ESTATE PLANNING CONSIDERATIONS FOLLOWING THE SECURE ACT

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EDUCATION

- Georgetown University Law Center, LL.M. in Taxation, 2007
- University of Houston Law Center, J.D., 2006
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PROFESSIONAL ACTIVITIES

- Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization,
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- State Bar of Texas
  - Member, Real Estate, Probate and Trust Law Section.
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  - Planning Committee, State Bar of Texas "Handling Your First (or Next) Trust Course, 2021.
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PRESENTATIONS

- Presenter, State Bar of Texas Estate Planning Drafting Course, *Drafting Considerations After the SECURE Act*, October 8-9, 2020.
- Presenter, State Bar of Texas Advanced Estate Planning Conference, *Planning for and Administration of Non-GST Exempt Trusts,* June 4, 2020.
- Presenter, Twelfth Annual Estate Planning & Community Property Law Journal CLE & Expo, Texas Tech University School of Law, *The Secure Act: What Planners Need to Know Now*, February 28, 2020.
- Presenter, Amarillo Area Estate Planning Council, *Planning for the Unexpected: How to Plan for Beneficiaries Who Can't (or Won't) Help Themselves,* October 23, 2019*.*
- Presenter, State Bar of Texas Advanced Estate Planning Conference, *Settlements in Probate and Trust Litigation,* June 19, 2019.
- Presenter, State Bar of Texas Intermediate Estate Planning Conference, *Planning for*

Minors (and What Happens When You Don't), June 17, 2019.

- Presenter, San Antonio Estate Planners Council Docket Call in Probate Court Course, *Planning for Digital (and other "Hard to Plan For") Assets*, February 15, 2018.
- Presenter, State Bar of Texas Estate Planning Drafting Course, *Planning for the Unexpected: How to Plan for Beneficiaries Who Can't (or Won't) Help Themselves*, October 27, 2017.
- Presenter, State Bar of Texas Intermediate Estate Planning Conference, *Grantor Trusts: Who, What and Why?,* June 9, 2015.
- Presenter, State Bar of Texas Intermediate Estate Planning Conference, *Preparing Form 706*, June 9, 2014.
- Presenter, State Bar of Texas Tax Section Webcast, *Trust Planning for S Corporation Shareholders*, August 7, 2008.
- Panelist, ACPEN Satellite Broadcast, *Fundamentals of S Corporations Practice*, November 19, 2008.
- Presenter, State Bar of Texas College Summer School Course, *Alternatives to Probate in Texas*, July 18 2009.

PUBLICATIONS

- *Unilateral Economic Sanctions: Necessary Foreign Policy Tool or Ineffective Hindrance on American Businesses?, Houston Business and Tax Law Journal*, Volume 6.2.
- Co-Author with Amanda M. Gyeszly, *Corporate Issues Facing Estates*, South Texas College of Law 24th Annual Wills and Probate Institute, September 18-19, 2008.

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I. INTRODUCTION

The most comprehensive set of changes to hit the area of retirement plans since the Pension Protection Act of 2006 became effective at the end of 2019, in the form of the "Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019" (the "Secure Act" or the "Act"). The legislation was passed by the U.S. House of Representatives in the Spring of 2019, cleared the United States Senate on December 19, 2019 and was signed into law by President Trump on December 20, 2019. The Bill has had somewhat of a mixed legislative history. It overwhelmingly passed the House by a margin of 417 to 3, but hit resistance in the Senate and was ultimately attached to an appropriations bill later in the year.

As traditional pension plans have declined, and employees are less likely to remain with a single employer for their careers, flexibility and portability have become very important considerations to plan participants.

Some of the key changes under the Act include:

- Makes changes so that small business owners could start "safe harbor" retirement plans that should cost less and be easier to administer.
- Some part-time workers are now eligible to participate in an employer retirement plan.
- An increase in the starting age for required minimum distributions ("RMDs"), from 70.5 to 72.
- Traditional IRA owners may now make contributions indefinitely.
- Most non-spouses inheriting IRAs must take distributions over a ten-year period.
- Penalty-free withdrawals for baby birthing or adoption costs.

Of particular importance to estate planners, the Act pushes back the RMD age to 72 (up from 70.5) and allows participants in traditional IRAs to make contributions indefinitely.

Given the fact that people are living longer and healthier lives, and in many cases, working well beyond what was considered "retirement age," this is a very important change for participants. Under the Act, participants can contribute to a retirement account for as long as they are receiving compensation. As a result, for many clients, the retirement plan or IRA will become an even more substantial portion of their estates, thereby increasing the importance of proper planning.

From the estate planner's perspective, the most critical change is the elimination (with certain exceptions) of the "stretch" for inherited IRA's, which was a significant income-tax benefit for beneficiaries.[1] Under the Act, unless the beneficiary is the surviving spouse or an "Eligible Designated Beneficiary" discussed herein, the proceeds must be paid out over a five, or more likely, ten year period. As discussed herein, if the beneficiary is someone other than a surviving spouse, there are three potential payout scenarios:

- In the case of a "designated beneficiary", a ten-year payout period[2];
- In the case of a beneficiary who is not a "designated beneficiary", a five-year payout period [3]; and
- In the case of an "Eligible Designated Beneficiary", a "stretch" payout period so long as the beneficiary qualifies as an "Eligible Designated Beneficiary".[4]

Because the Act eliminates the "stretch" payout for many clients, practitioners and clients must recognize that most beneficiaries will receive the plan proceeds over a much shorter time period (namely five or ten years). As such, the use of trusts will become all the more important with respect to inherited retirement plans in order to protect the proceeds from creditors, divorce

[1] Further Consolidated Appropriations Act , 2020 , Pub. L. No. 116-94
[2] § 401(a)(9)(H)(i).
[3] § 401(a)(9)(H)(i)(l).
[4] § 401(a)(9)(H).

courts, and federal transfer taxes. As under the prior law, the "conduit" trust and the "accumulation" trust will remain the choices for most clients. However, under the Act, in the limited situations in which the "stretch" payout is still available, the "conduit trust" will be the only option. For most other clients, the "accumulation" trust will be the most efficient option. However, the choice between the two trusts requires a thorough understanding of the changes made by the Act and a detailed analysis of the client's family situation and planning motivations in order to ensure the proper result.

II. SECURE ACT'S EFFECT ON PARTICIPANTS DURING THEIR LIFETIMES

A. Starting Age for Required Minimum Distributions.

Under the Act, the age for RMDs is raised from 70.5 to 72. Under previous law, participants were required to take RMDs by April 1 the year following their reaching age 70.5. Again, as Americans are living and working longer, this should give participants the ability to save and invest longer, which will hopefully aid them in meeting their retirement goals.

B. Time Frame for Creating Qualified Plans.

Prior to the Secure Act, an employer desiring to set up a stock bonus, pension, profit sharing or annuity plan for its employees had to have the plan in place prior to year-end. Section 201 of the Act amends IRC Section 401 as follows:

> (2) ADOPTION OF PLAN—If an employer adopts a stock bonus, pension, profit-sharing, or annuity plan after the close of a taxable year but before the time prescribed by law for filing the return of the employer for the taxable year (including extensions thereof), the employer may elect to treat the plan as having been adopted as of the last day of the taxable year.[5]

Accordingly, so long as the qualified plan is formed prior to the extended due date of the employer's tax return, the contribution/deduction may be taken in the same year.

C. Penalty-Free Withdrawals for Baby-Related Expenses.

Under the Act, retirement plan funds may be used to pay for costs associated with adoption and child birth. In particular, up to $5,000 may be withdrawn from an IRA or 401(k) without incurring the 10% early-withdrawal penalty. However, the distribution will be taxable income if the funds are not repaid. (For married couples, each spouse may withdraw the $5,000 penalty-free.) The funds must be withdrawn within one year from the child's birth date or the finalization of the adoption in order to be penalty-free. In addition, the withdrawn amounts may be repaid so as not to be treated as income, in which case the contribution will be treated as a rollover.

D. Age Limits on IRA Contributions.

One of the long-standing tenets of The Employee Retirement Income Security Act of 1974 ("ERISA") has been that upon reaching the age of 70.5, individuals could no longer make contributions to a traditional IRA.[6] Under the Secure Act, an individual may make a contribution to a traditional IRA irrespective of his or her age starting with the 2020 tax year.

E. Changes for Charitable Distributions.

Under prior law, up to $100,000 in charitable distributions from a traditional or Roth IRA were excluded from taxable income.[7] Under the Secure Act, the qualified charitable distribution exclusion is reduced by the excess of

[5] IRC Section 201(a), amending IRC Section 401(b)(2).
[6] *See* IRC Section 219(d)(1). "No deduction shall be allowed under this section with respect to any qualified retirement contribution for the benefit of an individual if such individual has attained age 70.5 before the close of such individual's taxable year for which the contribution was made."
[7] *See* IRC Section 219(d); Section 408(d)(8)(A)

the allowed IRA deduction for all taxable years ending on or after age 70.5, over the amount of all prior year reductions.[8]

III. What Does the SECURE Act Mean for Employers and Retirement Plan Sponsors?

While focus of this article is on the Act's impact on the individual, and therefore, their estate plans, there are some important changes applicable to plan sponsors, of which many clients may need to be aware.

A. Participation by Part-Time Employees.

Employers must allow certain part-time (i.e., long-term) employees to participate in the plan, once an employee completes one full year of service (more than 1,000 hours worked) or three consecutive years of service (with at least 500 hours worked).[9] Under current law, employers may, for the most part, exclude part-time employees (i.e., those who work less than 1,000 hours per year) when providing a defined contribution plan to their employees. Except in certain circumstances, the Act mandates that employers maintaining a 401(k) plan 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 at least 500 hours of service.

B. Pooled Employer Plans (PEPs).

A pooled employer plan ("PEP") or multiple employer plan ("MEP") allows unrelated small businesses to band together in a pre-arranged, "open retirement" plan agreement. This permits these smaller businesses to offer plans traditionally only available to larger plans due to economies of scale. Under prior law, employers taking part in such plans were required to share a commonality of interest economic nexus in order to be eligible. The Act modifies this and permits small employers that do not have a shared commonality of interest to adopt a MEP known as a "Pooled Plan Provider." Why would a company choose to do so? Firstly, the employer can shift a great deal of the fiduciary responsibility to the Pooled Plan Provider, or "PPP", who sponsors the plan and is treated as the primary fiduciary. In addition, doing so would reduce the administrative burdens of managing the plan to the PPP. (Such duties might include the approval of loans, hardship withdrawals and other distributions.) Finally, with sufficient participation, the PEP would be able to reduce costs by obtaining more cost-efficient investment products. This provision should allow smaller employers to take part in plans that might otherwise be out of reach due to administrative costs.

C. Safe Harbor Rules.

Under the prior law, plans relying on the 3% notice requirement for non-elective contributions safe harbor had to include certain provisions in the plan document. In particular, the document was required to include the safe harbor provision, and participants had to be provided with notice of the safe harbor provision and status prior the beginning of the plan year. Under the Act, the notice requirement for participants is eliminated for non-elective contributions.

In addition, the Act modified the rules related to qualified automatic contribution arrangements ("QACAs"). Under prior law, the applicable safe harbor was permitted to automatically increase a participant's deferral election up to 10% of eligible compensation. The Act increases the automatic safe harbor deferral maximum to 15%.

D. Lifetime Income Projections.

Lifetime income projections are now required to be included on plan participant benefit statements. This requirement is keeping with the "participants first" theme of the Act, in that the stated purpose is to make the savings process easier for all Americans.

E. Required Minimum Distributions.

[8] *Id*.

[9] IRC Section 111.

As described above, the age for RMDs is increased from 70.5 to 72.

F. Maximum Age for Contributions.

The age restriction on contributions to retirement plans (previously 70.5) is now eliminated. In short, the Act is a clear sign that lawmakers want to make the American retirement system more "user friendly" so as to encourage participation by all Americans. As such, plan administrators and business owners need to be aware of these changes and perhaps revise their plans accordingly.

IV. KEY DIFFERENCES - PRIOR LAW VS. THE SECURE ACT

Prior to the enactment of the Act, the minimum distribution rules for retirement plans inherited from a decedent were found in Section 401(a)(9)(B) of the Internal Revenue Code and the corresponding Regulations. Put simply, the previous rules provided that when a plan participant passes away, his or her account would be distributed annually based on the life expectancy of the participant's "Designated Beneficiary." If there was no Designated Beneficiary on the participant's plan, the recipient beneficiary had to withdraw the balance over five years, based on the deceased participant's remaining life expectancy.

The "bread and butter" method of planning for IRAs and other retirement plans was the "stretch IRA." By ensuring that your plan was payable to a Designated Beneficiary (i.e., a qualified individual or qualifying trust), the tax-favored status of the plan could be retained for decades, through the deferral of taxable payouts or withdrawals, based on the Designated Beneficiary's age. Now, under the Secure Act, most beneficiaries will be forced to withdraw the funds over a ten-year period. While the plans put in place for many clients may still "work" for them in some respects, the structure of their current planning may produce a drastically different outcome from what they had initially intended, both in the taxation of the retirement plan funds and the beneficiary's access to, and control over, them.

A. Beneficiary Definitions.

For the most part, the Act does not change Section 401(a)(9)(B), and the definition of Designated Beneficiary remains the same.

Under the old law, beneficiaries were classified as follows:

> A "Designated Beneficiary" is an individual who is designated as a beneficiary under the plan. An individual may be designated as a beneficiary under the plan either by the terms of the plan or, if the plan so provides, by an affirmative election by the employee (or the employee's surviving spouse) specifying the beneficiary.[10] The Designated Beneficiary may be (i) an individual; or (ii) a "see through" trust, in which the beneficiary is treated as the designated beneficiary.[11]

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[10] IRC §401(a)(9)(E); Treas. Reg. §1.401(a)(9)-4, A-1.
[11] Treas. Reg. §1.401(a)(9)-4, Q-5, A-5; "If a trust is named as a beneficiary of an employee, will the beneficiaries of the trust with respect to the trust's interest in the employee's benefit be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under Section 401(a)(9)."

A-5. (a) If the requirements of paragraph (b) of this A-5 are met with respect to a trust that is named as the beneficiary of an employee under the plan, the beneficiaries of the trust (and not the trust itself) will be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under Section 401(a)(9).

(b) The requirements of this paragraph (b) are met if, during any period during which required minimum distributions are being determined by treating the beneficiaries of the trust as designated beneficiaries of the employee, the following requirements are met:

> (1) The trust is a valid trust under state law, or would be but for the fact that there is no corpus.

A "Non-Designated Beneficiary", which would include the decedent's estate, a charitable organization, or a trust that is not a conduit or "see through" trust. Under prior law, the benefits would be paid out as follows:

- If the participant had reached his "required beginning date" for distributions, the benefits would be paid out over a five-year period; or

- If the participant had not reached his or her "required beginning date," the benefits would be paid out over the participant's remaining life expectancy.

Post-Secure, there are now the following three categories of beneficiaries:

A "Designated Beneficiary". Again, post-SECURE, a designated beneficiary is an individual beneficiary who is not an EDB, and a see-through trust. While the definition of Designated Beneficiary remains unchanged, the applicable rules are now different. Unless the Designated Beneficiary is also an "Eligible Designated Beneficiary" as described below, the beneficiary must withdraw the funds within ten years of the participant's death.

A "Non-Designated Beneficiary". Again, the definition has not changed, in that a Non-Designated Beneficiary would include the decedent's estate, a charitable organization, or a trust (that is not a conduit or "see through" trust).

An "Eligible Designated Beneficiary," which includes the following and are described in greater detail in Article IV below:

1. A participant's surviving spouse;
2. Minor children;
3. Disabled Persons;
4. Chronically Ill persons; and
5. Individuals not more than ten years younger than the deceased plan participant.

B. <u>The 10-Year Payout Rule.</u>

Section §401(a)(9)(B)(ii), set out the longstanding "5-year rule" which would govern the distribution of the plan proceeds under certain circumstances.

The Section provided that: "(ii) 5- year rule for other cases. A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), the entire interest of the employee will be distributed within 5 years after the death of such employee."[12]

This section is overridden in the Secure Act's new §401(a)(9)(H), which states that "Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii) shall be applied by substituting '10 years' for '5 years' and (ii) shall apply whether or not distributions of the employee's interests have begun…". In other words, under SECURE, if a beneficiary is not a "designated beneficiary" or an "eligible designated beneficiary", the plan will be paid out within five years.

Furthermore, under the new Section 401(a)(9)(H), in a qualified trust, the employee's interest in the plan must be distributed within ten years of the employee's death. This amount may be paid out in multiple distributions (i.e., annually) or all at once, with the main requirement being that all amounts are distributed by the end of the 10-year period.

Under the Act, the only exceptions to the 10-year rule involve an eligible designated beneficiary ("EDB") or a non-designated beneficiary. In the case of an EDB (discussed in

(2) The trust is irrevocable or will, by its terms, become irrevocable upon the death of the employee.
(3) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are identifiable within the meaning of A-1 of this section from the trust instrument.
(4) The documentation described in A-6 of this Section has been provided to the plan administrator.

[12] IRC § 401(a)(9)B)(ii).

greater detail below), the plan may be distributed annually in amounts based on the EDB's life expectancy.[13] In the case of a non-designated beneficiary (such as the decedent's estate, charitable organization or non see-through trust), the benefits may be taken over 5 years or the participant's life expectancy (if the account owner died on or after their RBD).

V. ELIGIBLE DESIGNATED BENEFICIARIES

The Act exempts five types of beneficiaries from the new 10-year payout rules, and refers to this class of beneficiaries as eligible designated beneficiaries ("EDBs"). In short, an EDB can still take advantage of the "stretch" payout as had been used in the past.

Under the Act, the following persons qualify as EDBs:

1. A participant's surviving spouse;
2. Minor children (up to the age of majority);
3. Disabled Persons;
4. Chronically Ill persons; and
5. Individuals not more than ten years younger than the deceased plan participant.

Although these beneficiaries are unaffected by some of the new rules imposed by the Act, this "exemption" is not unlimited. What happens upon his or her death? Under §401(a)(9)(H)(iii), the following rule applies upon the death of the EBD:

> If an eligible designated beneficiary dies before the portion of the employee's interest to which this subparagraph applies is entirely distributed, the exception under clause (iii) shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary.[14]

Thus, even in the case of an EDB, the 10-year rule would apply in the event they no longer qualify as an EBD, or pass away, in which case the new rules under the Act would be applicable to them or to their successor beneficiaries. The remainder of this Article V describes the rules and associated planning with each category of EDB in greater detail.

A. Planning for a Participant's Surviving Spouse.

A participant's surviving spouse is treated as an EDB for purposes of the Secure Act.[15] As under the previous law, leaving a plan to a surviving spouse remains a viable option. When the surviving spouse receives the plan outright, he or she can roll the plan into his or her existing IRA, or may choose to treat it as his own or her own. As described above, the beneficiary of a conduit trust is treated as the beneficiary of the plan, meaning that a conduit trust for the surviving spouse would treat the spouse as the owner for minimum distribution purposes. Under Section 401(a)(9)(BB)(iv)(I), the qualifying conduit trust would not need to start making required minimum distributions until year-end of the year in which the deceased owner would have reached age 72. (Note, this age is increased from 70.5 by the Act.) The surviving spouse's life expectancy would dictate the Applicable Distribution Period, meaning that the 10-year payout will not apply during the surviving spouse's lifetime. However, upon the surviving spouse's death, the 10-year rule would then apply.

B. Planning for a Participant's Minor Child.

A participant's minor child is treated as an EDB for purposes of the Act. Importantly, this "exception" only applies to a participant's child, and not to a participant's more remote descendants, i.e., grandchildren. However, the benefits are somewhat limited in that the ability to avoid the 10-year rule is not unlimited. Upon the child's reaching the age of majority, the plan

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[13] IRC § 401(a)(9)(B)(iii).

[14] § 401(a)(9)(H)(iii).

[15] § 401(a)(9)(E)(ii)(I).

would be subject to the 10-year rule and would need to be distributed out accordingly. The Secure Act Committee Report provides that "… under the provision, the 10-year rule also applies after the death of an eligible beneficiary or after a child reaches the age of majority. Thus, for example, if a disabled child of an employee (or IRA owner) is an eligible beneficiary of a parent who dies when the child is age 20 and the child dies at age 30, even though 52.1 years remain in measurement period, the disabled child's remaining beneficiary interest must be distributed by the end of the tenth year following the death of the disabled child. If a child is an eligible beneficiary based on having not reached the age of majority before the employee's (or IRA owner's) death, the 10-year rule applies beginning with the earlier of the date of the child's death or the date that the child reaches the age of majority. The child's entire interest must be distributed by the end of the tenth year following that date."[16]

Given the legal necessity of providing for the management of property for a minor, and thereafter, the desire to protect a younger beneficiary from himself or herself and the temptations of youth, a trust would generally be the preferred vehicle. A conduit trust for the minor child would therefore be the most viable option. Because the child would qualify as an EDB, the child would be treated as the sole designated beneficiary of the plan.[17] So long as the trust qualified as an EDB (i.e., so long as the child beneficiary was under the age of majority), the distributions would be based on the child's life expectancy. However, upon the child's reaching the age of majority (i.e., age 18 or 21), the 10-year rule would apply.[18] As a conduit trust, the remaining plan assets would then need to be distributed to the adult child outright, meaning that all of the plan benefits would be distributed to the child between the ages of 28 and 31. From a non-tax perspective, this is not ideal for many clients who would not want the child beneficiary to receive the plan assets at such a young age. The Treasury Regulations do provide an exception to this rule in limited circumstances. Under §1.401(a)(9)-6, A-15, "For purposes of the preceding sentence, a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26. In addition, a child who is disabled within the meaning of section 72(m)(7) when the child reaches the age of majority may be treated as having not reached the age of majority so long as the child continues to be disabled." Further, if a child dies prior to reaching the age of majority, the 10-year rule would then apply to the successor beneficiary of the plan.

Another option would be to establish an accumulation trust for the minor child. However, because the minor child would not be treated as the sole beneficiary, the trust would not qualify as an EDB.[19] (Note: the fact that the minor child might be the only beneficiary during his or her lifetime is irrelevant here, the trust would not qualify as an EDB.)[20] While the accumulation trust would be subject to the 10-year rule from the outset, there would be no requirement that the proceeds be distributed to the beneficiary outright during that time period. Thus, the post-tax proceeds could then be held pursuant to the terms of the trust, which would likely be a more desired outcome for many clients. Thus, the consideration would then be towards the tax treatment of such a plan, requiring a careful balance of the other assets and the client's preferences.

C. Planning for a Disabled Person.

The Act provides that a person who is "disabled within the meaning of Section 72(m)(7)" qualifies as an EDB. Under

[16] H. Rept. 116-65 - SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019
116th Congress (2019-2020), page 94.
[17] § 401(a)(9)(E)(iii).
[18] *Id*. § 401(a)(9)(f).

[19] Treas. Reg. 1.401(a)(9)-5, A-7(c)(1). A-5. "(a) If the requirements of paragraph (b) of this A-5 are met with respect to a trust that is named as the beneficiary of an employee under the plan, the beneficiaries of the trust (and not the trust itself) will be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9)."
[20] *Id*.

§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 may require."[21] The person's status as disabled is determined as of the plan participant's date of death, meaning that someone who becomes disabled thereafter may not transition into and qualify for EDB status.[22]

D. Planning for a Chronically Ill Person.

The Act provides that a person who is "a chronically ill individual within the meaning of Section 7702(B)(c)(2) is an EDB.[23] As is the case with a disabled person under the Act, a beneficiary's classification as "chronically ill" (and thus, as an EDB) is determined as of the plan participant's date of death, meaning that someone may not transition into EDB status after becoming chronically ill.[24]

E. Exceptions Applicable Only to Disabled or Chronically Ill Beneficiaries.

Importantly, there are some unique exceptions applicable only to disabled and chronically ill EDBs, which do not extend to beneficiaries who are ten years younger than the participant, surviving spouses or minor children. Under Section 401(a)(9)(H)(v), a separate rule applies to "applicable multi-beneficiary trusts." Specifically, the section defines an 'applicable multi-beneficiary trust' as "a trust (i) which has more than one beneficiary; (ii) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph; and (iii) at least one of the beneficiaries of which is an eligible designated beneficiary who is [disabled] or [chronically ill]."[25]

While the terms of these rules are not completely clear, and will need to be fleshed out in future regulations and guidance, this language does give some additional flexibility to clients who may have disabled or chronically ill beneficiaries. In short, the Act provides relief for plans in which (1) trusts are to be divided into separate sub-trusts upon the death of an employee and (2) accumulation trusts that have a disabled or chronically ill EDB as the sole beneficiary during his or her lifetime. Specifically, the Act supersedes the traditional rule that a single trust which divides into sub trusts for separate beneficiaries will not create separate accounts for purposes of calculating a plan's applicable distribution period unless the sub trusts are expressly named in the beneficiary designation forms.[26] However, under the Act, in the absence of being named in the beneficiary designation form, a trust may be subdivided into a separate trust for a chronically ill or disabled EDB.[27] In addition, under Section 401(a)(9)(H)(iv)(II), when "no individual other than [a disabled or chronically ill beneficiary] has any right to the employee's interest in the plan until the death of all such eligible designated beneficiaries, with respect to the trust," then the distribution of the plan proceeds may be calculated based on life expectancy. In other words, an accumulation trust for multiple beneficiaries may qualify for the life expectancy payout if a disabled or chronically ill individual is the sole lifetime beneficiary, despite their not being the only beneficiary of the trust. Again, this is an area that will need to be clarified and expanded upon in the future.

F. Planning for a Beneficiary Within Ten Years of Age.

From a planner's perspective, this will be a viable option for a smaller number of clients, but

[21] § 72(m)(7).
[22] *Id*.
[23] § 401(a)(9(E)(ii)(IV). "a chronically ill individual (within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature)."
[24] *Id*.

[25] IRC § 401(a)(9)(H)(v).
[26] Treas. Reg. 1.401(a)9)-4, A-5.
[27] IRC § 401(a)(9)(H)(iv)(I).

might be an opportunity in the right circumstances. For the most part, this would allow a participant to leave his or her plan to a sibling or other friend or relative who, is within ten years of the participant's age. For example, a participant might be unmarried and/or without children, and could leave the plan to his siblings, each of whom is within ten years in age. As an EBD, the sibling could withdraw the plan funds over his or her life expectancy. Upon the sibling's death, the inherited IRA would then be subject to the 10-year rule. This is another area that is likely to be clarified and expanded upon through the release of regulations in the future.

VI. TRUST PLANNING UNDER THE SECURE ACT

A. General Considerations.

From the estate planner's perspective, the use of trusts as the recipient of retirement plans has been an essential tool in planning for our clients. In addition to maximizing the payout periods and therefore being more tax efficient, they allow for our clients to (1) exclude benefits from their beneficiaries' taxable estates, (2) protect beneficiaries from creditors, and (3) in some (perhaps many) circumstances, protect beneficiaries. from themselves through the appointment of a non-beneficiary trustee. For retirement plan purposes, the two types of trusts that were used before the Secure Act are still valid- however, they can cause very different outcomes for the plan beneficiaries.

Under the prior and current law, a "designated beneficiary" is defined by Section 409(a)(9)(E) as "any *individual* designated by the employee". As we all know, a trust is not an individual, and the Regulations created what are commonly known as "see through" trusts. In order to qualify, the trust must:

- Be valid under state law;
- Be irrevocable upon the account owner's death;
- All applicable beneficiaries must be identifiable; and
- A copy of the trust, or a certified list of trust beneficiaries, must be provided to the IRA custodian, or plan administrator, by October 31st of the rear following the account owner's death.[28]

In general, under prior law, all of the "applicable" trust beneficiaries must be Designated Beneficiaries, or individuals, in order to qualify. As a result, if all of the applicable trust beneficiaries are DB's, the entire trust would be treated as a single DB, and the distributions would be taken based on the oldest applicable beneficiary's life expectancy. However, under the Act, unless a beneficiary is an EDB, the stretch payout would be unavailable. Thus, because the ten-year rule is applicable in most situations, there is no need to determine the age of the beneficiaries in determining the payout.

B. Conduit Trusts.

With a conduit trust, the beneficiary of the trust is treated as the sole beneficiary of the trust (and therefore, of the retirement plan). Under the prior law, a conduit trust allowed the distributions to be spread out based on the oldest income beneficiary's life expectancy (if, as discussed above, all beneficiaries were "Designated Beneficiaries".) Under the Act, naming a conduit trust as the beneficiary is, in practice, the equivalent of naming the trust beneficiary as the beneficiary outright, and the tax treatment will be contingent on the status of the income beneficiaries of the trust. If the trust instrument provides that all amounts distribute from the plan to the trustee is alive is to be paid to the primary beneficiary of the trust when received by the trustee, then the trust would be treated as a conduit trust.[29]

Importantly, in a conduit trust, all plan distributions to the trust must be distributed out to the beneficiary when received by the trustee, meaning that the post-tax distributions may not be held and administered by the trustee of the

[28] Treas. Reg. 1.401(a)(9)-4, Q&A-5.
[29] Treas. Reg 1.401(a)(9)-5, Q&A-7(c)(3), Example 2.

trust. (If distributions to the beneficiary are discretionary, the trust would not be a "conduit" trust.) Practically speaking, this means that for many clients, their beneficiaries will be receiving these assets, and paying the taxes on the distributions, under a significantly condensed timetable.

If a conduit trust has a single income beneficiary, the treatment is fairly straightforward. If the beneficiary is a DB, then under the Act, the all of the distributions must be made within a ten-year period, as received by the trustee.[30] If the beneficiary is an EDB, then the beneficiary will receive distributions based on the beneficiary's life expectancy, so long as he or she qualifies as an EDB.[31] If the beneficiary is non-designated beneficiary, then the proceeds would be payable over the five year period[32]. Again, in situations with a single income beneficiary, the mechanics of the conduit trust are predictable, if not ideal.

Furthermore, there is no need to identify the remainder beneficiaries of the trust, making the administration much simpler. For example:

- A charity (or non-individual) can be named as a remainder beneficiary without an adverse impact on the payout.[33]
- A trust can provide for the exercise of a power of appointment in favor of a charity or non-individual;[34] and
- The age of the remainder beneficiaries is no longer relevant in determining the payout schedule.[35]

For some clients, a conduit trust could continue to be an acceptable vehicle and not impact the client's planning. Again, if the beneficiary is an EDB, then the trust would be treated as an EDB and the distributions could be paid out over the beneficiary's life expectancy. Many trusts are created for surviving spouses, beneficiaries within ten years of age and/or minor children, in which case a stretch payout would be available either for the beneficiary's lifetime, or the period during which the beneficiary qualifies as an EDB (i.e., until a child reaches the age of majority.) Consider the case of a minor child, as discussed above. Because "a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26", it is possible that distributions form a conduit trust could be based on the child's life expectancy until she reaches age twenty-six prior to the applicability of the ten year rule.[36] In such a scenario, the plan would then be distributed to the child in its entirety prior to the child's reaching age thirty-six. While not ideal, it does permit a stretch payout for a considerable time period and would delay the. (Compared to a stretch payout until age eighteen and a full payout by age twenty-eight, this exception could make a conduit trust a more acceptable option for many clients.)

For a non-EDB beneficiary, the mandatory distribution and ten-year pay out would result in all of the retirement plan being distributed to a beneficiary outright within ten years of the plan participant's death. For many clients, the mandatory distribution provision may prove problematic. If the beneficiary is young, irresponsible, has addiction issues, etc., the conduit trust would likely not be the preferred option. Furthermore, the ten-year payout makes the conduit trust an ineffective tool for generation-skipping transfer planning.

Under the Act, key considerations with conduit trusts include:

- Unless the beneficiary qualifies as an EDB, the ten-year rule applies;
- If the beneficiary is an EDB, "stretch" payouts based on the beneficiary's life expectancy are available; and
- No retirement plan income is retained within the trust- all distributions must be paid to the beneficiary.

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[30] IRC § 401(a)(9)(H)(i).
[31] IRC § 401(a)(9)(H).
[32] IRC § 401(a)(9)(H)(i)(l).
[33] Treas. Reg 1.401(a)(9)-5, Q&A-7(c)(3), Example 2.
[34] *Id*.
[35] *Id*.
[36] Treas. Reg. 1.401(a)(9)-6, A-15.

C. Accumulation Trusts.

In an "accumulation trust", the plan distributions may be held or accumulated for distribution to the beneficiary later (or, possibly, to a successor beneficiary). Unlike a conduit trust, which can still take advantage of the stretch payout for all EDBs, the ten-year rule will still apply to most beneficiaries, including most EDBs. (As described in greater detail below, an accumulation trust may qualify for the "stretch" payout if the only beneficiary is a chronically ill or disabled person.)[37]

In order to qualify as an accumulation trust, all potential beneficiaries must be individuals.[38] In other words, there may be no beneficiaries, such as a charity, decedent's estate, etc..[39] However, in the event that a beneficiary of the trust is not an individual (i.e., an entity), the trust would not qualify as a see-through trust, and the distributions would be paid out over 5 years or the life expectancy of the participant (as if the trust was a non-designated beneficiary).

If all of the identifiable, and "countable" beneficiaries are individuals, then the trust can qualify as a "see through" trust.[40] All beneficiaries who are potentially eligible to receive the accumulated distributions are treated as "countable beneficiaries".[41] However, "the Regulations provide that "a person will not be considered a beneficiary for purposes of determining who is the beneficiary…merely because the person could become the successor to the interest of one of the employee's beneficiary's after the beneficiary's death."[42] Thus, in analyzing a trust's qualification as an accumulation trust, it is crucial to determine whether a beneficiary is a "countable" beneficiary for these purposes or a "mere successor beneficiary". In the context of an accumulation trust, in which the plan proceeds may be accumulated and not distributed, most practitioners believe that all named beneficiaries will be "countable" for these purposes.[43] As a result, all of the beneficiaries must be individuals in order to qualify.

While the typical "family" or "bypass" or "descendants'" trust would seem to be qualify as an accumulation trust, many of our standard language liked by practitioners and clients alike could disqualify a trust from qualifying as an accumulation trust. As such, we need to check our powers of appointment. Many practitioners, including this one, give beneficiaries a special power of appointment over exempt trusts, exercisable in favor of the grantor/testator's descendants, and in some, albeit more limited circumstances, a descendant's spouse. This practice would not prove problematic, as all of the potential beneficiaries would be individuals. But what if that special power of appointment includes charitable organizations, as many of our documents do? Such a provision would cause the trust to fail to meet the standards of an accumulation trust. Similarly, if the trust is non-GST exempt and the beneficiary possesses a general power of appointment exercisable in favor of her creditors or estate, the trust would not qualify.[44] In the event that the trust fails to meet the accumulation trust requirements described herein, the result would be the application of the five-year payout as opposed to the ten-year payout. This is an area to keep an eye on in the future, as future guidance from the IRS might address some of these concerns and clarify the rules regarding remainder beneficiaries. Given the accelerated payout and taxation under the Act due to the applicability of the ten-year payout for most accumulation trusts, the Service might be more inclined to permit the distribution might make the Service more inclined to permit a charitable beneficiary or a general power of appointment.

[37] IRC §401(a)(9)(H)(iv)(l).
[38] *See* Reg. §1.401(a)(9)-5, Q&A-7(c)(3) Ex. 1.
[39] *Id*.
[40] Treas. Reg. 1.401(a)(9)-5, A-7(c)(1).
[41] *Id*.
[42] Treas. Reg. 1.401(a)(9)-5, A-7(c)(1). Ex. 1.
[43] *See* Natalie B. Choate, Life and Death Planning for Retirement Benefits (8th ed., 2019). Chapter 6.
[44] *See* Mezzullo, 814-4th T.M., Estate and Gift Tax Issues for Employee Benefit Plans, II.C. Penalty Taxes.

As discussed above, the Act includes an exception to the payout rules for certain accumulation trusts of which the sole beneficiary is a chronically ill or disabled person.[45] In such a case, the plan benefits may be paid out over the disabled or chronically ill beneficiary's life expectancy.[46] (In planning for such a beneficiary, great care should be taken to ensure that a trust for his or her benefit qualifies for this exception, and the discretionary distributions would otherwise qualify as a special needs trust. For example, if a conduit trust is used for such a beneficiary, the mandatory distribution requirements could cause a disabled beneficiary to lose any governmental assistance to which he or she is otherwise entitled.)

From a management perspective, the accumulation trust may be preferable for many clients, in that the post-tax distributions may remain in the trust for future investment. Perhaps more importantly, they may remain under the management of the trustee who can make distribution decisions that it believes are in the beneficiary's best interests. However, the plan distributions will be taxed at the trust level, and their notoriously high tax rates. For example, in 2020, the Trust tax rates hit the maximum 37% rate at $12,950.00 of income.[47] Conversely, a single individual would hit that rate at $518,400 of income, or $622,050 for a married couple.[48] In other words, a client desiring to maintain control over the assets will need to accept the potential for less favorable tax treatment as a trade-off. Again, any income distributed to the beneficiary would not be subject to the compressed schedules, and would be picked up on a K-1 issued to the beneficiary.

From the planner's perspective, the end result is that the 10-year rule is applicable to most accumulations trusts, unless an exception for a certain eligible designated beneficiary applies, as discussed herein. With respect to accumulation trusts drafted prior to the Act, the administration of the trust and the tax treatment may differ significantly from what practitioners and clients had envisioned when designing an estate plan.

Again, when drafting accumulation trusts under the Act, practitioners must ensure that two of the potential issues discussed above do not cause an unintended or unexpected result.

Firstly, the trust should not provide for a charity or entity as the remainder beneficiary of the trust.[49] However if the client is motivated to do so, he or she may be willing to accept the applicability of the five-year rule in order to name a charitable remainder beneficiary.

In addition, the beneficiary should not be granted a general power of appointment over the trust assets (regardless of the potential generation-skipping transfer tax consequences or motivation in doing so).[50] If, however, the trust is fully GST-exempt, this wouldn't be necessary as the primary beneficiary's death would not be a taxable termination. If the trust is non-exempt, the trustee could distribute the assets to the primary beneficiary prior to his death and therefore avoid a taxable termination.[51] Alternatively, the primary beneficiary could exercise a limited power of appointment in favor of an individual who would not trigger a taxable termination.[52] Depending on the size of the Decedent's estate, the retirement plan proceeds might not be an efficient use of the Decedent's GST exemption. While allocating the Decedent's GST exemption to an accumulation trust would be an option, doing so is not without its drawbacks. In allocating the exemption, the property would be valued using the plan's fair market value on the Decedent's date of death. Thereafter, the plan distributions would be taxed as received by the trust (unless distributed out to the beneficiaries), making this a less than ideal

[45] IRC § 401(a)(9)(H)(iv)(I).
[46] *Id*.
[47] *See* I.R.S. Tax Inflation Adjustments for Tax Year 2020, Rev. Proc. 2019-44 (Nov. 6, 2019) (to be codified at 26 C.F.R. pt. 1).
[48] *Id*.
[49] Treas. Reg. 1.401(a)(9)-5, A-7(c)(1).
[50] *Id*.
[51] *See* Natalie B. Choate, "Planning for Retirement Benefits After the Secure Act," 54th Annual Heckerling Institute on Estate Planning, 7 (2020), at 21.
[52] *Id*.

result. As a result, if the Decedent's available GST exemption is less than the fair market value of her taxable estate, her GST exemption might be better utilized in sheltering other, non-retirement plan assets.

Under the Act, key considerations with accumulation trusts include:

- Unless the beneficiary qualifies as a certain EDB (chronically ill or disabled individual), the ten-year rule applies;
- Unlike a conduit trust, other EDB's do not qualify for "stretch" payouts based on the beneficiary's life expectancy are available; a
- The Trustee had discretion to retain plan distributions within the trust or distribute to the beneficiary;
- All undistributed retirement plan income is taxed at the trust level;
- While plan must be distributed to trust (and taxed) within ten years, plan distributions are not required to be distributed to the beneficiaries.

D. Charitable Trusts.

For clients with significant charitable motivations, the charitable remainder trust might be a viable option. A charitable remainder trust provides for a distribution (either an annuity or unitrust payment) to one or more persons for the life (or lives) of the beneficiary (or beneficiaries) or a term of no more than twenty years.[53] At the end of the trust term (or upon the death of the individual beneficiary), the remainder interest is held for, or distributed to, a charitable organization described in Section 170(c).[54] The charitable remainder trust is exempt from income taxes, and the Decedent's estate would receive an estate tax charitable deduction equal to the actuarial value of the charitable remainder interest under Section 2055.

In the case of a Charitable Remainder Annuity Trust, ("CRAT"), the trust must pay a fixed amount to one or more of the non-charitable beneficiaries, with such amount equal to at least 5%, but no more than 50%, of the fair market value of the trust assets as of the date of transfer to the trust.[55]

In the case of a Charitable Remainder Unitrust ("CRUT") the trust must pay a fixed amount to one or more of the non-charitable beneficiaries, with such amount equal to at least 5%, but no more than 50%, of the fair market value of the trust assets calculated on an annual basis.[56]

In order to qualify, the charitable remainder trust must meet all of the requirements under Section 664.

The charitable remainder trust would not be treated as a designated beneficiary, meaning that under the Act, all of the retirement plan proceeds would be subject to the five-year rule. However, because the charitable trust is not subject to income tax, the retirement plan proceeds would not be taxed when distributed to the trust. While all of the subsequent distributions in satisfaction of the annuity or unitrust payments would be taxable income to the recipient beneficiary, the beneficiary would be able to stretch that income over the trust term or life of the beneficiary.[57] Accordingly, for clients who have charitable aspirations, the charitable remainder trust provides an opportunity to provide a lifetime income stream to a beneficiary instead of a mandatory payout under the ten-year rule.

VII. SECURE ACT'S APPLICABILITY TO PRE-2020 DEATHS

E. Exemption for Pre-2020 Deaths.

The Secure Act provides that "except as provided in this subsection, the amendments made by this Section shall apply to distributions with respect to decedents who die after December 31, 2019".[58] However, there is language in Section 401(b)(5) that suggests that the Act could

[53] IRC § 664.
[54] IRC §§ 664(d)(1); 664(d)(2).
[55] IRC § 664(d)(1)(A).
[56] IRC § 664(d)(2)(A).
[57] *Id*.
[58] IRC § 401(b)(1).

be applicable in certain circumstances when the plan participant died prior to 2020.

More particularly, the Section provides:

> (5) EXCEPTION FOR CERTAIN BENEFICIARIES:
>
> (A) IN GENERAL, if an employee dies before the effective date, then, in applying the amendments made by this section to such employee's designated beneficiary who dies after such date:
>
> (i) Such amendments shall apply to any beneficiary of such designated beneficiary; and
> (ii) The designated beneficiary shall be treated as an eligible designated beneficiary[59] for purposes of applying section 401(a)(9)(H)(ii) of the Internal Revenue Code of 1986 (as in effect after such amendments).[60]

As discussed herein, Section 401(a)(9)(H)(ii) provides that when an EDB passes away, after receiving payouts based on his or her life expectancy, the 10-year rule applies.[61] The language "any beneficiary of such designated beneficiary" in (A)(i) would likely then apply when the designated beneficiary of a pre-2020 decedent subsequently passes away after 2020. Therefore, the determination of whether his or her named beneficiary is a designated beneficiary, EDB or non-designated beneficiary would then apply the "new" tests under the Act. This is one area in which the Secure Act has created significant uncertainty for planners, and where there may be different interpretations that should be discussed with clients and which may be fleshed out through future regulations.

In cases where a pre-2020 death left plan benefits to a single designated beneficiary, the application will be straightforward enough. When the designated beneficiary received the plan outright, upon his or her death, the rules under the Act would apply to determine the appropriate distribution period. Similarly, if, as a result of a pre-2020 death, a conduit trust was created for a single beneficiary (who, under the previous law would be taking distributions based on his or her life expectancy), the new rules would apply to determine the appropriate distribution period for his or her beneficiaries. Generally speaking, unless those beneficiaries qualified as EDBs under the Act, the plan benefits would most likely be distributable over ten years under the 10-year rule.

However, what happens in situations where benefits are left to trusts with multiple beneficiaries? For example, if benefits were left to an accumulation trust with multiple beneficiaries, the previous law looked to the life expectancy of the oldest beneficiary in determining the applicable distribution period. Under the Act, does this mean that the 10-year rule only applies when the oldest beneficiary dies, or would the death of another beneficiary trigger the applicability of the Act and mandate the ten-year distribution period?

Similarly, what if there are multiple individuals who are designated beneficiaries? Under the prior law, the applicable distribution period was based on the oldest beneficiary's life expectancy.[62] Again, does the 10-year rule only apply upon the death of the oldest beneficiary, or does the death of any beneficiary trigger the 10-year payout for all of the beneficiaries?

Needless to say, the Act has resulted in some uncertainty in these areas, and are many blanks which need to be filled in before practitioners will be able to confidently advise their clients as to the outcome under these scenarios.

VIII. WHAT TO LOOK FOR NOW?

[59] In this case, the designated beneficiary would be the beneficiary who dies after 2019, but was named by a decedent who passed away before 2020 and the effective date of the Act.
[60] IRC § 401(b)(5)(A)(i) – (ii).
[61] IRC § 410(a)(9)(H).

[62] Treas. Reg. §1.401(a)9)-4; Treas. Reg. § 1.401(a)(9)(5).

A. Different Perspective on Retirement Plans.

When meeting with new clients, it goes without saying that the discussions must involve a detailed conversation regarding a client's assets. The Secure Act should result in a separate assessment of retirement benefits, as well as a detailed income tax analysis in order to determine the best course of action for the client.

For example, suppose a client's assets include an IRA valued at $4,500,000. For estate tax purposes, the account is valued at $4,500,000. However, the account is not worth that to the beneficiaries, given the built-in income tax liability that must be recognized in the future. Put simply, many clients are so used to the concept of the stretch payout that they may easily overlook the built-in, deferred income tax liabilities inherent to the retirement plan. As such, practitioners will need to ensure that the client understands this, and explain why a more detailed examination of the retirement plan is warranted. Depending on the beneficiary's relationship to the decedent and his or her tax bracket, the value received could be substantially less than anyone is considering at the outset. In analyzing the planning options for our clients, income tax planning will become a larger component, as related to the client's retirement plan. These analyses will necessarily expand to include the beneficiaries' income and tax situations, in order to design the best path forward for the client's retirement plan.

In addition, the loss of the "stretch" payout for many, if not most, beneficiaries, will result in the entire plan being distributed and on an accelerated timetable. When dealing with substantial retirement plans, unless the estate plan incorporates the use of an accumulation trust, clients should recognize that their beneficiaries will be receiving all of such assets outright, in a relatively short time period. For those beneficiaries with spendthrift concerns, the Act will likely have frustrated the client's goals.

B. Review of Existing Estate Plans.

For some clients, the Secure Act will change very little. For example, those who do not have retirement plans, or whose plans represent a small portion of their taxable estates, should not be adversely impacted. Similarly, those clients who leave their retirement plans to a surviving spouse, or an EDB or charity will not be adversely impacted.

However, in situations where the retirement plan represents a substantial portion of the estate, it could have a very significant impact. In particular, when the plan is left to a conduit or accumulation trust with the goal of delaying and maximizing the distributions over time, the Act will cause a drastically different result. In particular, if a client's current plan incorporates the use of a conduit trust, a more thorough review is advisable. Unless the beneficiary is an EDB and the trust qualifies for a stretch payout, immediate changes (such as the use of an accumulation trust) may be required in order to avoid a significantly different result from what was originally intended when the document was drafted prior to the enactment of the Act.

For charitably-inclined clients, a charitable remainder trust might be a viable option. With most trusts being saddled with accelerated taxation (over the 10-year period), the mandatory distribution of plan benefits (in the case of a conduit trust), and/or the higher tax rates attributable to trusts (in the case of an accumulation trust), a charitable remainder trust might make a great deal of sense for those who wish to provide a beneficiary with a fixed stream of income and many clients. The plan benefits could be paid into the trust without triggering taxes, with the distributions to the individual beneficiary being taxed as distributed at his or her applicable rate.

In addition, the inability to spread out distributions and the tax liabilities of a plan may cause many clients to consider a Roth conversion for their IRAs. In some cases, the owner may be in a lower tax bracket than his or her individual beneficiaries, and exchanging tax-free growth appreciation for certainty in the rates might be attractive. In addition, the owner's income tax rate would almost certainly be lower than the rates that will now be paid by an accumulation trust (if that income is not distributed out to a trust beneficiary). While the plan benefits would still be subject to the ten-year rule, the distributions would be tax-free to the recipient beneficiary.

C. Conclusion

In conclusion, the Act is a very significant piece of legislation, which has caused practitioners to reevaluate planning options for many clients' retirement plans.

While many of the changes are positive, and will facilitate a person's ability to save for his or her retirement, others are not. The new, accelerated timelines for the distribution of inherited retirement plans will have significant administrative and tax implications for many, many people, and as such, practitioners will need to work with their clients to determine what changes are advisable, and in some cases, required, to ensure that the client's estate planning goals are accomplished.

Practitioners should review their forms to determine whether certain changes are indicated for the client. For example, the conduit trust may not be the most effective vehicle for most clients, and further, as discussed herein, could trigger a previously unanticipated result which many clients would deem disastrous. While the accumulation trust is a likely choice under the Act, the newfound applicability of the ten-year rule in almost all situations makes the determination of the oldest beneficiary unnecessary.