2021 Retirement Industry Update

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A change in administration from one party to another typically brings a significant change in priorities across the policy spectrum. However, with the arrival of the Biden administration, we don't expect to see any immediate impact on retirement policies, given the urgent focus on health care and ending the COVID-19 pandemic. Although we do expect there will be an emphasis on expanding coverage so that more Americans can have access to tax-preferred retirement savings programs.

DOL Regulatory Activity

Holdovers from Trump Administration

Investment Advice Exemption – It's a principle-based exemption based on the "best interest" standard and not just on disclosure-based relief. It will be the framework for what's to come in the future. The DOL under the Trump administration issued an exemption that provided broad relief for the receipt of compensation in connection with investment advice, including rollover recommendations, to participants and beneficiaries, IRA owners, and plan fiduciaries. This exemption was finalized, after many years, on February 16, 2021.

However, the Biden DOL, speaking through Secretary of Labor-Elect, Marty Walsh, has said that the exemption is not yet a done deal, and that they might take another look at it. We don't expect they will fiddle with the exemption per se, but they could revise and reissue the exemption —requiring advice to be "without regard to" own interests. We hope that under the current administration, the exemption will continue to apply to rollover transactions, and that it will cover compensation paid for such transactions.

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Fiduciary Rule – In connection with the investment advice exemption, the DOL currently relies on the 5-part test under Sectional 321 of ERISA to determine who will be considered a fiduciary as a consequence of billing activities and providing investment advice and recommendations. However, there were some important developments announced in the preamble to the exemption, which provided some new interpretations on the 5-part test that would generally expand the scope of who could be considered an investment advice fiduciary.

Private Equity – Is it okay, and under what circumstances can private equity be held in a DC plan? Private equity rules need to satisfy both prudence and diversification requirements. Under the previous administration, the DOL issued a letter, which stated, among other things, that private equity was permissible under certain circumstances and could be offered in a DC plan if it was part of a target date fund or a balanced fund. We expect the Biden administration may withdraw or water down that previous guidance.

ESG/Financial Factors Rule – ESG has been a major source of questions lately—and a major source of controversy within various administrations for many years, with Democrats taking a progressive view and Republicans taking a more restrictive view. The rules keep changing, which makes it difficult for investment managers to know which rules to follow, and whether they're investing in compliance with the rules. Then the Trump administration took an aggressive posture and finalized a rule requiring fiduciaries to only consider investments based on financial factors. After that rule was finalized, they shifted to a more centrist position and stated—if you believe ESG factors (normally not considered as pecuniary in nature) could affect a plan's long-term investment performance, and if you have documented that appropriately, then, you would be in compliance. That ruling also said that non-financial factors could be considered if the "everything else being equal test" is satisfied.

The Biden administration is reviewing that ruling and may revise or rescind it. Furthermore, we believe they will issue interpretive guidance to expand the potential use of ESG investments.

Pooled Employer Plans – The proposal for pooled employer plans (PEPs) is moving forward, and we're hopeful that it will succeed. PEPs represent an effort to reach out to small businesses to become part of employee benefit plans, without the burden of added costs and fiduciary responsibilities that normally go along with plan administration.

Lifetime Income – This was an interim final rule that will require DC plans to issue a quarterly benefit statement with an annual lifetime disclosure, that depicts retirement security—not in terms of accumulated dollars—but instead as a stream of income over retirement. We think this is a positive, sensible development.

Major Issues Facing Biden Administration:

Cybersecurity is an issue that continues to challenge the providers of employee benefit plans, who are responsible for protecting plan data. Over the past few years, several lawsuits have been filed alleging breach of fiduciary duty against plan sponsors and service providers regarding cybersecurity incidents. Two questions must be answered. First, as plan service providers, what have we done to protect against cyberfraud? Second, when there is a cybersecurity breach, who will be deemed responsible—who will make participants whole?

Financial wellness programs are becoming an increasingly important focus of financial institutions, which seek to help plan sponsors and participants make better lifetime and retirement decisions. However, there's an inherent conflict between the corporate business side, which wants to continue these programs, and the corporate legal side, which addresses privacy issues of using personal and identifying data for programs which are outside the retirement programs.

The question becomes: Is using information technology to integrate 401(k) plan data with other program elements considered to be inappropriate cross-selling of programs? Is 401(k) data a "plan asset" under ERISA?

DOL Major Enforcement Initiatives

Enforcement activity at the DOL has been at an all-time high, with the number of investigations steadily increasing in recent years. Although we expect to see little change between the Trump and Biden administrations' enforcement priorities, we do expect the Biden administration to be more protective toward the average consumer and retirement plan participant. Common areas of enforcement will continue to include missing participants, cybersecurity issues, fiduciary plan governance, ESOPs, delinquent contributions and 408(b)(2) (fee disclosure) compliance.

Retirement Legislation

With a slim Democrat majority in the House and a 50/50 split in the Senate, the question becomes…Will this 117th Congress be able to legislate? Or will Congress revert to a cycle of appropriations and debt ceiling fights? We see two key issues in play.

Pension Funding Legislation – This is a controversial issue (government funding versus reduction in benefits). The good news is that multi-employer and single-employer funding relief are linked and remain part of the stimulus relief package While this legislation has been a big priority for Democrats, Republicans haven't wanted to do a lot to help union pension funds with the relief they need to keep up benefit payments.

Secure Act 2.0 – Securing a Strong Retirement Act was introduced on October 27, 2020. We expect this legislation will be reintroduced, and that it will focus largely on improving DC plans, with most provisions taken from prior bills. However, we think there may be some material changes to more controversial provisions, along with some important new policies such as:

- Mandatory auto enrollment for most new plans
- Increased RMD to 75, with an exception for people with less than $100,000
- 403(b) changes : investment in CITs, participation in PEPs
- Mandatory paper statements
- Tax-credit enhancements: savers' credits, small business incentives
- New catch-up provision for people 60+
- Student loan repayment "matching"

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