



Davis & Harman LLP/T. Rowe Price

3rd Quarter 2022 Webinar Summary

CONGRESS PASSES INFLATION REDUCTION ACT

After struggling for months to move a budget reconciliation bill, congressional Democrats finally pushed a compromise package over the finish line. The Inflation Reduction Act, approved in August on a party line vote in both the House and Senate, provides incentives to promote energy security and address climate change, extends enhanced Affordable Care Act subsidies, and reduces the deficit. President Joe Biden signed the Inflation Reduction Act into law on August 16th.

For the retirement plan community, the headline is what the bill did not contain. Every single one of the retirement-related provisions of the Build Back Better Act, the original Democratic reconciliation bill, was removed. Thus, the final Inflation Reduction Act did not include retirement provisions that passed the House Ways and Means Committee in September 2021, such as a requirement for generally all employers to offer a retirement plan, nor the retirement provisions that passed the House of Representatives in November 2021, such as establishing a \$10 million cap on total IRA and defined contribution savings or eliminating “back door” Roth conversions.

SENATE TAX AND ERISA COMMITTEES ADVANCE SECURE 2.0 BILLS

With the near unanimous approval of the Securing a Strong Retirement Act of 2022 (H.R. 2954) by the House of Representatives in March, this summer the Senate took its turn to develop and advance its own retirement security legislation. The various bills are collectively known as “SECURE 2.0.” The House-passed bill contained nearly 50 provisions that would expand coverage and access to plans, help individual savers begin or increase savings for retirement, and simplify plan administration.

On June 14th, Senate Health, Education, Labor, and Pensions (HELP) Chair Patty Murray (D-WA) and Ranking Member Richard Burr (R-NC) advanced their version of SECURE 2.0. The bill, titled the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg (RISE & SHINE) Act, includes provisions from the House Education and Labor Committee’s RISE Act and additional provisions not found in the House-passed bill. The RISE & SHINE Act includes a requirement for new safe harbor automatic contribution arrangements to include automatic re-enrollment at least every three years. The bill also includes a proposal to address emergency savings by allowing employers to include a separate pension-linked emergency savings “sidecar” account in their plan, capped at \$2,500.

Subsequently on June 17, 2022, Senate Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Mike Crapo (R-ID) released the Enhancing American Retirement Now (EARN) Act, which would become the Senate Finance Committee’s version of SECURE 2.0. Less than a week later on June 22, 2022, the Senate Finance Committee unanimously approved the EARN Act, with some modifications.

Among a number of new provisions, the EARN Act includes a provision to support emergency savings within a qualified plan, permitting distributions up to \$1,000 from a 401(k) or IRA to address small emergencies. The bill also would provide for an automatic disaster relief process for participants affected by disasters (rather than ad hoc relief). Instead of making automatic re-enrollment a requirement for all new safe harbor plans, as proposed in the RISE & SHINE Act, the EARN Act incentivizes automatic re-enrollment by offering a tax credit for employers who choose to add the feature to their plan.

The Senate Finance Committee approved EARN Act, like the House-passed bill, would generally require all age-based catch-up contributions to be made a Roth basis. However, the EARN Act was modified to establish an income floor (\$100,000 in prior year wages) under which employees would be exempted from the Roth requirement.

SECURE 2.0 OUTLOOK

With summer approvals of the RISE & SHINE Act and EARN Act, House and Senate committee leadership has begun the informal process of reconciling the nearly 100 various provisions between the two Senate bills and the House-passed bill into a final bicameral and bipartisan bill. As legislators and staff work on the process of reconciling the three bill texts, there is an informal understanding that many of the stated effective dates and deadlines will likely need to be reviewed to allow sufficient time for plans implement the various changes.

In a similar process to the SECURE Act of 2019, a final SECURE 2.0 package will likely need to be attached to larger bill moving at the end of 2022, following the November midterm elections. Possible vehicles include “must pass” legislation to extend government funding, a bill to authorize spending on national defense, or a tax extenders bill.

DOL FOCUS ON DIGITAL ASSETS AND CYBERSECURITY

In March 2022, the Department of Labor (DOL) issued Compliance Assistance Release (CAR) 2022-01, which cautions plan fiduciaries to exercise “extreme care” before adding cryptocurrency as an investment option to a 401(k) plan. This summer, ForUsAll Inc., a small 401(k) recordkeeper which facilitates cryptocurrency investing in plans, filed a lawsuit to overturn the DOL subregulatory guidance. On September 12, 2022, DOL filed its answer to the suit, which asks the court to dismiss the action on the grounds that CAR 2022-01 is not a final action but rather an announcement of the direction of audits in the future.

DOL has also expressed an interest in cybersecurity insurance for employer plans. The ERISA Advisory Council (EAC), an advisory council comprised of private sector industry experts, will explore this issue and whether there is a need for DOL guidance. The EAC holds no rulemaking ability, but could inform DOL of possible directions for future regulation.

DOL has also continued to show interest in exploring cybersecurity via audits and investigations. On August 12, 2022, in a lawsuit involving a subpoena DOL issued to a recordkeeper Alight Solutions, a Court of Appeals affirmed that DOL has the authority to investigate cybersecurity incidents related to ERISA plans and issue subpoenas directly to providers.

PROHIBITED TRANSACTION DEVELOPMENTS

In March 2022, DOL published proposed amendments to its regulations governing the procedures for filing and processing individual and class exemption applications. The proposal has been heavily criticized because it places significant new barriers to plan sponsors and service providers obtaining individual and class exemptions. DOL held a public hearing on September 15, 2022 to hear from stakeholders.

On July 27, 2022, DOL released a proposed amendment to Prohibited Transaction Exemptions 84-14, which is the class exemption generally referred to as the qualified professional asset manager (QPAM) exemption. While some of the proposed changes will be relevant only to QPAMs that are convicted of a crime, the proposal includes significant new requirements on all managers of plan assets who rely on the QPAM exemption, including new requirements for investment management agreements, a new notification regime to DOL, and new recordkeeping requirements.

SECURE ACT OF 2019 IMPLEMENTATION

While SECURE 2.0 is making its way towards enactment, DOL and the Treasury Department are still working on implementing the first SECURE Act of 2019. For example, IRS has yet to release final regulations implementing the SECURE Act’s changes to required minimum distributions or release proposed regulations on the SECURE Act’s new long-term part-time employee coverage rule. The latter is particularly concerning because, without guidance, there are still many questions on how to appropriately implement participation, vesting, and nondiscrimination rules for long-term part-time employees. Congressional drafts of SECURE 2.0 include provisions to reduce the service requirement for long-term part-time employees from three years to two.

Lastly, DOL has not released final regulations following the September 2020 release of interim final regulations related to lifetime income illustrations. Plans were required to send out the first quarterly benefit statement requiring the disclosure no later than the second quarter of 2022. DOL still intends to release final regulations which might modify the rules for these disclosures, although timing remains unclear.

STATE AUTOMATIC IRA UPDATE

Without a national automatic IRA program in place, states have initiated the process of implementing automatic IRA programs to allow for employees to invest in retirement who are not offered an employer sponsored plan. Hawaii and Delaware recently adopted laws to implement a state-run automatic IRA program.

As an early adopter of the state automatic IRA program model, California is one of the few states accepting contributions into its program. California recently adopted an amendment to its law that will require employers who employ as few as one employee to offer the state-run program if they do not already offer an employer sponsored plan.