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Davis & Harman LLP/ T. Rowe Price 4th Quarter 2021 Webinar Summary

BUDGET RECONCILIATION PACKAGE INCLUDES LIMITED RETIREMENT PROVISIONS; APPROVED BY HOUSE

On November 3, 2021, following a series of internal discussions between Democratic party members in the House, Senate, and White House, the House Committee on Rules released a revised legislative text to the Build Back Better Act, which notably did not include many of the retirement related provisions seen in prior drafts.

The revisions to the Build Back Better Act omitted a proposal by House Ways and Means Chairman Richard Neal (D-MA) to require essentially all employers to offer automatic IRAs or 401(k) plans. The revised legislative text also removed a provision that would have made the Saver's Credit, an existing tax incentive to encourage lower income households to save for retirement, refundable and thus accessible to individuals without a tax liability.

The Build Back Better Act still includes some of the revenue raisers that affect retirement plan administration, including a provision to limit defined contribution and IRA plan balances to $10 million in overall assets. Starting in 2029, individuals who exceed the new $10 million cap would be required to take distributions over time to decrease their balance below the cap and would be prohibited from making new IRA contributions. The provision would also impose new obligations on plan sponsors to report on balances above $2.5 million, with Roth and non-Roth amounts reported separately, and allow plan sponsors to rely on the certification of individuals above the cap who may seek to take plan distributions to get into compliance.

The Build Back Better Act also would prohibit after-tax Roth conversions, also known as back door Roth conversions, beginning in 2022. Beginning in 2032, the Build Back Better Act would prohibit Roth conversions for high income individuals who make over $400,000 ($450,000 for joint filers).

On November 19, 2021, the House of Representatives passed the Build Back Better Act on a party line vote of 220 to 213, and offered the bill to the Senate for consideration. Subsequently, on December 11, 2021, Senator Ron Wyden (D-OR), Chairman of the Senate Finance Committee, introduced an updated text of the Build Back Better Act but made no changes to the retirement provisions. Senate consideration remains uncertain at this time.

SECURE 2.0 UPDATE: RISE ACT APPROVED BY HOUSE EDUCATION & LABOR COMMITTEE

Earlier this year, on May 5, 2021, the House Ways and Means Committee approved on a unanimous basis the bipartisan Securing a Strong Retirement Act (SSRA) that builds upon the work of the SECURE Act of 2019. The bill included many key retirement related provisions that expand plan coverage, help individual retirement savers, and simplify plan documents and procedures.

On November 10, 2021, the House Education and Labor Committee, which has jurisdiction over ERISA, conducted a bipartisan mark-up of its own retirement bill known as the Retirement Improvement and Savings Enhancement (RISE) Act. The bill contains many identical provisions to the SSRA, including multiple employer 403(b) plans, improved coverage for part-time workers, and elimination of unnecessary plan notices for unenrolled employees.

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The RISE Act does, however, make changes to the SSRA provisions related to missing participants. The SSRA would direct plans to transfer balances of unresponsive terminated participants of under $1,000 to the Pension Benefit Guaranty Corporation (PBGC), establish a lost and found registry for missing participants to reunite with lost accounts, and increase the plan cash-out level to $6,000. The RISE Act modification does not include the PBGC forced transfer of small balances, but retains the language related to the lost and found registry (though housed at the Department of Labor (DOL)) and increases the cash-out level to $7,000.

The RISE Act also offers a few new proposals that are not in the SSRA including a provision directing the DOL to review the fiduciary standards for purchasing pension risk transfer annuities, and a provision that would modify the requirements of a trustee for pooled employer plans. Unlike the SSRA, the RISE Act does not include any provisions related to electronic delivery of plan documents.

It is likely that electronic disclosure and a handful of other issues will continue to be addressed as Congress works on bipartisan retirement legislation in 2022.

IRS RELEASES 2022 RETIREMENT PLAN CONTRIBUTION LIMITS

On November 4, 2021, the Internal Revenue Service (IRS) announced an annual adjustment to the contribution and benefit limitations for qualified plans in 2022. This statutory procedure occurs annually and allows for the IRS to adjust these limitations for cost of living increases. The overall limitation for defined contribution plans under Internal Revenue Code (Code) section 415(c) (1)(A) is increased from $58,000 to $61,000. The elective deferral contribution limit for employees participating in a 401(k), 403(b), or 457(b) plan is increased from $19,500 to $20,500. The annual compensation limitation under Code section 401(a)(17), which is used in the calculation of benefit formulas, is increased from $290,000 to $305,000. The IRS left the annual catch-up contribution amount and IRA limitation unchanged for 2022.

DOL ESG AND PROXY VOTING RULES

On October 14, 2021, the DOL published a proposed rule amending its “Investment Duties” regulation to address prudence and loyalty in selecting plan investments and exercising shareholder rights. The proposed rule is a product of the Biden Administration’s review of two rulemakings finalized in 2020 by the Trump Administration that are commonly referred to as the ESG Rule and Proxy Voting Rule. Shortly after President Biden took office, he issued a series of executive orders directing agencies to review all existing regulations adopted under the Trump Administration that were inconsistent with the Biden Administration’s policies related to health and the environment.

The proposed rule would restructure the rules issued by the Trump Administration to clarify that environmental, social, and governance (ESG) factors may be appropriately considered when a fiduciary determines that they will impact the risk and return of the investment. The proposal does not require plans to consider ESG factors, but lists ESG factors as a potential consideration when making plan decisions.

The proposal also modifies the Trump Administration rule’s tie-breaker test, which would have required special documentation to explain an investment decision between two “economically indistinguishable options,” by eliminating the special documentation requirement to explain the use of ESG as a tie-breaker and by reframing the two investments as “equally serving the financial interests of the plan.” The proposed rule would require a new disclosure of the collateral-benefit characteristic of a designated investment alternative (DIA) if it was selected using collateral factors such as ESG. This new requirement is only intended for DIAs that were specifically selected for a collateral benefit characteristic such as ESG or religious requirements.

The comment period on the proposal closed December 13, and the DOL received hundreds of comments, including from Congressional Republicans who opposed the changes proposed. A final rule is expected in 2022.

TREASURY AND IRS 2022 OUTLOOK

The Treasury Department and IRS continue to work on the implementation of the SECURE Act of 2019 related to post-death required minimum distribution changes, and long-term part-time workers who may invest in employer sponsored retirement plans.

Under the SECURE Act most beneficiaries must receive distributions from an inherited 401(k) or IRA within 10 years of the death of the participant or IRA owner. There are still many questions on how the rules will be implemented and the eligibility for exceptions to the rule. The SECURE Act also requires employers to offer part-time workers participation in a retirement plan once the employee works at least 500 hours in three consecutive years. The IRS issued some guidance through Notice 2020-68, but questions remain about how the provision will interact with other participation rules.

Another closely watched item on the IRS agenda includes a plan to formalize guidance on the use of student loan matching programs in employer sponsored retirement plans, although it is unclear if IRS will move forward on this item while legislation on the topic is pending in Congress.

Lastly, in 2022 the IRS will be updating the withholding process on distributions from plans and splitting the withholding tax forms into the Form W-4R for lump sum distributions, hardship distributions, and rollover distributions; and the Form W-4P for periodic distributions. The IRS has released draft forms and delayed the effective date for the new forms to 2023 due to the complexity of the changes.

DEPARTMENT OF LABOR 2022 OUTLOOK

The DOL is continuing to explore the prevalence and use of cryptocurrency in retirement plans due to the concern about the lack of regulation surrounding the assets. DOL anticipates issuing formal or informal guidance on the subject in 2022. DOL is also increasing the enforcement of cybersecurity within retirement plans during the plan audit process. Lastly, final rules are still expected on the new requirement for plans to include an annual lifetime income disclosure on benefit statements.

STATE-RUN RETIREMENT SAVINGS PROGRAMS UPDATE

States have continued to adopt automatic-IRA arrangements to require employers to either offer a plan to employees, or allow employees to participate in the state-run program. Because the federal mandate was removed from the Build Back Better Act, we expect that states will continue to move forward with offering programs. On October 21, 2021, New York State enacted a law to create an auto-IRA program that builds upon the voluntary program for employers with 10 or more employees. Earlier in 2021, Virginia approved a state-run program and has formed an auto-IRA advisory committee. Maryland's program, which was enacted into law in 2016, has announced it will open enrollment in the summer of 2022.

California's program, also known as CalSavers, is currently being challenged in court, on the grounds that ERISA preempts the state-run retirement program. The trial court and the 9th Circuit Court of Appeals have ruled in favor of the state-run program; however, plaintiffs have filed a petition for certiorari to the Supreme Court. If the Supreme Court takes the case, the legal foundation of these state-run programs would be up for review.

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