



July 1, 2022

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Re: Proposed Regulations Related to Required Minimum Distributions [REG-105954-20]

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to address the need for guidance related to the changes made to required minimum distributions (RMD) as enacted in the Setting Every Community Up for Retirement Enhancement Act, commonly referred to as the “SECURE Act,” contained in the Further Consolidated Appropriations Act, 2020 ([P.L. 116-94](#)).

On February 23, 2022, Treasury and the IRS issued proposed regulations [REG-105954-20] related to the changes to RMDs (“the proposed regulations”). This letter is in response to the proposed regulations. In addition, the AICPA submitted comments¹ on the proposed regulations on June 14, 2022, related to trust and estates.

Specifically, the AICPA provides comments and recommendations in the following areas related to the proposed regulations:

- I. Minimum Distribution Requirements for Designated Beneficiaries when Death of the Employee or IRA Owner Occurs After the Required Beginning Date
- II. Definition of Employer and Guidance for Multiple Employer Arrangements

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Tom Pevarnik, Chair, AICPA

¹ <https://us.aicpa.org/content/dam/aicpa/interestareas/peerreview/prprompts/downloadabledocuments/aicpa-comments-on-trust-and-estate-secure-regs-submit.pdf>.

Employee Benefits Taxation Technical Resource Panel, at (202) 879-5314, or tpevarnik@deloitte.com; Kristin Esposito, AICPA Director – Tax Policy & Advocacy, at (202) 434-9241, or kristin.esposito@aicpa-cima.com; or me, at (601) 326-7119, or JanLewis@HaddoxReid.com.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan Lewis".

Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable Lily Batchelder, Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
Mr. William Paul, Principal Deputy Chief Counsel (Technical) and Deputy Chief counsel, Internal Revenue Service
Ms. Carol Weiser, Acting Benefits Tax Counsel, Department of the Treasury
Ms. Helen Morrison, Deputy, Benefits Tax Counsel, Department of the Treasury
Ms. Rachel Levy, Associate Chief Counsel, (EEE), Internal Revenue Service

AMERICAN INSTITUTE OF CPAs

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BACKGROUND

The SECURE Act, which took effect on January 1, 2020, made substantial changes to the rules for RMDs from retirement plans to plan participants as well as beneficiaries. The proposed regulations update the existing rules for RMDs to accommodate the changes. Prior to the SECURE Act, non-spouse beneficiaries of retirement accounts could “stretch” out distributions over their life expectancy. The ability of a designated beneficiary to take distributions over their life expectancy is referred to as a “stretch” distribution, allowing the beneficiary to be assured of retirement assets for their life expectancy.

The SECURE Act eliminated the ability to “stretch” out RMDs and instead requires distributions to non-spouse beneficiaries, except eligible designated beneficiaries, to be made within 10 years (the 10-year rule) after the death of a retirement plan participant or individual retirement account (IRA) owner.

I. Minimum Distribution Requirements for Designated Beneficiaries when Death of the Employee or IRA Owner Occurs After the Required Beginning Date

Overview

Section 401(a)(9)(H)² was added to the Internal Revenue Code (IRC or Code) by the SECURE Act to change the requirements for RMDs for plans and IRAs that apply after the employee or IRA owner’s death. The new rules apply to distributions from account balance type retirement arrangements made to designated beneficiaries, other than eligible designated beneficiaries (a new category of designated beneficiary created by the SECURE Act).³ The new rules apply to designated beneficiaries (including eligible designated beneficiaries) of employees or IRA owners who die after December 31, 2019.⁴

Under section 401(a)(9)(H), if the plan is a defined contribution plan, distributions are required to be made within 10 years of the death of the employee/IRA owner. The rules governing

² Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

³ The term “eligible designated beneficiary” is defined in section 401(a)(9)(E)(ii) and includes the surviving spouse of the employee/IRA owner, a child who has not attained the age of majority, a disabled (within the meaning of section 72(m)(7)) individual, a chronically ill individual, or any other individual who is not more than 10 years younger than the employee/IRA owner.

⁴ No changes were made to the RMD requirements applicable to defined benefit plans. Also, in relation to defined contribution plans, the rules in effect prior to the changes made by the SECURE Act continue to apply to designated beneficiaries of employees or IRA owners who die on or before December 31, 2019. In addition, the pre-SECURE Act rules apply to eligible designated beneficiaries, which is a new category of designated beneficiaries created by the SECURE Act.

distributions after death are contained in two separate locations in the proposed regulations, which parallel the organization of the rules in the current final regulations, as follows:

- Proposed Reg. § 1.401(a)(9)-3 provides rules applicable to determining RMDs in the case of the account owner's death prior to the required beginning date (RBD);⁵
- Proposed Reg. § 1.401(a)(9)-5 contains rules applicable to determining the lifetime minimum distributions to an employee or IRA owner, and the RMDs after the death of the employee or IRA owner if death occurs after the RBD.

Proposed Reg. § 1.401(a)(9)-3 contains rules for implementing the new 10-year rule added by the SECURE Act in cases where the employee/IRA owner dies prior to the RBD. Under Prop. Reg. § 1.401(a)(9)-3(c)(3), the entire interest must be distributed by the end of the tenth calendar year following the death of the employee/IRA owner. Proposed Reg. § 1.401(a)(9)-3 does not require any amount to be distributed in any year following the year of death, until the tenth year following death. In cases when death occurs after the RBD, the distribution requirements are set forth in Prop. Regs. § 1.401(a)(9)-5(d) and (e). Prop. Reg. § 1.401(a)(9)-5(d)(1)(i) requires the designated beneficiary to take a distribution in each year following the death of the employee/account owner. In addition, Prop. Reg. § 1.401(a)(9)-5(e) provides that if the designated beneficiary is not an eligible designated beneficiary, any remaining interest must be distributed in the tenth year following the year of death. The requirement for the designated beneficiary to take annual distributions each year between the year of death and the tenth year following death is the main difference in the rules that apply in cases of death before the RBD and death after the RBD for account-type plans.

Recommendation

The AICPA recommends that Treasury and the IRS eliminate the requirement in Prop. Reg. § 1.401(a)(9)-5(d)(1) mandating that a designated beneficiary who is not an eligible designated beneficiary take distributions in each of the 10 years following the death of the employee. We also recommend that the final regulations follow the rule set forth in Prop. Reg. § 1.401(a)(9)-3 requiring only that the entire interest is to be distributed no later than by the end of the tenth year following the death of the employee/IRA owner.

Analysis

The requirements of Prop. Reg. § 1.401(a)(9)-5(d)(1) do not reflect the statutory language related to the changes made to RMDs by the SECURE Act.

After-death RMD Requirements Prior to the SECURE Act

Prior to the SECURE Act, the rules governing RMDs after the death of the employee/IRA owner were fully contained in section 401(a)(9)(B). The rules that applied depended on when the

⁵ The RBD is the date when retirement account holders must begin taking RMDs. Section 401(a)(9)(C)(i) defines the "required beginning date" as (I) the calendar year in which the employee attains age 72, or (II) the calendar year in which the employee retires.

employee/IRA owner's death occurred relative to the RBD. If the employee/IRA owner's death occurred after RMDs had begun, section 401(a)(9)(B)(i) applied. Under this rule, distributions were required to be made at least as rapidly ("at least as rapidly" rule) as under the method of distributions being used during the employee's or IRA owner's lifetime. Section 401(a)(9)(B)(i) did not provide further details on how to satisfy the "at least as rapidly" rule, (i.e., how to calculate the minimum amount of distribution necessary each year). The details for how to comply with this rule in the case of defined contribution plans are set forth in Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a). The final regulations provide that if the beneficiary qualifies as a designated beneficiary, they may calculate RMDs by using either the designated beneficiary's life expectancy, or the decedent's life expectancy, whichever is longer.⁶ If the beneficiary does not qualify as a designated beneficiary, the distributions are calculated by reference to the decedent's life expectancy in the year of death.⁷

If death occurred prior to the RBD the general rule for distributions was set forth in section 401(a)(9)(B)(ii). Under this rule, prior to the changes made by the SECURE Act, the entire interest was required to be distributed within 5 years (5-year rule) from the death of the employee/account owner. Under the 5-year rule, distributions were not required to be made between the year of death and the end of the fifth year following the year of death. Rather, the entire interest was required to be distributed no later than the end of the fifth year following the year of death.⁸

As an alternative to the 5-year rule, section 401(a)(9)(B)(iii) permitted a designated beneficiary to use the life expectancy rule which allowed the designated beneficiary to take distributions over his or her life expectancy as determined in the year following death. To use the life expectancy rule, distributions must commence no later than the year following the employee/account owner's death.⁹

Prior to the SECURE Act, a designated beneficiary was able to receive distributions over his or her life expectancy regardless of when death occurred. If death occurred after the RBD, the "at least as rapidly" rule was the exclusive rule. If death occurred prior to the RBD, the 5-year rule applied, unless a designated beneficiary opted for the "life expectancy" rule. Under both rules, distributions were made over the designated beneficiary's life expectancy.

Distributions under both the "at least as rapidly" rule and "life expectancy rule" are determined by using the same formula. The distribution in the first year is equal to the prior year's account balance divided by the designated beneficiary's life expectancy in that year, determined from IRS tables. In subsequent years, the RMD is equal to the balance at the end of the year, divided by the original

⁶ For designated beneficiaries other than the surviving spouse, the designated beneficiary must first determine his or her life expectancy from Table 1 (the Single Life Table) set forth in Treas. Regs. § 1.401(a)(9)-9. The RMD for the first year following death is equal to the applicable account balance divided by the designated beneficiary's life expectancy (the "divisor"). The divisor in each subsequent year is reduced by one (and not based on the designated beneficiary's age in any subsequent year. An exception exists if the designated beneficiary is the spouse.

⁷ Section 401(a)(9) and the regulations draw a distinction between beneficiaries and designated beneficiaries. The rules for determining who is considered a "designated beneficiary" are set forth in Treas. Regs. § 1.401(a)(9)-4, and Prop. Reg. § 1.401(a)(9)-4.

⁸ See Treas. Regs. § 1.401(a)(9)-3, Q&A-3.

⁹ One difference between the life expectancy rules for death before the RBD and death after the RBD is that the option to use the decedent's life expectancy as an alternative is not available if death occurs prior to the RBD.

life expectancy, reduced by one for each year. The ability of a designated beneficiary to take distributions over the designated beneficiary's life expectancy is a "stretch" distribution, which allows the beneficiary to be assured of retirement assets for life expectancy.

Changes Made by the SECURE Act

The SECURE Act changed the beneficiary distribution rules for account balance type plans by prospectively eliminating "stretch" distributions for most designated beneficiaries. This change is applicable to designated beneficiaries of employees/IRA owners who died after December 31, 2019. The rules remain unchanged for defined benefit plans.

The limited nature of the change to these rules appears to be the basis in which Congress drafted the statute, leaving section 401(a)(9)(B) (which are the rules for defined benefit plans and beneficiaries of decedents who die prior to 1/1/2020) unchanged. The statute added section 401(a)(9)(H) to the IRC, which modifies section 401(a)(9)(B)(ii) for defined contribution plans with respect to decedents who die after 12/31/2019. New section 401(a)(9)(H) functions as an overlay on top of section 401(a)(9)(B)

Section 401(a)(9)(H)(i) provides that except in the case of a beneficiary who is not a designated beneficiary, section 401(a)(9)(B)(ii) shall be applied by substituting "10 years" for "5 years." The distribution requirements of the 5-year rule mandate that the full distribution must be made at the end of the period and does not require annual distributions. Section 401(a)(9)(B)(ii)(I) modifies the period from 5 to 10 years, however, no changes were made to the operating requirements of the rule as set forth in final regulations. Additionally, Congress would have explicitly stated in the statute, if they had intended to change the operating requirements of the 5-year rule or 10-year rule, to require annual distributions.

The Proposed Regulations Governing RMDs for Designated Beneficiaries of Employees and IRA Owners who Die After the Required Beginning Date Are Not Reflective of the Statutory Changes Made by the SECURE Act

The statute, providing for the 10-year rule, does not require annual distributions, the treatment of which is identical to the 5-year rule. The change made by the SECURE Act from 5 years to 10 years only extends the period of time and makes no other changes.

The proposed regulations mandate that in the case of a designated beneficiary of an employee/IRA owner who dies after the RBD, distributions must be completed by the end of the tenth year following death. However, they also require the designated beneficiary to take distributions in *each* year following the year of death.¹⁰ In order for there to be such a requirement, one of the following statements must be true:

- The 10-year rule requires a distribution to be made in each of the years prior to the tenth year based on life expectancy, with a full distribution by the end of year 10; or

¹⁰ The requirement for annual distributions under the proposed regulations is contained at Prop. Reg. § 1.401(a)(9)-5(d). The requirement that distributions be completed by the end of the tenth year following death is contained at Prop. Reg. § 1.401(a)(9)-5(e)(3).

- The 10-year rule applies simultaneously with the “at least as rapidly” rule, and the “at least as rapidly” rule continues to apply.

Since the 10-year rule does not require annual distributions between the year of death and the tenth year following death, thus eliminating the first alternative above as a basis for requiring annual distributions.

The second alternative above also is not correct, as the “at least as rapidly” rule has been rendered inoperative by section 401(a)(9)(H). Section 401(a)(9)(H)(i)(II) states that subparagraph (B)(ii) (i.e., the 5-year rule that is changed to 10 years) “shall apply whether or not distributions of the employees’ interest have begun in accordance with subparagraph (A)” (i.e., whether or not the death occurred prior to the RBD or after). Therefore, the 10-year rule also applies if death occurs after distributions have “begun.” The language does not specifically indicate that the “at least as rapidly” rule continues to apply. Therefore, the “at least as rapidly” rule does not apply, making the 10-year rule the only rule applicable.

The “at least as rapidly” rule is inconsistent with the 10-year rule. The “at least as rapidly” rule requires distributions to be made on an annual basis, while the 10-year rule does not. Since the language of the statute states that the 10-year rule “shall apply” whether or not distributions have begun, Congress intended for the 10-year rule, and only the 10-year rule to apply.

Our conclusion is further supported by the legislative history of the SECURE Act. House Report 116-65 explains the revisions to section 401(a)(9) as follows:

Under the provision, the five-year rule is expanded to become a 10-year period instead of five years (“the 10-year rule”), such that the 10-year rule is the general rule for distributions to designated beneficiaries after death (**regardless of whether the employee (or IRA owner) dies before, on, or after the required beginning date**) unless the designated beneficiary is an eligible beneficiary as defined in the provision. Thus, in the case of an ineligible beneficiary, distribution of the employee (or IRA owner’s) entire benefit is required to be distributed by the end of the tenth calendar year following the year of the employee or IRA owner’s death.

(Emphasis added.)

Congress clearly intended the 10-year rule to be the exclusive rule for distributions made after the death of the employee or IRA owner (except to eligible designated beneficiaries), which renders the “at least as rapidly” rule inapplicable. The “at least as rapidly” rule was not removed entirely since Congress did not intend to change the rules for beneficiaries of defined benefit plans or for beneficiaries of decedents who die prior to January 1, 2020, but its application is limited solely to those situations.

Adverse Impact of Retroactive Application of the Proposed Regulations

The new rules of section 401(a)(9) applicable to distributions after death apply to decedents who die after December 31, 2019. Therefore, a designated beneficiary of a decedent who died in 2020

would be required to take distributions beginning in 2021, and each subsequent year until 2031, when a distribution of the remainder of the account would be required. An individual who did not take a distribution during 2021, would be in violation of the minimum distribution requirements for 2021, which would trigger an excise tax under section 4974.

The negative consequences for a designated beneficiary of a decedent who died in 2020 may be mitigated by the proposed effective date of the regulations. The regulations are proposed to be effective for distribution calendar years beginning in 2022. However, individuals do not have clear guidance related to their RMD in 2021, the first potential year an RMD requirement applies. If the regulations are not published in final form prior to the end of 2022, uncertainty will extend to beneficiaries of decedents who die in 2021.

Uncertainty as to whether distributions were required may have an economic impact for some beneficiaries as many individuals believed that distributions were not required. Accordingly, IRA beneficiaries may have selected illiquid investments for their IRA, with the intention of investing with a 10-year investment horizon.¹¹ The position taken in the proposed regulations which mandate annual distributions, would disrupt those investment plans, and create a hardship for these beneficiaries.

In addition, section 401(a)(9) is a retirement plan qualification requirement. If qualified plans were required to make distributions during this period, and did not, the plan would have an operational failure. Adopting the alternative position, that no distribution is required, would preclude operational failures. Distributions to beneficiaries could still be made, but they would be permissive, not required.

II. Definition of Employer and Guidance Related to Multiple Employer Arrangements

Overview

Section 401(a)(9)(C)(i) defines the “required beginning date” for taking RMDs as April 1 of the calendar year following the later of (I) the calendar year in which the employee attains age 72, or (II) the calendar year in which the employee retires. The term “retires” generally includes a termination of an employee’s service for any reason without concern for the employee’s age or the definition of “retirement” stated in a governing retirement plan document. Proposed Reg. § 1.401(a)(9)-2 contains rules governing RMDs during the employee’s lifetime. Treas. Reg. § 1.401(a)(9)-8 Q-1 states that RMDs are applied at the plan level for each plan of the employee and employer.

Section 101 of the SECURE Act added section 413(e) to the IRC to create Pooled Employer Plans (PEPs). The SECURE Act further refined and added rules concerning Multiple Employer Plans (MEPs). These plan types represent qualified retirement plans wherein multiple employers are

¹¹ The edition of IRS Publication 590-B, published in May of 2021 indicates that a designated beneficiary (who is not an eligible designated beneficiary) of an IRA owner who dies after the RBD is not required to take distributions until the end of the tenth year following death. While IRS publications are not authoritative guidance, many individuals look to them for guidance on various individual tax issues. Many beneficiaries of deceased IRA owners followed the guidance contained in this publication, and planned their distributions accordingly.

represented within the document being defined as an “employer.” Currently, it is unclear whether the retirement requirement in section 401(a)(9)(C)(i)(II) is met at the plan level or participating employer level in relation to MEPS and PEPs, which would dictate when an employee is required to begin taking RMDs.

Recommendation

The AICPA recommends that Treasury and the IRS amend Prop. Regs. § 1.401(a)(9)-2 (b)(1)(ii) and 1.401(a)(9)-2(b)(3)(ii) to further define the term “employer” in a broader context and within the construct of MEPs and PEPs.

Specifically, we suggest defining the retirement requirement in section 401(a)(9)(C)(i)(II) as met at the plan level in reference to MEPS and PEPs; when an employee terminates employment with the employer after attaining age 72 and is reemployed with either the same employer or another employer sponsoring the same MEP or PEP prior to attaining their RBD of April 1 the following year.

Analysis

Currently, it is unclear whether the retirement requirement in section 401(a)(9)(C)(i)(II) is met when an employee terminates employment with one member of a plan covering multiple employers and continues participation in the plan as an employee of another member of the same multiple employer arrangement. In this instance, we suggest that the retirement requirement under section 401(a)(9)(C)(i)(II) continues to apply at the plan level. By applying at the plan level, employees who move between employers within a MEP or PEP, although terminated from one or more participating employer(s), would not be considered retired for purposes of section 401(a)(9) RMDs, while continuing their employment in the larger group of employers and participation in the plan.

With the legislative changes necessitating the proposed regulations, including changes in a variety of multiple employer arrangements, consideration of this issue is essential in the ongoing administration of these plans. Allowing the section 401(a)(9)(C)(i)(II) retirement requirements to apply at the plan level, provides the best interpretation of the rules for plan sponsors and the ongoing administration of the plan by service providers as illustrated by the following examples:

Example 1a

It is common in the restaurant industry for owners to own multiple restaurants. The ownership may be such that no controlled group or affiliated service group relationship exists. Nonetheless, the owners have a single retirement plan covering the restaurant group; a MEP to be offered by each employer of the group to their eligible employees.

Additionally, it is not uncommon for employees to move between restaurants. The restaurant group benefits from allowing the employees to transition between employers as they have knowledge of the employees’ abilities and work ethic from experience. The employees benefit from enhanced access to job opportunities than they would were it not for this group.

Consider Employee A who attains age 72 while working for Employer A. After attaining age 72, Employee A ceases to work for Employer A and begins working for Employer B. Employers A and B participate in the same MEP. It is currently unclear if Employee A is deemed to have retired under section 401(a)(9)(C)(i)(II) and if so, required to begin taking RMDs.

If the definition of “retired” is considered at the participating employer level, Employee A would be required to begin taking RMDs upon attaining age 72, although Employee A continued to work for a related employer in the MEP. However, if Employee A began working for an unrelated employer, they could rollover their retirement plan and avoid taking RMDs. However, if per our recommendation, the definition of “retired” is considered at the plan level, Employee A could defer the RMDs while working for Employer B, a related employer. It is a more appropriate determination in this circumstance if the definition of “retired” is considered at the plan level as opposed to the participating employer level.

Additionally, from an administrative perspective, the payroll feed from Employer A would report the termination date and status of the employee to the recordkeeper through their electronic census reporting process to the plan. Following the transition of the employee to Employer B, their electronic census reporting to the plan recordkeeper for the plan would report the participant to the plan as an active employee.

Example 1b

In comparison, consider the same facts as Example 1, however, two employers, Employer A and Employer B, maintain separate unrelated plans. If Employee A ceased working for Employer A and began working for Employer B, having attained age 72, the Employee A would be required to take an RMD from Employer A’s plan. However, the Employee A could rollover their retirement plan to Employer B’s plan and if they are not a 5% owner of Employer B, continue to defer their RMD.

Our recommendation of considering retirement at the plan level would allow the treatment of the employees in Example 1a and Example 1b to be the identical with respect to the continued deferral of their RMD until they actually retire.

Example 2

Another consideration is when retirement is measured for purposes of section 401(a)(9)(C)(i)(II).

Consider Employee C who attains the age of 70½ in 2019 and is employed by Employer M and participates in Employer M’s retirement plan. Employee C is not a 5% owner and is not required to take an RMD on April 1, 2020, due to his continued employment. In early 2022, Employee C retires making the RBD for taking RMDs as April 1, 2023. However, on February 1, 2023, prior to the RBD, Employee C returns to work for Employer M part-time (20 hours per week). It is not clear if section 401(a)(9)(C)(i)(II) applies again such that RMDs are no longer required for 2023 and are deferred until Employee C retires.

Our recommended treatment would be to consider the employment status with Employer M's plan (or any MEP or PEP) to consider reemployment up until the April 1, 2023, RBD. This treatment would allow Employee C to continue to defer their RMD until retirement and further, had Employee C taken an RMD during their period of unemployment, it would be considered eligible for rollover distribution and not reported as an RMD on Form 1099-R, *Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*