# ASK PAUL HOOD
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**Q:** I heard that the recent spending bill [technically, the Consolidated Appropriations Act, 2023, that Congress passed and President Biden signed into law on December 29, 2022] included a significant piece of legislation on estate planning for retirement plans and IRAs [entitled the *Setting Every Community Up for Retirement Enhancement Act* (SECURE Act)]. Could you please discuss the practical effects of this new law on retirement plan and IRA account holders and beneficiaries?

**A:** SECURE 2.0 continues significant revisions to the Code sections that impact estate planning with qualified retirement plans and regular Individual Retirement Accounts (IRAs) that began in 2019 with passage of the SECURE Act. Actually, 2022 saw two significant developments affecting estate planning with qualified retirement plans and IRAs. The first development was a highly anticipated set of Treasury Regulations interpreting the 2019 SECURE Act (and more are expected), and the second development was the SECURE Act 2.0 of 2022 (SECURE 2.0). In this issue, I'll only focus on the highlights of SECURE 2.0.

**The Bottom Line:** Because of the significant sea changes that the SECURE Act, the new regulations and SECURE 2.0 made, **I strongly encourage people who have significant interests in retirement plans and IRAs to get independent tax advice**.

**The SECURE Act:** In the SECURE Act, Congress significantly limited the ability of most plan or IRA beneficiaries (except for the favored class of "eligible designated beneficiaries" (EDB)-which includes the most tax-favored class of retirement plan and/or IRA beneficiary-surviving spouses) to "stretch" out the deferral of the federal income tax on taxable distributions from the retirement plan or IRA, to ten years maximum.

Under prior law, if a plan or IRA beneficiary was a "qualified beneficiary" (pretty much a natural person or a qualified trust), that beneficiary usually was able to "stretch out" receipt of the taxable plan or IRA benefits even taking out the required minimum distribution (RMD) over the beneficiary's remaining life expectancy, which could be substantially longer than ten years.

The SECURE Act significantly curtailed the ability of all plan and IRA beneficiaries except the five separate categories of "eligible designated beneficiaries" (surviving spouses, minor children of a deceased plan or IRA participant (but only during their minority (but not a minor grandchild or any other minor)), disabled beneficiaries, chronically ill individuals, and beneficiaries who are less than ten years younger than plan or IRA participant) to defer the income tax as long as possible by taking out only the RMDs, calculated over the beneficiaries' remaining life expectancies, often called a "lifetime stretch," which can be quite long for young beneficiaries. The SECURE Act limited the length of the maximum stretch to ten years.

**General Thoughts:** In my opinion, SECURE 2.0, and, indeed, the entire 1,653 page Consolidated Appropriations Act, 2023, was victimized by hyper partisan, frustrating last-minute politics (even though SECURE 2.0 enjoyed strong bipartisan support, so much so that it was surprisingly tacked onto the larger bill as Division T (beginning at page 817 of the Consolidated Appropriations Act, 2023) at the last minute).

I'll be posting a blog on my website (www.paulhoodservices.com) under the Blog tab on my homepage further discussing my non-partisan thoughts as a former legislation drafter on how the way that the Congress conducts its legislative business adversely affects the quality of its work and the laws it enacts.

**A Word of Caution About Differing Effective Dates of SECURE 2.0 Provisions:** One particularly nettlesome flaw of SECURE 2.0 is the Byzantine number of different effective dates of the law changes, i.e., various sections of SECURE 2.0 go into effect in 2023, 2024, 2025, and even later, including 2033-ten years out!!! I predict that too many taxpayers and their advisors are going to get tripped up by missing the particular applicable effective date. **It's imperative that one reading the various sections of SECURE 2.0 pay extremely close attention to the particular effective date of the section you're reading.**

Failure to carefully consider the bill language unfortunately has resulted in a few poorly conceived and thought through changes, which I predict will, in turn, lead to underperforming legislation, which will likely produce unnecessary uncertainty for both the IRS and taxpayers alike and probably will require subsequent technical corrections legislation.

**General Summary of SECURE 2.0:** SECURE 2.0 provides some moderate tweaks and improvements to encourage retirement savings.

Unfortunately, one of the changes transforms a current **right** of a surviving spouse beneficiary into an **election** that most will want to make, which in my opinion was unnecessary. I predict that it's going to create problems that I discuss below. **That change is effective in 2024**, i.e., next calendar year. There are some important changes in the rules for IRAs inherited by surviving spouses and **conduit trusts** (way beyond my pay grade here to define conduit trusts, but they're one of the few permitted types of trusts that are qualified beneficiaries for purposes of the RMD rules) for surviving spouses.

The new provisions provide significant benefits for those surviving spouses who **have been well advised**, but in my opinion set unnecessary traps for the unwary due to the new necessity of an election that wasn't previously required to get the benefits of the **default rule**, when most non-participant/IRA account holder surviving spouse plan or IRA beneficiaries will want to make the new election.

In my opinion, this is a legislative drafting error as it's a misplaced **default rule**, i.e., which is the result you get under the subject law unless you affirmatively elect otherwise. I'm certain that most congressmen and senators didn't intend to unnecessarily complicate their constituents' situations, but they have (again), principally due to the inability of the Congress for a decade or more to follow the time-honored legislative procedures, which were victims of the current hyper-partisan nature of national politics. Unfortunately, this change often is going to wind up being quite harmful for certain surviving spouses, yet will be very advantageous for those using so-called "conduit trusts" for surviving spouses, i.e., probably putting an unnecessary premium on getting (and paying for) good advice.

**QCDs to "split interest entities":** SECURE 2.0 also adds a first-time option to direct a Qualified Charitable Distribution (QCD) to a specified list of split-interest charitable vehicles, including the charitable remainder trust (both charitable remainder annuity trusts (CRAT) and charitable remainder unitrusts (CRUT)), and the charitable gift annuity (CGA) (but, curiously, not the pooled income fund (PIF), which often is called the "charitable mutual fund"), up to a $50,000 lifetime limit.

Under prior law, an eligible IRA account holder (at least age 70 ½) could direct the custodian of the IRA to make a QCD of up to $100,000 annually (SECURE 2.0 began indexing that limit for inflation) to an eligible charitable organization (no private foundations or donor advised funds) out of a regular IRA, which has been part of the law for many years as to wholly charitable transfers.

The unfortunate thing is the low $50,000 lifetime limit because, in my opinion, the $50,000 lifetime limitation is too small and restrictive to be of any value to most, except for the CGA. The $50,000 limit really is too small to justify the expense associated with establishing either a CRAT or a CRUT.

**Overview of Selected Significant Changes that SECURE 2.0 Made:** SECURE 2.0 also made the following tweaks to the law (this isn't an exhaustive list of the 92 changes that SECURE 2.0 made):

1. **Increases the age for beginning to take out RMDs.** The new required beginning date (RBD), i.e., the age by which the beneficiary must begin taking RMDs annually into income or face a significant penalty, is increased. Section 107 of SECURE 2.0 increases the required minimum distribution age to 73, beginning on January 1, 2023—and to 75, beginning in 2033. Specifically, the RMD age increases to 73 for individuals turning 72 after Dec. 31, 2022, and before Jan. 1, 2033. It will increase to 75 for individuals turning 74 after Dec. 31, 2032.
2. **Reduces the former 50% penalty for failure to take RMD timely to 25%**, and if the account participant or beneficiary timely makes the late RMD within time limits, **the penalty is further reduced to 10%.**
3. Permitted penalty-free withdrawals for **emergency expenses.**
4. Spousal beneficiaries may treat inherited accounts as **their own.**

5. Expansion of the so-called **Catch-Up Contribution Limits** and indexing them for inflation, which allow qualifying participants to contribute more than the regular upper annual limits.
6. **Expanded penalty-free access** to retirement funds.

The delayed RBD change is effective now. Surviving spouses don't have to do anything to get the delayed RBD, if applicable. However, **starting next year**, **surviving spouses** (and their IRA/plan administrators/custodians and advisors) **will have to be more diligen**t because of the new election.

Unfortunately, while many aspects of SECURE 2.0 improve the law, it's a case of one step forward and two steps back for several provisions. If a qualified retirement plan or IRA is important to you, you probably should see your tax advisor, because there've been some big changes.

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