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Davis & Harman LLP/T. Rowe Price 4th Quarter 2023 Webinar Summary

IRS Guidance on SECURE 2.0 Provisions

On December 20, 2023, the Internal Revenue Service (IRS) released Notice 2024-02, which provides initial guidance in the form of questions and answers (Q&As) on 12 provisions of the SECURE 2.0 Act of 2022 (SECURE 2.0). The guidance, sometimes referred to as a “grab bag” Notice, provides guidance on a number of key issues including: automatic enrollment requirements (section 101), small business startup credits (section 102), small immediate financial incentives for contributing to a plan (section 113), terminal illness distributions (section 326), safe harbor for corrections of employee elective deferral failures (section 350), plan amendments (section 501), optional treatment of employer match as Roth (section 604), and guidance on a number of provisions relevant to SEP and SIMPLE IRAs.

Long-term Part-time Proposed Regulations

On November 24, 2023, the Treasury Department and IRS released proposed regulations on the special rules for long-term, part-time (LTPT) employees that were originally adopted as part of the SECURE Act of 2019 (SECURE 1.0), and modified by SECURE 2.0. Under the new rules, subject to different effective dates, 401(k) plans and ERISA-covered 403(b) plans generally must allow employees to participate in the plan once they employee completes a specified number of consecutive years of service where the employee completes at least 500 hours of service (i.e., three years for the 2024 plan year for 401(k) plans, and two years for all later plan years).

The proposed regulations define LTPT employees as employees who are eligible to participate in the plan “solely by reason” of having completed the requisite number of years of at least 500 hours of service. Thus, only those employees who become eligible for the plan “solely by reason” of the LTPT rule can be excluded from nondiscrimination testing. Among other issues, the proposed regulations confirm that an employer can continue to exclude employees on criteria unrelated to service, such as employees working at a particular location, so long as the exclusion criteria is not a proxy for age or service. Comments on the proposal are due January 26, 2024, and a hearing on the proposal has been scheduled for March 15, 2024.

DOL Released Fiduciary Proposal

On October 31, 2023, DOL released a package of regulatory proposals, commonly referred to as the proposed “fiduciary rule,” that if finalized, would significantly expand the regulatory definition of fiduciary investment advice for purposes of ERISA and the Internal Revenue Code (Code) and significantly modify the prohibited transaction exemptions (PTEs) that are available to persons who provide fiduciary advice. The regulatory package was rolled out by President Biden and Acting Secretary of Labor Su in a White House press briefing.

Under the proposed fiduciary rule, a person would be treated as providing fiduciary investment advice if: (1) such person makes a covered recommendation; (2) such person, directly or through an affiliate, makes investment recommendations to investors on a regular basis as part of their business; (3) the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest; and (4) such person receives a fee or other compensation in connection with the recommendation. The proposed fiduciary rule makes no distinction between recommendations made to plan participants, IRA owners, or to other plan fiduciaries.

Plan sponsors generally already assume fiduciary status due to their discretion over plan investment menus and administrative functions, however, DOL’s proposed fiduciary rule would potentially require modifications to participant tools or guidance that are currently viewed as educational in nature. DOL states that the proposed rule would not capture HR professionals who might occasionally discuss plan investments with employees.

Following the release of the proposed fiduciary rule, in an uncommon procedure, DOL conducted a public hearing on December 12–13, 2023, prior to the close of the public comment period on January 2, 2024. As expected, in both the hearing and in written comments, there was a wide range of views, with many industry commenters in strong opposition and a number of consumer advocates in support.

It is expected that DOL will try to finalize the rule as soon as possible in 2024, in part to protect a final rule from being overturned under the Congressional Review Act. It is also expected that any final rule will be the subject of a legal challenge, on the grounds that the proposal is very similar to the Obama Administration rule that was struck down in federal court.

SECURE 2.0 Technical Corrections Discussion Draft

On December 6, 2023, the staffs of the Chairs and Ranking Members of the House Committee on Education and the Workforce, the House Committee on Ways and Means, the Senate Finance Committee, and the Senate Committee on Health, Education, Labor and Pensions, colloquially referred to as the "Big 8" leaders of the tax writing committees, jointly released a discussion draft containing technical corrections and other clarifications regarding the SECURE 2.0 Act of 2022 (SECURE 2.0). The technical corrections are the result of feedback from a wide range of stakeholders, and the discussion draft covers proposed changes to 10 provisions of SECURE 2.0.

Among other clarifications, the discussion draft corrects the glitch in SECURE 2.0 that appeared to prevent all catch-up contributions starting in 2024 (which the IRS separately addressed in guidance). In addition, the discussion draft provides clarification regarding section 326 of SECURE 2.0, relating to distributions to terminally ill individuals, to confirm that a plan may offer a special in-service distribution to a terminally ill individual. It is possible that a final version of the technical corrections legislation, reflecting stakeholder feedback, will ultimately be included in a larger bill moving through Congress in 2024.

It is important to note that the draft technical corrections bill does not include all of the changes requested by stakeholders. For example, the draft does not include the needed changes to securities laws to make functional the SECURE 2.0 provision (section 128) to permit the use of collective investment trusts (CITs) in 403(b) plans. The securities laws amendments are not included in the discussion draft because their omission from SECURE 2.0 was a result of an ongoing policy discussion and not a technical error. Further, the securities changes fall outside of the Big 8's jurisdiction.

Secretary of Labor Nomination Status

President Joe Biden's nominee to lead the Department of Labor (DOL), Julie Su, saw her nomination continue to linger in limbo. Deputy Labor Secretary Julie Su was nominated to serve as the Secretary of Labor by President Biden, and she has been serving as Acting Secretary of Labor since March 2023. As 2023 ended, Su's nomination was returned by the U.S. Senate back to the White House pursuant to Senate procedures. As expected, in early January 2024 President Biden resubmitted Su's nomination to the Senate, where it again awaits possible consideration.

The White House has publicly stated that Su may "serve as Acting Secretary indefinitely," however, House and Senate Republicans have strongly objected to the viewpoint and have requested that the White House withdraw her nomination and replace her with a candidate that could win bipartisan support. As the DOL continues to advance its regulatory agenda with a number of high-profile rulemakings, opponents have questioned Su's legitimacy in promulgating rules as an Acting Secretary.

Bipartisan Retirement Legislation Introduced

On December 13, 2023, Representatives Claudia Tenney (R-NY), Chris Pappas (D-NH), and Debbie Lesko (R-AZ), introduced the Expanding Access to Retirement Savings for Caregivers Act (H.R. 6772), to allow for earlier catch-up contributions for individuals who spent more than one year out of the workforce as a caregiver. The bipartisan bill was initially introduced in 2019 by then-Representatives Harley Rouda (D-CA) and Jackie Walorski (R-IN), and it received support from President Biden while he was campaigning for the White House in 2020.

Under current law, the contribution limit for defined contribution plans and IRAs is increased when an individual attains age 50 to allow for individuals to "catch-up" on retirement contributions they may have missed earlier in their careers. The bill would allow an individual to begin making these additional catch-up contributions earlier than age 50 by lowering the beginning age by one year for each year the individual experiences a "qualified unemployment period," where the individual earned no income while providing dependent care. The bill specifies conditions and documentation requirements necessary for eligibility.

Also occurring on December 13, 2023, Representatives Darin LaHood (R-IL) and Linda Sanchez (D-CA) introduced legislation (H.R. 6757) to permit the rollover of Roth IRA funds to designated in plan Roth accounts. Under current law, a distribution from a Roth IRA may not be rolled into a plan, however, the bill would amend the Code to permit such rollovers. Addressing this limitation has been previously included in the bipartisan Retirement Security and Savings Act of 2019 (S. 1431, known as "Portman-Cardin"), however, the initial proposal was not ultimately included in the final version of SECURE 2.0.

Federal Government Funding Outlook

The first session of the 118th Congress did not advance many individual pieces of legislation during the year with only 27 bills signed into law in 2023. The lack of substantial legislative development was partly a result of a thin Republican party majority in the House of Representatives and historic rejection of a sitting Speaker of the House. Additionally, 2023 saw a lot of time spent advancing legislation to keep the federal government open with repeated use of continuing resolutions to avoid a federal shutdown. In November, Congress passed a continuing resolution that extended the federal government funding deadline to January 19, 2024, for some federal departments, and February 2, 2024, for others. Congress subsequently extended these deadlines and continues its work to ensure the federal government stays open.