WHO CARES ABOUT BEING SECURE? ESTATE PLANNING WITH RETIREMENT PLAN ASSETS IN A RAPIDLY CHANGING LEGAL ENVIRONMENT

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Both prior to and during the Coronavirus crisis, Congress and the Treasury Department have made several significant changes to retirement plan distribution systems. These changes should cause every estate planner to reevaluate how to treat retirement plan assets when planning for her or his clients with significant retirement plan assets.

THREE MAJOR CHANGES SINCE NOVEMBER 2019

The three major changes to retirement plan distribution law since November 2019 are, in descending order of importance:

1. The Setting Every Community Up for Retirement Enhancement Act (the "SECURE" Act) was signed into law on December 20, 2019 as part of the massive congressional budget bill (spending over $1.7 trillion). It was generally effective for our purposes starting on January 1, 2020. The SECURE Act radically alters roughly 30 years of retirement plan distribution law, potentially reducing the long-term value of retirement plan assets held at the death of an account owner ("Owner") by generally requiring these retirement plan assets be distributed within about 10 years of the death of the Owner.

2. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES" Act), signed into law on March 27, 2020, is another massive bill in both spending (at least $2.2 trillion) and page count (880 pages), which "suspends" required distribution from most retirement plans for 2020, and provides a series of tax-favored rules for "Coronavirus related distributions."

3. In November 2019, the IRS published updated life expectancy tables for use in determining required distributions in proposed regulations generally expected to be effective starting January 1, 2021. These tables would replace the tables in use since 2003. The proposed regulations provide a modest increase of life expectancy, in recognition of the fact that people are living, on average, roughly two years longer than they did in 2003.

These new changes, massive as they are, layer on top of the existing laws and tools instead of supplanting them. Accordingly, a thorough understanding of pre-existing laws and regulations remains essential.

This article is not intended to be an exhaustive summary or analysis of the new rules. Rather, it is intended to provide practical guidance on how to engage in estate planning moving forward for clients with significant retirement plan assets.[1] The article uses the terms "Owner" and "client" interchangeably, while the pertinent IRS primary sources generally use the terms "employee" or "participant."

THE SECURE ACT SUMMARIZED WITH A PRACTICAL EYE

For more than 30 years, owners of retirement plan assets (401(k)s, 403(b)s, IRAs, Roth IRAs, SEPs, and the like) have planned their beneficiary designations around the basic premise that a "stretch" arrangement served to increase the after-tax value of the Owner's retirement plan assets as those assets were distributed to the named beneficiary(ies) after the Owner's death. For example, a 45-year-old daughter who inherited her mother's IRA could, under prior law, take distributions over the 39 years following her mother's death. Likewise, a four-year-old grandchild inheriting her grandmother's IRA could, under prior law, take distributions over the 79 years following her grandmother's death. The 39 years and 79 years respectively are the designated beneficiaries' remaining life expectancies. Appropriately drafted and administered trusts could stand in as individual beneficiaries, using the same lengthy life expectancies. These opportunities could leave large portions of retirement plan assets in tax-deferred (or tax-free, in the case of Roth IRAs or Roth 401(k) accounts) status for decades after the Owner's death, allowing those assets to remain invested and grow tax-deferred or tax-free—swelling the real economic value of those assets over the lifetime of the designated beneficiary.

However, the SECURE Act changed all that. Beginning with deaths in 2020, the SECURE Act wipes away the "stretch" arrangements available under previous law for all but specified niche categories of beneficiaries, discussed in more detail below. In place of those "stretch" arrangements, the SECURE Act borrows from the pre-existing "Five Year Rule" concept and requires full distribution of retirement plan accounts within a new "Ten Year Rule."

Congress held open the possibility for "stretch" arrangements, largely parallel to prior law, only for specific categories of beneficiaries. The following new special categories of beneficiaries, termed "eligible designated beneficiaries" (EDBs), remain eligible for "stretch" arrangements, with some caveats and limitations discussed in more detail below:

1. A surviving spouse of the Owner
2. A "minor child" of the Owner
3. A "disabled" or "chronically ill" beneficiary
4. A beneficiary who is less than 10 years younger than the Owner

The changes to available distribution periods following the Owner's death effectively devalue every retirement plan account significantly, to the extent the account does not pass to EDBs. See Tables 1 and 2,[2] parallel to the cases described above, for an illustration of the tremendous economic effect on the interests of the beneficiaries.

Other significant changes enacted by the SECURE Act include:

1. Increasing the age at which the Owner must begin taking required distributions—the "required beginning date" (RBD)—from roughly age 70½ to roughly age 72. This is a nod to increases in life expectancy and later retirement ages.
2. Removing the maximum age for qualified contributions to traditional IRAs, previously set at roughly age 70½. This also is a nod to later retirement ages and the fact that contributions after age 70½ were previously permitted under employer-sponsored plans.

THE CARES ACT SUMMARIZED WITH A PRACTICAL EYE

The CARES Act offers a variety of temporary Coronavirus oriented relief provisions, including:

1. *Suspension of 2020 RMDs*. A one-year "suspension" of "required minimum distributions" (RMDs) for all of 2020, which is applicable to most types of retirement plans, as to both owners and beneficiaries following an Owner's death. This provision is covered in CARES Act Section 2203. A similar temporary waiver was used as to RMDs in 2009 as part of the Worker, Retiree, and Employer Recovery Act of 2008, so a variety of existing IRS guidance from 2009 is thought to apply here. Very generally, RMDs otherwise required for 2020 are suspended and need not occur at all; they are not simply deferred into 2021. For example, a client turning age 80 in 2020 with an IRA worth $2 million at the end of 2019, subject to the Uniform Lifetime Table for RMDs, would normally have a 2020 RMD of approximately $107,000 (divisor of 18.7). In 2020, with enactment of the CARES Act, that client's RMD is "suspended" to $0. Therefore, in 2021, the same client would continue with her "normal" RMD calculations. Interestingly, retirement plan distributions currently using a Five Year Rule payout get a one-year extension, totaling six years. Distributions under the new Ten Year Rule are unaffected.

2. *Clawback of Completed "Rollovers" Made in 2020*. Notably, on April 9, 2020, the IRS issued a Notice extending an available "rollover" period for some Owners who may have taken portions of their otherwise applicable RMDs for 2020 before or around the time the CARES Act was enacted. This relief would apply to the extent an Owner took part of his RMD on or after February 1, 2020 and does not otherwise require that distribution for spending needs. In that case, the "unnecessary" distributions can be rolled back into the applicable IRA or retirement plan. The same Notice offers similar relief to a surviving spouse, as to a spousal rollover. For details, see IRS Notice 2020-23.

3. *"Coronavirus-Related Distributions" (CRDs)*. CARES Act Section 2202 (which is not an amendment to any existing tax code provisions, so is only found in the Act itself) overrides many of the normal distribution rules that would either prohibit distributions altogether or provide for penalties on distributions. To qualify for CRD treatment, the Owner, the Owner's spouse, or the Owner's dependent, must be diagnosed with Coronavirus by a test, or the Owner must experience "adverse financial consequences as a result of a laundry list of economic factors, such as job loss, or "other factors as determined by the Secretary of the Treasury." As of the date this article was submitted for publication there was no guidance from the Treasury Department on implementation of the softer CRD eligibility tests. To qualify as a CRD, the distribution from an eligible retirement plan must be taken on or after January 1, 2020 and before December 31, 2020. Eligible retirement plans include most mainstream retirement vehicles, including IRAs, Roth IRAs, and most employer-sponsored plans. The aggregate amount eligible as a CRD is $100,000. The Owner who has taken CRDs can either contribute the distributed funds back into a retire-

ment plan within three years (from the date of distribution) or he or she can spread the resulting tax over three taxable years (2020 through 2022).

NEW IRS LIFE EXPECTANCY TABLES EFFECTIVE FOR 2021 AND LATER

In recognition that, on average, we are living longer, the IRS has issued new life expectancy tables used in determining RMDs for 2021 and later. IRS Proposed Reg. 1.401(a)(9)-9. All three of the tables used in calculating RMDs were modified modestly but discernibly, compared to the current tables in use since 2003. The tables are: (a) the Uniform Lifetime Table (used during the Owner's lifetime, for most situations); (b) the Joint and Last Survivor Table (used where the Owner is married and has a spouse more than 10 years younger); and the Single Life Table (used after the Owner's death, as to a beneficiary). Assuming the proposed regulations go into effect as currently written, the more favorable tables will be effective starting at the beginning of 2021.

WHAT HAS CHANGED OR NOT CHANGED UNDER THE NEW MODIFIED RULES

LAYERING OF NEW RULES OVER THE OLD RULES

Though a variety of things have changed about the retirement plan distribution system moving forward, for the most part all of these changes layer on top of the existing law, meaning that aspects of the prior law still apply, or could apply, in a variety of situations. For example, the "old" distribution rules and tables, allowing for "stretch" IRAs at the death of an Owner, will continue in effect for niche situations, and will continue to be applicable generally as to retirement plan assets for which the Owner is already deceased and the beneficiary(ies) are living and currently receiving distributions. This means that estate planning practitioners and financial planners engaged with ongoing retirement plan distribution cases will need to understand the old rules for as long as another 80 years or so, when the Single Life Table runs its course based on the life expectancy of a very young current beneficiary!

FIVE YEAR RULE

The old Five Year Rule, calling for total distribution of all retirement plan assets within about five years of the Owner's death, is left unchanged and applies, for the most part, when any non-individual (charity; probate estate of the decedent, creditor, non-qualifying trust, etc.) is a beneficiary of retirement plan assets. Under the Five Year Rule, distributions need not be made pro-rata, but must be completed by the end of the five year period that starts on January 1 of the year following the Owner's death.

TEN YEAR RULE

A newly minted concept by the SECURE Act, the Ten Year Rule is modeled after the existing Five Year Rule, and requires total distribution of all retirement plan assets within roughly 10 years following the Owner's death, or whenever the 10-year period begins (e.g., at the death of an EDB). Under the Ten Year Rule, distributions need not be made pro-rata, but must be completed by the end of the 10-year period that starts January 1 of the year following: (a) the Owner's death; or (b) the trigger date starting the Ten Year Rule (e.g., the death of an EDB).

QCDS WITH INCREMENTAL CHANGES

The Qualified Charitable Distribution (QCD) rules, allowing for direct distributions from the custodian of an IRA to a charitable organization (excluding private foundations and donor advised funds) of up to $100,000 per year, have only changed incrementally. Interestingly, QCDs are still available starting when the Owner reaches age 70½, though, under the new law, the RBD is not until age 72. In other words, the trigger age for QCDs is now decoupled from the RBD, whereas before the change in law the ages were roughly consistent with each other. In one small change to QCDs to avoid potential abuse relating to the decoupling of the ages, the SECURE Act cuts back the ability of an Owner over age 70½ to make contributions to an IRA and then quickly make a corresponding QCD.

DESIGNATED BENEFICIARIES

The IRS definition of a "designated beneficiary" (DB) remains unchanged. A DB is an individual, or a qualified See-Through Trust (see below) for the benefit of one or more individuals.

SEE-THROUGH TRUST RULES

The existing See-Through Trust Rules were not modified by the SECURE Act. Just as before, qualified Trusts can still be treated as designated beneficiaries for retirement plan distribution purposes if:

- The Trust is valid under state law
- The Trust becomes irrevocable upon the Owner's death (Owner of the retirement plan)
- The beneficiary(ies) under the Trust are identifiable and are all individuals
- Appropriate documentation is provided to the retirement plan administrator or custodian by October 31 of the year following the Owner's death

Just as before, See-Through Trusts have two different possible flavors/iterations: Conduit Trusts and Accumulation Trusts.

CONDUIT TRUST RULES

The Conduit Trust rules remain unchanged on their face. By definition, a Conduit Trust must pay all distributions taken from the retirement plan to the DB (an individual) immediately upon receipt. Though not formally named "conduit trusts," the IRS regulations provide that a Conduit Trust automatically qualifies as a See-Through Trust, without having to examine subsequent "downstream" beneficiaries. Reg. 1.401(a)(9)-5, A-7(c)(3), Example 2. In a very literal sense, these Trusts act as a "conduit" between the IRA and the beneficiary, transmitting any distributions from the IRA directly out to the beneficiary. However, the practical implications and beneficial usage of Conduit Trusts are markedly different under the new rules compared to the old, as discussed later in this article.

Some early commentary following the SECURE Act has suggested that it may be possible, following the death of the Owner, to "toggle" a particular Trust's status from a "Conduit Trust" to an Accumulation Trust, at a set date or upon a set event (e.g., toggling from a Conduit Trust arrangement into an Accumulation Trust when a minor child of the Owner reaches the age of majority). While it is certainly possible that the IRS could issue future guidance or regulations supportive of this option, it appears to this writer that, based on the current definition we have of a Conduit Trust, a Trust capable of toggling into an Accumulation Trust would, by its nature, fail to qualify as a Conduit Trust, because the Trust offers the distinct possibility on its terms that future retirement plan distributions would not be passed out directly to the beneficiary.

ACCUMULATION TRUST RULES

Likewise, the Accumulation Trust rules remain unchanged on their face. An Accumulation Trust is any Trust permitted to retain (accumulate) retirement plan asset distributions within the Trust, and is not required by the Trust terms to distribute the retirement plan distributions out to the beneficiary immediately. However, only a subset of Accumulation Trusts qualify as DBs for purposes of the retirement plan distribution rules. An Accumulation Trust qualifies as a See-Through Trust only if all of the countable beneficiaries are identifiable individuals under the terms of the applicable trust instrument. Reg. 1.401(a)(9)-5, A-7(c)(1). Any and all trust beneficiaries are considered beneficiaries of the retirement plan assets for purposes of applying these rules, *except* that a beneficiary who is a "mere potential successor" to the trust is disregarded. Unfortunately, there is still a fair amount of ambiguity in the law about exactly who or what constitutes a "mere potential successor" beneficiary, meaning that a trust intended to qualify as a See-Through Trust as an Accumulation Trust must either: (1) make sure that all potential beneficiaries of the Trust are individuals/DBs; or (2) accept that there may be potential controversy about whether the Trust qualifies as a See-Through Trust. Again, the practical implications and productive usage of Accumulation Trusts are markedly different under the new rules compared to the old.

PLANNING IMPLICATIONS FOR OWNERS WHO ARE CURRENTLY LIVING—ACTIONS TO TAKE WITH THEIR RETIREMENT PLAN ASSETS

Owners who are currently living and who own significant retirement plan assets should consider the following:

1. CARES Relief. Owners should consider whether any of the CARES Act tax relief might be helpful to their situation.

2. QCDs. Charitably inclined owners over age 70½ should consider whether or not to use QCDs to accomplish their lifetime charitable giving objectives from existing IRAs. The economic devaluation of most retirement plan assets starting at the Owner's death, under the SECURE Act, makes QCDs comparatively more valuable than they were under prior rules. Remember that QCDs offer truly tax-free distributions, avoiding both Federal and Ohio income taxes on "income" that would otherwise be subject to both Federal and Ohio income taxes.

3. Roth Conversions. Owners who believe they are currently in lower income tax brackets than are projected for future years or, alternatively, than are projected for their intended individual beneficiaries (if driven by legacy considerations rather than personal spending needs), should consider Roth conversions of their existing retirement plan assets. Likewise, Owners who are likely subject to Federal estate taxes

could use Roth conversions to "pre-pay" future income taxes otherwise incurred by their intended beneficiaries. Doing so would serve to reduce the Owner's taxable estate, lowering exposure to Federal estate tax. Given all of the current spending by the Federal Government in connection with the COVID-19 crisis, one might reasonably suggest that the prospects of higher future taxes are a very real possibility, including: (a) higher future income rates, (b) reduced Federal and state estate and/or inheritance tax exemption amounts, and (c) higher Federal and state estate tax rates. The biggest single economic impact of the SECURE Act on retirement planning is the broad imposition of a Ten Year Rule on retirement plan distributions, which may well cause income tax bracket run-up for future beneficiaries compared to the much longer distribution periods available under the old "stretch" rules. All of these factors could serve to make broader application of Roth conversions beneficial.

4. Plan for New Distribution Tables In 2021. Owners should plan for distributions under the new, somewhat more favorable, distribution tables described earlier in this article.

PLANNING IMPLICATIONS FOR OWNERS WHO ARE DECEASED/PLANS IN DISTRIBUTION STATUS

If the Owner died before the end of 2019, and the retirement plan assets are being distributed out under some form of "stretch" treatment to a designated beneficiary, then all of the old distribution rules still apply, <u>except</u>:

- Under the old rules, the applicable distribution period continued even after the death of the initial DB. For example, if a child survived the Owner, and subsequently died after having started distributions but while 30 years of life expectancy remained under the applicable life expectancy table, the subsequent beneficiary(ies) of the deceased child's "beneficiary account" could continue the same distribution pattern, taking the remaining distributions over 30 years.
- Under the new rules, at the death of the initial DB, the required distribution period "resets" to a 10-year rule, regardless of the age of the deceased initial beneficiary or the age or identity of the subsequent beneficiary(ies). It is possible that the IRS will issue future guidance to provide for more favorable results (e.g., allow for a longer distribution period if the subsequent beneficiary is an EDB), though such a result does not appear in the SECURE Act currently.

PLANNING IMPLICATIONS FOR OWNERS AS THEY CONSIDER NAMING BENEFICIARIES

The following discusses the choice of beneficiaries primarily from the standpoint of income tax minimization. However, at the risk of stating the obvious, most owners have additional, often overriding, wishes/considerations separate and apart from income tax result. Those overriding wishes/considerations must be examined when deciding on the Owner's beneficiary designation choices.

A HIERARCHY OF BENEFICIARIES

The new distribution rules establish the following hierarchy of potential retirement plan beneficiaries, when viewed strictly from an income tax perspective. From most tax-advantaged to least, the hierarchy of potential beneficiaries under the new rules is as follows:

1. Charities. Naming one or more charities was, under the old rules, and continues to be, under the new rules, a truly tax-free arrangement. Compared to the alternatives under the new distribution rules, with most beneficiaries subject to a Ten Year Rule, naming a charity as a tax-free beneficiary is an attractive alternative for Owners who are charitably inclined. Retirement plan assets (other than Roth accounts) should probably be the first source from which to satisfy any charitable dispositions. Given the tax-free nature of this arrangement, the applicable distribution period is not generally relevant, but would be based on the Five Year Rule. From a technical perspective, a charity qualifies as neither a DB nor an EDB.

2. Surviving Spouses. Naming a surviving spouse as beneficiary continues to offer many potent tax-advantages, for the most part, parallel to the old rules. The surviving spouse qualifies as both a DB and an EDB, and may opt to:

a. Complete a "spousal rollover" of the retirement plan account, treating the Owner's former account as the spouse's own account. For all purposes, under this option, the spouse becomes the new Owner. The spouse is the only potential beneficiary with this option. Subsequent required distributions will be made starting only when the spouse (new Owner) reaches age 72 and will be computed under the highly advantageous Uniform Lifetime Table.

b. Take distributions over the spouse's life expectancy. Compared to a spousal rollover, this option is generally only used when the spouse is under age 59½, requires current distributions for current spending needs, and would be subject to penalties on distributions if he or she pursued the spousal rollover. Under this option b, at the death of the spouse, the Ten Year Rule begins as to the subsequent beneficiary(ies). Until the death of the spouse, required distributions will be made under the Single Life Table, using the "stretch" rules.

◆ **NOTE:** A See-Through Trust for the sole lifetime benefit of the surviving spouse should achieve the same distribution result as option b, but because any Accumulation Trust will have (downstream) beneficiaries other than the surviving spouse, it appears, absent helpful future IRS guidance to the contrary, that only a Conduit Trust for the sole benefit of the surviving spouse will allow for "stretch" distributions over the life expectancy of the spouse. Again, absent helpful guidance from the IRS, all other Accumulation Trusts would qualify as DBs but fail to qualify as EDBs, and therefore would be subject to a Ten Year Rule.

3. Eligible Designated Beneficiaries <u>Other than</u> Spouses. For proper analysis, this newly minted tax-advantaged category of beneficiaries is sub-divided further, as discussed below, because each category of EDBs has different potential challenges.

a. "Minor" Child(ren) of the Owner: The Owner may name a minor child (or See-Through Trust for the benefit of a minor child) as a beneficiary. The minor must be a *child of the Owner* to qualify for this category of EDB (grandchildren, nephews, nieces, etc., do not qualify). If done successfully, the "minor" child will be treated as a

DB and an EDB, until the "minor" child has "reached majority," at which point the child no longer qualifies as an EDB, and the Ten Year Rule applies. All of this means that, if successful, distributions would be computed based on the life expectancy of the child, until the child reaches majority, and then "reset" to use a Ten Year Rule thereafter. However numerous challenges/uncertainties exist at present, absent further guidance from the IRS. Those challenges/uncertainties include:

i. Who is a "minor" child? Incredibly, Congress borrowed from a little used provision under current law that relies on a combination of current federal regulation and state laws, and under which the possible outcomes of when a "minor" ceases to be a minor include: (a) when the child reaches age 18 (based on most states' laws); (b) when the child reaches age 21 (based on state law); (c) when the child ceases to be a student working to complete a "specified course of education," and no later than age 26 (based on a current, little used, IRS regulation that is itself ambiguous). A full discussion of this issue, albeit very interesting, is beyond the scope of this article.

ii. How does this exception work where there are multiple minor children, and/or if and when one of those minor children reaches the age of majority? This is entirely uncertain/unknown, particularly when one or more trusts for the benefit of minor children are named as the beneficiary(ies). Worse, we don't even have indirect precedents to work from on this question, because the concept of an EDB is entirely new and we don't yet know how the IRS will approach this question. Again, a full discussion of this issue is beyond the scope of this article.

iii. Even if the technical points are resolved, the absolute "best case" scenario using the minor child category of EDB is that required distributions will be computed based on the minor's life expectancy using a "stretch" until said minor reaches "majority," at which time the Ten Year Rule begins. That means the child (or trust for the child) will receive all retirement plan assets by not later than age 36 or so (age 26 plus 10 years). Query as to whether that result will be acceptable to most of our Owner/clients?

◆ **NOTE:** It may be that, until better guidance is offered by the IRS on the various outstanding questions, that the preferable course of action is to forego the possibility of using a "stretch" for the benefit of minor children, and instead plan to use the new normal Ten Year Rule as the distribution period. That approach would, at least for now, significantly cut down on complexity and uncertainty, and would allow the Owner to focus instead on how to deal with payment of the associated (now-accelerated) income tax liability on the distributions as they come out of the retirement plan.

b. Disabled or Chronically Ill Beneficiaries. The beneficiary's status as either disabled or chronically ill is determined as of the date of the Owner's death. Based on the SECURE Act text, if a beneficiary becomes disabled or chronically ill later, after the Owner's death, this special category will not apply. The term "disabled" is borrowed from existing Code Section 71(m)(7) which, as a practical matter, should roughly and imperfectly correspond to a beneficiary's entitlement to Social Security Disability Benefits. The term "chronically ill" is borrowed from Code Section 7702(B)(c)(2). If successfully employed, the beneficiary (or qualified See-Through Trust for the benefit of the beneficiary) is considered both a DB and an EDB, and the full IRS "stretch" rules apply, allowing for distributions over the DB's life expectancy. On the death of the DB, the Ten Year Rule kicks in for any subsequent beneficiary(ies). At least two special advantageous rules, not detailed here, are available to trusts for the benefit of disabled or chronically ill beneficiaries that are not available to any other category of beneficiaries. Both special rules make it substantially easier to qualify the applicable Trusts as EDBs. It is likely that specially crafted Accumulation Trusts, qualifying as See-Through Trusts, will be used in this context. Alternatively, if an intended beneficiary's status is not clear (the beneficiary may not be disabled or chronically ill), the Owner could opt to forego the possibility of using a "stretch" for the benefit of the beneficiary, and instead plan to use the Ten Year Rule as the applicable distribution period. For an early comprehensive look at connected considerations to planning for a beneficiary who is disabled or chronically ill, see "Security for Disabled and Chronically Ill Beneficiaries," by Nancy H. Webber, *Trusts & Estates Magazine*, April 2020, p. 40.

c. Beneficiaries Less Than 10-Years Younger than the Owner. The last category of eligible designated beneficiaries is "an individual . . . who is not more than 10 years younger than the [Owner]" and does not fall into another category of EDB. For niche situations, such as siblings, close friends, or unmarried life partners, this exception could work nicely to produce a tax-favored result. As with the spouse, a See-Through Trust for the lifetime benefit of the intended beneficiary should qualify for "stretch" treatment, but because any Accumulation Trust will almost certainly have (downstream) beneficiaries who are not EDBs, it appears, absent helpful future IRS guidance to the contrary, that only a Conduit Trust for the sole benefit of the intended beneficiary will allow for "stretch" distributions over the beneficiary's life expectancy. Accumulation Trusts could qualify as DBs but fail to qualify as EDBs, so would be subject to a Ten Year Rule.

4. Charitable Remainder Trusts. In a hybrid category that is difficult to place or quantify without all the details in place, some clients may wish to name charitable remainder trusts as the beneficiary of retirement plan assets. On the upside, clients with charitable inclinations might combine the income tax-advantaged characteristics of these trusts with the ability to mimic "stretch" distributions to DBs, when "stretch" treatment is not otherwise available. On the downside, this technique is probably only helpful for owners with significant charitable giving intentions, won't be available actuarially to younger beneficiaries, and offers less flexibility than other alternatives. A detailed discussion is beyond the scope of this article.

5. All Designated Beneficiaries Who are Neither Spouses nor Other Eligible Designated Beneficiaries. This is the category of beneficiaries that constitutes the new normal, as most beneficiaries will likely fall into this category. The category includes all individual beneficiaries (or See-Through Trusts for their benefit) who do <u>not</u> qualify under the SECURE Act provision for special treatment as an EDB (a spouse, a minor child of the Owner, a disabled individual, a chronically ill individual, or an individual not more than 10 years younger than the Owner). Typically, this category includes, but is not limited to, beneficiaries such as (non-minor) children of the owner, grand-

children, nephews, nieces, and friends more than 10 years younger than the owner. This category should cause the beneficiary(ies) to be treated as a DB, but not as an EDB, so the Ten Year Rule should apply. Notably, a trust for any individual in this category could include either type of See-Through Trust. An Accumulation Trust is somewhat easier to use here (compared to the prior rules or for most EDB situations), because the ages of the individual beneficiaries under the terms of the Accumulation Trust are not relevant to qualification for this type of Accumulation Trust. In other words, an Accumulation Trust used in this context should qualify as a See-Through Trust, so long as the "downstream" beneficiaries are limited to individuals, no matter the individuals' ages. The biggest planning challenge with this category of beneficiary is to plan effectively for the eventual distribution of retirement plan assets within the Ten Year Rule, which presents a significant departure from the rules in effect only a few months ago.

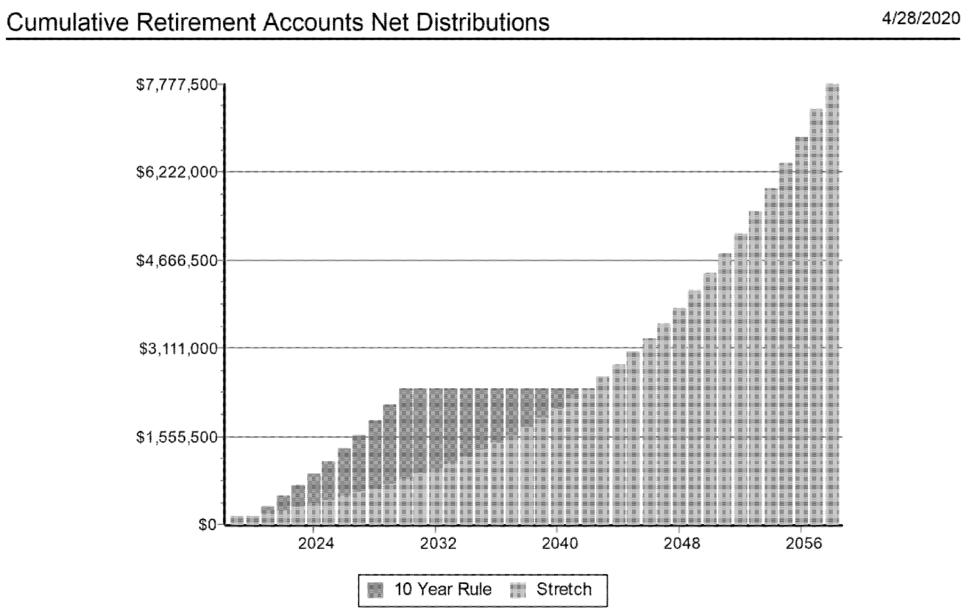
6. Hybrid Category/Situation—The Ghost Rule. If the Owner dies on or after January 1, 2020, and after his RBD (roughly age 72) then, regardless of the designated beneficiary(ies), that beneficiary(ies) may be able to take distributions over the remaining life expectancy of the Owner. Often described informally as the "Ghost Rule," this option could be helpful if: (a) the Ten Year Rule would otherwise apply and the Owner died between ages 72 and age 80 or so, yielding a remaining life expectancy under the Ghost Rule of more than 10 years; or (b) the Five Year Rule would otherwise apply and the Owner died between ages 72 and 86 or so, yielding a remaining life expectancy under the Ghost Rule of more than five years. Some ambiguity exists surrounding the Ghost Rule, because a literal reading of the current rules would apply the Ghost Rule only if a beneficiary of the retirement plan account does not qualify as a DB. Some commentators are confident that this highly technical issue will be solved by future IRS guidance, while other commentators suggest this is a real problem and pertinent trust documents should be written so that the trusts are deliberately disqualified as designated beneficiaries (for example, by failing to meet all of the qualifications for See-Through Trusts).

7. All Other Beneficiaries Not Previously Covered. For all other beneficiaries not included in the previous discussion, the least tax-favored of the beneficiaries are subject to distributions following the Five Year Rule. These beneficiaries generally include: (a) the Owner's probate estate; (b) creditors; (c) trusts which do not qualify as See-Through Trusts; and (d) organizations other than charities. As a planning point, the practical difference between this worst case scenario Five Year Rule, and the "normal" Ten Year Rule, is not nearly so different as the variance between the worst case scenario Five Year Rule and the old "stretch" rules, where distributions might be available over multiple decades. In other words, under the new rules, if the Owner's estate planning objectives are not compatible with a more tax-favored category of beneficiary, then the Owner and his advisors may be willing to forego any attempt to obtain a better tax result, opting instead for distributions under a Five Year Rule.

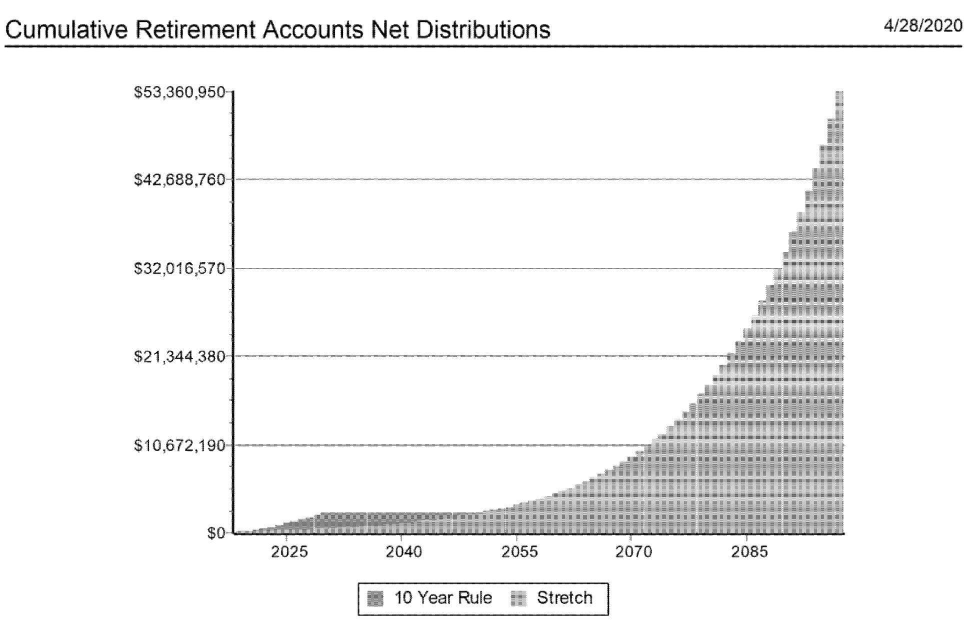
CONCLUSION

Congress and the Treasury Department have made important changes to retirement plan distribution systems. Every estate planner should reevaluate how to treat retirement plan assets when planning for her or his clients with significant retirement plan assets, particularly with clients who completed prior planning relying on the "stretch" distribution opportunities no longer available under the new rules.

Appendix Table 1: Cumulative Retirement Accounts Net Distributions (Child)



Appendix Table 2: Cumulative Retirement Accounts Net Distributions (Grandchild)



ENDNOTES:

[1]For far more detailed and nuanced discussion, see, for example, Natalie Choate's 648 page book, *Life and Death Planning for Retirement Benefits*, and her most recent 64 page analysis of the three developments discussed in this article, *Planning for Retirement Benefits: Recent Developments: CARES, SECURE, and New Life Expectancy Tables*, last updated prior to submission of this article on April 14, 2020, both of which are available directly or indirectly at: www.ataxplan.com.

[2]Cumulative Retirement Accounts Net Distributions Table 1 (Child) depicts distributions after the Owner's death to a 45-year-old child. Cumulative Retirement Accounts Net Distributions Table 2 (Grandchild) depicts distributions after the Owner's death to a 4-year-old grandchild. Both assume full use of the RMD system, comparing *cumulative* distributions from the IRA under the Ten Year Rule to a full "stretch" using the beneficiary's life expectancy. Both charts assume an IRA account starting value of $2 million and a straight annual investment return (within the IRA) of 7% per year.

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