



Davis & Harman LLP/T. Rowe Price 1st Quarter 2022 Webinar Summary

RECONCILIATION UPDATE: DEMOCRATS' PROGRESS STALLS THOUGH LIMITED RETIREMENT PROVISIONS STILL POSSIBLE

Democrats in Congress continue to seek to use the budget reconciliation process, which allows for the passage of tax legislation with only 50 votes in the U.S. Senate, to advance parts of President Biden's campaign agenda. Following a flurry of activity on the Build Back Better Act (BBBA) in November 2021—including passage of the reconciliation bill on a party-line vote in the House—the effort has largely stalled due in part to the opposition of Senator Joe Manchin (D-WV) who raised concerns about the size of, and specific provisions in, the House-passed BBBA.

The House-passed iteration of the BBBA had already dropped a number of major retirement provisions that were in earlier versions of the bill, the largest of which was a provision, long championed by House Ways and Means Committee Chairman Richard Neal (D-MA), to require all employers to offer employees an employer-sponsored plan or automatic IRA arrangement. Also removed was a provision that would have imposed limits on IRA investments and a proposed expansion of the existing Saver's Credit to make the credit refundable.

The BBBA still contains some of the revenue raisers affecting retirement plan administration that were included in earlier versions of the bill. Notably, a provision to limit defined contribution plan and IRA account balances to \$10 million in overall assets is still included in the bill. A provision prohibiting Roth conversions of after-tax amounts, also known as "back door Roth conversions," is still on the table as part of the BBBA. Under the provision, high income individuals who make over \$400,000 (\$450,000 for joint filers) would also be prohibited in the future from making Roth conversions of pre-tax amounts.

At this point, it is unclear whether Democrats will be able to reach consensus on a reconciliation package and, if they do, whether it will include any of the retirement changes currently in play. Democrats have until October 1, 2022, to approve the reconciliation package under the budget reconciliation process.

SECURE 2.0 UPDATE

Outside of the partisan reconciliation effort, a bipartisan consensus does exist in Congress to advance retirement savings reforms. On May 5, 2021, the House Ways and Means Committee unanimously approved the Securing a Strong Retirement Act (SSRA) that builds upon the work of the SECURE Act of 2019. The bill includes a range of provisions that expand plan coverage, help individual retirement savers, and simplify plan documents and procedures.

Subsequently, on November 10, 2021, the House Education and Labor Committee conducted a bipartisan mark-up of the Retirement Improvement and Savings Enhancement (RISE) Act. The bill contains many identical provisions to the SSRA, including allowing multiple employer 403(b) plans, improved coverage for part-time workers, and elimination of unnecessary plan notices for employees not participating in the plan. Both the SSRA and the RISE Act would establish a government-maintained lost and found registry for missing participants that employers would report to, but under the RISE Act, a broader federal role for small balance accounts envisioned under the SSRA would not occur. Unique to the RISE Act, the bill would require DOL to review existing guidance on pension risk transfers and clarify the duties of pooled employer plan (PEP) trustees established under the SECURE Act.

It is expected that a House SECURE 2.0 package could receive a full vote in the House of Representatives very soon, in part due to the commitment of Chairman Neal, as well as a bipartisan desire to advance additional retirement reform. However, the U.S. Senate still needs to put together its own SECURE 2.0 bill, which is expected to occur this spring with formal consideration in the Senate Finance Committee and the Senate HELP Committee.

Ultimately, the final SECURE 2.0 bill package is likely to be a combination of provisions from the House SECURE 2.0 proposals, existing Senate proposals from Senators Ben Cardin (D-MD) and Rob Portman (R-OH), and perhaps some additional new proposals. For example, it is possible that provisions relating to fee disclosures, emergency savings, and lifetime income guarantees could be inserted into the SECURE 2.0 product as it advances in the Senate. The looming retirement of a number of key members of Congress—such as Kevin Brady (R-TX) and Portman—is also driving a bicameral effort to enact a SECURE 2.0 bill in 2022.

TREASURY DEPARTMENT AND IRS RELEASE LONG-AWAITED RMD PROPOSED REGULATIONS

Enacted in December 2019, the SECURE Act changed the rules for required minimum distributions (RMDs) in two key ways. First, it increased the RMD age to 72. Second, it significantly revised the RMD rules that apply after a plan participant or IRA owner dies. Under the SECURE Act rules that are now in effect, most beneficiaries are required to empty out their plan account or inherited IRA within 10 years of the death of the plan participant or IRA owner (often referred to as the “10-year rule”). Exceptions exist for surviving spouses, beneficiaries who are not more than 10 years younger than the plan participant or IRA owner, chronically ill or disabled individuals, and minor children of the plan participant or IRA owner (until they reach the age of majority).

On February 24, 2022, the Treasury Department and Internal Revenue Service (IRS) released long-awaited proposed regulations relating to the SECURE Act changes to RMDs. The proposed regulations are a comprehensive re-write of the current RMD regulations as well as a re-write of other related regulations, such as those that address rollovers. While some provisions of the proposed regulations reflect changes in the law that plans and IRA custodians have already folded into administration, other provisions are likely to be the subject of significant pushback.

One key issue is the effective date. IRS proposes to apply the new regulations for calendar years beginning on or after January 1, 2022. In addition, IRS did not propose any extension of the deadline to adopt plan amendments to reflect the SECURE Act, which could be as early as the end of 2022. Comments on the proposed regulations are due May 25, 2022.

The RMD proposal is the first major SECURE Act-related regulation that has been issued since the law’s 2019 enactment. The Treasury Department and IRS have yet to issue guidance (or have issued very limited guidance) with respect to many other SECURE Act provisions. The most eagerly awaited next piece of guidance relates to the new long-term, part-time employee provision of the SECURE Act; timing of release of that proposal is uncertain.

DOL RELEASES RFI ON CLIMATE CHANGE-RELATED FINANCIAL RISK

On February 14, 2022, DOL published a Request for Information (RFI) related to climate-related financial risk. The wide-ranging RFI generally asks commenters what the federal government—and DOL in particular—could do to address the impact of climate change on retirement savings. For example, the RFI contains a series of questions on the possibility of enhancing annual Form 5500 reporting with questions related to the plan’s approach to the risks of climate change. Other questions deal with the potential impact of index investing in the federal government’s Thrift Savings Plan; whether annuities are a possible risk mitigation tool with respect to the effects of climate change; and whether the government should take some action with respect to investing outside of retirement plans, such as in IRAs or other non-ERISA arrangements.

While many of the questions posed in the RFI are not likely to lead to concrete government proposals, the RFI is another sign that taking action on climate change is a clear Biden Administration priority. The RFI also offers a wide-ranging opportunity for interested parties to share what they believe the federal government should or should not do with respect to climate change. Comments on the RFI are due May 16, 2022.

GUIDANCE ON CRYPTOCURRENCY IN PLANS

On March 10, 2022, DOL issued Compliance Assistance Release 2022-01, which relates to 401(k) plan investments in cryptocurrencies. The release tells plan fiduciaries of 401(k) plans to exercise “extreme care” in considering cryptocurrencies as part of a 401(k) investment menu for plan participants. In addition, DOL states that it “expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments.” Interestingly, while the release is primarily focused on cryptocurrencies as part of the menu of a 401(k) plan, DOL states that plan fiduciaries that offer them as investment options or *allowing them through brokerage windows* “should expect to be questioned about how they can square their actions with their duties of prudence and loyalty.”

2022 DOL REGULATORY OUTLOOK

2022 has already proven to be a busy year for regulatory action, and the remainder of the year will be just as busy. First, while the exact timing is not clear, a final rule regarding fiduciary obligations with respect to investments in the areas of environmental, social, and governance (ESG) and proxy voting is expected at some point in the future. The Trump Administration issued its own ESG/proxy voting rule, but the Biden Administration subsequently declined to enforce the rule and instead proposed its own rule in October 2021. The key thrust of the Biden Administration's proposed rule is to clarify that ESG is a legitimate factor that fiduciaries may take into account to the extent that the fiduciary concludes it will affect the long-term return on an investment.

Second, pursuant to the SECURE Act's requirement of a lifetime income disclosure on quarterly statements, DOL issued interim final rules describing how the disclosure should be calculated. While DOL assured stakeholders that a final rule would be issued in plenty of time for the disclosure calculation rules to go into effect, a final rule has yet to be issued, and the interim final rule is currently in effect. The timing of the expected final rule is unclear at this time.

Other key regulations or projects that DOL expects to release in 2022 include:

- A final rule and/or new proposed rule with respect to modifications to the Form 5500.
- A new proposed regulation relating to fiduciary investment advice.
- Stakeholder meetings on two key topics: (1) how to improve the overall effectiveness of retirement plan disclosures; and (2) pooled employer plan (PEP) guidance.