not a minimum distribution issue and the outcome would not have been changed had the 2024 Regulations been in effect at the time.

- **Qualification for charitable deduction under § 642(c).** In PLR 2014-38014, decedent's retirement benefits were payable to a trust that provided for certain pecuniary charitable bequests. The instrument did not specify the source of payment for such bequests. The taxpayer sought and received a court reformation of the trust instrument to avoid taxation of the retirement benefits at the trust level. Specifically, the "purpose of the reformation was to ensure that Trust's distribution of IRA assets to Charity 1 and Charity 2 would be treated as direct bequests to the charities rather than as income in respect of a decedent (IRD) to the trust § 691 [see ¶ 4.6 of *Life and Death Planning for Retirement Benefits*]. Alternatively, the purpose of the reformation was to qualify the Trust for a charitable deduction under § 642(c)." The Treasury ruled, citing numerous authorities, that the trust did not achieve this tax result because the state court's actions was not for the purpose of resolving a conflict; rather "The purpose of the court order was to obtain the tax benefits..." This was also not a minimum distribution issue, and the outcome would not have been changed had the 2024 Regulations been in effect at the time.

PART 8: BENEFICIARIES OF PRE-SECURE DECEDENTS

Omitted.

PART 9: THE CASE STUDIES

Case #1: Mr. Brady: Planning for a PODB; How to draft an accumulation trust

Your client Algernon Brady, age 63, a widower, wants to leave his estate in trust for his only child, Patrick O'Donahue Brady ("PODB" for short), age 31. PODB is not disabled or chronically ill. Concerned about PODB's ability to manage finances, and PODB's likelihood of having divorce troubles if he ever marries and/or creditor problems if he goes into business, client wants to leave all assets in trust for PODB, with the trustee using income and principal as the trustee deems advisable to provide for PODB's lifelong support and health and for the care of PODB's children if he ever has any. Client's assets include a traditional IRA, a Roth IRA, and a 401(k) plan with his employer, with significant sums in each account. You write the will and trust just as requested by Client, to deal with the nonretirement assets. What special considerations apply to the retirement accounts?

Two things make the retirement accounts different:

- No "stepped up basis" at death. All distributions from the accounts (except the Roth) will be income-taxable to the recipient at ordinary income rates. Thus planning for these accounts must take into consideration the income tax rate that will apply to distributions after Algernon's death.

- The minimum distribution rules which dictate how fast the money must be distributed from these accounts after client dies. Since spreading out the plan distributions over a longer period of time may allow a lower overall income tax burden, the planner needs to know what distribution period will apply to the client's IRAs—and the extent to which such period can be extended by drafting the trust to qualify as a "Designated Beneficiary Trust."

A. What happens when a traditional retirement plan is paid to a trust

When the trust withdraws distributions from the traditional plans, those distributions will be includible in the trust's gross income and accordingly will be taxed at trust income tax rates except to the extent the distributions are, in the same year received, passed out to the trust beneficiary in a manner qualifying for the "DNI deduction." If so passed out, the distributions would be taxed to PODB individually. The income taxes on the distributions will likely be much lower if they are passed out to PODB than if retained in the trust, due to the fact that a trust hits the top bracket (37% in 2024) at just $15,200 of taxable income vs. $609,351 for a single individual taxpayer. PODB's income is much lower than $609,351.

Client is still better off leaving the accounts to a trust to achieve his goals with respect to PODB: If the trustee has full discretion, when the trust receives a distribution from the retirement account, to pass such distribution out to PODB or not pass it out, the trustee can distribute (to take advantage of PODB's lower tax rate) when trustee judges that PODB will make good use of the money or not distribute (and let the benefits be taxed at the higher trust tax rate) at times when it appears PODB may not make good use of the funds. Thus the trustee will have to monitor PODB

and try to control the cash flow. From this perspective it would be helpful if the trustee could spread the distributions over a period of time rather than taking a lump sum distribution. But the longest possible period of time over which distributions can be spread is 10 years, due to SECURE.

The arbitrage between trust tax rates and PODB's personal income tax rate does not apply to the client's Roth account, distributions from which will be tax-free. The only advantage of "deferral" for the Roth account is, the longer the funds can be kept inside the account generating tax-free returns, the better.

B. The minimum distribution rules applicable to PODB

If the retirement accounts are left to PODB as designated beneficiary, he would be subject to the "10-year rule." Thus if client died at age 63 in 2024 (before his "required beginning date" in other words), PODB would have to withdraw the entire balance by 12/31/2034 (year containing the 10th anniversary of client's death). PODB could withdraw the balances anytime during the years 2024-2034, thus giving him 11 taxable years to "spread out" the distributions.

If client dies AFTER his required beginning date (April 1 of the year after the year he reaches his Applicable Age), the payout period for the Roth IRA wouldn't change—it would still be the 10-year rule as described above. However, the payout period for the PODB would change if Algernon dies AFTER his RBD, in two ways: First, the payout period would become the LONGER OF the 10-year rule or the "ghost life expectancy" (i.e., Algernon's remaining life expectancy at the time of his death) (which would be more than 10 years if he dies before roughly age 80). Second, PODB would have to take annual life expectancy payouts from the inherited *traditional* plans in years one through nine of the 10-year payout. See PART 3, #3(C). This aspect of the regulations (requiring annual distributions in cases of death after the RBD even when the 10-year rule applies) was such a surprise the IRS has said it will not enforce the 25% penalty tax on PODBs who fail to take RMDs in 2021-2024; see PART 3, #1(F).

Those are the payout requirements for accounts left directly to PODB as beneficiary. What if the accounts are left to the trust this client contemplates having?

C. How to get the same treatment for the trust

The 10-year rule as described above is the best possible deal available for PODB if the benefits are left to him personally under today's RMD rules. Can a trust for PODB get the same deal? PART 4 of this Outline explains the rules for getting designated beneficiary status for a trust, including the trust testing process, in detail, with citations. This case study provides an example of the process described in PART 4:

The kind of trust this client wants is called an Accumulation Trust: The trustee would not be required, every time it withdrew money from the retirement account, to immediately pass such distribution out to PODB—if it were, then the trust would be a "Conduit Trust" not an Accumulation Trust. On the contrary, the client wants the trustee to have the power to *accumulate* plan distributions in the trust (if the trustee thinks that would be best) for future use. Therefore the trust the client wants is an Accumulation Trust (PART 4, #2).

The 10-year rule is available only for a "designated beneficiary." The minimum distribution rules say, an accumulation trust can qualify as a designated beneficiary only if it meets certain requirements. Here are those requirements and how you as the estate planner must deal with them:

There are four initial rules that are easy to comply with: The trust must be valid under state law; the trust must be irrevocable upon the participant's death; a copy of the trust must be given to the plan administrator by 10/31 of the year after the year of the participant's death; and it must be possible to identify the persons who will be beneficiaries of the trust. See PART 4, #7.

Once you clear those hurdles you have a "See-through Trust."

Now we "look through" the trust and see who are the beneficiaries of the trust. Since the basic definition of a "designated beneficiary" is that the beneficiary must be an individual, all of the trust beneficiaries must be individuals or you are going to "flunk" this definition.

All of the trust beneficiaries must be individuals? Well not necessarily ALL: First, there is an exception to this rule for AMBTs; see PART 5, #2. Second, only the *countable* beneficiaries must be individuals—beneficiaries who cannot be "disregarded" in applying the "who are the *countable* beneficiaries" test. **This is the hard part of trust drafting and testing**. See PART 4, #7-#10.

This brings you to a decision point that will have to be faced with many clients. You can just draft the trust the way he wants it, and let the chips fall where they may—meaning the trust may not qualify as a Designated Beneficiary Trust (DBT; PART 4, #11) and therefore not qualify for the 10-year rule. Or you can offer the client alternatives—ways to draft the trust that would so qualify even if that is not exactly what the client originally requested.

Step 1 in this process is to ask client Algernon, "who will inherit the money that's left in this trust when PODB dies?" The answer to that question will tell you the RMD status of this trust—will it qualify as a DBT or not? Because the countable beneficiaries of this trust will be son Patrick [PODB] (the "primary" beneficiary) and whoever gets the money when he dies (the "residual beneficiary"). See PART 4, #9. If the trust is not an AMBT, all countable beneficiaries (PART 4, #10) must be individuals or the trust is not a DBT.

Client says: "On PODB's death, the remaining funds should go to PODB's children if he has any but he doesn't have any yet." Children would be fine as residual beneficiaries but [I believe] **you can't count anyone who isn't born yet**. PART 4, #8(B). So you ask: "And who will get the money if PODB dies without issue?"

Client says: "In that case my favorite charity." A charity is not an individual. Naming a charity as remainder beneficiary of this trust would cause the trust to "flunk" the RMD trust rules and client would have "no designated beneficiary." Would that be so terrible? The payout period would be, if client names charity as remainder beneficiary:

- If Algernon dies before his RBD, the 5-year rule instead of the 10-year rule. This rule would apply to the Roth IRA regardless of client's age at death.

- If he dies on or after his RBD, the "ghost life expectancy" payout would apply to the traditional plans—annual distributions over what was left of client's life expectancy. That period would range from about 15 years (if he dies at his current age, 74, after his RBD) to 4 years or less (if he dies at age 95 or older).

So the "no-DB treatment" is somewhat worse than the "DB" alternative.

To get "PODB" treatment for the trust, the client must choose one or more *individuals* as remainder beneficiaries. Instead of naming charity as the residual beneficiary, he could name his nieces and nephews to inherit whatever is left in the trust if PODB dies without issue.

Before encouraging Algernon to change his beneficiaries (and leave money to nieces and nephews that he would really rather leave to charity), consider running projections of what the estimated tax savings would be by having a DBT vs. a trust that does not qualify as a DBT.

Always a problem, now a bigger problem under SECURE

Some estate planners can have a tendency to seek "tax deferral" above all other goals when writing an estate plan for a client who owns a retirement account. While that tendency made some sense in the pre-SECURE era (when the long-term tax deferral offered by the "life expectancy payout" was relatively easy to obtain), it can act as a blinder in the post-SECURE world, where the difference between a 5-year payout and a 10-year payout may make little difference in long term value. Post-SECURE, a LONG life expectancy payout will be available only for a young surviving spouse, a young disabled beneficiary, or the close in age beneficiary of a young decedent.

If the nieces and nephews are named as the second-tier beneficiaries, the charity can be named as "wipeout" beneficiary if it should happen that PODB dies without issue AND all the nieces and nephews predeceased PODB. With that structure, the charity can be ignored because it will inherit only if all the "first choice residual beneficiaries" predecease the "primary beneficiary." Prop. Reg. § 1.401(a)(9)-4(f)(3)(ii)(A); see PART 4, #10(C).

D. Do this! Limit distributions from the trust to the decedent's estate

In its Preamble to the Proposed Regulations, the IRS stated that a trust provision that would call for the trustee to make payments from the trust to the participant's estate would cause the estate to be deemed to be a countable beneficiary of the trust! The participant's estate is not an individual and cannot qualify as a designated beneficiary under any circumstances. Reg. § 1.401(a)(9)-4(b). Therefore, the Preamble (p. 41) casually stated, if the trust is to pay money to the estate (or pay obligations of the estate out of the trust fund), the participant does not have a designated beneficiary and the "no-DB rules" would apply.

Accordingly for a trust that is to receive retirement benefits, if designated beneficiary treatment is desired, and the trust instrument calls for the trustee to make distributions or transfers to the decedent's estate, the trust should prohibit the trustee from distributing any *retirement benefits or proceeds thereof* to the estate, either altogether or (at a minimum) after September 30 of the year after the year of the decedent's death. See PART 7, #2.

E. Planning agenda; alternatives to consider

The client's original goal was to name a charity as remainder beneficiary of the trust after his son's death. Client has to sacrifice that goal to get "designated beneficiary trust" (DBT) treatment for the trust he contemplates. Various alternatives should be considered before finalizing the plan.

- Before revising the trust (and defeating client's desire to name charity as remainder beneficiary) you (or someone you engage) should crunch the numbers to determine what the projected income tax difference will be between qualifying for the 10-year rule vs. not so qualifying. That projection is going to be complicated and expensive and may well not prove much of anything. It will have to make assumptions about the growth rate of investments, when the client will die, what PODB's spending needs will be, when PODB will die, and what PODB's tax rate will be. Without any monetary projections, however, it is hard to justify the sacrifices being made to achieve DBT status—such as giving up on the client's charitable goal.

- There is one more potential cost of having a trust that does NOT qualify as a DBT: The trust will probably be stuck with a lump sum distribution from the *qualified plan* (Algernon's 401(k) plan) because most plans only permit a lump sum distribution and the trustee will not be able to transfer the lump sum to an inherited IRA (where the trust could spread distributions over whatever RMD payout period applies) unless the trust qualifies as a designated beneficiary. See ¶ 4.2.04 of *Life and Death Planning for Retirement Benefits*.

- If the two pots of money (retirement benefits vs. other assets) are large enough to justify two separate trusts, create one trust for the benefits (with individual remainder beneficiaries) and another for other assets (with a charity as remainder beneficiary). But this approach creates new complications for the trustee who is forced to choose each year which trust to deplete to provide for PODB's needs in such year. The planner might need to draft a formula for distribution on termination of the non-retirement-benefits trust to assure that nieces, nephews, and charity each received the appropriate amount regardless of which trust is depleted first during PODB's life.

Case #2: Jean Selby: Benefitting the spouse; How to draft a conduit trust

Your client Jean Selby has a $1 million IRA among other assets. She wants to leave the IRA to her husband Simon Selby (SS) but not outright. She wants it to be held in trust for him for life. She understands that as her surviving spouse SS is entitled to a life expectancy payout if he is named as beneficiary. A gradual payout over his lifetime sounds just right to her for this IRA, as long as he does not have to inherit as outright beneficiary in order to get that treatment.

A. The client's trust goals; RMD effects

Here is what Jean wants the trust to say: "The trustee will pay SS, each year, such amounts of income and/or principal as the trustee deems needed for his health and support. Upon his death the trust will distribute the remaining trust assets to my nieces and nephews equally, or if they have all died, to charity."

A trust written as Jean describes it would qualify as a DBT....all the "countable" beneficiaries are individuals:

SS = primary;
Nieces and nephews and charity= residual;
BUT charity is disregarded because [1] it is not a primary beneficiary and [2] it inherits only if all nieces & nephews (the "first choice residual guys") die prior to SS. See PART 4, #10(C).

However, unless ALL of the nieces and nephews are either disabled or chronically ill or not-more-than-10-years-younger (NoMoTTYY) than Jean, this trust will NOT qualify for a life expectancy payout. Why? Because a trust for the spouse is entitled to use the surviving spouse's EBT treatment ONLY if the spouse is the SOLE countable beneficiary of the trust—i.e., only if the trust is a "conduit trust." The trust can qualify for EDB treatment (without the special spousal deals though) if all countable beneficiaries are EDBs (for example if all of the nieces and nephews were disabled or chronically ill or NoMoTTYY), but that is not the case. See PART 5, #1, #4. If written as client has described it, this trust would only qualify for the 10-year rule (PODB treatment).

One solution is to use a conduit trust instead. That would give SS annual distributions over his life expectancy as Jean wants. However, it would give SS more control than he would have if the trust were written exactly as Jean envisioned it; the trustee would not be able to hold back any of RMDs from the IRA (they would all have to be passed out immediately to SS, or applied for his benefit). It would not be able to take IRA distributions and accumulate them in the trust's taxable account for future use.

Before SECURE 2.0, even a conduit trust would not be that good a "deal" if the spouses were already in their 80s. Suppose both are 83. Under the prior rules, the surviving spouse's payout period to start with would be only about 9 years; though it wouldn't "run out" (because of the recalculation of life expectancy) those RMDs would start large and get larger. Thanks to SECURE 2.0, the surviving spouse's opening payout period under the Uniform Lifetime Table would be about 17 years at age 83, a big difference.

Jean agrees to the conduit trust idea. Now how do you actually draft a conduit trust?

B. How to draft a conduit trust

The usual first step is to draft a separate article or section of the trust dealing with retirement benefits that are subject to the minimum distribution rules of § 401(a)(9) of the Code. **Describe them** by Code section or list the client's actual plans and accounts, being sure to include (if desired) subsequently acquired retirement accounts of a similar type. Have a boilerplate paragraph

authorizing the trustee to take actions with these accounts such as investing them and transferring them. Ideally there should be a paragraph discussing how the trustee will account for these retirement accounts (*e.g.* determine income and principal with respect to these accounts). Trust accounting income is not the same as federal gross income.

Then have a paragraph **dictating what the trustee will withdraw from the account**:

- If the marital deduction is sought, it is essential for marital deduction requirements that the surviving spouse be "entitled to all the income...payable annually or at more frequent intervals..." Accordingly, the trust should so specify. The trust should also specify how the "income" of the retirement accounts is determined for this purpose. The suggested way to meet this requirement is to specify that the trustee will withdraw such income from the retirement accounts.
- It is customary to direct the trustee to withdraw any amount required to be withdrawn in such year by the Tax Code (i.e., the RMD). In the case of a marital deduction trust it would be the extent the RMD is greater than the "income." It is not really necessary to do this since the trustee has to withdraw the required minimum distribution whether you tell him to or not. But including this shows you are aware of the obligation.

IF the client does not want to limit payments to the spouse to the requirements of the Tax Code, include provisions such as:

- [if desired for spouse's health and support; recommended! See comment below]: "Such additional amount or amounts, if any, needed in the opinion of the trustee to provide for my spouse's medical care, health, and support in his/her accustomed standard of living."

- [highly advisable to allow the trustee flexibility in view of potential changes in circumstances and/or tax laws] "Such additional amount or amounts, if any, as the trustee deems advisable for any reason to carry out the purposes of this trust." If using this type of provision be sure to state the purposes of the trust someplace—in fact that's a good idea anyway.

After completing the list of what the trustee must or may withdraw from the retirement accounts, the following additional clause is MANDATORY; this is what makes the trust a conduit trust:

> "Any and all amounts withdrawn from the Retirement Account(s) shall, upon receipt by the trustee, be paid directly to, or for the benefit of, [name of conduit beneficiary]." Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

Editorial comment: I would urge Jean to permit the trustee broad discretion to pay SS more than the "floor amount" of greater of RMD and income. Unless for some reason she is trying to put SS in a very tight box, the trust will provide SS no financial security or predictability if it is strictly limited to the RMD or even to the greater of income or the RMD. Remember 2020? The RMD that year was zero...and interest rates were also zero...so trusts that limited the surviving spouse to the

"greater of income or RMD" gave the spouse exactly nothing for the year. For the spouse's peace of mind, include such additional distributions as shall be needed for SS's health, support, etc. For maximum flexibility for the trustee to deal with changing circumstances and predicted changes, allow discretionary distributions for any reason consistent with the purposes of the trust.

C. This variation does not work: Until death "or remarriage"

Jean suddenly realizes: SS might remarry after her death! She asks you to insert a clause that if SS remarries the trust will terminate and be distributed immediately to the nieces and nephews. That's perfectly legal—you can do it. But it will cause the trust to lose its qualification for the life expectancy payout because SS will no longer be considered the sole beneficiary. (Of course it will also not qualify for the estate tax marital deduction for Jean's estate.)

Under a conduit trust for SS's *entire life*, SS is the sole "primary" beneficiary, and the nieces/nephew are "residual" beneficiaries...and because it's a *conduit trust* the residual beneficiaries are disregarded, and therefore SS is the sole countable beneficiary, and therefore the trust gets the same RMD treatment as SS would receive if named directly as designated beneficiary: Life expectancy payout commencing later of year Jean would have reached the Applicable Age or year after Jean's death, and life expectancy recalculated annually. [Note: This would not allow the trust to use the "spousal rollover" that SS could use if he were named as outright beneficiary. A trust for the spouse may not use the spousal rollover or election to treat an inherited IRA as the spouse's own IRA even if the surviving spouse is deemed to be the sole beneficiary of the trust for RMD purposes.]

But if the trust might terminate BEFORE SS's death, *e.g.* upon his remarriage, then the nieces and nephews move up to being "primary" beneficiaries. Why? Because their interest is "neither contingent upon, nor delayed until, the death of another trust beneficiary"—they might *not* have to wait until SS dies to get the money, they can get it if he remarries. See the Preamble to the 2022 Proposed Regulations, p. 32. If a life expectancy payout is sought for the trust, it needs to be a conduit trust for the surviving spouse's entire life, not terminable upon remarriage or any other lifetime event.

Query: In other sections of the Regulations, certain events that *could* happen after the participant's death (namely reformation or decanting of the trust, or exercise of a power of appointment) are ignored in "testing" a trust for RMD purposes until the event actually *does* happen. See PART 7,#7. This liberal approach does not apply, apparently, to a contingency dependent on the spouse's remarriage. Effectively the Proposed Regulations assume the surviving spouse WILL remarry so whether or not he actually does, the nieces and nephews move up to being primary beneficiaries.

D. Conduit Trust Warning: The 10-year rule option for EDBs

The Regulations create one surprise pitfall for conduit trusts: If the conduit beneficiary is an EDB, and the participant dies before his RBD, the beneficiary can elect to use the 10-year rule instead of the life expectancy payout, if the election is permitted by the applicable retirement plan and not prohibited by the participant. See PART 3, #4(C) for this problem.

E. A Trusteed IRA is the same as a Conduit Trust

An individual retirement account under § 408 can be either a "custodial" account with a bank as the custodian or a trust with a bank as trustee. The Tax Code is indifferent regarding these two formats—they are treated identically under the Code. From the perspective of the IRA owner, the differences are in the level of service and degree of customization of the IRA governing agreement that can be provided by the "IRA provider."

With a *custodial IRA*, the bank keeps track of the investments and the inflow and outflow of money and files required annual IRS tax reports (1099 and 5498). With a *trusteed IRA*, the bank performs additional services typically including managing the investments, determining when distributions should be made, paying the account owner's bills or other designated expenses directly from the account, and (most importantly), after the owner's death, limiting distributions to the account beneficiary(ies) to the minimum required distributions plus such other amounts (if any) as the deceased account owner has authorized. The trustee of a trusteed IRA can make distributions to or for the benefit of the account beneficiary(ies) on a similar basis to what the trustee of a conduit trust would do: For example, pay to (or apply for the benefit of) the beneficiary the RMD plus additional amounts if needed in the trustee's opinion for health or support.

With a trusteed IRA the IRA owner does not have to prepare a separate trust agreement: The IRA agreement *is* the trust agreement. However, the IRA owner's estate planning lawyer should participate in drafting that trust agreement or at the very least review it on the IRA owner's behalf. Another possible advantage of a trusteed IRA is, the client can specify in the IRA agreement that the 10-year rule would (or would not) apply to the IRA if the client died before (or after) his RBD. See "D" above and PART 3, #4(C).

Since a trusteed IRA and an IRA paid to a separate conduit trust are identical in tax and RMD treatment, whenever a client is going to use a conduit trust, consideration should be given to placing the IRA into a trusteed IRA account and having the IRA trustee carry out the duties that were to be specified in the conduit trust. However, the trusteed IRA option is probably limited to the wealthiest clients, since "mass market" IRA providers cannot accommodate customization for individual clients.

Case #3: Mr. & Mrs. Steinmetz: Providing for minor children

A. Stan and Stacey Steinmetz: Facts and goals

Stan and Stacey Steinmetz are in their 30s. They have four children ages 2, 6, 9, and 12. They have combined net assets of $1.5 million, including Stan's $100,000 401(k) plan, Stacey's $250,000 IRA, their $1,200,000 home with a $500,000 mortgage, $200,000 of life insurance (through Stan's job), and $250,000 in various liquid investments acquired through savings and inheritance.

They are leaving all of their assets outright to each other. On the death of the surviving spouse, they would like to have all assets of both spouses pour into a "pot" trust for the benefit of the children. The trustee would be instructed to use the principal and/or income of the trust as the trustee deems best to provide for the care, support, and education of all four children, based on their various needs (*i.e.,* not necessarily equally) until there is no child living who is under the age of 25

years, at which time the trust would terminate and be distributed outright to Stan's and Stacey's issue then living by right of representation. In the highly unlikely event that at any time there are no issue of Stan and Stacey living, while there are still assets remaining in this trust, the remaining trust assets would pass to Stan's Uncle Oscar who is age 63.

Where do the retirement benefits fit into this?

B. RMD effects of leaving benefits to or f/b/o minor child-EDBs

The first step is to determine how the "life expectancy payout" could apply to benefits left to a trust for the Steinmetz children post-SECURE. As minor children of the plan owner they are "eligible designated beneficiaries"—but only up to a point. Specifically, as each child "attains majority," he or she ceases to be an EDB and the 10-year payout limit kicks in. Attaining majority occurs on the 21st birthday. Reg. § 1.401(a)(9)-4(e)(3). So the "life expectancy payout" for a minor-child-EDB is actually a "life-to-age-31" payout.

The outer limit for distributions to a minor child-EDB is "the tenth calendar year following the calendar year in which the designated beneficiary reaches the age of majority," meaning 100% must be distributed by the end of the year the minor attains age 31 (not by the 31st birthday itself). If the child dies before age 21, the Outer Limit Year (100% distribution required) is the year that contains the 10th anniversary of the minor child's death. § 401(a)(9)(E)(iii).

For RMD purposes, the Steinmetzes have the following options for retirement benefits payable to their minor children who are not disabled or chronically ill:

- **For one child: Name child as beneficiary.** Of course a share could be left outright to each child, to be administered by the child's guardian, and this outright bequest would qualify for the life-to-age-31 payout. However, few parents would choose this approach which among other drawbacks would give the child total outright control of the asset upon attaining the applicable state law age of majority (18 in many states). Even though the *tax law* would permit the child to keep the IRA going to age 31 (taking annual RMDs in the meantime), the child might decide to cash it out at age 18 and throw a hell of a party.

- **For one child, cont: Conduit trust for child.** The parent could leave benefits to a conduit trust for a minor child-EDB. All retirement plan distributions received by the trust would have to be immediately paid out by the trustee to (or for the benefit of) the child. As a conduit trust, this would have the advantage of being guaranteed to receive the same RMD "deal" as the child would receive if named individually, i.e., the life-to-age-31 payout, without the drawback of the child's gaining control at age 18 or 21 (state law age of majority). The trustee would have substantial control of the distributions from the retirement account: The trustee would of course have to withdraw from the account, each year, the RMD for such year...but the RMDs would be small (due to the child's long life expectancy...*e.g.* 69.9 years at age 15–see Appendix—meaning the RMD for a $500,000 IRA would be $7,153) and the trustee can "apply" that distribution "for the benefit of" the minor (e.g., paying tuition bills directly from the trust), or pay it to a custodian for the minor, rather than distributing the cash to the child. Reg. § 1.401(a)(9)-4(f)(3)(iv). The trustee can

determine whether to take any distributions beyond the RMD (with all such distributions being immediately paid to or for the benefit of the child). control the rate of distributions from the retirement account until the year the child reached age 31 at which point the entire account would have to be distributed to the child. The *drawback* obviously is the trustee's inability (under a conduit trust) to take distributions from the IRA and hold them in the trust for distribution at a later time. An *advantage* of the conduit trust is that the parents can name any residual beneficiary they want (such as a charity) to take the remaining benefits if the child dies before age 31. But under the Regulations it is not necessary to use a conduit trust to get these two advantages—if the parents are willing to have the money pass outright to the child at age 31. See next paragraph.

- **For one child, cont: Outright-at-age-31 trust:** The good news is the parents do not have to use a conduit trust for the child in order to qualify for the life-to-age-31 payout. An accumulation trust will work as well, *provided* it is entirely distributable to the child by the end of the year in which the child reaches age 31. In effect it is an "accumulation trust" during the years from age zero to age 30, that turns into a conduit trust in the year the child reaches age 31. So the trust could provide that for years infancy through 30, the trustee would (1) take annual RMDs from the IRA based on the child's life expectancy and (2) take such additional distributions from the IRA as the trustee deemed advisable and (3) EITHER pass out such IRA distributions to or for the benefit of the child or hold them in the trust for distribution in a later year, provided that (4) 100% of the trust is distributed to the child no later than the year child attains age 31. Because of the outright distribution no later than the age-31 year, the child is deemed to be the sole beneficiary of the trust for purposes of computing RMDs. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B). See PART 4, #10(B).

- **For one (or more) multiple minor child-EDBs.** There's still another option allowing a "life expectancy payout" to a trust for a minor child-EDB (or multiple minor child-EDBs): An accumulation trust that has ANY countable beneficiary who is a minor child-EDB can use the life expectancy payout, with the following payout requirements: The life expectancy payout will be computed based on the life expectancy of the oldest countable beneficiary of the trust (who may or may not be a minor child-EDB). Reg. § 1.401(a)(9)-5(d)(1), (2); (f)(1); and the 10-year-payout limit year will be 10 years after the minor-child-EDB (or all of them, if there are multiple minor-child EDBs who are countable beneficiaries of the trust) have either reached age 21 or earlier died. Reg. § 1.401(a)(9)-5(f)(2)(ii).

Example: Parent leaves IRA to an accumulation trust for the benefit of her minor child Sophie, age 9. The trustee will use income and principal of the trust as the trustee deems best for Sophie's benefit for her entire life. Upon Sophie's death, the trust will terminate and pass to Sophie's cousin Len who is now age 24. Because the trust has a countable beneficiary who is a minor-child-EDB (Sophie), it uses the life expectancy payout based on LEN's life expectancy (because he is the oldest countable beneficiary). The entire IRA must be distributed *to the trust* no later than 10 years after Sophie reaches age 21 or earlier dies. Assuming she doesn't die prematurely, therefore, the entire IRA must be distributed in 22 years (when Sophie attains age 31). **However, note that the fact that**

the IRA must be distributed to the TRUST does not mean it has to be distributed to SOPHIE. The trustee can retain the IRA distributions in the trust, pay tax on them, and then hold and administer the net after-tax amount for Sophie's benefit for the rest of her life, as provided in the trust.

Wow! That's a lot of choices for the parents to sort through. But we've only just begun. Stanley and Stacey Steinmetz don't want separate trusts for each of their children, they were thinking more of a "pot" trust so the trustee would have the ability to spend more for one child than another based on relative need. The 2-year-old will need to be supported a lot more years just to reach the life-stage the 12-year-old has already attained. And who knows which child might need special additional education or have unforeseen medical expenses? Or which child might have unique abilities that will cost extra money to develop—or will enable him/her to attend college "for free" on a scholarship? It does not make sense to this couple to create rigid predetermined shares for such young children.

What are their options for a trust for *multiple* minor children-EDBs?

A pot trust written just as the clients want it would say: Trustee pays income and principal as the trustee deems best to or for the benefit of the children for their health, education, support, etc. until "until there is no child of ours living who is under age 25," at which point any remaining funds are paid out to the surviving children equally (and issue of a deceased child, if any).

C. What are the annual RMDs for this trust?

Before we can draft this trust, we have to ask the client, if all four children die before that termination point is reached, where does the money go? Of course that scenario is actuarially extremely unlikely but the trust is incomplete if it does not dispose of the trust funds based on any eventuality. The clients say "That is extremely unlikely, fortunately, but if it did occur the remaining funds should pass to our Uncle Oscar who is now age 63."

The distribution period for this trust would be determined as follows: Because there is at least one minor child-EDB [there are four], the trust is entitled to "eligible designated beneficiary" treatment, meaning that the life expectancy payout will apply. Reg. § 1.401(a)(9)-4(e)(2)(ii). The life expectancy used will be that of the *oldest countable beneficiary*. Reg. § 1.401(a)(9)-5(f)(2)(ii), (f)(1)(i).

The oldest countable beneficiary is Uncle Oscar. At age 63, his life expectancy is 24.5 years. The Steinmetz's oldest child is 12; his life expectancy is 72.9 years!

Can Uncle Oscar be disregarded? No. As explained in the "How to Test a Trust" section of this Outline, the Regulations tell us that Uncle Oscar (as a "residual" beneficiary) can be disregarded if he can only inherit the trust if his inheritance is conditioned on the death of a primary beneficiary who will inherit the benefits fully by age 31. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B). In other words, if there were only one child-beneficiary, and he/she would receive the benefits outright by age 31, but Uncle Oscar would inherit the benefits if such child died before age 31, Uncle Oscar would be disregarded.

But under the Steinmetzes' proposed trust Oscar's inheritance is contingent on FOUR primary beneficiaries' dying before they are *all* over age 25. By the time the Steinmetzes' youngest

child (now age 2) reaches age 25, the oldest child (now age 12) will be age 35—i.e., older than age 31. So it appears Oscar is NOT disregardable under the Regulations.

The Steinmetzes cure this problem by selecting a younger "wipeout" beneficiary, a 10-year-old cousin of Stacey's. Now the countable beneficiaries are the four children ages 2 to 12 and the 10-year-old wipeout beneficiary, **so the Steinmetzes' oldest child's life expectancy can be used as the Applicable Denominator for the trust.** As with many cases involving trying to mesh estate planning goals with deferral goals, the estate plan has to be changed to accommodate the deferral goals. Is that worth doing? See "E" below.

Changing the estate plan to improve RMD results

Choosing a younger wipeout beneficiary for a pot trust for minor children is one case where modifying the clients' plan to achieve a better RMD result definitely seems advisable. Uncle Oscar is extremely unlikely to inherit anything from this trust (likelihood of a 63-year-old surviving four minor children is remote), yet his presence as "wipe-out beneficiary" significantly affects the payout period for the children's IRA money.

D. What is the Outer Limit Year for this trust?

The outer limit year will be, in most cases, 10 years after the youngest minor child-EDB reaches majority. So the IRA must be totally distributed in the year the Steinmetz's youngest child (now age 2) reaches age 31. If both Steinmetz parents die this year, the IRA must be paid out in annual instalments over the life expectancy of the oldest countable beneficiary of the trust, with a final payout no later than 29 years from now (when the "baby" turns 31).

The regulation is slightly more complicated than that simple statement because it must include the possibility that one or more of the children die before attaining majority. The precise definition of the Outer Limit Year is, the 10th year after the first year in which none of the minor child-EDBs is living and under age 21. Reg. § 1.401(a)(9)-5(f)(2)((ii)(B), (C).

[More than you need to know: The actual wording of the regulation indicates final payout 10 years after the later of the death of the last surviving minor child-EDB or the year "the youngest of...[the minor child-EDBs] reaches the age of majority." This drafting leaves a gap—literally, if the youngest of the children dies before majority, he/she will NEVER "reach the age of majority" and the payout period will not end until annual RMDs exhaust the IRA! Experienced trust drafter know you have to word this type of provision not as "when the youngest child reaches 21" but rather as "10 years after the earliest time at which there is no child living who has not attained age 21." Presumably that is how this Reg. will be interpreted.]

Though complicated, this formula is a ***substantial improvement*** (for parents trying to provide for their minor children in case of premature death of the parents) over the proposed regulations' formula, which ended the IRA payout 10 years after the *oldest* minor-child-EDB attains age 21 or earlier dies. See Prop. Reg. § 1.401(a)(9)-5(f)(1)(i), (2)(ii)(A). The final regulation cures the planning issues that existed under the proposed regs—where termination of the IRA was tied to the oldest child, thus shortchanging the younger minor child-EDBs (drastically so if the oldest minor child died prior to age 21).

Reminder: The trust can continue in force after the IRA is fully distributed. The RMD payout period governs only the IRA payout, it does not dictate the trust terms. The trust terms are dealt with elsewhere in the regulations, in the determination of whether the trust qualifies as a designated beneficiary.

E. Separate trusts vs. a family "pot" trust

If the Steinmetzes use a "pot trust" for the children as a group, with the oldest child's life expectancy as the initial payout period for the retirement accounts, are they "wasting" the even longer life expectancy of their youngest child? As one practitioner put it, the youngest child is being "forced to use the life expectancy of the oldest child." Is it "bad" that the trust cannot use the life expectancy of each child?

Not really. The difference between the life expectancy of the oldest child (age 12, LE = 72.9 years) and the youngest (age 2, LE = 82.8 years) is insignificant. The trustee will almost certainly be drawing out more than the RMD each year regardless of whether the RMD is 1/72.9th (1.37%) or 1/82.8th (1%), to provide for the children's needs. A fixed-share division among the children is contrary to the client's goal of having distributions based on relative need, with little or no "gain" on the RMD side.

To have a separate trust for each child, so each child's RMDs would be based on his or her own age, each child's trust would have to be distributable outright to him or her no later than age 31 (so the residual beneficiaries can be ignored). However, unless each child's trust is a conduit trust, or a trust that is distributable totally to the child by age 31, the second-tier beneficiary(ies) will be countable, and those presumably would be the other children....putting you right back into the picture of having the oldest child's age (or premature death) dictate the annual RMDs and Outer Limit Year!

How much is it worth, in terms of tax savings for the children, to use this separate-trusts approach as opposed to the "pot" trust the parents want? The estate planner must be prepared to quantify exactly how much money it would save for the family to have separate trusts for each child (to get the maximum deferral for each child's share) vs. having a pooled "pot" trust that must base annual RMDs on the age of the oldest minor child. Though hypothetical tax savings based on using *each minor child's* own life expectancy for his/her share are not normally a significant planning factor, the tax savings from using a younger rather than an older "wipe-out" beneficiary may be.

Here is where we have to leave the theoretical framework of "what gets the longest payout" and look at the individual family's situation. Here are some views developed during the planning process:

- If the spouses die in the near future, it appears likely the total family assets of $1,500,000 will be substantially or totally depleted by raising these four children to adulthood. Deferring taxes on the retirement benefits is not a realistic goal in view of the likely financial needs of the children. The retirement plans are likely to be cashed out faster than the RMD rules would require no matter what estate plan structure is used.

- The "pot" trust makes much more sense for this very young family, where the exact amount each child is likely to need to be raised to adulthood cannot be predicted and the asset pool

is not so large they can safely assume that each child has more than enough under an equal-share division.

- It is extremely unlikely that both parents (now in their 30s) will die in the near future. The much more likely scenario is that all the children will be well past age 25 when the parents die. It does not make sense to invest legal time and expertise in trying to arrange this trust to get the maximum deferral for every dollar of retirement benefits when (1) doing so would require adopting less desirable fixed-share estate plan and (2) this plan is being written to cover a very unlikely event anyway.

- Another approach would be to have four fixed-share separate trusts to use as beneficiaries of the retirement benefits (to achieve maximum deferral for each child's share) and a fifth trust, holding all the nonretirement assets, to be the true "pot trust" for the children as a group. Distributions from this trust could be used to (for example) provide the "extra share" the youngest child needs just to catch up with the older ones or the extra expenditures needed for each child's particular educational, medical, etc. needs. Realistically does it make sense to draft and then administer five separate trusts for this family, when the death of both parents during the children's minority is an unlikely event and the assets are not substantial enough to justify administration of so many trusts? So this is an alternative that might be considered in case of a family with much more substantial wealth.

F. Conclusion, comments regarding planning for minor children

If time and money is going to be spent preparing numerical projections, aim those projections at how much money (after tax) should be left in trust to raise these children to adulthood. If it appears that number is more than the current family net worth, consider buying term second-to-die life insurance on the young parents (very cheap) to cover the gap, rather than trying to increase the pot by squeezing extra post-death deferral out of the retirement benefits. My motto: Pay the insurance company to get an estate plan the clients DO WANT instead of paying the lawyer to draft an estate plan they DON'T WANT!

Can a case *ever* be made for rejiggering an estate plan to capture the benefits of the life-to-age-31 payout for minor children of the participant? Perhaps yes if it involved a substantial retirement account and a much older and wealthier participant who has minor children through a late-in-life union or adoption. This hypothetical client has more at stake (larger retirement plan) and is more likely to die while the child is still a minor (because client is old) and has sufficient other assets that there will be no need to accelerate distribution of the retirement plan just to raise the child to adulthood. Call me when that client shows up.

Here are few more fine points to cover for Stanley and Stacey:

<u>Stan's 401(k) plan</u>: Stan and Stacey and their attorney decide qualification as a Designated Beneficiary Trust (DBT) could indeed matter with respect to Stan's 401(k) plan. Although the only form of death benefit permitted under that plan is a lump sum distribution in cash, the trustee of a DBT named as beneficiary of the plan can direct the plan to transfer the lump sum, by direct trustee-

to-trustee transfer (also called direct rollover) to an "inherited IRA," thus preserving the possibility of life-to-age-31 payout allowed for minor children of the participant. Reg. § 1.402(c)-2(j)(2)(ii).

Stacey's IRA: Stacey's IRA does offer the life expectancy payout form of benefit. Thus, if the trust that is named as contingent beneficiary of Stacey's IRA qualifies as a DBT, the trustee will qualify for the life-to-age-31 payout applicable to minor children of the participant if the trust for the children is designed to qualify for that. This would be a desirable outcome. It would be nice for the trustee to have the option of spreading out distributions from the IRA over the years of the children's childhood.

G. Can we pay to a "§ 678 grantor trust" (BDOT) instead of to the child?

Under § 678, a beneficiary is deemed the owner of any trust assets he has the right to withdraw from the trust. This is the only one of the "grantor trust rules" that applies to the beneficiary rather than to the creator/funder of the trust.

Planners would like to find a way to get the life-expectancy-to-age-31 payout for an IRA payable to the client's minor child without actually paying the IRA over to the child. They would prefer to hold the assets in a trust but have the distributions taxed at the child's tax rate. Can this be done by naming a § 678 grantor trust (nicknamed by practitioners a "beneficiary deemed owner trust" or BDOT) for the minor child as beneficiary of the IRA? The theory is, the trust-drafter and trustee would somehow figure out a way that the child wouldn't actually withdraw the money.

Advocates of this approach suggest that the child would deemed to be the IRA beneficiary either because under § 678 he and the trust are considered "the same person," or because the § 678 trust would be a see-through DBT of which the child would be deemed the sole beneficiary (thereby qualifying for minor child-EDB treatment). See discussion of "conduit trust" in this outline for response to this point..

Clearly under Code § 671 IRA distributions paid to a § 678 grantor trust for "Beneficiary X" will be included in the income of Beneficiary X. It does not automatically follow that a trust for Beneficiary X (§ 678 or otherwise) meets the definition of "designated beneficiary," which is an ***"individual*** designated as a beneficiary by the employee." § 401(a)(9)(E)(1). Although we do have all the IRS rulings starting in 1985 which seem to essentially say "grantor trust = grantor" and "your grantor trust is you and you is your grantor trust," nothing has ever extended that viewpoint (which is NOT a viewpoint necessarily dictated by § 671—far from it) to § 401(a)(9)(E)(1). We know IRS has extended it to the point of allowing disabled or minor beneficiaries to transfer personally-inherited IRAs to their own grantor trusts, but the only IRS mention allowing such transfers by the IRA owner during life was hostile.

Some commenters requested this treatment in comments on the proposed regs; the IRS did not adopt that treatment and explained why, so we have their answer—this does not work.

Case #4: The Dingles: Planning for a disabled child: How to draft an AMBT

SECURE added to the Code specific provisions intended to facilitate leaving retirement benefits in trust for the benefit of a disabled or chronically ill (D/CI) individual. The Code gave the

type of trust it especially authorized for D/CI beneficiaries the cumbersome title "Applicable Multi-Beneficiary Trust" (AMBT). The Regulations elaborated on and extended the AMBT provisions extensively to facilitate this type of trust planning. This case study focuses on the supplemental needs trust.

A. Client facts and goals

Mr. and Mrs. Dingle, both age 48, have three children, Winnie (age 23), Daisy (age 18), and Tony (age 16). One of the children, Daisy (the 18-year-old), is severely disabled and will need lifelong care. Mr. and Mrs. Dingle have $500,000 in their combined IRAs. Each will leave his or her IRA to the other spouse, who will roll it over into the survivor's IRA. On the survivor's death, the IRA will be left to a trust that will provide for Daisy's supplemental needs throughout her life.

The Dingles have no other substantial assets they will be able to leave for Daisy's benefit. Daisy Dingle qualifies for government-provided medical care and other need-based welfare-type benefits. Thus, the Dingles want the IRA to be held in a trust to provide for Daisy's needs that are not covered by the benefits programs she qualifies for, and they want to be sure that after their deaths the trust and the IRA it holds are not considered "countable assets" or a "resource" that would disqualify Daisy for the benefits she now receives. They similarly do not want trust distributions for Daisy's benefit to disqualify her for need-based assistance. The type of trust they seek is called a "supplemental needs" trust." A supplemental needs trust should be drafted by a lawyer who is conversant with the asset/income requirements of the disability benefit programs Daisy participates in and with the requirements for a supplemental needs trust (SNT) to be treated as a non-countable asset.

Mr. and Mrs. Dingle will name each other as outright beneficiary of their IRAs, with the supplemental needs trust for Daisy's benefit as contingent beneficiary.

B. Options for Daisy's trust under the RMD rules

The Dingles cannot name a "conduit trust" for Daisy as beneficiary of their IRAs. Because a conduit trust mandates that all distributions from the IRA to the trust be paid out forthwith to or for the benefit of the individual trust beneficiary, such a trust would disqualify Daisy from the various need-based benefits programs. The required minimum distributions from the IRA would be treated as "countable income" of Daisy for purposes of her qualification for the various benefit programs. Thus the trust must be an accumulation trust, not a conduit trust.

Due to her disability, Daisy is an "Eligible Designated Beneficiary" (EDB) under SECURE, entitled to a life expectancy payout for benefits that are payable to her outright as designated beneficiary. As we have seen, benefits left to a conduit trust for her would be entitled to the same EDB treatment she individually is entitled to—a life expectancy payout. But it is not possible to name either Daisy individually or a conduit trust for her as beneficiary without sacrificing her eligibility for government benefit programs. Fortunately for the Dingells...

Under SECURE, a see-through accumulation trust for the *exclusive life benefit* of a disabled (or chronically ill) EDB *is* entitled to the EDB treatment/life expectancy payout—even though accumulation trusts for some other categories of EDB are not so entitled.

It would be desirable for Daisy's supplemental needs trust to qualify for the life expectancy payout so that distributions from the IRA to the trust could be spread out over her long life expectancy. If she dies before the end of her "life expectancy," payouts after her death would continue to be made over her remaining life expectancy, subject to an outer limit requirement: final distribution would be required no later than 10 years after her death (even if her remaining "life expectancy" when she died was longer than 10 years).

C. "Applicable Multi-Beneficiary Trust" (AMBT)

In order to qualify for the life expectancy payout, the trust for Daisy must meet two requirements:

- First, it must qualify as a Designated Beneficiary Trust. Since it must be an Accumulation Trust, that means the remainder beneficiaries will also be "countable beneficiaries." This in turn NORMALLY means that the remainder beneficiaries must be "individuals" (i.e., people!) who will receive the trust property immediately and outright upon the death of either Daisy herself or some other trust beneficiary. However, under a special dispensation for AMBTs, due to an amendment of the law made by SECURE 2.0, most types of charities could also be named as remainder beneficiaries without causing the trust to lose DB status, with respect to participants dying after 2022.

- Second, the trust must provide that distributions from the retirement account (including proceeds thereof) may not be paid to or for the benefit of anyone other than the disabled beneficiary (Daisy) during Daisy's lifetime. § 401(a)(9)(H)(iv), (v); Reg. § 1.401(a)(9)-4(g)(1)(iii).

Oddly, the law does not seem to require that the trust make any distributions at all to Daisy or for her benefit—as long as no distributions are made to or for the benefit of anyone else during her life.

To meet these requirements, the trust could be structured in either of two ways. One way would be to have a trust that was solely for Daisy's benefit during her lifetime, with the trustee making distributions from the trust to Daisy or for her benefit for her supplemental needs; the trust could hold the IRA only, or the IRA plus other assets. This trust could provide that it would terminate and be distributed to Daisy's two siblings (or a permitted charity) at her death. This would make the trust a DBT since Daisy would be the primary beneficiary and her siblings (or the permitted charity) are the residual beneficiaries, and they are all individuals or permitted charities so they count as "designated beneficiaries." If Daisy's siblings are the remainder beneficiaries, and there is a contingent or wipeout beneficiary that would inherit at Daisy's death only if her siblings predeceased her, that contingent beneficiary is disregardable. See PART 4, #5-#10.

Another approach would be to have the trust be for the benefit of all the Dingell children but require the trustee to segregate the retirement account and all distributions from it and all "proceeds" (reinvestments) of such distributions; these retirement plan distributions and proceeds could be used only for Daisy, with other trust assets available to all the children. Someone will have to figure out

how the trustee can reliably keep the IRA and its distributions and reinvestments separate from other trust assets and remember to make distributions from this segregated account to or for nobody other than Daisy. On Daisy's death this segregated account would pass outright to the other two siblings (or a permitted charity).

Either approach works and will qualify as an AMBT.

Under either of those structures, because the trust (or the segregated IRA-plus-distributions-from-the-IRA account) is to terminate at Daisy's death and pass immediately outright to two other named individual beneficiaries (the siblings), or (if the participant dies after 2022) to a permitted charity, the trust qualifies as a Designated Beneficiary Trust. The applicable distribution period (ADP) for required minimum distributions (RMDs) to this trust under the Proposed Regulations would be the life expectancy of the oldest disabled beneficiary, in this case Daisy.

Here are the RMDs for the above-described AMBT (either structure):

- If the IRA owner died before his RBD, the payout period would be over Daisy's life expectancy because she is the oldest D/CI beneficiary, even though she is not the oldest child. Reg. § 1.401(a)(9)-5(f)(1)(ii). If the IRA owner died after the RBD, the payout would be based on the "greater of" the IRA owner's life expectancy or Daisy's, but since Daisy is younger than her parents this would still be Daisy's life expectancy. Reg. § 1.401(a)(9)-5(d)(1)(ii).]

- The Outer Limit Year would be the final year of Daisy's life expectancy, or, if earlier, 10 years after Daisy's death, because she is the oldest D/CI beneficiary of the trust. Regs. § 1.401(a)(9)-5(e)(1), (3), § 1.401(a)(9)-5(f)(2)(iii).

So, at first, it appears that all is well—the Dingells can leave their IRA to a see-through supplemental needs trust for Daisy that will qualify for the life expectancy payout, just as they could have done before SECURE. However there are important differences between these parents' pre- and post-SECURE options:

- Under pre-SECURE law, the Dingells might have provided that, in any particular year, if the RMD taken from the IRA exceeded Daisy's "supplemental needs" expenses for such year, the excess could be paid to other beneficiaries, for example Daisy's siblings. That would have enabled the trustee to pass out such "excess" gross income to the siblings who are probably in lower income tax brackets than the trust itself is. That clause cannot be included post-SECURE without losing the life expectancy payout...so RMDs that come in to the trust and exceed the amount that can be spent that year on Daisy's supplemental needs will be retained in the trust and be taxed at trust tax rates to the extent the retained distribution exceeds the trust's exemption and lower-taxed income brackets. This result is presumably consistent with Congress's goal of benefitting a disabled individual without allowing other family members to piggyback on this disabled individual's status to get tax deferral.

- Under pre-SECURE law, some practitioners would have recommended including a "poison pill" clause in the trust that would cause the trust to terminate and be distributable outright

to other beneficiaries (such as Daisy's siblings) if at any time its continued existence would cause Daisy to lose her eligibility for government benefits. Post-SECURE this clause cannot be included in that form due to the requirement that no beneficiary other than Daisy can receive any benefits from the retirement benefits during her lifetime. A "poison pill" clause can terminate payouts to Daisy, but only if nothing will be paid to anyone other than Daisy until her death.

- Under pre-SECURE law, if Daisy were to die before the end of her "life expectancy" payout period, the IRA could continue to be held by the trust (or by the trust's remainder beneficiaries) with distributions continuing to be paid out gradually over what was left of Daisy's original life expectancy. Post-SECURE, all benefits must be distributed within 10 years after Daisy's death even if her "remaining life expectancy" was more than 10 years.

If Daisy's trust is also a "qualified disability trust," the trust would get an annual exemption of $2,000 for federal income tax purposes (compared with the $100/$300 exemption applicable to other trusts), although this exemption is subject to a phaseout in case of income over $100,000. See § 642(b)(2)(c) for the special exemption rule and the definition of qualified disability trust.

D. Other planning ideas to benefit a D/CI beneficiary

The Dingles as noted have limited assets with which to provide for Daisy after their deaths, and correspondingly limited planning choices. A SNT is essential for their plan. Here are other options that would-be benefactors of a D/CI beneficiary can consider; the options are different for wealthier clients vs. those of more limited means, and differ depending on whether a SNT is part of the mix, whether the client has charitable intent, and whether the D/CI individual is capable of managing his/her own finances.

A wealthier client with some charitable intent could consider naming a charitable remainder trust (CRT) as beneficiary of the IRA. The IRA would pass income-tax-free to the CRT which would then pay a life-long annual income (either a fixed dollar amount or a fixed percentage of the trust's assets revalued annually) to the D/CI beneficiary. The annual income paid to the D/CI beneficiary would be includible in his/her gross income. On death of the beneficiary, the principal would pass to the charity. See PART 9, Case #7.

The Dingles could consider naming a CRT as beneficiary of the IRA. The annual unitrust or annuity payments from the CRT could be paid to a special needs trust (SNT) for Daisy so as not to disqualify her from her government benefit programs. Rev. Rul. 2002-20, 2002-1 I.R.B. 794. While this approach might be suitable for some families, it is not suitable for the Dingles because this approach would cause the bulk of their IRA to pass to charity. Their intent is to have the IRA pass exclusively to family members. Also, Rev. Rul. 2002-20 appears to require that the SNT be includible in Daisy's estate on her death; see the Ruling for details. For full explanation of charitable remainder trusts (CRTs) and the advantages of naming a CRT as beneficiary of a retirement account, see ¶ 7.5.04 *et seq.* o f *Life and Death Planning for Retirement Benefits*.

Another approach that some planners might consider is, using a conduit trust as beneficiary of the benefits, then having Daisy (through her guardian) transfer the conduit distributions, as she

receives them, into a "(d)(iv)(A)" (self-settled) supplemental needs trust, if that approach is permitted under applicable state law without causing Daisy to lose her qualification for need-based benefit programs. A (d)(iv)(A) trust is a supplemental needs trust created by the disabled individual with her own assets. While permitted by applicable law governing various need-based benefit programs, this kind of trust does require that any trust assets remaining at the beneficiary's death must be transferred to the state that paid Daisy the welfare benefits, up to the amount of such benefits Daisy received after contributing those assets to the trust.

A client who has a very large retirement account balance, likely to generate annual RMDs after the client's death in excess of the D/CI beneficiary's needs, should consider the tax rate that will apply to large post-death IRA distributions paid to the trust. If the client's personal tax rate is lower than what is likely to apply to these post-death distributions the client should consider doing annual partial Roth conversions from the IRA, which would be taxable at the client's tax rate rather than the trust. The Roth IRA's distributions to the trust after client's death would be income tax-free.

Case # 5: Beverly: Providing for NoMoTTYY beneficiaries

One category of EDB is an individual who (1) is not a member of any other category of EDB and [i.e., not the participant's spouse, not disabled, etc.] and (2) is "not more than ten years younger than" the participant. The not more than ten years younger [or "NoMoTTYY"] individual might be older than the participant, or the same age as the participant, or younger than the participant—as long as he/she is not more than 10 years younger.

Leaving an IRA to a trust for the benefit of a NoMoTTYY is no easier than leaving a trust for any other EDB. For one thing, the fixed-term life expectancy payout may end well short of the actual lifespan of the NoMoTTY, which is not good if the NoMoTTYY will be depending on this income stream. Also, the early death of a NoMoTTYY could accelerate the payout unexpectedly for other trust beneficiaries who were counting on him/her to live to within 10 years of his/her IRS life expectancy.

A. Facts and goals: Beverly

Beverly is age 76, unmarried, and childless. She wants to leave her $3 million IRA to a trust for the benefit of her three siblings Molly (age 74), Billy (72), and Kelly (70). Her goal is to provide them with professional management of the funds, a predictable (not necessarily large) income for life, and a fund that can be tapped disproportionately for extra expenses when needed. Preserving the fund for other possible beneficiaries after all the siblings are deceased is not one of Beverly's goals for this trust. However, if there are funds left over they will go to charity, or (if that would cause the trust not to pass the "all beneficiaries must be individuals" test) to Beverly's nieces and nephews. None of the siblings is disabled. All are NoMoTTYYs.

The parents of these four siblings only recently died, at ages 98 (mother) and 102 (father); they were killed when struck by lightening while hiking in Baxter State Park, Maine, with their many siblings. Longevity is a feature on both sides of Beverly's family tree.

Here are possible structures and the pluses and minuses of each based on the assumption Beverly dies right now.

B. Three trust choices to get life expectancy payouts

Beverly considers the following trust configurations to utilize her siblings' "EDB" status:

- **A single "conduit" trust fund which would pay out to all of the siblings as needed.** As a conduit trust, the remainder ("residual") beneficiaries would be disregarded so charity could be named as the remainder beneficiary. Since all countable beneficiaries would be EDBs, the life expectancy payout would apply based on the life expectancy of Molly, the oldest sibling. Reg. § 1.401(a)(9)-5(f)(1)(i). (The "greater of" rule would not enter in because Beverly's "ghost life expectancy" is shorter than Molly's life expectancy.) The 10-year Outer Limit Year would apply based on Molly's death, because she is the oldest EDB—100% distribution of the IRA and the trust would be required within the earlier of about 15 years (Molly's approximate life expectancy) or 10 years after Molly's death (if she dies in the next five years, i.e., when her life expectancy is still over 10 years). Reg. § 1.401(a)(9)-5(f)(2)(i). This last feature makes this structure unacceptable. Since anyone can die at any time, you have to look at what happens if Molly dies suddenly, shortly after Beverly, say at age 77? The whole trust would be paid out by the year Molly would have turned 87, when Billy and Kelly are still living and with many years to go on their probable life expectancy. This result would destroy the plan for the IRA to provide a lifelong source of income and financial security managed by a professional trustee for the younger siblings.

- **3 separate "conduit trusts," one for each sibling.** This gets closer to the goal. Although each sibling would have an equal predefined share (which is not the ideal—the ideal was to have some flexibility to pay more to one than another based on relative needs), each sibling would have a life expectancy payout based on his or her own life expectancy, and not be surprised by a speeded up payout based on the unexpected death of the oldest sibling. If a sibling died, his or her remaining share would be placed into a trust for the benefit of the other siblings. This "remainder trust" would NOT be a conduit trust and would not be subject to ANY of the restrictions applicable to see-through trusts...for example, it could accumulate IRA distributions, spend unequally between the surviving siblings based on need, and have a charitable remainder beneficiary. This remainder trust would have to withdraw the deceased sibling's share of the IRA in annual instalments over the remainder of the deceased sibling's life expectancy (with an Outer Limit Year of 10 years after such sibling's death—even if the remaining life expectancy payout would have been longer than 10 years). **Drawbacks:** A conduit trust forces the trustee to pay out to or for the benefit of the sibling the RMD each year; the trustee is not able to accumulate distributions for possible needs in later years. And, as the IRA payout ends at the end of the sibling's life expectancy, the sibling may have many years left to live, but the trust for that sibling is then "gone" and no longer provides a financial cushion. For example, at age 72, Billy's life expectancy is about 17 years. If he lives into or past his 90s (as their parents did), Billy will no longer have any income from his conduit trust. Once again, this structure does not fit well with Beverly's goals.

- **3 separate "accumulation trusts," one for each sibling.** The trust for, e.g., Kelly, would say "the trustee will use income and principal for the benefit of Kelly as long as she lives [setting forth the goal of a lifelong income plus extra funds as needed etc.]. Upon her death, if both of the other siblings are then living, the trust shall continue for their benefit on the same terms, or, if only one of them is then living, the trust shall terminate and the fund shall be distributed outright to such surviving sibling, or, if none of them is then living to Charity X." Assuming all 3 siblings survive Beverly, here's how this trust is tested. Countable beneficiaries are Kelly (primary) and Molly and Billy (residual). Charity is disregarded because it can inherit only if both of the other two siblings die before the primary beneficiary Kelly. Reg. § 1.401(a)(9)-4(f)(3)(i), (ii)(A). Since all countable beneficiaries are EDBs, the trust is entitled to the life expectancy payout. The life expectancy payout and Outer Limit Year are both determined based on the oldest sibling's (i.e. Molly's) life expectancy. Thus, the trust has a foreseeable payout of about 15 years (Molly's life expectancy) after Beverly's death if Beverly dies in the near future. That anticipated payout would be accelerated by up to five years if Molly dies less than 10 years after Beverly (because then the Outer Limit Year would be 10 years after Molly's death). But regardless of when Molly dies, the trustee would have the ability to accumulate IRA distributions and (after paying tax on them) save them for future years' needs. **Drawbacks**: If two of Beverly's siblings predecease her, she would need to take a different approach since in that case the two countable beneficiaries would be last surviving sibling and charity, and the trust would not qualify as a DB. In that case the payout would be over Beverly's then remaining life expectancy, with no option to elect the 10-year rule (since Beverly is past her required beginning date).

C. Conclusion about Beverly's IRA trust plan

No matter how you cut it, this IRA is going to have to be distributed within no more than about 15 years after Beverly's death and even that short payout period gets shorter each year that Beverly and the siblings live. Based on their family history there is a good chance that one or more siblings will live beyond the IRS table life expectancy.

And: Beverly has to make some compromises to get even that much "life expectancy payout" (such as possibly diverting the remainder to nieces and nephews to avoid having a countable charity/nonindividual beneficiary). And: The trust will have to pay trust income tax rates on any significant IRA distributions accumulated for the purpose of providing for the siblings' later years and/or for unexpected large expenses. And: The trust will be in a higher income tax bracket than Beverly is right now.

So: Beverly has a problem if this is the only asset she has to fund her goal of providing for the siblings. If that is the case, she should consider annuity solutions and/or consider doing Roth conversions during life so the trust can be funded with an asset that does not creates such income tax complications.

On the other hand, if this asset is just one of many, then the conduit trust for each beneficiary for his/her 1/3 share can make sense. The siblings could be advised to regard the life expectancy payouts as temporary income, to be saved for the future or used for nonrecurring expenses. Or, the manager of the other assets could level out each beneficiary's cash flow by reducing distributions

from the "main" trust (holding Beverly's substantial other assets) in the "early" years, then increasing distributions from the main trust when the IRAs ran out. The main trust provisions would say exactly what Beverly wants them to say with no compromises (in either drafting or trust administration) to accommodate the RMD rules.

And/or (again, if Beverly has other assets besides the IRA), Beverly could leave the IRA to a charitable remainder trust (CRT) which would pay the siblings a predictable *lifelong* income AND eliminate all income tax on the IRA death benefit AND provide for her charitable intent AND even provide an estate tax charitable deduction. The CRT distributions would provide the *lifelong* income which is one of the goals and other (nonIRA assets) could be used to provide the slush fund for extra/unforeseen expenses to supplement the income from the CRT. For full explanation of charitable remainder trusts and the advantages of naming a CRT as beneficiary of a retirement account, see ¶ 7.5.04 *et seq.* o f *Life and Death Planning for Retirement Benefits*.

In summary, **qualifying for EDB status/"life expectancy payout" does not by itself accomplish the client's goals.** As a supplement to substantial other assets providing for the beneficiary(ies), it can work. As is often the case, the life expectancy payout does not provide a long enough "payout period" to substantially increase the value of the inherited plan, while its attendant complications and drawbacks may force compromises with the client's goals if those goals cannot be achieved with other assets.

Case #6: Hiram: Leaving retirement benefits to a trust with a variety of beneficiaries

So far we have looked primarily at retirement benefits left to one beneficiary or one type of beneficiary (such as a minor child of the participant or a disabled individual). If the trust is for the benefit of a varied collection of people with possibly different classifications in the DB/EDB system, what happens? The RMD effects will have to be painstakingly parsed out from the proposed regulations. The planner will have to consider whether the estate plan could be rearranged to get better RMD results for at least some of the beneficiaries. The planner will have to be able to determine and convey to the client what would be the likely economic benefit to the estate plan if RMD results could be improved.

A. Hiram's complicated facts and family

Hiram, age 55, has about $10 million of assets, of which $2.5 million is in several traditional retirement plans and $400,000 is in a Roth IRA. He wants to provide for his spouse (Holly, age 46, his second wife), his children from his first marriage (Hugo, age 30, and Hester, age 28; Hester is disabled) and his children from his second marriage (Hilda, age 16, and Harry, age 14). He is not worried about estate taxes. His plan is just to leave everything to one giant family trust, where the trustee would pay income and/or principal to or for the benefit of the family members, giving priority to wife Holly's lifelong support; lifelong support and care for Hester the disabled child; support, education, and care into adulthood for minors Hilda and Harry; and (upon death of survivor of Hiram and his wife) everything distributed outright equally to the children, except that Hester's share would stay in trust to provide for her care for life, and the younger children's shares would be held in trust for their education and support until age 25.

B. RMD treatment if trust is written as Hiram has described it

The family group at this time has four EDBs: spouse Holly, disabled daughter Hester, and participant's minor children Hilda and Harry. If the trust qualifies as a Designated Beneficiary Trust (DBT), and Hiram dies in the near future, here is the applicable distribution period that would apply to this trust. As a preliminary matter we SHOULD probably first make sure the trust qualifies as a "DBT," but let's leave that aside for a moment and assume we can make it so qualify if necessary.

Even though the surviving spouse is a beneficiary and she is an EDB, the trust does not get a life expectancy payout based on her status because (1) she is not the sole beneficiary (it's not a conduit trust for her) and (2) the other countable beneficiaries are not all EDBs. One of the four children (Hugo age 30) is not an EDB—he is neither a minor child nor D/CI.

Even though disabled daughter Hester is also an EDB, there is no life expectancy payout based on *her* status since she is not the sole beneficiary (it is not a conduit trust as to her) and it is not an AMBT (there is no requirement that any retirement plan be set aside solely for her during her lifetime).

However, there are two beneficiaries who cause this big pot trust to qualify for a life expectancy payout of some type: the two minor children of the participant, Hilda, age 16, and Harry, age 12, who are EDBs. Because the trust has one or more minor child-EDBs, the Applicable Denominator (payout period) for the trust will be the life expectancy of the oldest countable beneficiary of the trust. The life expectancy of the oldest MINOR? No...of the oldest countable trust beneficiary. Reg. § 1.401(a)(9)-5(f)(1)(i). That would be wife Holly, age 46 (assuming Hiram does not add a "wipeout beneficiary" who is older than Holly). At age 46, her life expectancy is 40 years. So the first year's payout would be 1/40th of the account balance, the second year's 1/39th, and so on until the final distribution year (or earlier if she dies within 30 years).

Note this odd situation—the trust gets a life expectancy payout because it has minor child-EDBs (even though not all the trust beneficiaries are EDBs), but that life expectancy payout is not based on those children's life expectancies—it's based on the oldest trust beneficiary's life expectancy, even though the oldest trust beneficiary is not a minor child.

The final (Outer Limit) distribution year would be 10 years after the earliest point at which both minor children have either attained age 21 or earlier died. Assuming there are no premature deaths, Harry, the younger of the two minor children-EDBs is 12; so he will turn 21 in 9 years, meaning the predicted Outer Limit Year will be in 19 years when Harry turns 31.

So, this picture is <u>a little better</u> than the "10-year rule." Essentially there would be a 19-year payout if Hiram dies right now. Of course as minor child Harry gets older the payout period shrinks. Unless Hiram has some more children, the trust will not "do better" than the 10-year rule once baby Harry (now 12) reaches age 21 (because after that point there will be no more minor child-EDBs).

This does not sound like a sound payout period for Hiram's retirement account.

C. Slicing and dicing may be better for Hiram

It might be worth running numbers to slice and dice these retirement benefits among separate trusts for different beneficiaries. Hiram has a large enough estate he could consider leaving particular

separate IRAs to different beneficiaries (or trusts for them) to get substantially longer deferral for the benefit of most of the family. In particular:

- Leave some IRA assets to wife Holly, perhaps through a conduit trust which would provide a "life expectancy payout" based on the life expectancy of someone 10 years younger than she is, recalculated annually (thank you SECURE 2.0!). Or leave some of the IRA to Holly outright (for her to roll over to her own IRA).

- A separate IRA could be left to a trust for disabled daughter Hester; structured as an AMBT, it would have a life expectancy payout based on Hester's very long (57 years) life expectancy at age 28. Note this does not have to be a "supplemental needs" trust to qualify as an AMBT; the only requirements are that Hester qualifies as D/CI and is the only permissible recipient for life (and that the remainder beneficiaries are individuals or qualifying charities).

- Separate trusts for Hilda and Harry, or a combined trust for both of them, could take full advantage of their minor child-EDB status.

- Hiram might consider weighting the Roth IRA to oldest-child Hugo, since Hugo (as the only "PODB") is stuck with the 10-year rule and doesn't get whatever "stretch" payouts are available to his siblings.

The rest of the assets could be left to a pot trust administered by the same trustee with explicit directions, in administering the pot trust, to take into account each beneficiary's share of the retirement benefits. Or Hiram could specifically deduct from each beneficiary's share of the "pot" trust the value of the IRA he/she received, though that would be quite difficult, since it involves comparing pretax and after-tax assets.

Unlike with some other clients, where striving to "fit" into the minimum distribution rules' requirements produced little apparent tax benefit (while sacrificing other goals), the slicing and dicing does benefit Hiram's estate plan because he has a *large estate* with *large retirement account assets*, and plenty of *nonretirement assets* as well, and multiple beneficiaries entitled to EDB status.

D. First things last: Make sure the trust qualifies as a DBT

Again looking at the trust the way Hiram wants it written, we have to make sure the trust qualifies as a Designated Beneficiary Trust (DBT). That means it must have all individual beneficiaries. Testing the trust based on what we know so far:

Primary: The beneficiaries are the people who will definitely or probably or perhaps receive funds from this trust after the participant's death, without having to wait for someone else to die. The primary beneficiaries are wife Holly and all four children.

Residual: As Hiram envisioned it, his trust would terminate on death of wife Holly and be distributed outright to the children equally (with the shares of minor or disabled children held in further trust). What if a child has died? The other children would get that child's share. But under the IRS's testing system, a child who succeeds to the share of another child due to such other child's death cannot be considered a "residual" beneficiary because all the children are already in the

"primary" group. This is the "problem" under the RMD testing system: If you use a spray trust, everybody in the family is already in the primary beneficiary group and there's nobody left to put into the residual category.

And we have to ask Hiram who gets the money if all the children die before Holly, or before the youngest child reaches age 25? In a normal world, Hiram would probably solve this problem by naming a charity as wipeout beneficiary—but you can't do that here because the charity is a countable residual beneficiary and (except in an AMBT) you can't have a nonindividual beneficiary be "countable" because then you don't have a designated beneficiary.

In a semi-normal world, Hiram would then name some relative such as his Uncle Oscar age 73 as the wipeout beneficiary. BUT you do not want to name someone who is older than your oldest already-countable beneficiary if you have minor-child EDBs in the trust! Because with a minor-child EDB in the trust, the trust is entitled to a life expectancy payout based on the oldest countable beneficiary's life expectancy. As the trust is written so far, that's wife Holly age 46. If you put in Uncle Oscar as the wipeout beneficiary, he would be countable, and HIS much shorter life expectancy would become the payout period.

So: Choose a younger individual as your wipeout beneficiary; OR use the "last man standing" approach. Provide that if the trust is ever down to just one beneficiary (*e.g.* if Holly and three of the four children are deceased while there is still money in the trust), it will terminate and pass immediately outright to that last living beneficiary. Now there is no one else "countable," and your planned distribution scheme is preserved. This kind of crazy outcome may be a reason to use a separate trust or separate fund within a trust just for the retirement benefits. You don't have to have a crazy wipeout beneficiary for the nonretirement assets.

This paragraph "D" is considering a trust for all the family members in one pot...and the limitations again push in the direction of using separate trusts funded with separate retirement accounts for each beneficiary. In this case, that apparently more complicated approach seems to produce definite benefits.

Case #7: Wallace: How to leave benefits to charity through a trust or otherwise

Traditional retirement benefits are a good asset to leave to charity. Other heirs will have to pay income taxes when they draw money out of an inherited retirement plan, but a charity, being income tax exempt, collects the full account tax-free. The $1 million IRA may be worth only $600,000 to your family after taxes, but it's worth $1 million to your favorite tax-exempt charity.

The best way to leave a retirement account to charity is to name the charity as beneficiary on your beneficiary designation form. The account goes directly to the charity no fuss no muss.

If the client has multiple charities to be named as beneficiary, and the client loves to change the identity and/or percentages of the chosen charities, consider naming a Donor Advised Fund (DAF) [see IRC § 4966(d)(2)] as beneficiary of the IRA, then "advising" the DAF that the fund is to be distributed to your list of charities at your death. It's usually easier to change beneficiaries' names and amounts through a DAF account than to revise a beneficiary form....plus the DAF administrator will be much more skilled at and comfortable with getting the funds disbursed to the charities than the charities are likely to be themselves when dealing with the plan administrators.

If the charitable gift is made through a trust, additional complexities arise:

Wallace's Trust: Wallace dies, leaving $10 million of assets, including $4 million of retirement accounts to a trust. The trust provides that the trustee is to distribute $100,000 to each of 10 charities (total $1 million), and to distribute the rest of the assets in three equal shares to Wallace's two children, Wallace Junior and Lucinda, and another charity. Upon Wallace's death, the trustee finds itself holding $4 million of inherited IRAs plus $6 million of other assets, and the need to distribute about $4 million to charities and $3 million to each of the children. The trustee's very first thought is, "Boy it would be nice to use the IRAs to fund those charitable gifts. Can I do that?"

If the trust is drafted to simply say the above, with no special provisions for how the charitable gifts will be paid, guess what: There will be no income tax charitable deduction for paying either the ten $100,000 "pecuniary" charitable gifts or the $3 million charitable "residuary" gift. The trustee could cash out the $4 million of IRAs and be liable for the income tax on that amount, with no charitable deduction to offset the income.

Why not? **There is no DNI deduction for distributions to charity**. A distribution to charity is deductible only if it qualifies for the fiduciary income tax charitable deduction under the stringent rules of Code § 642(c). For full explanation of those rules see and the ideas discussed below see ¶ 7.4 of *Life and Death Planning for Retirement Benefits*.

The easy way out of this problem is to specify IN THE TRUST INSTRUMENT that the charitable gifts must be paid out of the IRAs to the extent possible...then the trust gets its income tax charitable deduction, no problem. See example in PLR 2016-11002. [Note: It is not recommended to use the phrase "income in respect of a decedent" (IRD) when specifying the source of funds for payments to charity. Instead specify the retirement account(s) to be used (by name or by type) (even if part of the money in the account(s) is after-tax money so it may not be "IRD"). Why? Because IRD might be considered a "class of income" and an instruction to fund a charitable bequest with a "class of income" will not be respected for fiduciary income tax deduction purposes unless it has independent "economic effect." Reg. § 1.642(c)-(3)(b)(2); § 1.643(a)-5(b). Even though IRD has never been defined as a "class of income," there is nothing that says it is NOT a "class of income." A retirement account is an asset, not a "class of income."]

But Wallace is deceased so it is now too late to add these words to the trust. The trustee can "fix the problem" with respect to the *residuary* bequests to charity by transferring the IRAs directly to those charities (rather than withdrawing money from the IRA and giving the money to the charity), but (according to the IRS) not with respect to the *pecuniary* bequests: The IRS's position is that transferring the IRA in fulfillment of a pecuniary bequest is treated as a sale of the IRA (which would generate equivalent income at the trust level) and of course there is no DNI deduction for a distribution to charity and no charitable deduction either since these bequests do not meet the requirements of § 642. However, the trustee can shift IRA income to the *residuary* charitable beneficiary by transferring a $3 million inherited IRA to the charity intact. Transfer of an IRA to a residuary beneficiary does not trigger realization of income at the trust level. The charity takes over the IRA and cashes it out tax-free because the charity is income tax-exempt.

Appendix A: The IRS RMD Life Expectancy Tables

Reg. § 1.401(a)(9)-9(b), (c). Effective for 2022 and later years.

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 participants to compute their lifetime required distributions in 2022 and later years, unless the sole beneficiary of the account is the participant's more-than-10-years-younger spouse. This table may not be used: for years prior to 2022; or by beneficiaries of a deceased participant, with two exceptions: [1] in the year of the participant's death if participant died after his RBD; or [2] by the surviving spouse in some cases—see PART 3, #5.

For each Distribution Year, determine: (A) the account balance as of the prior calendar year end; (B) the participant's age at the end of the Distribution Year; 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. For how to apply this table to determine RMDs for the nonspouse designated beneficiary of a pre-2021 decedent, see PART 3, #1(E), of this Outline. If the sole beneficiary is the participant's surviving spouse, the Uniform Lifetime Table may apply instead of this table: see PART 3, #5, regarding which table to use.

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	42.9
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**

See preceding page for how to apply to nonspouse designated beneficiary of a pre-2021 decedent.

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		

APPENDIX B: Charts Summarizing The RMD Rules

Effective January 1, 2025
by Natalie B. Choate, JD

These charts summarize the minimum distribution requirements for beneficiaries of a retirement-account owner ("participant") according to final and proposed IRS regulations issued in July 2024. Reg. § 1.401(a)(9)-1(d). Exceptions and limitations:

- These charts do not apply if participant died before 2020.
- Annuities and collectively bargained retirement plans are not covered in this Outline.
- The rules in these charts are from: final regulations effective 1/1/2025, restating the prior editions of RMD regulations and proposed regulations that would implement changes made by "SECURE 2.0" (2022). For transition rules for years 2021–2024 see PART 3 of this Outline, #1(F).

Charts I-A, I-B, and II summarize the requirements applicable to one beneficiary. For multiple beneficiaries, the payout periods would be the same as for a trust with the same "countable beneficiaries"; see Note following Charts III and IV. These charts apply only to defined contribution (individual account) plans, not defined benefit plans or annuities.

The regulations' 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 [not an official term] in which 100% of the account becomes the RMD, regardless of what the "annual distributions track" was. To advise a beneficiary you'll need to know both the annual distributions requirement and the Outer Limit Year requirement. See 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 distributions (required or otherwise).

To use the charts you need the following information; see PART 3 of this Outline for detail::

1. ***Did the decedent die before or after his required beginning date (RBD)?*** You can NOT figure out any beneficiary's RMDs without knowing whether the decedent died before, or on/after, his RBD with respect to the particular IRA or plan account you are concerned with.

2. ***What category is the beneficiary? Is he/she....***

...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 (NoMoTTYY) beneficiary? See PART 3, #4, of this Outline.

...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) (see Appendix A, "Table 2"). 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*.

You must read the preceding page, as well as notes following each chart, to understand the charts

Chart I-A: RMDs for one individual non-spouse beneficiary or non-designated beneficiary: Participant died before his/her RBD

Beneficiary	**Annual distributions required beginning the year AFTER the year of the participant's death (Note 1)**	**Outer Limit Year (100% distribution required in this year)**
EDB: Minor child of participant	Annual distributions over child's life expectancy (Note 2) unless 10-year rule applies (Notes 3, 4).	Year that contains the 10th anniversary of the earlier of the child's death or the child's 21st birthday. Reg. § 1.401(a)(9)-5(e)(1), (3), (4).
EDB: Disabled or chronically ill individual; or not more than 10 years younger individual	Annual distributions over beneficiary's life expectancy (Note 2) unless 10-year rule applies (Notes 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, or if the 10-year rule applies). Reg. § 1.401(a)(9)-5(e)(1), (3).
Plain old designated beneficiary (PODB)	None. No distributions required in Years 1-9. Reg. § 1.401(a)(9)-3(c)(3).	Year that contains the 10th anniversary of participant's death. Reg. § 1.401(a)(9)-3(c)(3).
Non-DB (i.e., participant's estate, or a trust that does not qualify as a designated beneficiary)	None. No distributions required in Years 1-4 (or 1-5, if participant died in 2015-2019). Reg. § 1.401(a)(9)-3(c)(2).	Year that contains the 5th anniversary of participant's death (or 6th anniversary, if participant died in 2015–2019). Reg. § 1.401(a)(9)-3(c)(2).

Notes to Chart I-A:

1. Reg. § 1.401(a)(9)-5(a)(2)(iii).

2. Life-expectancy RMDs to a non-spouse EDB commence the year after the year of participant's death. Reg. § 1.401(a)(9)-3(c)(4). Life expectancy of a non-spouse EDB is NOT recalculated annually. 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. Reg. § 1.401(a)(9)-3(c)(5)(ii). The retirement plan may permit a participant who has an EDB to elect whether the10-year rule or the life expectancy payout will apply to such EDB. Reg. § 1.401(a)(9)-3(c)(5)(iii). If the 10-year rule applies under such a provision, see "PODB" rather than EDB for payout rules. An EDB who inherits a retirement account from a qualified plan under which he is subject to the 10-year rule (not by electing it himself, but because the plan imposes it) may want to transfer the account to an IRA that permits the life expectancy payout; a non-spouse DB who inherited a qualified retirement plan [e.g. a 401(k) plan] account can have the inherited account transferred directly to an IRA. Reg. § 1.402(c)-2(j)(2)(ii).

4. The retirement plan may permit "some categories of" EDBs to elect to have the 10-year rule apply instead of the life expectancy payout; the deadline for this election for a non-spouse EDB is the closing year of the 10-year rule period. Reg. § 1.401(a)(9)-3(c)(5)(iii). As of such deadline, any such election becomes irrevocable, and will apply to all subsequent beneficiaries [i.e., whoever inherits from this beneficiary, if this beneficiary dies before withdrawing the entire account] and for all subsequent calendar years. If the 10-year rule has been elected under such a provision, see "PODB" rather than EDB for payout rules.

Chart I-B: RMDs for participant's surviving spouse as sole beneficiary: Participant died before his RBD

This chart applies if the participant died before his RBD, and the participant's surviving spouse is the sole designated beneficiary of the decedent's entire account, or of a "separate account" created in accordance with Reg. § 1.401(a)(9)-8 (see PART 6 of this Outline). This Chart also applies to a conduit trust (PART 4, #2) for the surviving spouse's sole life benefit if such trust is the sole beneficiary of the decedent's entire account (or of a separate account thereof). This Chart shows required minimum distributions only; see Note 5 re *spousal rollover/election* option.

This Chart is effective for the surviving spouse-beneficiary of any decedent who reaches, or would have reached, or will reach, his Applicable Age in 2024 or later; see Note 6. The Chart covers two possible "payout periods" for such spouse, the "life expectancy payout deemed elected under 401(a)(9)(B)(iv)" and the "10-year rule."

If the life expectancy payout applies (see PART 3, #5):

When distributions to the spouse must begin	Annual distributions required once distributions begin	Outer Limit Year (100% distribution required in this year)
Year participant would have reached his Applicable Age, or the year after the year of participant's death, whichever is later. Reg. § 1.401(a)(9)-3(c)(4), (d). Deadline for first RMD (surviving spouse's "required commencement date") is Dec. 31 of that year. There is no RMD for the year of the decedent's death. Notes 1, 2.	Annual distributions are determined under the Uniform Lifetime Table, as if spouse were "the employee." Note 3. Life expectancy is recalculated annually.	Year the surviving spouse turns age 120 or, if earlier, year that contains the 10th anniversary of surviving spouse's death. Note 7.

If the 10-year rule applies:

See PART 5(A)(vi), (vii), for how the 10-year rule can apply to the surviving spouse if participant dies before his RBD, and for how the spouse can escape the 10-year rule and get a life expectancy payout instead. See PART 5(E) for "catchup" distributions required in some cases if spouse escapes the 10-year rule by rolling over the inherited account into her own IRA or electing to treat the inherited IRA as her own IRA after reaching her own Applicable Age..

If the 10-year rule does apply to the surviving spouse, then 100% distribution of the account is required in the year that contains the 10th anniversary of the decedent's death. No distributions are required for the year of the decedent's death or in the following years 1-9. Reg. § 1.401(a)(9)-3(c)(3). If the 10-year rule applies, the delayed commencement date that applies when the surviving spouse is taking a life expectancy payout does NOT apply; the 10 years are measured from the year of the

deceased spouse's death, NOT the year he would have reached his Applicable Age. Reg. § 1.401(a)(9)-3(d). If the spouse dies before the end of the 10-year period, it appears her successor beneficiary must complete the payout within the 10-year period that applied to the spouse.

Note 1: The Code generally requires that life expectancy payout to a designated beneficiary, based on the beneficiary's life expectancy must begin the year after the year of the participant's death. § 401(a)(9)(b)(iii). However, for the surviving spouse, there can be a deferred commencement date—RMDs to the surviving spouse begin in the year the deceased spouse would have reached his/her Applicable Age, or the year after the year of participant's death, if later. Reg. § 1.401(a)(9)-3(c). Under the Code, this treatment is elective for the spouse; under the proposed regulations, it is automatic (no election required). § 401(a)(9)(B)(iv); Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(A). This Chart does not cover the possibility that somehow the spouse elects OUT of this treatment.

Note 2: Because in cases of death prior to the Required Beginning Date the first distribution year is no earlier than the year after the participant's death, and because a decedent could die IN the year he reaches his Applicable Age and still die before his RBD, the RBD for the surviving spouse (though generally it is the year decedent would have reached his Applicable Age) is the "later of" that year and the year after the year of the participant's death. If the surviving spouse then dies BEFORE that required commencement date, see Note 4!

Note 3: Life expectancy payments to the surviving spouse are determined using the Uniform Lifetime Table (ULT) (Reg. § 1.401(a)(9)-9(c)) "as if" the surviving spouse were "the employee." The ULT is based on the joint and survivor life expectancy of the "employee" [surviving spouse] and a hypothetical 10-years younger individual. Under the Code, this treatment is elective for the spouse; under the regulations, it is automatic (no election required). § 401(a)(9)(B)(iv); Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(A)

The commencement date for "life expectancy" RMDs to the surviving spouse ("S/S") is "the end of the calendar year in which the employee would have reached" his Applicable Age. If the S/S dies "before distributions have commenced" under the preceding rule see Note 4.

Note 4: The generous payout rules for the surviving spouse have a potential trap: If the surviving spouse dies BEFORE her extended required commencement date, she suddenly is treated as the "participant" and the payout period for her successor beneficiary(ies) is determined using the "death before the RBD" rules. § 401(a)(9)(B)(iv)(III). Thus, for example, if she failed to name a successor beneficiary, and the account defaulted to her estate as beneficiary, the 5-year rule would apply to the spouse's estate. § 401(a)(9)(B)(iv)(II); Reg. § 1.401(a)(9)-4(d).

Note 5: This Chart deals only with required minimum distributions (RMDs). The surviving spouse named as outright beneficiary of a retirement account also has the option to "roll over" distributions to him or her from the decedent's account into the S/S's own retirement account or into an "inherited IRA." Reg. § 1.402(c)-2(j)(1)(i); § 1.408-8(d)(1)(ii), (iii). In the case of an inherited IRA, the spouse has the option to elect to treat the inherited IRA as the spouse's own IRA. Reg. § 1.408-8(c). Following such rollover or election, the S/S's RMDs will be calculated using the

Uniform Lifetime Table with the spouse as "participant." The rollover option does not apply to any distribution to the S/S that is an RMD. Reg. § 1.402(c)-2(c)(2)(ii). (RMDs are not eligible rollover distributions). The rollover/election options are NOT part of the minimum distribution rules; they are separate spousal rights. The right to elect to treat an IRA as the spouse's own IRA applies only if the spouse has the unlimited right to withdraw from the IRA, and cannot apply to a trust (even a conduit trust). Reg. § 1.408-8(c)(1)(ii).

Note 6: The effective date of this payout system will be surprising in some situations because it applies to surviving spouses of participants who died before SECURE 2.0 [or even SECURE itself] was enacted. It applies to the surviving spouse of any decedent who reaches or would have reached his Applicable Age in 2024 or later. Thus, if the participant died in 2018, in the year he attained or would have attained age 64, that means he was born in 1954. His Applicable Age (under laws passed after his death) was 73. He would have attained his Applicable Age in 2027 if he had lived. If the surviving spouse, as sole beneficiary of the decedent's IRA, is still holding the IRA as beneficiary, she will be required to start taking RMDs as beneficiary (using the Uniform Lifetime Table) in 2027.

Note 7: 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 the surviving spouse's remaining SINGLE life expectancy minus one each year. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D). Thus if her death occurs in her age 81 year or later, the payout period for her successor beneficiary(ies) will be less than 10 years.

Chart II: Post-death RMDs to One Beneficiary
Participant Died ON OR AFTER his/her RBD

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 (S/S)	Balance of participant's RMD if not taken by participant (Note 1)	Annual distributions over longer of spouse's "Uniform Table" life expectancy or decedent's ("ghost") life expectancy (Notes 2, 3).	Earlier of year that contains 10th anniversary of S/S's death or final year of S/S's (single) life expectancy (Note 4)
EDB: Minor child of participant	Same–see above	Annual distributions over the longer of the "ghost" life expectancy or the beneficiary's life expectancy (Note 5)	Year that contains the 10th anniversary of the earlier of the EDB's death or the EDB's 21st birthday. Reg. § 1.401(a)(9)-5(e)(3), (4)
EDB: Disabled, Chronically ill, or not more than 10 years younger individual	Same–see above	Annual distributions over the longer of the "ghost" life expectancy or the beneficiary's life expectancy (Note 5)	Earlier of: Year that contains 10th anniversary of EDB's death or final year of the EDB's life expectancy. Reg. § 1.401(a)(9)-5(e)(1), (3)
PODB	Same–see above	Annual distributions over the longer of the "ghost" life expectancy or the beneficiary's life expectancy (Notes 5, 6)	Earlier of: (1) year that contains the 10th anniversary of the participant's death or (2) final year of the beneficiary's life expectancy. (Notes 2, 8)
Non-DB (such as participant's estate)	Same–see above	Annual distributions over ghost life expectancy. Reg. § 1.401(a)(9)-5(d)(1)(iii), (3)(ii).	Final year of ghost life expectancy. Reg. § 1.401(a)(9)-5(d)(1)(iii).

Notes to Chart II:

1. 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 participant's death. 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 excise tax (currently 25%) 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 (or, if later, the last day of the calendar year following that calendar year)." Reg. § 54.4974-1(g)(3).

2. RMDs to the S/S are a "life expectancy payout" using either the Uniform Lifetime Table (annual RMD is based on the joint life expectancy of spouse and a hypothetical beneficiary 10 years younger than spouse) OR the Single Life Table (based on spouse's life expectancy only)—spouse elects which applies, though the plan may have a default choice if spouse fails to elect one or the other; OR, if longer, the participant's life expectancy ("ghost life expectancy"). Reg. § 1.401(a)(9)-5(d)(1)(ii), (g)(3)(i); Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(B), (C). The S/S's life expectancy is recalculated annually, the ghost life expectancy is not, so they might eventually "cross." Reg. § 1.401(a)(9)-5(d)(3)(ii), (iv). 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 the surviving spouse's remaining SINGLE life expectancy minus one each year. Prop. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D). Thus if her death occurs in her age 81 year (the last year life expectancy exceeds 10 years) or later, the payout period for her successor beneficiary(ies) will be less than 10 years.

3. This Chart deals only with required minimum distributions (RMDs). The surviving spouse named as outright beneficiary of a retirement account also has the option to "roll over" distributions to him or her from the decedent's account into the S/S's own retirement account or into an "inherited IRA." Reg. § 1.402(c)-2(j)(1)(i); § 1.408-8(d)(1)(ii), (iii). In the case of an inherited IRA, the spouse has the option to elect to treat the inherited IRA as the spouse's own IRA. Reg. § 1.408-8(c). Following such rollover or election, the S/S's RMDs will be calculated using the Uniform Lifetime Table with the spouse as "participant." The rollover option does not apply to any distribution to the S/S that is an RMD. Reg. § 1.402(c)-2(c)(2)(ii). (RMDs are not eligible rollover distributions). The rollover/election options are NOT part of the minimum distribution rules; they are separate spousal rights. The right to elect to treat an IRA as the spouse's own IRA applies only if the spouse has the unlimited right to withdraw from the IRA, and cannot apply to a trust (even a conduit trust). Reg. § 1.408-8(c)(1)(ii).

4. Reg. § 1.401(a)(9)-5(e)(1), (3).

5. Reg. § 1.401(a)(9)-5(d)(1)(ii). Life-expectancy RMDs to a non-spouse designated beneficiary are required to commence the year after the year of the participant's death. Reg. § 1.401(a)(9)-5(d)(1)(i) (2d sentence); § 1.401(a)(9)-5(a)(3) (2d sentence). Life expectancy of a nonspouse EDB is not recalculated annually. Reg. § 1.401(a)(9)-5(d)(3)(iii).

6. The rule for PODBs in case of participant's death after the RBD is the 10-year rule limit, unless the payout ends earlier under the "longer of" (PODB's or participant'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 participant, the PODB would be an EDB! ("Not more than 10 years younger..."). So for practical purposes, in case of participant'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. If the PODB is over age 81, this will result in the account being fully distributed before the end of the 10-year rule period since the beneficiary's life expectancy would be less than 10 years. If the PODB's life expectancy is more than 10 years, he would take RMDs based on his life expectancy for the first nine years after the participant's death, 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 II does not cover trusts or multiple beneficiary situations, see Chart IV instead.

Chart III: RMDs to a Trust Named as Beneficiary of a Retirement Account If Participant Died BEFORE RBD

SEE NOTE 1 FOLLOWING CHART IV BEFORE USING THIS CHART

Type of trust that inherited the account	Annual distributions required beginning year after Participant's death	Outer Limit Year (100% distribution required in this year)
Trust that does not qualify as a DBT; a Non-DB.	None. Reg. § 1.401(a)(9)-3(c)(2).	Year that contains 5th anniversary of participant's death. Reg. § 1.401(a)(9)-3(c)(2).
Conduit trust for one beneficiary who is a PODB or EDB	Same RMD "deal" as would apply to that PODB or EDB if named directly as beneficiary; see Charts I-A and I-B. Reg. § 1.401(a)(9)-4(f)(3), (6)(i) (Example 1). Note 2.	Same as would apply if that PODB or EDB were named directly as beneficiary (see Chart I). Reg. § 1.401(a)(9)-4(f)(1)(ii), (3)(i)(B), (6)(i) (Example 1). Note 2.
Applicable Multi-Beneficiary Trust (AMBT)	Annual distributions over life expectancy of oldest countable D/CI beneficiary. Reg. § 1.401(a)(9)-5(f)(1)(i), (ii). Note 2.	Year that contains the 10th anniversary of the death of the last D/CI beneficiary of the trust. Reg. § 1.401(a)(9)-5(f)(2)(iii). Note 2.
DBT which has at least one countable minor-child-EDB	Annual distributions over life expectancy of the oldest countable beneficiary of the trust (NOT just the oldest minor-child EDB). Reg. § 1.401(a)(9)-5(f)(1)(i).	10th year after the point at which there is no living minor child-EDB who is under age 21. Reg. § 1.401(a)(9)-5(f)(2)(ii).
DBT which is none of the above, but all countable beneficiaries of which are EDBs	Annual distributions over the life expectancy of the oldest countable beneficiary of the trust. Reg. § 1.401(a)(9)-5(f)(1)(i). Note 2.	Year of 10th anniversary of death of oldest countable beneficiary. Reg. § 1.401(a)(9)-5(e)(1), (3), (f)(2)(i). Note 2.
DBT trust which is none of the above	10-year rule applies; no annual distributions. Reg. § 1.401(a)(9)-3(c)(1), (3), (5)(i)(B).	Year containing 10th anniversary of the participant's death. Reg. § 1.401(a)(9)-5(e)(2).

Chart IV: RMDs to a Trust: if Participant Died AFTER RBD

See Note 3 for all beneficiaries; all notes for this Chart are on next page

Type of trust that inherited the account	Annual distributions required beginning year after Participant's death	Outer Limit Year (100% distribution required in this year)
Trust that does not qualify as a DBT; a Non-DB.	Annual distributions over ghost life expectancy. Reg. § 1.401(a)(9)-5(d)(1)(iii).	Apparently, the final year of ghost life expectancy. Reg. § 1.401(a)(9)-5(d)(1)(iii).
Conduit trust for one beneficiary who is a PODB	Same RMD "deal" as would apply to that PODB if named directly as beneficiary: see Chart II. Reg. § 1.401(a)(9)-5(f)(1)(ii). Note 4.	Same as would apply if PODB were named directly as beneficiary. See Chart II. Reg. § 1.401(a)(9)-5(f)(1)(ii).
Conduit trust for one beneficiary who is an EDB	Same RMD "deal" as would apply to that EDB if named directly as beneficiary: see Chart II. Reg. § 1.401(a)(9)-5(f)(1)(ii).	Same as would apply if that EDB were named directly as beneficiary. See Chart II. Reg. § 1.401(a)(9)-5(f)(1)(ii).
Type II AMBT	Annual distributions over life expectancy of oldest countable D/CI beneficiary (or, if longer, ghost life expectancy). Reg. § 1.401(a)(9)-5(f)(1)(i), (ii).	Year that contains the 10th anniversary of the death of the last D/CI beneficiary of the trust to die. Reg. § 1.401(a)(9)-5(f)(2)(iii).
DBT which has at least one countable minor-child-EDB	Annual distributions over life expectancy of oldest countable trust beneficiary or ghost life expectancy if longer. Reg. § 1.401(a)(9)-5(d)(1)(ii), (f)(1)(i).	10th year after the point at which there is no living minor child-EDB who is under age 21. Reg. § 1.401(a)(9)-5(f)(2)(ii).
DBT which is none of the above, but all countable beneficiaries of which are EDBs	Annual distributions over life expectancy of oldest countable beneficiary of the trust or over ghost life expectancy if longer. Reg. § 1.401(a)(9)-5(d)(1)(ii), (f)(1)(i).	Final year of oldest EDB's life expectancy, or if earlier year that contains 10th anniversary of death of the oldest EDB. Reg. § 1.401(a)(9)-5(e)(1), (3); (f)(2)(i). Note 3.
DBT trust which is none of the above	Annual distributions over life expectancy of oldest countable trust beneficiary or ghost life expectancy if longer. Reg. § 1.401(a)(9)-5(d)(1)(ii), (f)(1)(i). Note 4.	Year that contains the 10th anniversary of the participant's death. Reg. § 1.401(a)(9)-5(e)(2).

NOTES TO CHARTS III and IV

NOTE 1: APPLICABLE TO BOTH CHARTS:

Though these charts apply specifically to trusts, the same RMD rules apply to any retirement account that had multiple designated beneficiaries, even if there is no trust involved. To apply in that situation, just apply the charts as though your multiple DBs were countable beneficiaries of a designated beneficiary trust. Reg. § 1.401(a)(9)-5(f)(1)(i).

Charts III and IV summarize the information provided in PART 5 of this Outline, "DETERMINING THE APPLICABLE DENOMINATOR FOR A TRUST." To use Charts III and IV, you must FIRST determine who are the "countable beneficiaries" of the trust you are testing; see PART 4. You cannot use Charts III and IV for a trust unless you have first read and understood PART 4, "RMD RULES FOR TRUSTS; HOW TO TEST A TRUST." To determine the countable beneficiaries, you will also need to learn along the way the difference between a designated beneficiary trust (DBT) and a trust that does not qualify as a designated beneficiary and the difference between a conduit trust and an accumulation trust. *See PART 4!!!!*

NOTE TO CHART III:

NOTE 2: If the participant died before his RBD, 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 an EDB to elect the 10-year rule instead of life expectancy payout; OR allow the participant to elect that the 10-year rule shall apply to the EDB instead of life expectancy payout. Reg. § 1.401(a)(9)-3(c)(5)(ii), (iii). If the beneficiary is a trust with EDB beneficiary(ies) it is not known whether the trustee or the EDB individual or neither could make the election; the Regulations do not cover this point. For details on this election, see PART 3, #4(C).

NOTES TO CHART IV:

NOTE 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 participant's death. 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 excise tax (currently 25%) 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 (or, if later, the last day of the calendar year following that calendar year)." Reg. § 54.4974-1(g)(3).

NOTE 4: For a PODB and for the successor beneficiary to an EDB [but NOT for the EDB him/herself!], RMDs for the years 2021–2024 may be "skipped" without consequence; see discussion of Notices 2022-53, 2023-54, and 2024-35 at PART 3, #1(F).