



# Davis & Harman LLP/T. Rowe Price 2nd Quarter 2022 Webinar Summary

## **HOUSE OF REPRESENTATIVES ADVANCES SECURE 2.0 BILL**

On March 29, 2022, the House of Representatives, in a near unanimous vote of 414-5, approved the Securing a Strong Retirement Act of 2022 (H.R. 2954). The “SECURE 2.0” bill, which is the moniker of the legislative package, builds upon the work of the SECURE Act of 2019. The bill takes a combination of provisions from the Securing a Strong Retirement Act of 2021, originally introduced by Ways & Means Committee Chairman Richard Neal (D-MA) and Ranking Member Kevin Brady (R-TX) which was approved by the committee in May 2020, and the Retirement Improvement and Savings Enhancement (RISE) Act, introduced by Education and Labor Committee Chairman Bobby Scott (D-VA) and Ranking Member Virginia Foxx (R-NC) which was approved by the committee in November 2021.

The bill contains nearly 50 provisions to expand coverage and access to retirement plans, help individual savers begin or increase savings for retirement, and simplify plan administration and participant disclosure. The bill includes a phased increase of the required beginning date for required minimum distributions (RMDs) from age 72 to age 75; increases the catch-up contribution limit for participants age 62 to 64; and indexes IRA catch up contributions. The bill will also allow for 403(b) plans to sponsor or participate in open 403(b) MEPs, including pooled employer plans (PEPs), and would permit 403(b) participants to invest in collective investment trusts (CITs) for the first time.

The House SECURE 2.0 bill includes multiple provisions to encourage young and low-income employees to begin saving for retirement including an expansion of the Saver’s Credit, and mandated automatic enrollment in new 401(k) and 403(b) plans. The House-passed bill would also permit all employers to establish 401(k) employer matching for qualified student loan repayments made by their participants. The legislation builds upon the SECURE Act for long-term part-time worker eligibility by reducing required service to 500 hours per year for two years down from the original three years; this change would apply to both 401(k) and 403(b) plans.

SECURE 2.0 also includes a series of provisions to simplify retirement plan administration. The bill reduces required plan notices and disclosures for unenrolled participants. The bill allows for plans to self-correct most errors, allows for participants to self-certify for hardship withdrawals, and increases the cash-out limit for plan sponsors from \$5,000 to \$7,000. The bill also addresses missing participants by creating a retirement savings “lost and found” registry, which will be housed within the federal government to help reunite participants with their money.

At the request of participant groups and to earn their support for SECURE 2.0, the bill also requires a provision generally requiring participants to receive one of their quarterly benefit statement in paper, unless the participant opts out.

## **SENATE HELP ADVANCES RISE & SHINE ACT**

Building on the progress on SECURE 2.0 in the House, Senate Health, Education, Labor and Pensions (HELP) Committee Chair Patty Murray (D-WA) and Ranking Member Richard Burr (R-NC) released their version of SECURE 2.0. The bill, titled the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE Act), was introduced on May 26, 2022. Subsequently, on June 14, 2022, the Senate HELP Committee held a markup and unanimously approved the RISE & SHINE Act with two bipartisan amendments.

Generally, due to jurisdictional rules in the Senate, the RISE & SHINE Act focuses on amendments to ERISA rather than Internal Revenue Code changes. Similar to the House-passed SECURE 2.0 bill, the RISE & SHINE Act includes provisions related to long-term part-time workers, increased cash out limit, reduced notices to unenrolled participants, and 403(b) open MEPs.

The RISE & SHINE Act does include a number of provisions not contained in the House bill, including a requirement for new safe harbor automatic contribution arrangements to include automatic re-enrollment at least every three years. Chair Murray also helped lead an effort to include a provision on emergency savings in the bill. Under a new proposal in the bill, employers would have the option to include in their plan a separate pension-linked emergency savings “sidecar” account, capped at \$2,500. Contributions would be made after-tax and must be invested in a principal preservation investment. Generally, amounts could be withdrawn at any time, penalty free; however, the account cannot be funded over \$2,500 in participant contributions.

The RISE & SHINE Act would also require the DOL to review fee disclosure rules, and require DOL and the Treasury Department to permit consolidation of employee notices. Notably, the RISE & SHINE Act did not include any changes to the Department of Labor’s electronic delivery rules.

## **NEXT STEPS AND LEGISLATIVE OUTLOOK**

Following the Senate HELP Committee markup on the RISE & SHINE Act, the Senate Finance Committee is expected to hold its own markup of its SECURE 2.0 legislative package focused on changes to the Tax Code.

In a similar process to the SECURE Act of 2019, where the bill was attached to an end-of-year spending bill, should a bicameral agreement be reached on a final SECURE 2.0 package between the House and Senate it would need to be attached to a larger bill following the 2022 midterm elections.

## **SECURE ACT IMPLEMENTATION**

Following the final passage of the SECURE Act in 2019, the Treasury Department and Internal Revenue Service (IRS) were tasked with implementing all of the provisions impacting retirement plans. On February 24, 2022, the Treasury Department and IRS released one of the last remaining proposed regulations to implement the SECURE Act, related to required minimum distributions. The proposed regulations are a comprehensive re-write of the current regulations, as well as a re-write of regulations addressing rollovers. One of the largest changes made by the SECURE Act was related to after death distributions, requiring beneficiaries in most cases to withdraw an inherited plan account or IRA within 10 years of the death of a plan participant or IRA owner. The proposed regulations would implement that provision, among many other changes.

The retirement plan industry is also still awaiting regulations to implement the SECURE Act’s provision related to long-term part-time workers. In the SECURE Act, employees who work at least 500 hours each year in three consecutive years must be allowed to make elective deferrals into a 401(k) plan. Without proposed regulations, there are still many questions on how to appropriately implement participation, vesting, and nondiscrimination rules. Under the SECURE Act’s effective date, part-time employees will be eligible to enter the plan starting in 2024, so regulations need to be released soon.

Another key SECURE Act provision is the new annual lifetime income illustrations required on defined contribution plan statements. Under an “interim” final rule released by DOL, the first illustrations must be provided no later than the statement due for the second quarter of 2022. DOL had suggested that it would release a “final” rule regarding the assumptions needed to make the calculation, but with the deadline fast approaching, plans will need to move forward based on the “interim” final rule.

## **REMOTE NOTARIZATION EXTENDED**

On May 13, 2022, the IRS released Notice 2022-27, which grants a six-month extension to the temporary relief from the physical presence requirement for notarization or witnessing of spousal consent. The relief known is in effect until December 31, 2022. By way of background, Treasury regulations require that spousal consent, when required, must be witnessed in the “physical presence” of a notary public or plan representative. During the pandemic, the IRS issued temporary relief to allow for the use of remote notarization or similar live audio/video procedures. The IRS implies in the latest notice that it will not grant any further temporary extensions.

However, in Notice 2022-27, the IRS states that it is still reviewing stakeholder input to determine if it will make this relief permanent or otherwise modify the “physical presence” requirement. The IRS states that if it does so, this will be done through the regulatory process, offering the opportunity for further comment.

## **DEPARTMENT OF LABOR UPDATE**

DOL's Employee Benefits Security Administration (EBSA) has been without a Senate confirmed department head since the first days of the Biden Administration. Lisa Gomez, a partner at Cohen, Weiss, and Simon, has been waiting for a confirmation vote since July 28, 2021. On June 8, 2022, the Senate attempted to vote for Ms. Gomez's nomination to be the Assistant Secretary of EBSA, however, the vote resulted in a 50-50 tie. Without Vice President Kamala Harris in attendance to break the tie, Senate Majority Leader Chuck Schumer (D-NY) changed his vote to allow for the nomination to be considered at a later date. We expect that her nomination will finally move forward at some point. Acting Assistant Secretary Ali Khawar will remain as the head of EBSA until the nomination is reconsidered.

Among the projects on DOL's agenda is a project to again address fiduciary investment advice. The Biden Administration has expressed interest in studying the potential ability to re-hash the 2016 Obama administration rule, although exactly what the DOL might do is not clear. At the request of Congressional Democrats, the Government Accountability Office (GAO) has recently begun studying the effects of the 2016 rule.

## **DOL CRYPTOCURRENCY GUIDANCE LAWSUIT**

On March 10, 2022, DOL issued Compliance Assistance Release (CAR) 2022-01, which relates to 401(k) plan investments in cryptocurrencies. The subregulatory guidance 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 it expects to conduct investigations aimed at plans that offer cryptocurrency investments, and take action where necessary to protect the interest of plan participants and beneficiaries. Since very few plan sponsors offer cryptocurrency investment in their plan, the main impact of the CAR is any implications on fiduciary oversight of other investments in a brokerage window.

On June 2, 2022, the company ForUsAll, Inc., a small 401(k) service provider that specializes in offering cryptocurrency in 401(k) plans, filed a suit in the U.S. District Court for the District of Columbia to invalidate the CAR. The lawsuit alleges that the CAR is effectively a new rule, which must be issued through the notice and comment process under the Administrative Procedure Act in order to be valid.