

WHAT DO THE SECURE ACT AND COVID-19 HAVE TO DO WITH YOUR RETIREMENT BENEFITS?

presented by

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BENEFITS AND RETIREMENT

People are most interested in getting professional guidance about

How to not run out of money before they die (66%) and

How the market impacts their savings (64%)

([Majority of Americans are Reluctant to Discuss Retirement Concerns](https://www.allianzlife.com/about/newsroom/2021)
[Allianz Life](https://www.allianzlife.com/about/newsroom/2021) at <https://www.allianzlife.com/about/newsroom/2021>)

SECURE ACT OF 2019

On December 20, 2019, President Trump signed into law the Setting Every Community Up For Retirement Enhancement Act of 2019 (the “SECURE” Act), which became effective on January 2, 2020.

Major changes to defined contribution plans (IRAs, qualified retirement plans and other retirement arrangements):

- required beginning date is before April 1 of the year following a participant’s 72nd birthday
- allowing contributions to IRA’s past 70 ½, provided the taxpayer has taxable income
- lifetime income disclosure based on single life and qualified joint and survivor annuity
- drastically modified stretch rules

SECURE ACT OF 2019 LIFETIME INCOME DISCLOSURE

- SECURE requires qualified defined contribution plans (such as covered by Code sections 401(k) or 403(b), profit-sharing plans and ESOPs, but not defined benefits plans or cash balance plans) to provide, at least annually, a lifetime stream of income disclosure (Lifetime Income Disclosure).
- On September 18, 2020, Department of Labor (“DOL”) published its interim final rule regarding Lifetime Income Disclosure. In July of 2021, DOL published temporary FAQ related to Lifetime Income Disclosure rule. On September 18, 2021, Lifetime Income Disclosure rule became effective. Plan administrators for calendar year plans will have until September 18, 2022 to provide Lifetime Income Disclosures.
- As a practical matter, if the plan issues benefit statements on a quarterly basis, the Lifetime Income Disclosure will have to be included with the 2nd quarterly statement for 2022 (i.e. July) in order to be issued by September 18, 2022.

SECURE ACT OF 2019 LIFETIME INCOME DISCLOSURE

Lifetime Income Disclosure rule requires a plan administrator to provide an annual estimate of the participant’s retirement savings illustrated as both:

- a single life income stream, and
- a qualified joint & survivor annuity

The disclosure is required REGARDLESS of whether the plan actually offers an annuity as a form of payment or whether the participant is married on the statement date.

SECURE ACT OF 2019 LIFETIME INCOME DISCLOSURE

DOL provided the model disclosure language and listed several important assumptions, including, among other things:

- No guarantee for illustrated amounts
- Annuity commencement date is the date of the benefits statement (e.g. June 30, 2022)
- Participant is presumed to be vested 100% (even though he/she might not)
- All outstanding notes are presumed to be paid off

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SECURE ACT OF 2019 LIFETIME INCOME DISCLOSURE

The Participant is presumed to be 67 years old (or, if actually older, his/her actual age)

Spouse is presumed to be of the same age as the participant

Joint and survivor annuity presumes 100% of the monthly payments payable during joint lives

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SECURE ACT OF 2019 STRETCH RULES

Replaced two-tiered system by three-tiered system

Two -Tiered		Three - Tiered		
Designated beneficiary	No designated beneficiary	No designated beneficiary	Designated beneficiary	Eligible Designated beneficiary

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SECURE ACT OF 2019 NO DESIGNATED BENEFICIARY

- Estate
- Charity
- Trust that has an estate and/or charity as one of the beneficiaries

Payout Period – 5 years if the participant died BEFORE the required beginning date (RBD)

- remaining life expectancy, if the participant died AFTER the RBD

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SECURE ACT OF 2019 DESIGNATED BENEFICIARY – 10 YEAR RULE

Catch-all group, since it excludes eligible designated beneficiaries and those who fall under “no designated beneficiaries” group

Simple 10 - year rule applies REGARDLESS of whether the participant died BEFORE or AFTER his/her required beginning date.

Payout period - by the end of the 10th year of the participant’s year of death (either in lump sum or in installments)



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SECURE ACT OF 2019 ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH* SURVIVING SPOUSE

Pre-SECURE options remain ALMOST the same as post-SECURE

SAME

- Rollover into his/her own IRA and take after 72
- Treat as inherited IRA and take either now or decedent’s 72
- Conduit trusts will stretch over spouse’s lifetime (spouse is the sole beneficiary AND all retirement distributions received by the trust are paid out or applied for the spouse)

DIFFERENT

- Accumulation trusts – 10 yrs
 - (A) spouse is the sole beneficiary BUT the trust does not qualify as a conduit trust
 - (B) spouse and others are trust beneficiaries

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**SECURE ACT OF 2019
ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH*
DISABLED AND CHRONICALLY ILL**

General rule – lifetime stretch (i.e. inherited IRA) is allowed whether the benefits are left outright or in trust

Conduit trust – disabled/chronically ill is a sole beneficiary AND retirement benefits as received by the trust must be paid out to or applied for the benefit of the beneficiary

Accumulation trust (a so called multi-beneficiary trust) – either BEFORE or AFTER the participant's death can be divided into separate shares with one for the disabled/chronically ill and stretch over his/her lifetime

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**SECURE ACT OF 2019
ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH*
DISABLED AND CHRONICALLY ILL**

SECURE does not define either of these terms.

The term “disabled” is found in Section 72(m)(7) of the Code as “(i) unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment (ii) which can be expected to result in death or to be of long-continued and indefinite duration”.

The proof of “disability” is likely to be furnished as the Secretary of Treasury may require.

Upon death of a disabled individual, the payout period is 10 years.



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**SECURE ACT OF 2019
ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH*
DISABLED AND CHRONICALLY ILL**

The term “chronically ill” is found in Section 7702(B)(c)(2) of the Code as related to qualified long-term care insurance and services.

Upon death of the chronically ill individual, the payout period is 10 years.

Further guidance is likely to be provided whether determination of chronic illness needs to be done annually.

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**SECURE ACT OF 2019
ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH*
OLDER, SAME AGE OR NO MORE THAN 10 YEARS YOUNGER**

General rule – lifetime stretch (i.e. inherited IRA) is allowed, if the benefits are left either outright or to a conduit trust

Accumulation trust – 10-year rule



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SECURE ACT OF 2019
ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH*
MINOR (18, 19, 21 OR 25 ???)

It is not clear whether the age of majority is determined exclusively by state and/or federal law.

Most of the states define age of majority as 18, except for Alabama (19), Nebraska (19) and Mississippi (18, but 21 for purposes of paying child support).

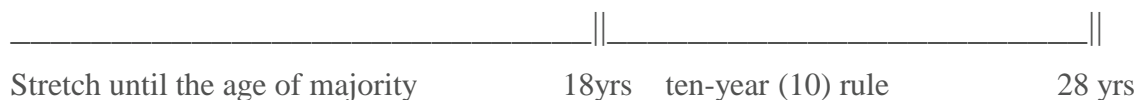
IRS issued regulations allowing parents to claim their child as minor (up to reaching the age of 26), if a person has not completed a specific course of education).

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SECURE ACT OF 2019
ELIGIBLE DESIGNATED BENEFICIARIES – LIFETIME STRETCH*
MINOR

General rule – lifetime stretch (i.e. inherited IRA) until the minor reaches the age of majority, if the benefits are left either outright or to a conduit trust; after that 10-year rule applies (unless the child can qualify as a disabled or chronically ill).



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SECURE ACT OF 2019 10-YEAR RULE

As of right now there are no IRS regulations addressing 10-year rule.

IRS Pub. 590-B (Distributions from Individual Retirement Arrangements for 2020 Returns) published early in 2021 and amended on May 27, 2021, permits those who qualify for a 10-year stretch to take out the inherited retirement benefits either in lump sum or in increments by December 31 of the 10th year of the participant's date of death.

SECURE ACT OF 2019 10-YEAR RULE - EXAMPLES

Participant died BEFORE his/her RBD (before April 1 of the year following his/her 72nd birthday) – no RMD, but all IRAs must be taken out by December 31 of the 10th year from death

||_____||

October 1, 2021 (DOD) no RMD

December 31, 2031 (10 years expire)

Participant died AFTER his/her RBD – not clear whether RMD shall continue, but all IRAs must be taken out by December 31 of the 10th year from death

||_____||

October 1, 2021 (DOD) RMD (?) 22, 23, 24, 25, 26, 27, 28, 29, 30 December 31, 2031 (10 yrs)

**SECURE ACT OF 2019
UPDATED SINGLE LIFE AND UNIFORM LIFE TABLES
TREAS. REG. 1.401(A)(9)-9(B)-(C)**

Effective as of January 1, 2022

Reflect longer life expectancy (by about 1-2 years)



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**SECURE ACT OF 2019
UPCOMING TREASURY REGULATIONS**

During the summer of 2021, the IRS confirmed that regulations would be issued shortly re SECURE for:

RMD



Naming trusts (conduit and accumulation trusts as well as trusts that fall outside Designated Beneficiaries) as IRA beneficiaries

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SECURE ACT OF 2019 CARES ACT – POINTERS

On March 13, 2020, the President declared a national emergency related to COVID-19. Under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, a national emergency related to COVID-19 pandemic existed in the United States beginning March 1, 2020. CORONAVIRUS, AID, RELIEF AND ECONOMIC SECURITY ACT (“CARES ACT”), was signed into law on March 27, 2020.

Unless the payment of the benefits is annuitized, RMD for 2020 are waived (count 2020 as if RMD were taken for purposes of The Single Life and Uniform Life tables)

Coronavirus-related distributions (a distribution made from an eligible retirement plan to a qualified individual from January 1, 2020, to December 30, 2020, up to an aggregate limit of \$100,000 from all plans and IRAs) **can be** repaid to an eligible retirement plan, provided that the repayment is completed within three years after the date that the distribution was received. If CRD is repaid, the distribution will be treated as though it were repaid in a direct trustee-to-trustee transfer so that no federal income tax is owed on the distribution.

SECURE ACT OF 2019 IMPACT OF THE SECURE ON CURRENT ESTATE PLANS SINGLE INDIVIDUALS – NO CHILDREN, LIVING SIBLINGS (No Special Needs)

PRIOR TO SECURE

Inherited IRA to the sibling - outright

Regardless of the sibling's age, he/she can stretch over his/her life or the life of the decedent, if longer

AFTER SECURE

Inherited IRA to the sibling – outright

Unless the sibling is older, the same age or no more than 10 years younger than the decedent, 10 yrs

If the sibling is older, the same age, or no more than 10 years younger, then he/she can stretch over his/her life or the life of the decedent, if longer

SECURE ACT OF 2019
IMPACT OF THE SECURE ON CURRENT ESTATE PLANS
SINGLE INDIVIDUALS – NO CHILDREN, LIVING SIBLINGS (NO SPECIAL NEEDS)

PRIOR TO SECURE

Inherited IRA to the trust for the benefit of the siblings and his/her descendants

If a conduit trust, then stretch over the life of the sole beneficiary (i.e. usually, the sibling)

If an accumulation trust, then stretch over the life of the oldest beneficiary

AFTER SECURE

Inherited IRA to the trust for the benefit of the siblings and his/her descendants

If a conduit trust AND the sole beneficiary is older, the same age or no more than 10 years younger, stretch over the life of the sole beneficiary

If an accumulation trust, then 10 years

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SECURE ACT OF 2019
IMPACT OF THE SECURE ON CURRENT ESTATE PLANS
SINGLE INDIVIDUALS – LIVING GROWN-UP CHILDREN (NO SPECIAL NEEDS) AND GRANDCHILDREN (NO SPECIAL NEEDS)

PRIOR TO SECURE

Assets are left outright to children with specific bequests to grandchildren

A child (regardless of age) can stretch over his/her life the inherited IRA

AFTER SECURE

Assets are left outright to children with specific bequests to grandchildren

A child (unless a minor) is subject to the 10-year rule

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WHAT DO THE SECURE ACT AND COVID-19 HAVE TO DO WITH YOUR RETIREMENT BENEFITS

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SECURE ACT OF 2019 IMPACT OF THE SECURE ON CURRENT ESTATE PLANS SINGLE INDIVIDUALS – LIVING GROWN-UP CHILDREN (NO SPECIAL NEEDS) AND GRANDCHILDREN (NO SPECIAL NEEDS)	
PRIOR TO SECURE	AFTER SECURE
Assets are left to a dynasty trust for the child and his/her bloodline	Assets are left to a dynasty trust for the child and his/her bloodline
Inherited IRA can be stretched over the life expectancy of the oldest trust beneficiary	Inherited IRA is subject to the 10-year rule regardless whether the trust is a conduit trust or an accumulation trust
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SECURE ACT OF 2019 IMPACT OF THE SECURE ON CURRENT ESTATE PLANS MARRIED COUPLE – MINOR CHILDREN (NO SPECIAL NEEDS)	
PRIOR TO SECURE	AFTER SECURE
Assets outright to spouse with one pot trust for minor children	Assets outright to spouse with one pot trust for minor children
Spouse can (i) rollover, (ii) treat as her own, or (iii) treat as inherited IRA. After the surviving spouse's death, stretch over the life of the oldest beneficiary (for rollover and own IRA) or the remainder of the spouse's life (for inherited IRA).	Spouse can (i) rollover, (ii) treat as her own, or (iii) treat as inherited IRA. After the surviving spouse's death, stretch until one of the children reaches the age of majority, after that 10 yrs.
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SECURE ACT OF 2019 IMPACT OF THE SECURE ON CURRENT ESTATE PLANS MARRIED COUPLE (SECOND MARRIAGE, BLENDED FAMILY) – CHILDREN FROM EACH MARRIAGE (NO SPECIAL NEEDS)

PRIOR TO SECURE

Assets to the spouse in a marital or credit shelter trust and upon his/her death, to decedent's children, outright

The trust (either marital or credit shelter) can stretch over the oldest bene lifetime (usually, spouse). After the surviving spouse's death, children could stretch over the remainder of the spouse's life

AFTER SECURE

Assets to the spouse in a marital or credit shelter trust and upon his/her death, to decedent's children, outright

Unless the trust (either marital or credit shelter) is a conduit trust, 10 yrs. After the surviving spouse's death, not clear whether children will have 10 yrs or the remainder of 10 yrs.

If the trust (either marital or credit shelter) is a conduit trust, then stretch over the surviving spouse life. After the surviving spouse's death, children are subject to 10 yrs.

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SECURE ACT OF 2019 IMPACT OF THE SECURE ON CURRENT ESTATE PLANS MARRIED COUPLE (PARENT) – CHILDREN WITH SPECIAL NEEDS (DISABLED OR CHRONICALLY ILL)

PRIOR TO SECURE

Assets are left to a special needs trust

The trust could stretch IRA over the life expectancy (i) of the sole beneficiary (conduit), or (ii) the oldest beneficiary (accumulation)

AFTER SECURE

Assets are left to a special needs trust

The trust (whether conduit or accumulation, provided a separate share trust) can stretch IRA over the life expectancy of the disabled/chronically ill beneficiary.

If a minor child does not have disability yet, stretch until majority age for a conduit trust and, if the child becomes disabled before reaching the majority age, stretch for the life of the disabled child after majority age.

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PRIOR TO SECURE	AFTER SECURE
Assets are left to a special needs trust	Assets are left to a special needs trust
The trust could stretch IRA over the life expectancy (i) of the sole beneficiary (conduit), or (ii) the oldest beneficiary (accumulation)	(special needs MUST BE at the time of the participant's death) The trust (whether conduit or accumulation, provided a separate share trust) can stretch IRA over the life expectancy of the disabled/chronically ill beneficiary
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SECURE ACT OF 2019 PLANNING OPPORTUNITIES CHARITABLE REMAINDER TRUST – SECTION 664 OF The CODE
Charitable Remainder Trusts (CRT) have individuals as primary beneficiaries and charities as remainder beneficiaries (e.g. annuity to my son for life, upon his death to Red Cross of America.
CRTs do not fall within Designated Beneficiaries (or Eligible Designated Beneficiaries) – 5 yr rule or remainder of the participant's life rule applies
BUT IT IS IRRELEVANT BECAUSE
CRT whether unitrusts or annuity trusts, <u>are exempt, by statute, from income tax.</u>
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SECURE ACT OF 2019 PLANNING OPPORTUNITIES CHARITABLE REMAINDER TRUST – REQUIREMENTS

1. CRT from which a fixed percentage (which is not less than 5% nor more than 50%) of the net fair market value of its assets, valued annually, or a fixed annuity (but no other payments) is to be paid
2. not less often than annually
3. to one or more persons (at least one of which is an individual, only to an individual who is living at the time of the creation of the trust)
4. for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals
5. the remainder interest to be transferred to, or for the use of, a charity or is to be retained by the trust for such a use, and
6. the value of such remainder interest in such property is at least 10% of the net fair market value of such property as of the date such property is contributed to the trust

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SECURE ACT OF 2019 PLANNING OPPORTUNITIES CHARITABLE REMAINDER TRUST VS. ACCUMULATION TRUST FOR A GROWN UP SON (NO SPECIAL NEEDS)

CRT

IRA of \$1,000,000 is left to a CRT for a 60-yr old son with no special needs, with 5% annuity to be paid for his life

\$1,000,000 is cashed out by CRT without federal income tax, thus leaving \$1,000,000 in trust for administration.

Son receives 5% annually (\$50,000) and pays deferred income tax

The decedent's estate takes a charitable deduction of \$379,040 for the remainder interest.

ACCUMULATION TRUST

IRA of \$1,000,000 is left to an accumulation trust for the benefit of the 60-yr old son with discretionary income and principal, upon his death, continue in trust for his bloodline.

The accumulation trust will have 10 yrs to cash \$1,000,000 IRA. If the trust cashes it outright away, the highest tax rate (federal 37% as of 2021) will apply at the trust level, leaving, roughly, \$600,000 of net assets to administer

NOTE: (Commentators suggest using Beneficiary Defective Owner Trust (BDOT) to have the beneficiary pick up income tax on IRA distributions, but leaving IRA distributions in trust)

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SECURE ACT OF 2019
PLANNING OPPORTUNITIES
RETIREMENT BENEFITS ARE LEFT TO ACCUMULATION TRUST WITH ONE OR
MORE DISABLED BENEFICIARIES

Since it is not clear whether all or only some of the trust beneficiaries must be disabled, in order to qualify for a lifetime stretch over the disabled beneficiary's life, it is wise to split the trust into separate share trusts (by September 30 of the year following the year of death of the participant) to take advantage of the lifetime stretch for the separate share trust.



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SECURE ACT OF 2019
PLANNING OPPORTUNITIES
CONVERT IRAS INTO ROTH IRAS*

SECURE applies to Roth IRAs

Since no RMD are required during the life of the owner, the real impact is upon the death of the Roth IRA owner (i.e. stretch)

Because Roth distributions are tax-free, if the inherited Roth IRA is subject to the 10-yr rule, at least no income tax is due upon distributions.

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**SECURE ACT OF 2019
PLANNING OPPORTUNITIES
CHARITABLE GIVING**

Because SECURE drastically limited stretch options, it may be better to give life insurance and other non-IRD assets (ie. assets with step-up basis or insurance) to individuals and IRAs to charities (since charities are tax exempt)

MIX OF IRA AND OTHER ASSETS

IRA (\$1,000,000) and securities (FMV \$1,000,000) are left equally to the decedent's son and a charity

Total income tax due if IRA is cashed out and the securities are sold right after the death - \$185,000
(37% x \$500,000 – son's share)

DESIGNATED CHARITABLE GIVING

IRA (\$1,000,000) is left to a charity and securities (FMV \$1,000,000) are left to the decedent's son

Total income tax due if IRA is cashed out and the securities are sold right after the death - \$0
(charity does not pay tax on IRA, and son got step-up basis equal to FMV of the securities)

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**SECURE ACT OF 2019
PLANNING OPPORTUNITIES
CHARITABLE GIVING**

It is recommended that IRAs should be left to donor-advised funds at the local community foundations instead of naming specific charities. Under the PATRIOT Act, IRA custodians will require a lot of documents re the charity's board of directors. It can be burdensome for small charities to comply with, while community foundations have experience in providing such information.



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SECURE ACT OF 2019 PLANNING PITFALLS

A study by wealth management firm United Income says that, in 2016:

1 in 4 recipients were older than 61 when they received their inheritance (including spouses).

A number of people are now living into their late 80s and 90s,

plenty of children will be in their late 50s or early 60s when they receive an inheritance

<https://www.rate.com/research/news/> “What to Know Before you Leave Your IRA or 401(k) to the Kids)

SECURE ACT OF 2019 PLANNING PITFALLS

Successor (contingent) beneficiaries MUST NOT be overlooked due to premature death or disclaimers by primary beneficiaries.

Lifetime Income Disclosure illustrations may blindly lead a participant to choose an annuity over other distribution options, including rolling over into an IRA. In light of PTE 2020-02 (to be discussed later), it may be difficult to compare low cost annuities with higher investment fees for individual IRAs (in case plan assets are rolled over to an IRA rather than used to purchase an annuity).

SECURE ACT OF 2019 PLANNING PITFALLS – CONDUIT TRUSTS

Unless the sole beneficiary is one of the eligible designated beneficiaries, 10-year rule applies.

Since all IRA distributions received by a conduit trust will be paid out (or applied for the benefit) of the sole beneficiary right away, there is little assets protection value in creating the conduit trust, if the only assets owned by the trust is the inherited IRAs.



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SECURE ACT OF 2019 PLANNING PITFALLS – MARITAL (QTIP) TRUSTS AND CREDIT SHELTER TRUSTS

Unless the trust (in particular, the marital (QTIP) trust) is a conduit trust for the benefit of the surviving spouse, 10-year rule applies.

DO NOT ASSUME



that marital trusts (or credit shelter trusts) created under the Wills automatically allow inherited IRAs to be stretched over the surviving life expectancy.

The requirement to pay all income to the surviving spouse for life IS NOT ENOUGH to stretch the IRA over the surviving spouse's life.

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SECURE ACT OF 2019 TRUSTS FOR MINORS – TRUNCATED LIFE EXPECTANCY

- Post SECURE trusts for minors have to be reviewed with additional scrutiny.
- Relationship to the IRA owner – only minor children of the benefits owners are eligible to get a lifetime stretch
- Age of the minor – the lifetime stretch is allowed only until the minor reaches the age of majority
- Medical condition of the minor – if the minor becomes disabled or chronically ill PRIOR to reaching the age of majority, he/she can stretch over his/her life as a disabled/chronically ill
- One pot trust for minors – it is not clear whether lifetime stretch is allowed if all trust beneficiaries are minors, and if so, whether the stretch converts to 10 yrs after one of the beneficiaries reaches the age of majority

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POTENTIAL IMPACT OF PROPOSED BUILD BACK BETTER ACT OF 2021

On September 15, 2021, the House Ways and Means Committee proposed an amendment to the Build Back Better Act of 2021 that, if enacted, will affect, among other things, retirement benefits.

Who will be affected – high income earners (taxable income for single taxpayer of \$400,000, married filing jointly of \$450,000 and a head of household of \$425,000)

How it applies to IRAs – NO ANNUAL CONTRIBUTIONS TO IRAS (if they have, in aggregate, more than \$10 million of vested accounts in all defined contribution plans (401(k), 403(a) and (b), governmental 457(b), and IRAs), and IMMEDIATE RMD if, on aggregate basis, such taxpayer's defined contribution plans and IRAs exceed \$10 million (DO NOT FORGET 10% PENALTY IF RMD BEFORE 59 ½ YEARS OF AGE)

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POTENTIAL IMPACT OF PROPOSED BUILD BACK BETTER ACT OF 2021

Immediate RMD will be equal to 50% of the amount needed to reduce balance to \$10,000,000 and 100% of the amount needed to reduce balance to \$20,000,000.

Examples (from “A Deeper Dive into the Build Back Better Act: IRA Provisions” by Robert Richter as posted on September 26, 2021 at <https://www.asppa.org/news/deeper-dive-build-back-better-act-ira-provisions>)

“Andy, an “applicable taxpayer,” has a vested 401(k) account balance of \$9,999,000 as of Dec. 31, 2021. In 2022, Andy would be limited to a \$1,000 contribution to his IRA (other than contributions made pursuant to a SEP or SIMPLE IRA).”

POTENTIAL IMPACT OF PROPOSED BUILD BACK BETTER ACT OF 2021 WAIT, THERE IS MORE

Examples (from “A Deeper Dive into the Build Back Better Act: IRA Provisions” by Robert Richter as posted on September 26, 2021 at <https://www.asppa.org/news/deeper-dive-build-back-better-act-ira-provisions>)

“Alisa, an “applicable taxpayer,” has a vested 401(k) account balance of \$11M as of Dec. 31, 2021. In 2022, Alisa would not be able to make a contribution to her IRA (other than contributions made pursuant to a SEP or SIMPLE IRA).

Marcia, an “applicable taxpayer,” has a vested account balance of \$1 million in her IRA as of Dec. 31, 2021. Marcia’s maximum IRA contribution for 2022 would not be impacted by the bill. In 2022, Marcia inherits \$10 million in defined contribution accounts from several deceased relatives. As of Dec. 31, 2022, she exceeded the \$10 million threshold and therefore cannot make any IRA contributions in 2023 (other than contributions made pursuant to a SEP or SIMPLE IRA).”

**POTENTIAL IMPACT OF PROPOSED BUILD BACK BETTER ACT OF 2021
WAIT, THERE IS MORE**

REGARDLESS OF THE INCOME LEVEL, no after-tax contributions can be rollover or converted into ROTH.

HIGH-INCOME EARNERS will be prohibited from contributing or rolling over any non-ROTH accounts into ROTH IRAs or ROTH designated plan accounts



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**POTENTIAL IMPACT OF PROPOSED BUILD BACK BETTER ACT OF 2021
WAIT, THERE IS MORE**

IRAs will be restricted from holding investments in private placements, including, but not limited to, small businesses)

ROBS (Rollover as the Business Start-up) are one of the targets of the proposed bill. (ROBS usually entail creating a C-corporation, setting up a self-directed 401(k) under the C-Corporation, employing the IRA owner by the C-Corporation as an officer, transfer of retirement benefits to the self-directed 401(k) sponsored by the C-corporation, and as an officer of the corporation and trustee of 401(k) plan, directing 401(k) plan to buy stock in the C-corporation.)



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DEPARTMENT OF LABOR (DOL) FIDUCIARY RULES AS RELATED TO INVESTMENT ADVICE, INCLUDING ADVICE TO ROLLOVER INTO AN IRA

As a general rule, under ERISA (1974) and Code Section 4975, parties providing fiduciary investment advice to plan sponsors, plan participants, and IRA owners may not receive payments creating conflicts of interest, unless they comply with conditions in a prohibited transaction exemption (“PTE”).

In 1975, DOL issued the regulations determining who is an investment advice fiduciary.



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DEPARTMENT OF LABOR (DOL) FIDUCIARY RULES AS RELATED TO INVESTMENT ADVICE, INCLUDING ADVICE TO ROLLOVER INTO AN IRA 1975 REGULATIONS

- ✿ Value of securities or other property, or recommends to invest in, buy or sell securities or other property
- ✿ On a regular basis
- ✿ Pursuant to a mutual agreement, arrangement, or understanding that
- ✿ Such advice will serve as a primary basis for investment decisions with respect to the plan or IRA assets, and that
- ✿ The advice will be individualized based on the particular needs of the plan or IRA

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DEPARTMENT OF LABOR (DOL) FIDUCIARY RULES AS RELATED TO INVESTMENT ADVICE, INCLUDING ADVICE TO ROLLOVER INTO AN IRA

In **2016** DOL issued a regulation (commonly known as the “Fiduciary Rule” – 2016”) that updated the 1975 regulation as well as granted new associated prohibited transaction class exemptions and amended certain pre-existing class exemptions.

In **2018** the U.S. Court of Appeals for the Fifth Circuit vacated the rulemaking, including both the rule defining fiduciary advice and the new and amended exemptions. (*Chamber of Commerce of the United States v. U.S. Department of Labor*, 885 F. 3d, 360 (5th Circ. 2018).



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DEPARTMENT OF LABOR (DOL) FIDUCIARY RULES AS RELATED TO INVESTMENT ADVICE, INCLUDING ADVICE TO ROLLOVER INTO AN IRA

Later in **2018** the DOL issued Field Assistance Bulletin (FAB) 2018-02, a temporary enforcement policy providing prohibited transaction relief to investments advice fiduciaries who complied with “Impartial Conduct Standards” (based on (i) a best interest standard, (ii) a reasonable compensation requirement, and (iii) no misleading statements about investment transaction and other relevant matters).

In **2019**, the Securities and Exchange Commission (“SEC”) finalized its regulations (known as Regulation Best Interest) for SEC-regulated broker-dealers and investment advisers.

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DEPARTMENT OF LABOR (DOL) FIDUCIARY RULES AS RELATED TO INVESTMENT ADVICE, INCLUDING ADVICE TO ROLLOVER INTO AN IRA

On July 7, **2020** the DOL proposed PTE 2020-02 (and on December 18, 2020, DOL adopted PTE 2020-02) (“Fiduciary Rule – 2020”), dealing with a new prohibited transaction exemption under ERISA and the Code for investment advice fiduciaries with respect to employees benefit plans and IRAs.

The exemption expressly covers prohibited transaction resulting from both rollover advice and advice on how to invest assets within a plan or IRA.

On July 7, 2020, the DOL issued a technical amendment to the Code of Federal Regulations, and restored the text of the 1975 regulation defining an investment advice fiduciary under ERISA and the Code. It also clarified the exemptions as they were prior to 2016 amendment to be relied upon on their pre-amendment terms.

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The main purpose for issuing PTE 2020-02 is to ensure prudent and loyal investment advice that is in the best interests of retirement investors (i.e. plan participants and beneficiaries, and IRA owners) by mitigating the conflict of interest.

It applies to investment advisors, broker-dealers, banks, and insurance companies and their employees, agents and representatives (investment professionals).



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WHY - the decision to roll over assets from an ERISA governed plan to a non-ERISA IRAs is “the single most important financial decision a plan participant makes, involving a lifetime of retirement savings”. Since advice to roll assets out of a plan is advice as to the sale, withdrawal, or transfer of plan assets, and therefore, is covered as fiduciary advice to the extent that 1975 fiduciary advice definition is satisfied.

HOW THE ROLLOVER ADVICE IS TREATED- Rollover advice becomes fiduciary investment advice rendered on a regular basis if rollover advice occurs as part of an ongoing relationship OR as the beginning of an intended future ongoing relationship. The DOL applies the 1975 regs to the entire advice relationship and does not exclude the first instance of advice.

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- Acknowledge their fiduciary status in writing;
- Disclose their services and material conflicts of interest;
- Adhere to Impartial Conduct Standards (i.e. consumer protection provisions requiring fair dealings and adherence to fiduciary norms). Impartial Conduct Standards require that advisors
 - (i) investigate and evaluate investments, provide advice and exercise sound judgment as a knowledgeable and impartial professional would be (“prudent”);
 - (ii) act with undivided loyalty to retirement investors when making recommendations (“loyal”);
 - (iii) charge no more than reasonable compensation and comply with federal securities laws re “best execution”; and
 - (iv) avoid making misleading statements about investment transactions and other relevant matters

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PTE 2020-02

Adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and to mitigate conflicts of interest;

Document and disclose the specific reason that any rollover recommendations are in the retirement investor's best interests; and

Conduct an annual retrospective compliance review.



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No Enforcement - the DOL will NOT pursue claims for breaches of fiduciary duty or prohibited transactions for the period between 2005 and February 16, 2021, or treat parties as violating the prohibited transaction rules based on rollover recommendations that would have been considered nonfiduciary advice covered under (now revoked) the Deseret Letter, Advisory Opinion 2005-23A.



Further Regulations - PTE 2020-02 became effective as of February 16, 2021. Even though DOL indicated that it may consider additional protections or clarifications, the Impartial Conduct Standard and the requirements for strong policies and procedures are fundamental investor protections that would stay.

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INVESTMENT ADVICE – PTE 84- 24

Insurers and agents may also rely on PTE 84-24, which provides relief for a smaller range of compensation practices, including the insurance agent's receipt of a sales commission from an insurance company, and the insurance company's receipt of compensation and other consideration in connection with annuity sales, provided the conditions of the exemption are satisfied.



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DEPARTMENT OF LABOR (DOL) FIDUCIARY RULES AS RELATED TO
INVESTMENT ADVICE – PTE 84- 24

The transaction must be carried out in the ordinary course of business;

The terms must be at least as favorable to the participant as an arm's length transaction with an unrelated party would be;

The combined total of all fees, commissions and other consideration received by the insurance company or agent must be reasonable;

Disclosures must be made to an independent fiduciary or the plan (e.g. the plan sponsor or committee), including any affiliation between the agent the insurance company, whose policy is being recommended, the sales commission payable with the recommended transaction, and any other costs associated with the purchase, holding, exchange, termination or sale of the recommended contract; and

The recommended transaction must be approved by the independent fiduciary in writing.

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Thank You!

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