4Q 2021

Defined Contribution Plan Legislative Update

Congress continues to negotiate retirement legislation with the hope of finalizing Secure Act 2.0 early next year; as it stands, there are two legislative bills proposed by the House and Senate.

- House: Securing a Strong Retirement Act – H.R. 2954
- Senate: Retirement Security and Savings Act – S. 1770

While each bill has more than 50 provisions, noteworthy overlap includes: allowing collective investment trusts (CITs) in 403(b) plans; permitting employers to make matching contributions to plans on behalf of employees who are repaying student loans; and increasing the catch-up contribution amount for individuals of a certain age.

The content herein focuses on other changes and trends that are most relevant to our clients.

ESG Considerations

In October, the Department of Labor (DOL) issued a proposed rule that would allow plan participants to consider environmental, social, and governance (ESG) factors when selecting investments and exercising shareholder rights. The much-anticipated proposal is in response to the Final Rule that was issued last year under the Trump administration; the Biden administration had placed an enforcement moratorium on any Trump administration rulings and directed federal agencies to assess and mitigate financial risk related to climate change.

The proposed rule is titled *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* and while it provides an endorsement for ESG investing, it falls short of mandating the consideration of ESG criteria. In terms of proxy voting, the proposed rule would eliminate the statement in the current regulation that "the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right." This is consistent with the DOL's longstanding view that proxies are considered plan assets and should therefore be voted; however, the DOL has also stated that proxies do not need to be voted if the fiduciary determines the costs outweigh the benefits. The proposed rule also eliminates two key requirements for plan fiduciaries: to monitor any third-party proxy voting service to which voting has been delegated and to maintain records on proxy voting. The intent behind these changes is to remove any misperception that heighted fiduciary standards or liability apply to proxy voting.

There will be a 60-day comment period with a final rule expected to be published in early 2022. Once the final rule is published, we will provide additional guidance on implementation.

Cybersecurity Guidance

The DOL has issued guidance around cybersecurity in the form of three separate documents, each addressed to a specific audience: *Tips for Hiring a Service Provider with Strong Cybersecurity Practices*, *Cybersecurity Program Best*

Practices, and _Online Security Tips_. While posed as best practices, it does seem that the guidance is an attempt by the DOL to establish minimum expectations for all ERISA plans.

The guidance makes it clear that plan fiduciaries have a duty to mitigate cybersecurity risk; in that vein, the *Tips for Hiring a Service Provider with Strong Cybersecurity Practices* document applies to plan sponsors and fiduciaries, focusing on due diligence and contracting.

The *Cybersecurity Program Best Practices* document is aimed at recordkeepers and other service providers and includes the following:

1. Have a formal, well documented cybersecurity program.
2. Conduct prudent annual risk assessments.
3. Have a reliable annual third-party audit of security controls.
4. Clearly define and assign information security roles and responsibilities.
5. Have strong access control procedures.
6. Ensure that any assets or data stored in a cloud or managed by a third-party service provider are subject to appropriate security reviews and independent security assessments.
7. Conduct annual cybersecurity awareness training.
8. Implement and manage a secure system development life cycle (SDLC) program.
9. Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response.
10. Encrypt sensitive data, stored and in transit.
11. Implement strong technical controls in accordance with best security practices.
12. Appropriately respond to any past cybersecurity incidents.

Lastly, the *Online Security Tips* document is geared towards participants, focusing on password protection, phishing, and security updates.

Focus on Target Date Funds

Congress has asked the Government Accountability Office (GAO) to review and report on Target Date Funds (TDFs). In addition to gathering general market data, Congress posed specific questions to the GAO, including but not limited to:

- How much variation is there in the performance of TDFs of the same vintage?
- How do plan sponsors select and oversee TDFs to ensure these funds have a suitable risk level for participants?
- To what extent do TDFs have alternative assets, such as hedge funds and private equity?

A similar request was issued following the Global Financial Crisis; the report is expected to be finalized next year.

2022 Contribution Limits

The IRS has announced that for 2022, the annual contribution limit for employees who participate in 401(k), 403(b) and most 457 plans will increase to $20,000. The catch-up limit for employees aged 50 and over remains unchanged at $6,500.

As additional information surfaces and the content of Secure Act 2.0 becomes clearer, we will update our clients and provide recommendations as appropriate.

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