



# The SECURE Act

Impact on Estate Planning with Qualified Retirement Plans and IRAs

BY EMILY L. BOWMAN

*This article analyzes the SECURE Act's impact on individuals with qualified retirement plans and IRAs. It focuses on changes related to estate planning.*

---

**T**he Setting Every Community Up for Retirement Enhancement Act of 2019, more commonly known as the SECURE Act (the Act),<sup>1</sup> was signed into law on December 20, 2019. Among other things, the Act aims to make it easier for more people to save for retirement. The Act makes several significant changes to how and when individuals can save for retirement using qualified retirement plans and individual retirement accounts (IRAs) (collectively, retirement

plans). It also drastically limits the timeframes during which retirement plan benefits must be distributed to a participant's beneficiaries.

This article focuses broadly on the Act's most significant changes as relevant to estate planners. The Act's impact on the estate planning profession will be substantial, but because the Act is still in its infancy, unforeseen complexities and complications will inevitably result, and solutions to these issues remain uncertain. This article does not offer the best

solutions to all of the issues that will arise as a result of the Act, nor should it be relied on to answer questions relating to specific situations, given the uncertainties and the wide range of possible circumstances and outcomes. Instead, the article focuses on the changes that have been enacted, the expected impact of those changes on currently established estate planning practices, and some possible alternative estate planning options available to estate planners.

ABBREVIATION KEY	
Act	SECURE Act
DB	Designated beneficiary (either a pre-SECURE Act DB, or post-SECURE Act ODBs and EDBs collectively)
EDB	Eligible designated beneficiary
IRA	Individual retirement account
IRC	Internal Revenue Code
Non-DB	Non-designated beneficiary (a beneficiary that does not qualify as a DB, such as an estate, charity, or non-see-through trust)
ODB	Ordinary DB (a DB that does not qualify as an EDB)
RBD	Required beginning date
Retirement plans	Qualified retirement plans and IRAs
RMD	Required minimum distributions

## Overview of the Act

The Act originated in the House of Representatives, where it passed quickly in the summer of 2019 (H.R. 1994), but thereafter stalled in the Senate and appeared to have been indefinitely delayed and virtually forgotten. In a surprise shift, however, the Act was attached to a critical spending bill in December 2019 that needed to be passed to avoid a government shutdown. The spending bill (and the Act) was quickly approved by the Senate on December 19, 2019 and signed into law by President Trump on December 20, 2019, catching estate planning attorneys and retirement plan participants totally by surprise and leaving them with many unanswered questions about the Act's operation and impact on estate planning. The changes brought by the Act affect not only who clients select as their retirement plan beneficiaries, but also how clients' estate plans (particularly trusts receiving retirement plan benefits) must be drafted going forward.

### RMDs Begin at 72

Before the Act's passage, owners of retirement plans (participants) were required to begin taking their required minimum distributions (RMDs) beginning on April 1 of the calendar year following the year in which the participant turned 70½, known as the required beginning

date (RBD). With more individuals continuing to work longer, retire later, and live longer, and with the progressively increasing need for the country's workforce to individually save for retirement, Congress saw a need to adjust the age at which retirement plan participants were required to start withdrawing minimum distributions. Therefore, the Act adjusted the RBD for participants to age 72.<sup>2</sup>

This change applies to retirement plan participants turning 70½ on or after January 1, 2020. Note that those participants who are under 72 but turned 70½ before January 1, 2020 are still required to continue taking their RMDs (or begin taking RMDs on April 1 of the year after turning 70½), pursuant to the prior laws.

### Traditional IRA Participants May Contribute Beyond 70½

Due to the increasingly vital need for individuals to save for their retirement, coupled with the fact that workers are continuing to work longer and postpone retirement, the SECURE Act eliminates the prior rule that traditional IRA participants could not contribute to their plans after reaching age 70½. Now there is no age limit to participants contributing to traditional IRAs (other qualified retirement plans, such as 401(k)s, did not have a contribution age limit in the first place). Thus, estate planners should

expect to see estate planning clients who have increasingly larger traditional IRAs.

### 10-Year Beneficiary Payouts Limit

By far the SECURE Act's greatest impact on the estate planning profession is the elimination of stretched IRA payouts in most cases. Previously, designated beneficiaries (DBs) of retirement plans, defined as "any individual designated as a beneficiary" by the participant<sup>3</sup> or any see-through trust for such person, could elect to receive their benefits in the form of inherited "stretch" IRAs, through which the retirement plan benefits were paid out to these beneficiaries over the course of their individual life expectancies. The stretch IRA was a widely used and popular estate planning tool because it permitted DBs to defer distributions of taxable income while allowing the benefits to grow tax-free in the retirement account. Now, for retirement plans of participants who die on or after January 1, 2020, the availability of stretch IRAs has been eliminated for all but a specific new category of DBs, as discussed below. (Note that the Act did not affect the rules regarding spousal rollovers, which remain an alternative option for surviving spouse beneficiaries.)

### RMDs

Before the Act, Internal Revenue Code (IRC) § 401(a)(9)(B) and the affiliated Treasury Regulations provided the rules governing retirement plan required minimum distributions (RMDs) following the participant's death. Under this section, there were two categories of retirement plan beneficiaries, DBs and non-designated beneficiaries (non-DBs). A non-DB was anything other than a DB, primarily any entity such as an estate, non-see-through trust, or charity. Under these old rules, if a DB was named on the retirement plan, he or she could elect to stretch the payment of the plan's benefits over his or her life expectancy. Non-DBs, on the other hand, were required to receive all retirement plan proceeds within five years after the participant's death, if the participant's RMDs had not yet begun; or, if the participant's RMDs had begun, over the participant's remaining life expectancy, had he or she been still living.

Significantly, the Act has changed IRC § 401(a)(9) by (1) adding a third class of retirement plan beneficiary, named an “eligible designated beneficiary” (EDB),<sup>4</sup> and (2) modifying the timing within which DBs must receive distributions of retirement plan benefits.

An EDB is a special category of DB that includes any DB who is (1) the surviving spouse of the participant,<sup>5</sup> (2) a child of the participant who has not yet reached majority,<sup>6</sup> (3) a disabled individual,<sup>7</sup> (4) a chronically ill individual,<sup>8</sup> or (5) an individual not described above who is not more than 10 years younger than the participant.<sup>9</sup> Whether a beneficiary qualifies as an EDB is determined as of the participant’s date of death, and, except in the case of a participant’s child who later reaches the age of majority, appears to be irrevocably fixed at such date. Under the Act, EDBs are now the only class of beneficiaries who can still use their life expectancies to stretch the payout of retirement plan benefits over their lifetime.<sup>10</sup>

Because there are now two types of DBs under the Act—EDBs, and all other DBs that do not qualify as EDBs—they must be carefully distinguished because the distinction has significant consequences. Therefore, for purposes of this article, DBs will be referred to either as EDBs or ODBs, meaning all other “ordinary” DBs.

While the Act did not change who or what constitutes a DB and a non-DB, it modified the timing for distributions to DBs depending on whether the DB is an ODB or an EDB. ODBs are no longer eligible for a stretch payout and must receive all retirement plan benefits within 10 years following the participant’s date of death (the 10-year payout).<sup>11</sup> Note that, while the Act does not expressly so provide, estate planning professionals generally believe that the 10-year payout is intended to operate similar to the five-year rule,<sup>12</sup> which preceded the Act, so that all retirement plan benefits must be paid to the beneficiary by December 31 of the tenth year following the participant’s date of death. Thus, the 10-year payout may actually span the course of up to 11 tax years.

Similar to the old five-year rule, the 10-year payout does not require any distributions to be made in years one through nine; it requires

DISTRIBUTION PERIODS FOR RETIREMENT PLAN BENEFICIARIES			
	EDB	ODB	Non-DB
Participant’s RMDs had not begun	EDB’s life expectancy (stretch) <sup>13*</sup>	10-year payout <sup>14</sup>	5-year payout <sup>15</sup>
Participant’s RMDs had begun	EDB’s life expectancy (stretch) <sup>16*</sup>	10-year payout <sup>17*</sup>	Participant’s remaining life expectancy <sup>18</sup>

*\*Subject to anticipated regulatory guidance, as discussed herein.*

only that the retirement plan benefits be distributed in full by the end of the tenth year. This affords the beneficiary some degree of flexibility in determining when and how to receive distributions, depending on need, income, and current and expected future tax brackets. However, in most circumstances, spreading the receipt of income out evenly to have it taxed at lower tax brackets usually produces the best tax results.

The new distribution rules under the Act may be summarized as:

- EDBs must receive their share of retirement plan benefits in annual RMDs over the EDB’s life expectancy (the stretch payout), regardless of whether the participant died before or after his or her RBD. However, there has been some discussion as to whether certain exceptions may apply to this rule, as discussed below.
- ODBs must receive their share of retirement plan benefits via the 10-year payout, regardless of whether the participant died before or after his or her RBD. Again, there has been some discussion as to whether certain exceptions may apply to this rule, as discussed below.
- Non-DBs (estates, charities, and non-see-through trusts) must receive their share of retirement plan benefits via either (1) the five-year payout, if the participant died before his or her RBD; or (2) over the participant’s remaining life expectancy, if the participant died after his or her RBD. These non-DB distribution rules are unchanged from the old rules.

## Open Questions

As expected, some complications and uncertainties have arisen as a result of the Act. The following are notable issues and may require clarification through Treasury Regulations.

- The participant’s children are considered EDBs (and thus eligible for the stretch payout) only so long as they have not reached the age of majority. Upon reaching the age of majority, a child loses EDB status and becomes an ODB, at which point his or her remaining share of the retirement plan benefits must be distributed within 10 years of the date he or she reached majority.<sup>19</sup> However, it is uncertain whether these remaining benefits must be paid exactly 10 years after the child reaches majority, or by December 31 of the tenth year after the child reaches majority. The age at which the minor child reaches “majority” may not always be straightforward, as this appears to depend on state law as well as whether the child is in the process of completing a “specified course of education.”<sup>20</sup> In the latter case, a child may not reach the age of majority until reaching up to 26 years of age.
- If an EDB dies before receiving all of his or her retirement plan benefits, the Act provides that such EDB’s named successor beneficiaries must withdraw the remaining benefits within 10 years of the EDB’s death, rather than over the deceased EDB’s remaining life expectancy. Under this rule, the 10-year payout applies to all successor beneficiaries of the EDB, no matter who or what they are.<sup>21</sup> It appears this would



be true even if the remainder beneficiary were a non-DB who would otherwise be subject to the five-year payout, such as an estate, charity, or non-see-through trust, resulting in an extended payout timeframe for such non-DBs.

- Qualified retirement plans and IRAs of participants who die on or after January 1, 2020 may not be the only retirement plans impacted by the Act. For participants who died before 2020, the Act appears to provide that, if the DB begins taking RMDs based on his or her own life expectancy but dies post-2020 before receiving all of his or her benefits, the DB's successor beneficiaries will be required to withdraw the remaining benefits over the 10-year payout (as opposed to continuing to receive the remaining benefits based on the deceased DB's remaining life expectancy, as under the old rules).<sup>22</sup> This may or may not be a beneficial result, depending on the remaining life expectancy of the deceased DB.
- There has been some discussion among estate planning professionals as to whether the 10-year payout for ODBs and the stretch payout for EDBs are the only payout options available to these beneficiaries. Pre-SECURE Act, certain Treasury Regulations permitted a DB to

elect to have his or her retirement plan benefits paid out as if such DB were a non-DB (i.e., over the five-year payout, if the participant died pre-RBD; or over the participant's remaining life expectancy, if the participant died post-RBD), if this would produce a more favorable payout timeframe for the DB.<sup>23</sup> This might have been applied where the DB was older than the participant or had a life expectancy of less than five years. The intent was to ensure that DBs were never subject to less favorable payout terms than non-DBs. Post-SECURE Act, however, with the seemingly rigid 10-year payout for ODBs and life expectancy payout for EDBs, it is not clear whether these two types of DBs can avail themselves of such non-DB treatment in circumstances where it would be beneficial to do so. Until Treasury guidance is issued to resolve this uncertainty, the conservative approach would be to assume that no such option is available.

#### The Act's Impact on Trusts

Trusts remain a popular and useful estate planning tool for a variety of circumstances—for example, when clients want to ensure that their beneficiaries receive their inheritance over an extended period of time and are not given the

opportunity to take (and potentially squander) their inheritance in one lump sum. (Potential beneficiaries who often fit this description include those who are young, spendthrifts, disabled, or struggle with substance abuse.) As retirement plans continue to represent a growing portion of clients' estates, trusts have been increasingly designated as beneficiaries of the retirement plans to preserve the benefits and prevent individual beneficiaries from receiving their share of retirement plans too quickly. However, trusts that are designated as retirement plan beneficiaries require specific and careful drafting. Without proper drafting, these trusts may be required to withdraw and/or distribute retirement plan benefits much more rapidly than the client intended.

There are two general categories of trusts for purposes of receiving retirement benefits, "see-through" and "non-see-through." The Act's impact on the operation of each of these trusts is discussed below.

#### See-Through Trusts

A trust cannot attain DB status unless it qualifies as "see-through." While an in-depth analysis of how a trust qualifies as see-through is beyond the scope of this article, in general terms, a trust is see-through if (1) it is valid under state law, (2) it is irrevocable as of the participant's date of death, (3) the trustee provides certain



FEWER THAN 1 IN 5  
CANDIDATES BECOME  
CFA® CHARTERHOLDERS.  
DOES YOUR INVESTMENT  
ADVISER MEASURE UP?

Find one at [cfacolorado.org](http://cfacolorado.org)

 CFA Society  
Colorado  
LET'S MEASURE UP™

© 2020 CFA Institute. All rights reserved.

documentation to the plan's administrator by October 31 of the year following the participant's date of death, and (4) the trust beneficiaries—all of whom must be “individuals” within the meaning of the IRC—are identifiable from the trust instrument.<sup>24</sup> By qualifying as see-through and gaining DB status, the see-through trust avoids being subject to the restrictive five-year/participant life expectancy payout that would otherwise apply to trusts that do not qualify as see-through and are therefore non-DBs.

There are two types of see-through trusts, conduit trusts and accumulation trusts. In general terms, conduit trusts are structured such that all retirement plan distributions (including RMDs) that are paid to the trust must be distributed immediately and in full to the trust's beneficiaries. No retirement plan benefits may be held in the trust, and the proceeds are taxed as ordinary income to the beneficiaries. When structured as a trust for an individual beneficiary, the conduit trust is guaranteed see-through status. (While conduit trusts for multiple beneficiaries are also presumed to qualify as see-through, there is little IRS authority on this point and see-through status is therefore less certain.)

In contrast to conduit trusts, accumulation trusts are not required to immediately distribute all retirement plan distributions received to the beneficiaries and can instead “accumulate” the proceeds in trust. To the extent the proceeds are not distributed in full to the trust's beneficiaries, they are taxed to the trust at its compressed income tax rates. However, not all accumulation trusts qualify as see-through. To qualify as see-through, all primary and “countable” remainder beneficiaries of the accumulation trust must be identifiable individuals. If any beneficiaries do not so qualify, the trust fails to be see-through.<sup>25</sup> For purposes of this article, references to “accumulation trusts” are generally to those accumulation trusts qualifying as see-through.

#### *Operation Before the Act*

The primary advantage of using see-through trusts is the ability to hold retirement plan benefits in trust to protect against the beneficiary accessing the benefits too quickly, while also

having RMDs gradually distributed to the trust over the beneficiary's life expectancy. This maximizes tax-free growth in the account and minimizes the income tax burden on the trust or its beneficiaries. Before the Act, when a trust qualified as see-through and attained DB status, the measuring life for purposes of

“  
Now, in general,  
unless all  
countable  
beneficiaries of  
the see-through  
trust would  
individually  
qualify as EDBs,  
retirement plan  
benefits must be  
paid to the trust  
in full within 10  
years following  
the participant's  
date of death.”

calculating the retirement plan's RMDs was that of the trust's beneficiaries. Essentially, the IRS would disregard the trust and “see through” to its individual beneficiaries. Whether the trust was a conduit or accumulation trust, and whether such trust was structured as a “pot trust” (one trust for multiple beneficiaries)

or a single-beneficiary trust dictated which measuring life to use for purposes of determining the applicable distribution period for RMDs:

- For conduit trusts for one beneficiary, the measuring life was that beneficiary.
- For conduit trusts for multiple beneficiaries, the measuring life was the beneficiary with the shortest life expectancy.
- For accumulation trusts, the measuring life was the beneficiary (whether primary or countable remainder) with the shortest life expectancy.

#### *The Act's Impact*

While the Act has not changed the requirements for a trust to qualify as see-through, it has significantly impacted the see-through trust's utility. Now, in general, unless all countable beneficiaries of the see-through trust would individually qualify as EDBs, retirement plan benefits must be paid to the trust in full within 10 years following the participant's date of death. While this change will affect both conduit and accumulation trusts, the change is expected to most significantly impact the use of conduit trusts, particularly when structured for the benefit of younger beneficiaries.

#### **Conduit Trusts**

The operation and utility of conduit trusts will vary greatly post-SECURE Act, depending in large part on (1) whether the conduit trust's beneficiary is an EDB or an ODB, and (2) whether it is a single-beneficiary conduit trust or a conduit pot trust.

Now, a conduit trust for an ODB must both withdraw all retirement plan proceeds *and* distribute all such proceeds to the ODB within 10 years of the participant's death. This is an extreme deviation from the operation of conduit trusts before the Act, when retirement plan benefits were withdrawn and distributed to the trust beneficiary over the course of his or her life expectancy (or, in the case of pre-Act conduit pot trusts, over the life expectancy of the oldest beneficiary). Though the trustee of a conduit trust post-Act may retain some discretion as to when and how much of the retirement plan benefits to draw from the plan and pay to the beneficiary over the 10-year period, depending

on the terms of the trust instrument (e.g., no distributions in years one through eight; one-half of the retirement account in year nine; and the remainder in year 10), the unavoidable result is that all of the trust's beneficiaries must receive all retirement plan proceeds within 10 years. Not only will most conduit trust beneficiaries now receive larger sums of money more quickly, which may push them into higher tax brackets, but they will also be burdened with increased income tax liability upon these distributions. This will undoubtedly be an unacceptable result for many clients, as historically one of the primary reasons clients used conduit trusts was to ensure their retirement plan benefits were paid out gradually over their beneficiaries' lifetimes.

But conduit trusts for most EDBs are expected to remain a useful estate planning tool. Because an EDB can still use his or her life expectancy to calculate RMDs, a conduit trust for the benefit of a single EDB should generally continue to operate in the same fashion as before the Act, with annual RMDs withdrawn and distributed to the trust beneficiary gradually over the course of his or her life. For EDBs who are participants' minor children, however, the conduit trust will be far less advantageous, because the EDB stretch payout will be replaced by the 10-year payout as soon as these children reach the age of majority. While conduit trusts for the benefit of a single EDB are expected to generally remain popular, the operation and viability of conduit trusts for multiple EDBs is far less certain under the Act.

Various factors must be weighed carefully in determining whether a conduit trust is the appropriate estate planning vehicle:

- If the conduit trust's EDB is the participant's minor child, the life expectancy payout can only be used until such beneficiary reaches majority, which may not always be age 18. After this point, the beneficiary becomes an ODB and the 10-year payout applies. Practically speaking, this would mean that a conduit trust established for a minor EDB must pay all retirement plan benefits to the beneficiary by the time he or she reaches age 28, assuming age of majority is 18 and the education exception does not apply.

- Many questions exist about how a conduit pot trust for multiple beneficiaries will operate under the Act. Assuming a conduit pot trust remains viable under the Act, which is not yet certain:

- ▷ For a conduit pot trust for the benefit of either (1) all ODBs, or (2) a combination of EDBs and ODBs, it appears there is no longer a need to determine which of the beneficiaries has the shortest life expectancy, as the 10-year payout is expected to apply regardless.
- ▷ While conduit pot trusts for multiple EDBs appear to remain possible under the Act, there are many uncertainties. Is the measuring life for purposes of calculating the life expectancy payout the oldest beneficiary? The youngest? What happens when one of the EDBs is a participant's child and reaches the age of majority; does the 10-year payout apply at that point, or does the life expectancy payout continue because the other trust beneficiaries remain EDBs? Would this determination depend on whether that child's life expectancy was the life expectancy used to calculate the RMDs?
- ▷ When the conduit trust is structured as a pot trust for multiple minor children EDBs, many estate planning professionals believe (but are not yet certain) that the "switch" from EDB to ODB status for payout purposes will likely occur when the first child reaches the age of majority and becomes an ODB, at which point the 10-year payout is expected to apply to all of the trust's beneficiaries, regardless of whether they are still minors.
- ▷ Due to the uncertainties surrounding the operation of conduit trusts for multiple beneficiaries, if the stretch payout is of primary importance to the client (for example, in the case of a conduit trust for the benefit of a surviving spouse), it would be best practice to establish separate single-beneficiary conduit trusts for each EDB to ensure that each receives

retirement plan benefits individually over their respective life expectancies.

### **Accumulation Trusts**

The Act also significantly impacts accumulation trusts, but perhaps to a lesser degree. Now, for most accumulation trusts, all retirement plan benefits must be distributed to the trust within 10 years of the participant's death. The trust, however, is not required to distribute those proceeds to the trust's beneficiaries over the same 10-year period. Instead, the terms of the trust can still control the payout period, method, and restrictions. Thus, while the SECURE Act requires retirement plan benefits to be paid to an accumulation trust more rapidly (thereby resulting in increased income taxes to the trust at a potentially higher tax bracket, unless all benefits are immediately distributed to the trust beneficiaries), it does not change the accumulation trust's ability to hold the retirement benefits in trust and ensure that the benefits are not distributed to its beneficiaries too quickly. For this reason, the accumulation trust may become a more popular estate planning tool, replacing the conduit trust for many clients.

Accumulation trusts for EDBs with life expectancy stretch payouts appear to remain theoretically possible under the Act. In practice, however, with the exception of the "applicable multi-beneficiary trust" (discussed below), it will be virtually impossible to qualify an accumulation trust for an EDB's life expectancy payout, because presumably all primary *and* countable remainder beneficiaries of the trust would have to individually qualify as EDBs to avoid application of the flat 10-year payout. Even in such cases, the life expectancy of the oldest EDB would likely be used to calculate RMDs for all beneficiaries, as was the case pre-SECURE Act.

Again, various factors must be considered in determining whether an accumulation trust is an appropriate estate planning vehicle for the client's circumstances:

- Generally, accumulation trusts require more extensive and careful drafting by the estate planning attorney to ensure the trust qualifies as see-through and avoids the five-year payout. Specifically,

both primary and countable remainder beneficiaries must all qualify as DBs (whether ODBs or EDBs). Extra care must be taken to ensure that no part of the retirement plan benefits can be paid to an estate, charity, or non-see-through trust, whether by power of appointment or some other method.<sup>26</sup>

- For most accumulation trusts, as long as at least one of the primary or countable remainder beneficiaries is an ODB, it appears it should no longer be necessary to determine the trust beneficiary with the shortest life expectancy, as the 10-year payout will apply regardless.
- Due to the relative difficulty in drafting an accumulation trust, there is an increased likelihood that the trust will not qualify as see-through (usually because at least one potential remainder beneficiary is a non-DB). If the accumulation trust fails to qualify as see-through, it would have to withdraw the retirement plan benefits based on the five-year payout (if the participant died before his or her RBD), or over the remaining life expectancy of the participant (if the participant died after his or her RBD).

While virtually all see-through accumulation trusts will be subject to the flat 10-year payout going forward, the Act has carved out an important exception for the “applicable multi-beneficiary trust.” This is a new type of trust defined under the Act as a trust for two or more beneficiaries, all of whom must be DBs and at least one of whom must be a disabled or chronically ill EDB.<sup>27</sup>

- If an applicable multi-beneficiary trust is structured such that no individual (other than the disabled or chronically ill EDB(s) of the trust) has any right to the participant’s interest in the retirement plan until the death of all such EDBs, the EDB(s) can use the life expectancy payout during their life. Following the death of such EDBs, the remaining retirement plan benefits must be paid out to the remainder ODBs via the 10-year payout.<sup>28</sup> Note that it is not yet clear which EDB’s life expectancy would be used to calculate

the stretch payout where an applicable multi-beneficiary trust is established for the benefit of two or more disabled or chronically ill EDBs.

- If the terms of an applicable multi-beneficiary trust provide that such trust be divided immediately upon the death of the participant into separate trusts for each beneficiary, the EDBs may use their individual life expectancies to receive stretch payouts of their separate trusts, while ODBs will be subject to the 10-year payout for their separate trusts.<sup>29</sup> This is a notable exception to the general rule that if a single trust is named as the DB of a retirement plan and subsequently divides into sub-trusts following the participant’s death, the individual life expectancies of each sub-trust’s beneficiary cannot be used for purposes of determining distribution periods, and instead a single distribution period is applied to all of the sub-trusts.

### Non-See-Through Trusts

The Act did not change the payout rules for non-see-through trusts. As with any other non-DB, a non-see-through trust must receive all retirement plan distributions either (1) within five years following the participant’s death (if the participant died before the RBD), or (2) over the remaining life expectancy of the participant (if the participant died after the RBD). What the Act has changed, however, is the relative utility of see-through trusts as opposed to non-see-through trusts. Because the Act has limited the time period in which ODBs must receive all retirement plan benefits to 10 years following the participant’s death, see-through trusts for the benefit of individuals who would individually qualify as ODBs likewise must receive all retirement plan proceeds within the same 10-year period.

For clients with smaller retirement plans who want their retirement plan benefits to be held in trust after their death, it may become more common to have such benefits pass to ordinary non-see-through trusts instead of see-through trusts. While the five-year payout remains less desirable than the new 10-year

payout that would result for most see-through trusts, this five-year difference may not be significant enough for clients with smaller retirement plans to justify an estate planning attorney’s fee for drafting a see-through trust that complies with the Act’s new rules.

Further, where the retirement plan participant died after his or her RBD, the non-see-through trust may present a more beneficial payout option than the see-through trust. Whereas ODBs (and see-through trusts for ODBs) apparently must use the 10-year payout under such circumstances, non-DBs (including non-see-through trusts) may be subject to a payout period that is longer than 10 years, if the participant died shortly after reaching age 72 and has a life expectancy of more than 10 years.

### General Estate Planning Considerations Post-Act

The Act has brought many changes for both existing and future estate plans. Clients with retirement plans of significant value should have their estate plans and beneficiary designations reviewed and revised appropriately. Clients with existing estate plans having retirement plan benefits paid into trust will require extra attention. Perhaps the most critical assessments are needed for estate plans that have arranged to have conduit trusts receive retirement plan distributions at the participant’s death for the benefit of beneficiaries who would individually qualify as ODBs and not EDBs. Many clients likely established conduit trusts with the understanding that the beneficiaries of these trusts would gradually receive the retirement plan benefits over the course of their lifetimes. With this possibility now gone, these conduit trusts are required to pay out all retirement plan benefits over 10 years, which will be an unacceptable outcome for many clients.

For those select clients who wish to keep their conduit trusts intact, at a minimum, revisions to the trust’s language may be required. For example, language in existing conduit trust documents may state that only RMDs from the retirement plan can be distributed to the trust’s beneficiaries. However, if the conduit trust is for the benefit of an ODB who would now be subject to the 10-year payout, technically the



only *required* distribution is the participant's entire interest in the retirement plan at the end of the tenth year following the participant's death. Failure to revise the language of such an existing trust document could result in the trust beneficiary having to receive one lump sum payment of all the retirement benefits in year ten.

One option would be to change the conduit trust to an accumulation trust, in which case the retirement plan benefits would still have to be paid in full to the trust within 10 years, but would not have to be paid to the trust's beneficiaries during this timeframe. While the 10-year payout to the trust may result in higher income taxes than before the Act, this may be a preferred alternative for clients who want their individual beneficiaries (often their children) to receive their entire share of retirement plan benefits over a more extended period of time.

Another option for charitably inclined clients would be to designate a testamentary charitable remainder trust as the beneficiary on the client's retirement plan. By this method, the entire retirement account could be immediately paid to the charitable remainder trust tax-free, an income stream from the reinvested proceeds could be paid to the client's named beneficiaries over a period of greater than 10 years (which would be taxable income to such beneficiaries), and the remaining proceeds would be paid to a charity of the client's choice. While this option permits payments to the lifetime beneficiaries to exceed the 10-year payout that would likely otherwise result, such beneficiaries may receive less than they otherwise would if they were the expressly named DBs on the retirement plan, because the remainder of the retirement plan benefits must ultimately be paid to a charitable entity. The reduction in the amount of payments to the non-charitable beneficiaries will ultimately depend on the value of the remainder interest to the charity.

Yet another option is for eligible individuals to convert their traditional IRAs to Roth IRAs during their lifetimes. Distributions from Roth IRAs are tax-free, so this option is anticipated to be of greater interest going forward. Making this conversion would not prevent the retirement

plan benefits from being paid out to beneficiaries at a different rate than that required by the Act but would allow beneficiaries to avoid paying income taxes at the accelerated rate that would otherwise be associated with the new payout rules. This option, however, may only be viable for clients who are both (1) in a lower income tax bracket than their beneficiaries, and (2) able and willing to foot the bill for the income tax owed at the time of the conversion.

## Conclusion

The SECURE Act will undoubtedly have a far-reaching impact on estate planning for indi-

viduals with significant retirement plan assets. Clients' estate plans, especially those using conduit trusts to pass retirement benefits to younger beneficiaries, will need to be reviewed and appropriately revised as soon as possible. As time passes, and with anticipated clarifying Treasury Regulations, estate planners will develop a range of solutions to suit each client's individual needs within this new estate planning landscape. In the meantime, conservative estate plan revisions that maximize built-in flexibility, coupled with trial-and-error drafting aimed at addressing the various possible outcomes, will be the name of the game. <sup>CL</sup>



**Emily L. Bowman** is a partner with Kirch Rounds Bowman & Deffenbaugh PC in Aurora. Her practice focuses on estate planning, estate administration, elder law, tax planning, conservatorships, and guardianships—ebowman@dwkpc.net.

**Coordinating Editors:** David W. Kirch, dkirch@dwkpc.net; Emily Bowman, ebowman@dwkpc.net

## NOTES

1. Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. 116-94.
2. IRC § 401(a)(9)(C)(i)(I).
3. IRC § 401(a)(9)(E) (pre-SECURE Act); IRC § 401(a)(9)(E)(i) (current law).
4. IRC § 401(a)(9)(E)(ii).
5. IRC § 401(a)(9)(E)(ii)(I).
6. IRC § 401(a)(9)(E)(ii)(II).
7. IRC § 401(a)(9)(E)(ii)(III). "Disabled" is determined within the meaning of IRC § 72(m)(7) ("an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary [of the Treasury] may require.").
8. IRC § 401(a)(9)(E)(ii)(IV). "Chronically ill" is determined within the meaning of IRC § 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)."
9. IRC § 401(a)(9)(E)(ii)(V).
10. IRC § 401(a)(9)(H)(iii).
11. IRC § 401(a)(9)(H)(i).
12. See 26 CFR § 1.401(a)(9)-3, A-2.
13. IRC § 401(a)(9)(H)(ii).
14. IRC § 401(a)(9)(H)(i).
15. IRC § 401(a)(9)(B)(ii).
16. IRC § 401(a)(9)(H)(ii).
17. IRC § 401(a)(9)(H)(i).
18. IRC § 401(a)(9)(B)(i).
19. IRC § 401(a)(9)(E)(iii).
20. See 26 CFR § 1.401(a)(9)-6, A-15.
21. IRC § 401(a)(9)(H)(iii).
22. See § 401(b)(5) of the SECURE Act (Further Consolidated Appropriations Act, 2020, Division O, Title IV).
23. See, e.g., 26 CFR § 1.401(a)(9)-3, A-4(c).
24. For a more complete analysis as to what constitutes a see-through trust, see Bowman and Kirch, "Avoiding Pitfalls for Minor Beneficiaries of IRAs and Other Qualified Retirement Benefits," 46 *Colo. Law.* 46 (Oct. 2017).
25. Perhaps the most uncertain and complicated issue in this analysis is determining which remainder beneficiaries are "countable" and which are disregarded as "mere potential successors." Before drafting see-through trusts for retirement benefits, practitioners are strongly encouraged to review Choate, *Life and Death Planning for Retirement Benefits: The Essential Handbook for Estate Planners* (8th ed. Ataxplan Publications 2019).
26. For a more complete analysis of all the ways an accumulation trust could fail to qualify as see-through, see *id.*
27. IRC § 401(a)(9)(H)(v).
28. IRC § 401(a)(9)(H)(iv).
29. *Id.*