INSIDE RETIREMENT

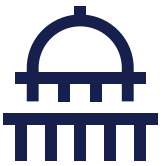
Quarterly Recap | Fourth Quarter 2021

LEGISLATIVE UPDATE:

CONGRESS CONSIDERING THE BUILD BACK BETTER ACT

Throughout 2021, large-scale reform bills that would significantly affect retirement plans have been introduced in both the House and the Senate, collectively referred to as SECURE Act 2.0. Despite bi-partisan support for enhancing retirement savings opportunities for U.S. workers, these proposals have taken a back seat for now while other legislation makes its way through Congress. Capitol Hill is now debating the Build Back Better Act, which contains key elements of President Biden's economic agenda. The bill prioritizes social assistance type programs such as providing two years of free pre-school and four weeks paid parental and medical leave, as well as increasing taxes for high earners and corporations. It was passed by the House and is now with the Senate for consideration. With a cost of about $2 trillion, it's anticipated changes will be needed to ensure passage in the Senate.

The few retirement savings-related provisions in the bill are tax generators, so these may have a better chance of remaining in the final bill. As of the publication date of this newsletter, the Build Back Better Act would eeliminate the option for retirement savers to convert non-deductible IRA or after-tax retirement plan savings to a Roth IRA or Roth in-plan account beginning January 1, 2022. Closing this "backdoor" strategy used by high earners who are not eligible to contribute to a Roth IRA directly would reduce the amount of tax-free investment earnings in the U.S. retirement savings market. This also closes the "mega backdoor" strategy that involves making after-tax contributions to a retirement plan then converting those assets to a Roth account within the plan or to a Roth IRA.



The Act would also eliminate conversions of pre-tax retirement savings to a Roth plan account or Roth IRA for high earners beginning in 2032. The high earners affected by this provision are single taxpayers whose adjusted taxable income for a year is more than $400,000, a head of household with more than $425,000, and married taxpayers with more than $450,000. These same high earners would be prohibited from contributing to an IRA if their combined IRA and defined contribution plan balances exceed $10 million. Additionally, they would be required to distribute 50% of their retirement savings balances that exceed $10 million, beginning in 2030.

DOL UPDATES:

DOL RELEASES ENFORCEMENT RESULTS FOR FY 2021

The Department of Labor (DOL) is tasked with enforcing the ERISA fiduciary rules and protecting plan participants' rights and benefits and has been actively investigating and correcting plan errors as part of its examination and enforcement efforts. For its 2021 fiscal year, the DOL reported recovering more than $2.4 billion from its investigations into U.S. private employee benefit plans:

- $1.9 billion through enforcement action investigations
- $34 million through voluntary fiduciary corrections
- $50.8 million through the Abandoned Plan program
- $499.5 million through informal resolution of individual complaints

The DOL's enforcement program also obtains non-monetary corrections and injunctive relief in civil cases. Examples of these types of enforcement actions include removing or barring individuals from acting as fiduciaries and requiring plans to reform their procedures, such as their search procedures for missing participants.

The DOL offers a Voluntary Fiduciary Correction Program (VFCP) to encourage plan sponsors to voluntarily correct common ERISA violations and report them to the DOL before becoming the subject of an enforcement action. Common ERISA plan errors that can be self-corrected using the VFCP include:

- Delinquent plan contributions
- Improper handling of participant loans
- Expenses improperly paid by a plan
- Prohibited purchases and sales of plan assets

The corrections procedures generally require a plan sponsor to restore the plan and the participants to the condition they would have been in had the error not occurred. Often, this means making an additional contribution (including earnings) to the plan to correct the error. If a plan sponsor properly completes and documents acceptable correction procedures under the VFCP, there will be no civil penalties under ERISA, the plan will be eligible for relief from IRS excise taxes, and the DOL will issue a no-action letter.

DOL CHANGES FIDUCIARY RESPONSIBILITIES FOR ESG INVESTING – AGAIN

The Department of Labor (DOL) has proposed a new set of regulations to guide plan fiduciaries in their duties of prudence and loyalty when selecting investments for the plan. The proposed regulations make clear that fiduciaries may consider environmental, social, and corporate governance (ESG) factors material to the risk/return analysis when making investment decisions. This contrasts with regulations finalized just one year ago, which took a much different approach to whether ESG factors could be considered for ERISA retirement plan investments.

In November 2020, the DOL published regulations that generally required plan fiduciaries to select investments and investment courses of action based solely on consideration of "pecuniary" (financial or economic) factors that have a material effect on the risk/return of an investment based on appropriate investment horizons, consistent with the plan's funding policy and investment policy objectives. Consideration of non-economic factors could be only used as a tiebreaker if a fiduciary could not distinguish between investment alternatives based on economic factors alone, and fiduciaries were required to document if an investment was chosen based on collateral factors. These regulations also restricted the use of ESG investments as a qualified default investment alternative (QDIA).

In March 2021, in response to an order from the Biden administration to consider suspending, revising, or rescinding any rules that would have barred investment firms from considering ESG factors, the DOL announced that it would not enforce its 2020 ESG-related regulations.

In October 2021, the DOL proposed new regulations that view ESG factors as more integral considerations when evaluating investments for retirement plans. If finalized as written, these regulations will allow fiduciaries to consider ESG factors as financially material and permit their use as QDIAs. Specifically, the proposal states that a fiduciary's duty of prudence may require "an evaluation of the economic effects of climate change and other ESG factors on the particular investment." The regulations would also make it easier to use ESG factors as a tiebreaker between competing investments by permitting a fiduciary to select an investment based on economic or non-economic benefits — and without a documentation requirement. In the case of a QDIA, a fiduciary would need to disclose the ESG factors to participants.

Comments on this proposal are being accepted by the DOL until December 13, 2021. Final regulations are expected in 2022.

IRS UPDATE:
COST-OF-LIVING ADJUSTMENTS FOR 2022

Each fall, the IRS announces the cost-of-living adjustments (COLAs) that affect the dollar limitations and thresholds for retirement plans in the coming year. In some years, the changes in the cost-of-living index do not meet the statutory thresholds to trigger increases, but for 2022 most of the limits will be increasing. These increases might allow certain plan participants to save more for retirement or affect a plan's nondiscrimination testing results.

Plan sponsors may want to:

- Review these increases with payroll staff or provider to make sure all necessary adjustments in operations are made
- Confirm that the correct definition of compensation is being used for plan operations
- Analyze 2021 nondiscrimination testing results to determine how the 2022 COLA changes could affect the plan

LIMIT	2022	2021
402(g) Elective Deferral Limit	$20,500	$19,500
Catch-Up Limit	$6,500	$6,500
Per-Participant Total Contribution Limit (415 limit)	$61,000	$58,000
Annual Compensation Limit (Compensation Cap)	$305,000	$290,000
Highly Compensated Employee (HCE) Compensation Threshold	$135,000	$130,000