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Folks:

**Caution:** Remember, I am only the messenger. I did not create this mess.

**Take-Away:** A surviving spouse named as the sole beneficiary of a qualified plan retirement account can elect to be treated as the employee-participant to arguably extend the period of distribution from that inherited retirement account. Whether that election is worth the effort after reading the Proposed Regulations is definitely subject to debate.

**Background:** The SECURE Act 2.0 permits a defined contribution retirement plan, e.g., a 401(k) plan, to provide that if a participant dies *before* his/her required beginning date (RBD) then the participant's surviving spouse may elect to receive his/her interest under the qualified plan under the 10-year distribution rule, or as annual payments over the period not extending beyond the spouse-beneficiary's life expectancy. [Section 327 of the Act.] If so, the surviving spouse may then elect to (i) be treated as if the surviving spouse were the employee-participant (providing for annual payments over that beneficiary's life or life expectancy); (ii) *delay* commencement of required minimum distributions (RMDs) until the year that the employee-participant would have attained that applicable age; and (iii) be treated as the employee-participant in the event the surviving spouse dies before distributions to that spouse actually begin. [IRC 401(a)(9)(B)(iii)(iv)(1)through (3).] If the employee-participant dies the *before* his/her RBD and the participant's surviving spouse is the sole beneficiary of the participant's account, and that surviving spouse is subject to the life expectancy rule, these rules will *automatically* apply, which means that a separate election is not required by the surviving spouse to be treated as the employee-participant. [Final Regulations 1.401(a)(9)-3(d) and (e).]

**Aside:** Head spinning yet? Just wait, read on. This is what we get when Congress passes legislation in the last week of its session, and no one has read what they are voting on. It passes the buck to the IRS and asks it to tell Congress what it intended. But I digress.]

**Purpose of Rule:** The apparent purpose behind this surviving spouse election is to extend the distribution period in the case of the employee-participant's death *after* his/her RBD. Accordingly, a qualified plan *may permit* a surviving spouse who is the sole beneficiary of the participant to elect to be treated as the employee-participant for purposes of determining the RMD for each calendar year, either delaying or minimizing, the survivor's RMD for the year.

**Spousal Election Proposed Regulations:** The recently released Proposed Regulations provide a series of rules that would apply to the surviving spouse's election. [Regulation 1.401(a)99)-5(g)(3)(i).] Deciphering these rules is like reading Sanskrit.

**Before:** If the participant dies *before* his/her RBD and the sole beneficiary of the participant is his/her surviving spouse who is subject to the life expectancy distribution rule, then the surviving spouse will *automatically* be treated as making the election. In short, the 'treated as the employee-participant' presumption applies automatically.

**After:** If the participant dies on or *after* his/her RBD, then the corresponding spousal election under Section 327(b) does *not* apply automatically. The proposed Regulations provide that this corresponding spousal election *may be* the default election under the terms of the relevant qualified plan, so that the surviving spouse need not take any action to have the election apply. However, the qualified plan sponsor will have to formally opt-in to make it a default election.

**RMD Calculation:** If the election is in effect for a surviving spouse

then, regardless of when the participant died, whether before, on, or after the RBD, the proposed Regulations provide that the applicable denominator to be used to determine the survivor's RMD for each distribution calendar year up to and including the calendar year that includes the surviving spouse's date of death would be determined using the Uniform Lifetime Table, not the Single Life Table, for the survivor's age as of the survivor's birthday in the distribution calendar year. The Uniform Lifetime Table would produce a smaller, i.e., taxable, RMD to the surviving spouse.

**Unpaid RMD:** The RMD for the calendar year of the surviving spouse's death must be paid to the beneficiary of the surviving spouse to the extent that the RMD amount has not already been distributed to the surviving spouse.

**Successor Beneficiaries:** If the election is in effect for the surviving spouse and he/she dies on or after the date on which distributions are considered to have begun to the survivor, the annual distributions to the survivor's beneficiary, a successor beneficiary, will have to continue. Those distributions will be determined using the survivor's remaining life expectancy for the survivor's age of the survivor's birthday in the calendar year of the survivor's death, using the Single Life Table, reduced by one for each subsequent year. In this case the survivor's successor beneficiary will *not* be an *eligible designated beneficiary*. Accordingly, as a result, a final distribution of the participant's interest in his/her qualified plan balance would have to be made by the end of the calendar year that includes the 10<sup>th</sup> anniversary of the surviving spouse's death.

**Spousal Election:** The spousal election will be available only if the *first* year for which annual RMDs to the survivor must be made is 2024 or later.

**Example:** Charlie, the participant, died in 2017 and before his RBD. Charlie would have reached his RBD in 2024, or later. The first year

for which an annual RMD is due would be 2024 or later, and Charlie's wife Gail could apply and make the election. However, if Charlie would have reached his RBD in 2022, then the first year for which annual RMDs is due to Gail was 2022 and the spousal election would not be available to Gail. Similarly, if Charlie died in 2021 and after his RBD, then Gail must begin receiving annual RMDs based on her remaining life expectancy in 2022, and the spousal election would not be available to Gail.

**Being Treated as the Employee:** While the Tax Code results in the surviving spouse being treated as the employee for purposes of the Regulations [IRC 401(a)(9)(B)(iv)] that treatment does not extend to other purposes. Some examples of when this limitation may apply and not apply include:

**Rollovers:** If the surviving spouse executes a spousal rollover to the survivor's own IRA [per IRC 402(c)(9)] after having made the spousal election, then the surviving spouse will not be treated as a beneficiary with respect to any amounts in his/her rollover IRA.

**Early Distributions:** The surviving spouse would not be subject to the 10% additional excise tax even if the survivor takes a distribution before attaining the age 59 ½.

**Participant's RBD Controls:** The date by which the surviving spouse must commence taking distributions is determined by reference to the employee-participant's attainment of his/her RBD, rather than by reference to the spouse's attainment of that applicable mandatory distribution age.

**Roth Accounts:** For purposes of determining the account balance under a plan while the electing surviving spouse is taking distribution, the rule that excludes amounts held in a designated Roth account (which are excluded from the participant's account during his/her lifetime for RMD purposes) does *not* apply.

Consequently, *all* amounts held in a designated Roth account and any other account under the sponsor's qualified plan are included for purposes of determining the electing spouse's RMDs that are due under the plan for the calendar year.

**Conclusion:** These Proposed Regulations will not be of much help to most surviving spouses who inherit a qualified plan account. Few have the patience or are willing to pay someone to decipher the options and how an election will impact the amount of a required minimum distribution. Their presence simply adds even more complexity and confusion to an already mind-numbing process exemplified by byzantine rules and automatic vs non-automatic applications. When in doubt, do a spousal rollover? That seems to be my 'take-away' after wading through the Proposed Regulations.

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