



Davis & Harman LLP/T. Rowe Price

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Executive Summary

Congress Extends Debt Ceiling Beyond 2024 Election

Following extensive negotiations between President Joe Biden and House Speaker Kevin McCarthy (R-CA), an agreement was reached to increase the debt limit to avoid a default on federal government debt obligations. The Fiscal Responsibility Act of 2023 was introduced on May 29, 2023, and subsequently passed the House of Representatives on May 31st, and the Senate on June 1st. The legislation was approved in the House by a vote of 314-117, with support from 149 Republicans and 165 Democrats (71 Republicans and 46 Democrats opposed the bill), and in the Senate by a bipartisan vote of 63-36.

Among the Fiscal Responsibility Act's major provisions, the bill suspends the debt limit until January 1, 2025, after the 2024 congressional and presidential election. The bill also sets caps on Fiscal Year 2024 and Fiscal Year 2025 nondefense discretionary spending levels. With the debt limit addressed, for now, Congress must now turn its attention to approving spending bills to fund the federal government. This process must occur before September 30, 2023 to avoid a federal government shutdown.

While the political process and lengthy negotiations successfully addressed the debt ceiling, it also exposed fault lines in the thin Republican majority in the House of Representatives. While a majority of House Republicans voted for the final agreement, almost one third of the GOP caucus opposed the deal and briefly tried to prevent it from even coming to the House floor for a vote. This infighting will likely continue to be a challenge for Speaker McCarthy as he seeks to navigate legislation through the House and could significantly complicate the process of keeping the government funded beyond September 2023.

Outlook for SECURE 3.0 & SECURE 2.0 Technical Corrections

Bipartisan retirement savings legislation takes time to enact into law. It took Congress 13 years following the enactment of the sweeping retirement savings package known as the Pension Protection Act in 2006 to build and advance the next large package, the SECURE Act of 2019. Following that, it was a shorter sprint of three years to usher in the successful enactment of the SECURE 2.0 Act of 2022 (SECURE 2.0). At this point SECURE 3.0 (or whatever it will ultimately be called) is not expected to move anytime soon, as Congress is expected to take an extended pause before designing and advancing a comprehensive retirement saving reform package.

Identified shortly after the enactment of SECURE 2.0, a number of drafting issues in the statutory language of the bill need to be addressed. One such glitch that has garnered attention relates to the provision requiring age-based catch-up contributions for higher income employees to be Roth; SECURE 2.0 appears to eliminate, inadvertently, all age-based catch-up contributions in 2024.

Key leaders in Congress, and at the Treasury Department, have long been aware of these drafting issues within SECURE 2.0. In a very positive sign, on May 23, 2023 the bipartisan leaders of the House Ways and Means Committee and Senate Finance Committee sent a letter to the Treasury Department and Internal Revenue Service (IRS) regarding four issues, including the catch-up glitch, that need technical correction. The letter was drafted in coordination with Treasury Department officials, and regulators are expected to formally reply to provide clarity and assurances that the glitches are not issues that plan sponsors and service providers need worry about. The letter makes clear that technical corrections legislation will soon be introduced, but the tax leaders know that the ultimate timeline to successfully advance the formal technical corrections remains unclear.

Senate HELP Committee Letter on SECURE 2.0 Guidance Priorities

On May 30, 2023, Senate Health, Education, Labor, and Pensions (HELP) Committee Chair Bernie Sanders (I-VT), and Ranking Member Bill Cassidy (R-LA), sent a letter to the Department of Labor (DOL) listing the top issues for DOL to prioritize while providing guidance on SECURE 2.0. DOL is tasked with providing guidance on approximately 20 provisions regarding changes to plan administration, as well as optional plan design features, and many provisions are effective immediately, or will soon be effective. The Senate HELP Committee letter notes six areas of priority for guidance including: employee stock ownership and initiatives, annual funding notices for defined benefit plans, and Roth-based emergency savings accounts in defined contribution plans, among other priorities.

Notably absent from the Senate HELP Committee letter, was mention of the development and implementation of Section 303 of SECURE 2.0 which requires DOL to create a national Retirement Savings Lost and Found registry to assist retirement savers who have lost track of their retirement savings.

Awaiting Guidance on Mandatory Provisions and Optional Plan Design Features

As was the case with the SECURE Act of 2019, preliminary guidance on easily addressed provisions may be delivered through a “grab bag” type notice in the format of question and answer guidance. The Treasury Department and IRS have indicated that they are working on possibly developing two sets of notices, so they can deliver urgent guidance in a timely manner while working on additional guidance needs. More complex guidance impacting plan administration will need to be addressed through formal rulemaking processes.

Along with the requirements placed on DOL, plan administrators are seeking guidance from the IRS on a number of provisions that will impact plan operations. Perhaps most pressing, the IRS needs to develop guidance on the new required Roth tax treatment of age-based catch-up contributions for employees earning over \$145,000. The provision provides a unique challenge, because it will require plan sponsors to work closely with their payroll providers to coordinate with the plan recordkeeper.

Optional plan design features enacted as part of SECURE 2.0 will also need additional guidance from regulators. For example, Section 604 of SECURE 2.0 allows employers to provide participants with the option to receive employer matching contributions on a Roth basis, and the provision became effective on the date SECURE 2.0 was enacted. This provision creates a host of questions about withholding and reporting.

IRS Issues Guidance on EPCRS Expansion

As the earliest initial piece of guidance on SECURE 2.0, the IRS, on May 25, 2023, released Notice 2023-43, which provides interim question and answer guidance regarding the SECURE 2.0 provision expanding the IRS’s Employee Plans Compliance Resolution System (EPCRS). The guidance generally provides that any inadvertent tax compliance failure by a plan may be self-corrected under the EPCRS, subject to certain conditions, exceptions, and restrictions. The Notice states that certain failures that may not yet be self-corrected at any time, including, for example, a failure to initially adopt a written plan and a significant failure in a terminated plan.

SEC Hard Close

In the months leading up to the end of 2022, the Securities and Exchange Commission (SEC) released a proposal intending to improve mutual fund liquidity and develop a new swing pricing requirement. However, the proposal, if enacted, would negatively impact participants in 401(k), 403(b), and 457(b) plans, by imposing a “hard 4 p.m. close” on orders to purchase or redeem shares in a mutual fund to receive that day’s price. Since many retirement plan investors do not directly purchase or redeem shares with mutual funds, but rather by using an intermediary (the plan recordkeeper), those participants would be operating at a significant disadvantage to institutional and other retail investors.

The idea was previously proposed by the SEC in 2003 but was never adopted, in large part due to concerns about the negative impact on retirement and other individual savers. Following the 2022 re-release of the proposal, a number of congressional leaders, including the Chairs and Ranking Members of the House Ways and Means Committee and Senate Finance Committee, wrote to the SEC opposing the proposal, emphasizing the potential impact on retirement plan investors. The proposal received over 3,000 public comments, and the response to the hard close was nearly universally negative. Next steps and timing on the proposal from the SEC remain unclear.

Investment Advice Fiduciary Proposal

Separate from implementation of SECURE 2.0, the DOL appears intent on releasing a new proposal regarding fiduciary investment advice. DOL officials, including Lisa Gomez, the Assistant Secretary for DOL’s Employee Benefits Security Administration, continue to comment that the project is an important priority for DOL, and the Department hopes to release a proposal soon. In the DOL’s spring regulatory agenda, which details the Department’s ongoing and potential regulatory projects and approximated release dates, the rule has a potential release date of August 2023. However, regulatory agenda deadlines are often not achieved.

With the release of a new fiduciary rule, DOL will need to navigate two pending lawsuits on Prohibited Transaction Exemption (PTE) 2020-02, which offered new interpretations of DOL’s regulatory five-part test for fiduciary investment advice. Recently, DOL dropped its appeal of a district court ruling invalidating DOL’s current interpretation of the “five-part” test of fiduciary status; it is unclear what this means for the potential upcoming release of a fiduciary rule.