Take-Away: The SECURE Act 2.0 provides new statutes of limitations for excess contributions to an IRA or the failure to take a required minimum distribution. However, these new statutes of limitations are not retroactive, which means that prior excess contributions or failures to take RMDs must still be formally fixed, despite the running of the statute of limitations.

Background: I recently got a question about an earlier missive written about the Tax Court decision in *Courturier v. Commissioner, No. 19714-16, 162 Tax Court No. 4 (February 28, 2024)* with respect to the 'new' statute of limitations imposed by the SECURE Act 2.0. The *Courturier* decision held that these new statutes of limitations created by the SECURE Act 2.0 are **not retroactive.**

SECURE Act 2.0: The SECURE Act 2.0 created a three year and a six-year statute of limitations for the excise tax on excess contributions and the excise tax for the failure to take a required minimum distribution (RMD.)

> **Excess IRA Contributions:** An excess IRA contribution is a contribution that exceeds the maximum amount that can be contributed to a traditional or Roth IRA for a calendar year. For a Roth IRA contribution, a contribution limit arises when the account owner's income exceeds allowable limits, e.g., for 2024: $230,000-$240,000 for married filing jointly; $146,000-$161,000 for a single individual. The maximum annual dollar limit for 2024 is $7,000 for those individuals under age 50. Excess IRA contributions are subject to a 6% penalty **each year** the excess amount remains in the IRA until it is 'fixed.' This 6% penalty can be avoided if the IRA owner withdraws or recharacterizes the excess contribution, long with

associated earnings or losses (called *net income attributable, or NIA*) by October 15 of the year after the year for which the excess contribution was made. A recharacterization is no available after the October 15 deadline. Prior to the SECURE Act 2.0 the 6% penalty applied each calendar year the excess remains in the IRA as of December 31 of that year, and Form 5329 had to be filed for each year.

Failure to Take a Required Minimum Distribution: RMDs must be withdrawn once the account owner reaches his/her required beginning date (RBD) of age 73 (with the notable 'still working' exception for qualified plan accounts.) For most IRAs, the RMD must be withdrawn by December 31, except the first RMD can be delayed until April 1 of the year following the first RMD year. Beneficiaries, including Roth IRA beneficiaries, are also subject to RMDs-some have annual RMDs while others are subject to the 10-year payout rule. Before the SECURE Act 2.0, the penalty for not taking an RMD was 50% of the amount not taken. The Act reduced the penalty to 25%, and down to 10% if the missed RMD is timely corrected. Thus, as a generalization, the missed RMD to be taken and the 10% penalty had to be paid by the end of the second calendar year follow the year for which the RMD was missed.

SECURE Act 2.0 Statute of Limitations: Before the Act, the statute of limitations for IRS enforcement of excess IRA contributions did not start until the account owner filed Form 5329. So long as no Form 5329 was filed, the IRS could go back in time to the first year the excess contribution was made to impose the 6% excise tax. The SECURE Act 2.0 established a **6-year statute of limitations for the 6% excess IRA contributions penalty.** The statute starts to run with the deadline (excluding extensions) for the account owner's income tax return for the year for which the excess contribution occurs. Which means that the IRS can go back 6 years to assess the excise tax/penalty for an excess contribution. The Act also created a **3-year statute of limitations period for missed RMDs.** This statute of limitations also starts to run with the due date (excluding

extensions) for the tax return for the year of the missed RMD. The need to file Form 5329 is no longer required to 'trigger' the statute of limitations.

Effective Date: The Act provides that both statutes of limitations take effect on the date of enactment of the SECURE Act 2.0, which was December 29, 2022. Thus, these changes are effective for 2022. However, the Act was silent as to whether the statutes of limitations it created were to be applied retroactively. That is why the *Couturier* case was filed and why the Tax Court's decision, that the Act is not to be retroactively applied, is important to those who in the past have made excess IRA contributions still need to take steps, e.g., file Form 5329, to start the statute of limitations running.

> **Example:** Bart has made Roth IRA contributions each year from 2012 through 2021. Unfortunately, Bart's modified adjusted gross income (MAGI) exceeded the applicable income limit each year. Bart has failed to correct his excess contributions each year, he failed to file Form 5329, and those excess contributions remain in Bart's Roth IRA. Assume that the IRS assesses a 6% penalty on these excess contributions. If the Act's statute of limitations had been retroactive, the IRS would only be able to asset it for years 2018-2021. Yet, since the statute of limitations is not to be applied retroactively, the IRS will be able to assess the 6% penalty going all the way back to 2012.

Conclusion: To avoid these penalties/excise taxes from continuing to accumulate, excess contributions, or the failure to take an RMD, should be corrected by filing Form 5329 and paying the annual penalty. A missed RMD should be corrected by taking the missed RMD and filing Form 5329 accompanied with a 'reasonable cause' statement to the IRA to request that the penalty be waived by the IRS, since the IRA has been fairly lenient in granting waivers of penalties for the failure to take an RMD.

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