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Personal Financial Planning Section

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TRADITIONAL IRA RMD FLOWCHART

For Deaths __After__ Effective Date of SECURE Act

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Is the IRA owner living?

Yes → Is the spouse the sole primary beneficiary?
- No → Calculate using Uniform Lifetime Table
- Yes → Is the spouse more than 10 years younger than IRA owner?
  - No → Calculate using Uniform Lifetime Table
  - Yes → Calculate using Joint and Last Survivor Table

No. What is the named beneficiary?

Trust
- Is the trust a designated beneficiary? See Treas. Reg. Sec. 1.401(a)(9)-4, Q&A 5
  - No → Did owner die before RBD? (see Estate or Charity)
  - Yes → Is the beneficiary of the trust a disabled or chronically ill person?
    - No → **10-Year Rule**
    - Yes → Beneficiary's life expectancy using the Single Life Table

Estate or Charity
- Did owner die before RBD?
  - Yes → **5-Year Rule**
  - No → **Ghost Life Expectancy Rule** RMDs based on Single Life Table

Spouse
- Does spouse transfer IRA to own IRA or treat as inherited IRA?
  - Transfer to own IRA → Take RMD, if applicable, then go to step one treating survivor as new owner.
  - Treat as Inherited IRA → Beneficiary's life expectancy using the Single Life Table

Non-Spouse Individuals
- Is the beneficiary disabled, chronically ill, not more than 10-years younger than the IRA owner, or a minor child?
  - No → **10-Year Rule**
  - Yes → Is the beneficiary a minor child of the IRA owner?
    - Yes → Distributions based on child's life expectancy until the child reaches the age of majority (or dies) at which time the 10-year rule applies
    - No → Beneficiary's life expectancy using the Single Life Table

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Inherited Spousal Beneficiary

Owner Dies ***Before*** RBD	Spouse may defer RMDs until the year the IRA owner would have reached age 70.5**. Thereafter, RMDs are calculated based upon spouse's life expectancy by referencing her attained age for the year of distribution under the Single Life Table. For each succeeding year, this process is repeated. (RECALC'D)
Owner Dies ***After*** RBD	RMD for year of death must be taken based upon IRA owner's life expectancy factor under the Uniform Lifetime Table if not taken during life. Thereafter, the applicable distribution period is the longer of: (1) the surviving spouse's life expectancy based on the Single Life Table using the surviving spouse's birthday for each distribution calendar year after the calendar year of the IRA owner's death up through the calendar year of the spouse's death. (RECALC'D); or (2) the life expectancy of the deceased spouse under the Single Life Table using the age of the deceased spouse as of his or her birthday in the year of death. In subsequent years, this initial factor is reduced by one.

Non-Designated Beneficiary

Death ***Before*** RBD	Entire balance must be distributed no later than December 31st of the fifth anniversary year of the decedent's death..
Death ***After*** RBD	RMD must be taken for year of decedent's death based upon decedent's age in year of death using the Uniform Lifetime Table if not taken during owner's life. For the year after the year of death, determine factor by referencing the owner's age in year of death and reduce by one. This factor is reduced by one for each succeeding year.

UNIFORM LIFETIME TABLE*

Attained Age in year of distribution	Divisor	Attained Age in year of distribution	Divisor
70	27.4	93	9.6
71	26.5	94	9.1
72	25.6	95	8.6
73	24.7	96	8.1
74	23.8	97	7.6
75	22.9	98	7.1
76	22.0	99	6.7
77	21.2	100	6.3
78	20.3	101	5.9
79	19.5	102	5.5
80	18.7	103	5.2
81	17.9	104	4.9
82	17.1	105	4.5
83	16.3	106	4.2
84	15.5	107	3.9
85	14.8	108	3.7
86	14.1	109	3.4
87	13.4	110	3.1
88	12.7	111	2.9
89	12.0	112	2.6
90	11.4	113	2.4
91	10.8	114	2.1
92	10.2	115 and older	1.9

Single Life Table*

Age	Divisor	Age	Divisor	Age	Divisor
0	82.4	37	46.5	74	14.1
1	81.6	38	45.6	75	13.4
2	80.6	39	44.6	76	12.7
3	79.7	40	43.6	77	12.1
4	78.7	41	42.7	78	11.4
5	77.7	42	41.7	79	10.8
6	76.7	43	40.7	80	10.2
7	75.8	44	39.8	81	9.7
8	74.8	45	38.8	82	9.1
9	73.8	46	37.9	83	8.6
10	72.8	47	37.0	84	8.1
11	71.8	48	36.0	85	7.6
12	70.8	49	35.1	86	7.1
13	69.9	50	34.2	87	6.7
14	68.9	51	33.3	88	6.3
15	67.9	52	32.3	89	5.9
16	66.9	53	31.4	90	5.5
17	66.0	54	30.5	91	5.2
18	65.0	55	29.6	92	4.9
19	64.0	56	28.7	93	4.6
20	63.4	57	27.9	94	4.3
21	62.1	58	27.0	95	4.1
22	61.1	59	26.1	96	3.8
23	60.1	60	25.2	97	3.6
24	59.1	61	24.4	98	3.4
25	58.2	62	23.5	99	3.1
26	57.2	63	22.7	100	2.9
27	56.2	64	21.8	101	2.7
28	55.3	65	21.0	102	2.5
29	54.3	66	20.2	103	2.3
30	53.3	67	19.4	104	2.1
31	52.4	68	18.6	105	1.9
32	51.4	69	17.8	106	1.7
33	50.4	70	17.0	107	1.5
34	49.4	71	16.3	108	1.4
35	48.5	72	15.5	109	1.2
36	47.5	73	14.8	110	1.1
				111	1.0

****Note:** these tables are scheduled to change after 2020.*

*****Note:** Although the SECURE Act changed the required beginning date to age 72, Reg. § 1.401(a)(9)-3, Q&A 3(b) still specifically references age 70.5 as the date that distributions must begin for spousal beneficiaries who do not perform a rollover. It is likely that the 70.5 date will be changed to 72 when the IRS issues further guidance.*

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KEY SECURE ACT PROVISIONS AND EFFECTIVE DATES*

Provisions	Description	Effective Dates
Division M: Bipartisan American Miners Act Reduction in minimum age for allowable in-service distributions (Section 104)	Moves the voluntary in-service distribution age under IRC Section 401(a)(36) for defined benefit plans and 457(b) plans from age 62 to age 59 1/2.	Plan years beginning after Dec. 31, 2019
Division O: SECURE Act **Title 1: Expanding and Preserving Retirement Savings**		
Multiple Employer Plans / Pooled Employer Plans (Section 101)	Allows two or more unrelated employers to join a pooled employer plan. The one bad apple rule is eliminated with further guidance forthcoming. Designated pooled plan provider must be a named fiduciary, be responsible as the ERISA Section 3(16) plan administrator, must register with the DOL/IRS, with the ERISA bond limits increased to $1 million. Each adopting employer maintains responsibility for selection and monitoring of the pooled plan provider or any other named fiduciary. IRS and DOL have the authority to audit the pooled plan provider for Code and ERISA compliance.	Plan years beginning after Dec. 31, 2020
Increase in 10% cap for automatic enrollment safe harbor after 1st plan year (Section 102)	Modifies the automatic enrollment safe harbor to raise the automatic escalation cap from 10% of pay to 15% of pay.	Plan years beginning after Dec. 31, 2019
Rules relating to election of safe harbor 401(k) status (Section 103)	The safe harbor notice requirement for nonelective contirbutions is eliminated, but maintains the requirement to allow employees to make or change an election at least once per year. The bill also permits plan sponsors to switch to a safe harbor 401(k) plan with nonelective contributions at any time before the 30th day before the close of the plan year. Amendments after that time would be allowed if the amendment provides (1) a nonelective contribution of at least 4% of compensation (rather than at least 3%) for all eligible employees for that plan year, and (2) the plan is amended no later than the last day for distributing excess contributions for the plan year, that is, by the close of following plan year.	Plan years beginning after Dec. 31, 2019
Increase credit limitation for small employer pension plan startup costs (Section 104)	Increases the credit by changing the calculation of the flat dollar amount limit on the credit to the greater of: (1) $500, or (2) the lesser of: (a) $250 for each employee of the eligible employer who is not a highly compensated employee and who is eligible to participate in the eligible employer plan maintained by the eligible employer, or (b) $5,000. The credit applies for up to three years.	Tax years beginning after Dec. 31, 2019

Small employer automatic enrollment credit (Section 105)	Creates a new tax credit of up to $500 per year to employers to defray startup costs for new 401(k) plans and SIMPLE IRA plans that include automatic enrollment. The credit is in addition to the plan start-up credit allowed under present law and would be available for three years. The credit would also be available to employers that convert an existing plan to an automatic enrollment design.	Tax years beginning after Dec. 31, 2019
Certain taxable non-tuition fellowship and stipend payments treated as compensation for IRA purposes (Section 106)	Stipends and non-tuition fellowship payments received by graduate and postdoctoral students are not treated as compensation and cannot be used as the basis for IRA contributions. This provision removes this obstacle by taking such amounts that are includible in income into account for IRA contribution purposes.	Tax years beginning after Dec. 31, 2019
Repeal of maximum age for traditional IRA contributions (Section 107)	Repeals the prohibition on contributions to a traditional IRA by an individual who has attained age 70½.	Contributions and distributions made for tax years after Dec. 31, 2019
Qualified plans prohibited from making loans through credit cards and similar arrangements (Section 108)	Prohibits the distribution of plan loans through credit cards or similar arrangements.	Applies to loans made after date of enactment
Portability of lifetime income options (Section 109)	Permits qualified DC plans, 403(b) plans or governmental 457(b) plans to make a direct trustee-to-trustee transfer to another employer-sponsored retirement plan or IRA of lifetime income investments or distributions of a lifetime income investment in the form of a qualified plan distribution annuity, if a lifetime income investment is no longer authorized to be held as an investment option under the plan.	Plan years beginning after Dec. 31, 2019
Treatment of custodial accounts on termination of section 403(b) plans (Section 110)	Under the provision, not later than six months after the date of enactment, Treasury will issue guidance under which if an employer terminates a 403(b) custodial account, the distribution needed to effectuate the plan termination may be the distribution of an individual custodial account in kind to a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to the 403(b) rules in effect at the time that the individual custodial account is distributed. The Treasury guidance shall be retroactively effective for taxable years beginning after Dec. 31, 2008.	Treasury to issues guidance no later than 6 months after enactment
Clarification of retirement income account rules relating to church-controlled organizations (Section 111)	Clarifies individuals that may be covered by plans maintained by church-controlled organizations. Covered individuals include duly ordained, commissioned, or licensed ministers, regardless of the source of compensation; employees of a tax-exempt organization, controlled by or associated with a church or a convention or association of churches; and certain employees after separation from service with a church, a convention or association of churches, or an organization described above.	Applies to years beginning before, on or after enactment

Qualified cash or deferred arrangements must allow long-term, part-time employees to participate (Section 112)	Under current law, employers generally may exclude part-time employees (employees who work less than 1,000 hours per year) when providing a defined contribution plan to their employees. Except in the case of collectively bargained plans, the bill will require employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (with the 1,000-hour rule) or three consecutive years of service where the employee completes more than 500 hours of service. In the case of employees who are eligible solely by reason of the latter new rule, the employer may elect to exclude such employees from testing under the nondiscrimination and coverage rules, and from the application of the top-heavy rules.	Applies to plan years beginning after Dec. 31, 2020; 12-month periods beginning before Jan. 1, 2021 shall not be taken into account
Penalty-free withdrawals for individuals in case of birth or adoption (Section 113)	This provision creates a new waiver from the IRC Section 72(t) additional income tax on retirement plan distributions used for childbirth or adoption expenses up to $5,000.	Distributions made after Dec. 31, 2019
Increase in age for required minimum distributions (Section 114)	Under current law, participants are generally required to begin taking distributions from their retirement plan at age 70½. The policy behind this rule is to ensure that individuals spend their retirement savings during their lifetime and not use their retirement plans for estate planning purposes to transfer wealth to beneficiaries. However, the age 70½ was first applied in the retirement plan context in the early 1960s and has never been adjusted to take into account increases in life expectancy. The provision increases the required minimum distribution age from 70½ to 72.	Distributions made after Dec. 31, 2019, for individuals who attain age 70½ after such date
Special rules for minimum funding standards for community newspaper plans (Section 115)	This provision provides pension funding relief for community newspaper plan sponsors by increasing the interest rate to calculate those funding obligations to 8%. Additionally, this bill provides for a longer amortization period of 30 years from 7 years. These two changes would reduce the annual amount struggling community newspaper employers would be required to contribute to their pension plan.	Applies to plan years ending after Dec. 31, 2017
Treat difficulty of care payments as compensation for determining contribution limitations (Section 116)	Many home health care workers do not have a taxable income because their only compensation comes from "difficulty of care" payments exempt from taxation under Code Section 131. Since such workers do not have taxable income, they cannot save for retirement in a DC plan or IRA. This provision would allow home health care workers to contribute to a plan or IRA by amending Code Sections 415(c) and 408(o) to provide that tax exempt difficulty of care payments are treated as compensation for purposes of calculating the contribution limits to DC plans and IRAs.	Applies to contributions after date of enactment; 415(c) changes are effective for plan years beginning after Dec. 31, 2015

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SECURE Act, Title II: Administrative Improvements		
Plan adopted by filing due date for year may be treated as in effect as of close of year (Section 201)	Permits businesses to treat qualified retirement plans adopted before the due date (including extensions) of the tax return for the taxable year to treat the plan as having been adopted as of the last day of the taxable year. The additional time to establish a plan provides flexibility for employers that are considering adopting a plan and the opportunity for employees to receive contributions for that earlier year and begin to accumulate retirement savings.	Applies to plans adopted for tax years beginning after Dec. 31, 2019
Combined annual report for group of plans (Section 202)	Directs the IRS and DOL to effectuate the filing of a consolidated Form 5500 for similar plans. Plans eligible for consolidated filing must be DC plans, with the same trustee, the same fiduciary (or named fiduciaries) under ERISA, and the same administrator, using the same plan year, and providing the same investments or investment options to participants and beneficiaries. The change will reduce aggregate administrative costs, making it easier for small employers to sponsor a retirement plan and thus improving retirement savings.	Implemented no later than Jan. 1, 2022, and shall apply to returns/ reports for plan years after Dec. 31, 2021
Disclosure regarding lifetime income (Section 203)	Requires benefit statements provided to DC plan participants to include a lifetime income disclosure at least once during any 12-month period. The disclosure would illustrate the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant's surviving spouse and a single life annuity. The Secretary of Labor is directed to develop a model disclosure. Disclosure in terms of monthly payments will provide useful information to plan participants in correlating the funds in their defined contribution plan to lifetime income. Plan fiduciaries, plan sponsors, or other persons will have no liability under ERISA solely by reason of the provision of lifetime income stream equivalents that are derived in accordance with the assumptions and guidance under the provision and that include the explanations contained in the model disclosure.	Applies to pension benefit statements furnished more than 12 months after DOL issues interim final rules, the model disclosure and assumptions
Fiduciary safe harbor for selection of lifetime income provider (Section 204)	Provides certainty for plan sponsors in the selection of lifetime income providers, a fiduciary act under ERISA. Under the bill, fiduciaries are afforded an optional safe harbor to satisfy the prudence requirement with respect to the selection of insurers for a guaranteed retirement income contract and are protected from liability for any losses that may result to the participant or beneficiary due to an insurer's inability in the future to satisfy its financial obligations under the terms of the contract. Removing ambiguity about the applicable fiduciary standard eliminates a roadblock to offering lifetime income benefit options under a DC plan.	No effective date
Modification of nondiscrimination rules to protect older, longer service participants (Section 205)	Provides nondiscrimination testing relief for large employers with defined benefit plans that are closed to new entrants. The nondiscrimination testing relief includes benefits, rights and features relief for the closed participant class; benefit accrual relief for the closed participant class; and minimum participation requirement relief.	Effective on date of enactment, without regard to when the plans are modified

Modification of PBGC premiums for CSEC plans (Section 206)	In 2014, different funding rules were adopted for three types of pension plans: single-employer, multiemployer and cooperative and small employer charity (CSEC) plans. The legislation establishes individualized rules for calculating PBGC premiums. For CSEC plans, the legislation specifies flat-rate premiums of $19 per participant, and variable rate premiums of $9 for each $1,000 of unfunded vested benefits.	No effective date
SECURE Act, Title III: Other Benefits		
Benefits provided to volunteer firefighters and emergency medical responders (Section 301)	Reinstates for one year the exclusions for qualified state or local tax benefits and qualified reimbursement payments provided to members of qualified volunteer emergency response organizations and increases the exclusion for qualified reimbursement payments to $50 for each month during which a volunteer performs services.	Applies to tax years beginning after Dec. 31, 2019
Expansion of Section 529 plans (Section 302)	Expands IRC Section 529 qualified tuition program accounts to cover costs associated with registered apprenticeships and qualified education loan repayments.	Applies to distributions made after Dec. 31, 2018
SECURE Act, Title IV: Revenue Provisions		
Modification of required distribution rules for designated beneficiaries (Section 401)	Modifies the required minimum distribution rules with respect to DC plan and IRA balances upon the death of the account owner. Under the legislation, distributions to individuals other than the surviving spouse of the employee (or IRA owner), disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee (or IRA owner), or child of the employee (or IRA owner) who has not reached the age of majority are generally required to be distributed by the end of the 10th calendar year following the year of the employee or IRA owner's death.	Applies to distributions with respect to employees who die after Dec. 31, 2019
Increase in penalty for failure to file (Section 402)	Increases the failure to file penalty to the lesser of $435 or 100% of the amount of the tax due. Increasing the penalties will encourage the filing of timely and accurate returns which, in turn, will improve overall tax administration.	Applies to returns due after Dec. 31, 2019
Increased penalties for failure to file retirement plan returns (Section 403)	Modifies the failure to file penalties for retirement plan returns. The Form 5500 penalty would be modified to $250 per day, not to exceed $150,000. Failure to file a registration statement would incur a penalty of $10 per participant per day, not to exceed $50,000. Failure to file a required notification of change would result in a penalty of $10 per day, not to exceed $10,000 for any failure. Failure to provide a required withholding notice results in a penalty of $100 for each failure, not to exceed $50,000 for all failures during any calendar year. Increasing the penalties will encourage the filing of timely and accurate information returns and statements and the provision of required notices, which, in turn, will improve overall tax administration.	Applies to returns, statements and notifications required to be filed, and notices required to be provided after Dec. 31, 2019

Increase information sharing to administer excise taxes (Section 404)	Allows the IRS to share returns and return information with the U.S. Customs and Border Protection for purposes of administering and collecting the heavy vehicle use tax.	No effective date
SECURE Act, Title V: Tax Relief for Certain Children		
Modification of the rules relating to the taxation of unearned income of certain children (Section 501)	Reduces taxes levied on children's military survivor benefits and certain other nonearned income.	Tax years beginning after Dec. 31, 2018 (with elective retroactive application)
SECURE Act, Title VI: Administrative Provisions		
Provisions relating to plan amendments (Section 601)	Provides for a remedial plan amendment period until the 2022 plan year (2024 plan year for Section 414(d) governmental plans) or a later date if Treasury provides for any plan amendment required under the SECURE Act.	No effective date
Division Q of Appropriations Act (H.R. 1865) **Title II: Disaster Tax Relief** Special disaster-related rules for use of retirement funds (Section 202)	This provision creates a waiver from the Section 72(t) additional income tax penalty for qualified disaster distributions from retirement plans up to $100,000. Individuals can spread income tax payment on the qualified disaster distribution ratably over a three-year period. Individuals are permitted three years to repay the distribution back into the retirement plan. Individuals who took a hardship distribution from a retirement plan for a first-time home purchase in the disaster area whose transaction was terminated due to the disaster is able to recontribute the amount back into the retirement plan without tax penalty. The loan limits on retirement plans subject to this relief can be increased from $50,000 to $100,000 and retirement plan loan repayment periods extended.	Applies to individuals who suffered losses in a qualified disaster area beginning after 2017 and ending 60 days after the date of enactment.

**In addition to the SECURE Act, this chart also includes other retirement-related provisions that were incorporated into the Further Consolidated Appropriations Act, 2020 (H.R. 1865).*

Morgan Lewis

LAWFLASH

SECURE RETIREMENT LEGISLATION BECOMES LAW: OVERVIEW OF PROVISIONS AFFECTING RETIREMENT PLANS

December 23, 2019

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The SECURE Act—the most impactful retirement plan legislation since the Pension Protection Act of 2006—was included in the bipartisan spending bill signed by US President Donald Trump on December 20, 2019. The SECURE Act will advance the goals of increasing access to defined contribution plans, promoting lifetime income options, and facilitating retirement plan design and administration.

Shortly after an earlier version of the Setting Every Community Up for Retirement Enhancement (SECURE) Act was passed by the US House of Representatives, we published a LawFlash summarizing its key terms. Now that the act has been signed into law, we revisit in this LawFlash those key terms as they relate to tax-qualified retirement plans and outline considerations for retirement plan sponsors in response to the new law. While this LawFlash focuses on the SECURE Act's impact on retirement plans, we will issue additional LawFlashes on other key aspects of the SECURE Act in the near future.

CHANGES TO 401(K) PLAN ELIGIBILITY FOR CERTAIN LONGER-SERVICE, PART-TIME EMPLOYEES

Under existing law, qualified retirement plans may exclude part-time employees from participation if the employees do not complete 1,000 hours of service in a year. The SECURE Act requires 401(k) plans to extend participation—solely for purposes of making elective deferrals—to any part-time employee who has worked at least 500 hours in each of the immediately preceding three consecutive 12-month periods. 401(k) plans would not be required to provide matching or other employer contributions to these part-time employees, and special nondiscrimination and top-heavy testing relief would be provided to ensure that extending participation to these part-time employees does not adversely affect nondiscrimination testing. These changes are effective for plan years beginning after December 31, 2020,

but hours of service during 12-month periods beginning before 2021 are not taken into account.

- 401(k) plans that currently exclude part-time employees will need to be amended to incorporate these new eligibility rules.
- Plan sponsors and recordkeepers may need to update payroll and/or human resources information systems to identify and track this new class of part-time employees for nondiscrimination testing purposes.
- Calendar year 401(k) plans will need to accommodate the new eligibility rules beginning January 1, 2021. However, because the 12-month periods for purposes of counting the 500-hour requirement are not counted before 2021, the counting of service (for purposes of the 500-hour requirement) will begin but actual eligibility will be delayed.

CHANGES REGARDING LIFETIME INCOME OPTIONS IN DEFINED CONTRIBUTION PLANS

New Defined Contribution Lifetime Income Disclosure Requirement

The SECURE Act requires benefit statements to include an estimate of the monthly income a participant could receive in retirement if a qualified joint and survivor annuity or a single life annuity were purchased. These estimates must be provided at least annually and regardless of whether any annuity distribution option is offered under the plan. The SECURE Act directs the US Department of Labor (DOL) to issue safe harbor model disclosures and specified assumptions that plans may rely on in preparing these lifetime income disclosures and estimates. These requirements do not take effect until one year after the DOL has issued each of the interim final rules, model disclosures, and specified assumptions.

- Defined contribution plan sponsors and recordkeepers will need to revisit the processes for distributing benefit statements (e.g., who is responsible for producing and sending benefit statements). While it will take some time for the DOL to issue the rules, model disclosures, and specified assumptions, and it will likely provide a grace period to implement the changes, plan sponsors and recordkeepers should begin planning for the required changes as soon as possible. This is particularly true if the plan intends to implement a lifetime income provider as described below.
- Many recordkeepers voluntarily provide lifetime income disclosures on websites and/or benefit statements. Plan fiduciaries will want to be sure to understand how those disclosures may change—and, in particular, how the lifetime income amount in those disclosures may change—under the DOL rules, model disclosures, and specified assumptions in order to evaluate whether any communications might help participants during the transition.

Safe Harbor for Plan Fiduciary Selecting Lifetime Income Provider

The SECURE Act provides a new safe harbor that defined contribution plan fiduciaries can rely on in selecting lifetime income investment providers to make available as an investment option or a component of an investment option under the plan. The new safe harbor is similar in some respects to the safe harbor set forth in the DOL's 2008 regulations, but importantly sets forth specific representations that a defined contribution plan fiduciary can obtain from the provider of the lifetime income product (typically an insurance company). In particular, the safe harbor allows a fiduciary to satisfy its obligation to "consider the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract," and its obligation to conclude that "at the time of selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract" by obtaining specific

representations from the insurer providing the lifetime income product. The safe harbor also requires the plan fiduciary to consider the costs and fees associated with the guaranteed retirement income contract and conclude those costs are reasonable. There are no specific representations that allow the plan fiduciary to satisfy those requirements.

Plan fiduciaries that satisfy these requirements and qualify for the safe harbor would be shielded from liability with respect to participant losses in the event of the annuity provider's inability to pay the full benefits when they are due. No specific effective date is provided in the SECURE Act for these safe harbor provisions, meaning they are effective on the date of enactment.

- While the safe harbor will provide some degree of protection to plan fiduciaries regarding the selection and implementation of a lifetime income option, the decision to offer (or not offer) a lifetime income option as an investment option or a component of an investment option still requires significant fiduciary consideration and diligence.
- Annuity investment products are inherently different and more complicated than typical mutual fund investment alternatives. Thus, the fiduciary considerations for annuity investment products may include consideration of the nature of annuity investments as investment options or components of investment options as compared to other investments, the costs and benefits of offering such an investment option, and whether offering such an option is in the best interests of the plan's participants.

Portability of Lifetime Income Investments

Lifetime income investments often can be subject to termination penalties, surrender charges, and other fees upon liquidation. These concerns of penalties, charges, and fees often lead to plan fiduciaries not offering lifetime income investment options, or if offered, to participants not taking advantage of such options. The SECURE Act addresses these concerns by providing additional assurances of portability—that is, allowing for the transfer or distribution of the lifetime income investment to potentially avoid some or all of the penalties, charges, and fees. Under the changes in the SECURE Act, participants who invest in lifetime income investment options in their plans, and who are faced with a plan-level decision to eliminate the option, may take a distribution of the investment without regard to any other plan-level restrictions on in-service distributions (such as a prohibition on in-service distributions before age 59½). The distribution would have to be in the form of a direct transfer to another retirement plan (such as an IRA or another qualified plan) or a distribution of an annuity contract. The change is effective for plan years beginning after 2019.

- For plans that intend to offer one or more lifetime income investment options, an amendment to the plan documents will be needed to permit these types of in-service and in-kind distributions of lifetime income investments.
- Plan sponsors should also consider whether the plan should be amended to accept in-kind transfers of lifetime income investments, such as through a rollover from a previous employer-sponsored plan. Similarly, as more plans adopt lifetime income investment options, there will be an increased possibility that such investments may be acquired through corporate transactions and resulting plan mergers. Plan sponsors will want to consider how to handle these investments under such circumstances.

CHANGES TO PLAN DISTRIBUTION RULES

Required Beginning Date Increased to Age 72 for Required Minimum Distributions

Currently, a participant in a qualified retirement plan generally is required to begin receiving certain

minimum distributions by April 1 of the calendar year following the year in which the participant attains age 70½ or terminates employment, whichever comes later. The SECURE Act increases the required minimum distributions (RMD) age to 72. However, we note that plan sponsors can still choose to require distributions at an earlier age (for example, at normal retirement age). This change applies to both defined benefit plans and defined contribution plans, and is effective for participants who turn 70½ after December 31, 2019.

- Plan sponsors will need to evaluate the new RMD rules and generally amend plan documents to reflect the new RMD age of 72 in required provisions that govern the required minimum distribution rules. However, as stated, plan sponsors could choose to retain provisions that mandate distributions at an earlier age.
- Plans will need to evaluate, and likely update, current policies and procedures for notifying participants of an upcoming RMD trigger date and for updating any notices that it sends to participants regarding RMDs.
- Plan sponsors and recordkeepers will need to coordinate their approach to address the new RMD rules. For example, distribution reporting will need to be updated beginning January 1, 2020, for participants who turn 70½ in 2020 to ensure that distributions between age 70½ and 72 are treated as being eligible for tax-free rollover, and subjected to a mandatory 20% withholding to the extent not rolled over.

Changes to Earliest Age for Pension Plan In-Service Retirement

Pension plans, such as defined benefit pension plans, money purchase pension plan, and hybrid plans, generally are not allowed to permit distributions before the earlier of retirement (i.e., termination of service) or normal retirement age. However, since 2007, current law has also permitted an employee to receive benefits while still in-service and before retirement as long as the participant had reached age 62. The SECURE Act reduces the earliest age an employee can receive in-service retirement benefits from a pension plan from age 62 to age 59½. The change is effective for plan years beginning after December 31, 2019.

- Many plan sponsors that have added in-service retirement provisions to their plans have done so in order to retain older and more experienced workers who might otherwise leave employment (and perhaps even work for a competitor) solely for the opportunity to start receiving pension plan benefits. Plan sponsors that currently offer in-service retirement—or that are considering adding in-service retirement—will want to consider whether lowering the earliest in-service retirement age to 59½ would be beneficial to the company and help achieve its business objectives. Plan sponsors will continue to be able to pick any in-service retirement age for its plan, so long as the age is no younger than age 59½.

Changes to Post-Death RMDs for Defined Contribution Plans

Under current law, a plan may allow a designated beneficiary to “stretch” distributions from a plan over the beneficiary’s remaining life expectancy. The SECURE Act places caps of 10 years (for designated beneficiaries) and 5 years (for nondesignated beneficiaries) on the time permitted to exhaust the plan or IRA assets. The 10-year rule generally does not apply to an “eligible designated beneficiary,” which includes a beneficiary who, as of the date of the participant’s death, is a surviving spouse, a minor child, a disabled person, a chronically ill person, or any person not more than 10 years younger than the employee. Such eligible designated beneficiaries may spread RMDs over the beneficiary’s expected lifetime, except that for minor children, the 10-year rule begins to apply on the date that the minor child reaches the age of majority. We also note that there are special rules for employees subject to collective bargaining agreements, and these rules do not apply to binding annuity contracts. These new rules generally apply with respect to

participants who die after December 31, 2019, subject to possible additional delays for employees subject to collective bargaining agreements.

- Plan sponsors should consider whether a plan document amendment is required in response to this new limitation (e.g., if stretch distributions are currently permitted under the plan documents). For plans that provide for more rapid post-death distributions, no amendment may be necessary.
- Depending on the plan's existing provisions and the impact of the SECURE Act changes, plans may need to notify participants of the changes and solicit new beneficiary elections from affected participants.

Child Birth or Adoption Distributions up to $5,000

The SECURE Act allows defined contribution plans to permit penalty-free distributions of up to $5,000 for expenses related to the birth or adoption of a child. The adopted child must be either under age 18 or physically or mentally incapable of self-support, and the distribution must be made during the one-year period following the birth or legal adoption of the child. In addition, these special distributions can later be repaid to a qualified retirement plan. This change is effective for distributions after 2019.

- Plan sponsors should consider whether to offer this special distribution. To the extent plan sponsors adopt this change, corresponding plan amendments and updates to participant forms and communications will be required.

CHANGES TO OTHER DEFINED CONTRIBUTION SAFE HARBORS

Safe Harbor Plan Adoption and Administration

Under existing law, safe harbor 401(k) plans that avoid nondiscrimination testing by providing a minimum 3% nonelective contribution to participants must provide annual safe harbor notices to covered participants. The SECURE Act eliminates the notice requirement. It also permits a 401(k) plan to elect into the 3% nonelective safe harbor at any time up until 30 days before the close of the plan year. Further, the SECURE Act permits a 401(k) plan to elect into the nonelective safe harbor even *after* the 30th day before the close of the plan year so long as (1) the amendment to adopt the nonelective safe harbor is made by the end of the following plan year, and (2) the nonelective contribution is at least 4%. This change is effective for plan years after 2019.

- Plans sponsors that are considering adopting a 401(k) safe harbor provision in 2020 have additional flexibility and can wait until later in 2020 or even into 2021 to make the decision. However, we note that the new rules only apply to nonelective safe harbor contribution plans and generally not to matching safe harbor plans.

Increased QACA Safe Harbor Rate Cap

Under existing law, 401(k) plan automatic contribution arrangements that satisfy the qualified automatic contribution arrangement (QACA) safe harbor to avoid 401(k) nondiscrimination testing must cap default automatic contribution rates at no more than 10%. The SECURE Act would retain this 10% cap for a participant’s first year of participation, but permits the rate to be increased to 15% for subsequent years. This change is effective for plan years beginning after 2019.

- Plan sponsors with QACA arrangements or that are considering QACA arrangements may consider higher contribution rates.

SOFT-FROZEN DEFINED BENEFIT PLANS

The SECURE Act provides nondiscrimination testing relief with respect to closed or "soft-frozen" defined benefit plans so as to permit existing participants to continue accruing benefits without running afoul of the testing requirements. This relief would cover plans that closed before April 5, 2017, or that have been in effect for at least five years without a substantial increase in coverage or benefits in the last five years. These changes are effective immediately, or if the plan sponsor so elects, for plan years beginning after 2013.

FORM 5500 CHANGES

Consolidated Form 5500 Reporting for Defined Contribution Plans

The SECURE Act directs the Internal Revenue Service and the DOL to modify annual retirement plan reporting rules to permit certain common individual account plans or defined contribution plans (for example, multiple defined contribution plans sponsored by the same employer with the same trustee, fiduciary, and investment menu) to file a consolidated Form 5500. The modified rules must be implemented by the end of 2021 and apply for plan years beginning after 2021.

Increased Penalties for Failure to File Returns

The SECURE Act raises the late filing penalties for a number of required tax returns and filings. For example, the late filing penalty for failing to file a Form 5500 is increased to $250 per day, capped at $150,000 (increased from $25 and $15,000, respectively). The increased penalties are effective for returns and filings due or required to be provided after December 31, 2019.

OTHER CHANGES

Small Business (Up to 100 Employees) Startup Credit

The SECURE Act increases the current $500 tax credit cap (for the plan's first three years) to the greater of (1) $500 or (2) the lesser of (a) $5,000 or (b) $250 multiplied by the number of non-highly compensated employees eligible to participate in the plan. The increase is effective for plan years beginning after 2019.

Small Business (Up to 100 Employees) Automatic Enrollment Credit

Small employers that adopt automatic enrollment provisions are eligible for an additional $500 credit for three years regardless of when the automatic enrollment provisions are adopted. The new credit is effective for plan years beginning after 2019.

CONTACTS

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SECURE ACT

An Introduction and Overview

of ulcer causing provisions for estate planning

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SECURE Act

- Enacted December 20, 2019
- Effective January 1, 2020 (with some retroactive effect)
- §401, Title V—Revenue Provisions of Division O, Further Consolidated Appropriations Act, 2020, H.R. 1865
    - Modifying IRC §401(a)(9) - adding new Paragraph
    - Modifying IRC §401(a)(9)(E) - adding new definitions

SECURE Act

- Setting Every Community Up for Retirement Enhancements
- Stupid Even for Congress, Undermines Retirement Ends
- Surprising Every Competent User of Retirement Experts
- Seemingly Endless Congressional Upsets to Retirement Expectations
- Some Extremely Complicated Uncertain Rules Enacted
- Sucking Economic Certainty Up Rapidly Everywhere

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Good News - Bad News

- Good - Natalie Choate will be speaking on this topic (and others) at the fall Annual Estate Planning Conference September 24
- Bad - Today, you are stuck with me.

Good News - Bad News

- Good - the Act actually does not change much
- Bad - what is changed has a HUGE effect

Good News - Bad News

- Good - Some forms of stretch payouts are preserved
- Bad - For most beneficiaries, the max deferral is 10 years

Good News - Bad News

- Good - The Definition of a "Designated Beneficiary" did not change - Current beneficiary designations will still work
- Bad - They likely will not work as originally planned. A new type of beneficiary was added - "Eligible Designated Beneficiary"

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Good News - Bad News

- Good - Participants of traditional IRAs are no longer required to start distributions at 70 1/2 years old
- Bad - They will have to start at age 72 - for participants born after June 30, 1949
- Good - The age 70.5 contribution limit removed. Employed individuals of any age can make contributions

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Good News - Bad News

- Good - Current beneficiaries receiving life-time payouts can continue to do so
- Bad - Upon their deaths, the “new” beneficiary is not grandfathered in and is subject to the 10 year rule

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Good News - Bad News

- Good - The definition of “See Through Trusts” has not change. Your conduit or accumulation trusts are still valid
- Bad - These trusts in most cases will not be “Eligible Designated Beneficiaries” and will be subject to a 10 year payout. Conduit trusts, rather than restricting and deferring distributions will force the entire account on the beneficiary over 10 years (most likely 11 years).

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Overview of Changes

- Type of Beneficiary
  - Old Rule - Two types of Beneficiaries
    - Designated Beneficiary - life expectancy
    - Non-Designated Beneficiary - 5 year rule

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Overview of Changes

- Type of Beneficiary
  - New Rule - Three types of Beneficiaries
    - Eligible Designated Beneficiary - Modified Life
    - Designated Beneficiary - 10 year rule
    - Non-Designated Beneficiary - 5 year rule (no change from old law)

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Eligible Designated Beneficiary

- Five types of Eligible Designated Beneficiaries
  - The Surviving Spouse - Payout over surviving Spouse's life expectance, but converts to 10 year rule upon surviving spouse's death
  - Minor Child **of Participant** - life expectance until age of majority, then converts to 10 year rule.

Eligible Designated Beneficiary

- Five types of Eligible Designated Beneficiaries
  - Disabled Beneficiary - Life expectance but converts to 10 year rule upon death of beneficiary
  - Chronically Ill Individual - Life expectance but converts to 10 year rule upon death of beneficiary
  - Less than 10 years Younger - Life expectance but converts to 10 year rule upon death of beneficiary

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Eligible Designated Beneficiary

- Disabled Beneficiary - defined in §72(m)(7)
  - unable to engage in any substantive 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
    - Basically, qualifies for Social Security Disability
- Chronically Ill Individual - defined §7702(B)(c)(2)
  - Assistance with 2 ADLs or severe cognitive impairment

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Eligible Designated Beneficiary

- Modified Life Expectancy Payouts - Basically, life expectance of the beneficiary and then 10 year rule

- Exceptions - Minors use life expectance until age of majority plus 10 year rule - §401(a)(9)(F)

    - Generally determined by state law (18 for Idaho)

    - MAYBE 26 if still pursuing a course of education

    - Treated as minor if meet Social Security Disability

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Ten Year Rule

- Not really a new rule - it piggy-backs off of the existing 5 year rule by substitution “10” for “5” in the relevant situations — so the rules we have used for the 5 Year Rule will generally be used to implement the 10 Year Rule

- All amounts must be distributed by December 31 of the year that contains the 10th anniversary of the death, so actually 11 tax years

- No required interim distributions required

Planning Options

- Surviving Spouse
  - direct roll over is unchanged and “defers” the effects of the SECURE Act
  - Conduit Trust (modified QTIP) still good planning
    - no RMD until Participant would have reached 72
    - recalculated life expectancy RMDs
    - 10 year rule applies at spouse’s death
    - “Accumulation Trust” will NOT get life expectance

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Planning Options

- Minor Children of Participant
  - General Rule - life expectance RMD until age of Majority plus 10 Year Rule - I.C. §32-101 - "Minors are under 18 years of age"
  - Conduit Trust - MAY be good planning
    - life expectancy RMDs until age of majority
    - 10 Year Rule after age of majority - Trustee can continue to limit or defer distributions, but full account MUST be distributed to the child by the end of the 10 Year Rule
    - Cannot convert to"Accumulation Trust" at majority

Planning Options

- Minor Children of Participant
  - UTMA Custodian
    - I.C. §68-820 - allows for UTMA until age 21
  - Accumulation Trust
    - 10 Year Rule starts immediately with no modified life expectance, but allows for lifetime administration

Planning Options

- Disabled/Chronically Ill Beneficiary
  - Both Conduit Trusts and Accumulation See-Through Trusts qualify for life expectancy payout
  - Appears that, unlike under the old rules, a single trust for multiple beneficiaries CAN qualify for separate account treatment if one of them is disabled/chronically ill
  - Third Party Supplemental Needs Trusts (Accumulation Trust)

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Planning Options

- NON-EDB Beneficiaries
  - Charitable Remainder Trust for life of child then to charity
  - Accumulation Trust combined with life insurance to pay tax, using RMDs to pay annual premiums

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Quirks

- No Required Beginning Date in 2021
  - Participant born June 30, 1949 is age 70 1/2 on December 30, 2019 and is governed by the old rule with an April 1, 2020 Required Beginning Date
  - Participant born July 1, 1949 - governed by the new rule and will have a Required Beginning Date of April 1, 2022

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Quirks

- Qualified Charitable Distributions (QCDs)
  - Age 70 1/2 is still the trigger date
  - New limitation - QCD deduction is reduced dollar for dollar for post age 70 1/2 deductible contributions in the same year

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Final Thoughts

- Existing Conduit or Accumulation Trusts - Need to contact those clients and let them know their existing plan will no longer work as intended

- Maybe let **all** clients know of the change and suggest a review is in order

- If you have “standard” Retirement Account language in your trust or will templates, those provisions need to be reviewed and potentially updated.

Final Thoughts

- If you provide clients with “default” beneficiary designation language, those provision need to be reviewed.

- Consider membership is a national association such as Wealth Council, InterActive Legal, American Academy of Estate Planning Attorneys, National Network of Estate Planning Attorneys…..

THANK YOU