

Fiduciary Hot Topics

Q1 2024



DOL Releases New Fiduciary Advice Proposal

On October 31, 2023, the Department of Labor (DOL) released its “Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary,” along with proposed revisions to Prohibited Transaction Exemptions (PTEs) 2020-02, as well as other fiduciary-advice-related PTEs (i.e., 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128).

If finalized, a new definition of an “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974 (ERISA) would apply, likely resulting in more individuals becoming fiduciaries. Amendments to certain PTEs would provide pathways for fiduciaries to receive otherwise prohibited compensation and fees.

At a high level, the proposed regulation would replace the current “Five- Part Test” for determining fiduciary status with the following. A person would be an ERISA investment advice fiduciary and, therefore, subject to ERISA’s “best interest” standard of conduct, disclosure and reporting if

- A person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property ... to [a] plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary;
- For a fee or other compensation, direct or indirect;
- In one of the following contexts:
 - The person either directly or indirectly ... has discretionary authority or control ... with respect to purchasing or selling securities or other investment property for the retirement investor.
 - The person either directly or indirectly ... makes investment recommendations to investors on a regular basis as part of their business and 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.

- The person making the recommendation represents or acknowledges that he/she is acting as a fiduciary when making investment recommendations.

Recall that under the DOL's current Five-Part Test, a person is a fiduciary only if he or she satisfies all of the following requirements:

1. Renders advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property
2. On a regular basis
3. Pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary where
4. The advice will serve as a primary basis for investment decisions with respect to plan assets, and where
5. The advice will be individualized based on the particular needs of the plan.

DOL has expressed particular concern about requirements 2, 3 and 4. According to the DOL, these elements "... too often work to defeat legitimate retirement investor expectations of impartial advice and allow some advice relationships to occur where there is no best interest standard."

Under the proposal, these concerns are addressed in the following ways. First, the "regular basis" rule would change to simply require the advice fiduciary to be in the business of providing advice on a regular basis. Thus, someone in the "advice business" would satisfy this requirement even if the advice in question was a one-time occurrence (e.g., a recommendation to take a rollover). Second, as to the "mutual agreement or understanding" requirement, the proposed rule would remove this clause and focus on the advisee's reliance on an advisor's recommendation as financial advice, and provide that disclaimers by the advisor, "... will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor." Finally, "a primary basis" requirement would become, instead, "... a basis for investment decisions that are in the retirement investor's best interest."

What you need to know:

- These are proposed changes at this time. They are not in effect and investors, plan sponsors and financial professionals may not rely on them.
- There is a 60-day comment period for each piece of the fiduciary package. Many comments from industry players are expected, and an extension to the comment period has been requested.
- A public hearing will be held on December 12, 2023.
- Advisors operate under the direction of their affiliated firms. For those that are providing fiduciary investment advice for a fee as defined under current guidance (the Five-Part Test), they are (or should be) following a current statutory exemption [e.g., ERISA Sec. 408(g) fiduciary adviser] or a PTE (e.g., PTE 2020-02, PTE 84-24, etc.) as instructed by their firms. The proposals do not affect current advice activity.

Q4 2023 Retirement Legislative Update

Congress releases SECURE 2.0 technical corrections discussion draft

On December 6, 2023, the Senate's committee on Health, Education, Labor and Pensions (HELP) and two House committees (Ways and Means and Education and the Workforce) released a "discussion draft" of proposed technical corrections to SECURE 2.0 legislation passed at the end of last year.

The issues addressed – some of which were raised in a May 2023 letter from Congressional leaders to the Department of the Treasury and IRS – are technical and are not intended to change the substance of SECURE 2.0 as passed.

The proposed technical corrections applicable to retirement plans would (if finalized) clarify the

- Timing of SECURE 2.0 increases in the applicable age/required beginning date for required minimum distributions (RMDs);
- Limit on student loan repayments that qualify for a match is increased (where applicable) by the catchup contribution limit;
- Starter 401(k) plan contribution limit (currently \$6,000 indexed for inflation beginning in 2025) will be the same as the IRA limit (already \$6,500 in 2023);
- Initial ceiling on automatic contributions would be limited to 10% until 2026 (not, as under current law, 2025) under the rules requiring new 401(k) plans to include an automatic enrollment provision;

- “Regular” limits on startup credits would not apply to the increased startup credits for small plans;
- Provision for reporting under Retirement Savings Lost and Found rules by IRAs receiving mandatory distributions (“cashouts”) from covered plans and by deferred annuity contracts receiving distributions from covered plans.
- Fix to the catchup contribution glitch – language in SECURE 2.0 which seemed to prohibit catchup contributions by any participant beginning in 2024.

This is, at this point, only a discussion draft – it’s not unlikely that further technical issues (and, in some cases perhaps, non-technical issues) with SECURE 2.0 will be raised.

Retirement Savings for Americans Act would create a government-run plan

U.S. Senators John Hickenlooper (D-CO) and Thom Tillis (R-NC) and Representatives Lloyd Smucker (R-PA) and Terri Sewell (D-AL) introduced [HR 6065](#), the Retirement Savings for Americans Act (RSAA) of 2023. If the bill were to be enacted, it would establish a new savings program, “The American Worker Retirement Plan” (AWRP), which would give eligible workers access to federally-sponsored, portable, tax-advantaged retirement savings accounts. Key features of the AWRP are described below.

- Available to full and part-time workers without access to an employer-sponsored retirement plan.
- Automatic enrollment at 3% of income, with the ability to increase or decrease the deferral rate or opt out.
- Independent workers would also be eligible.
- Low- and moderate-income workers would be eligible for a federal 1% automatic contribution (as long as they remain employed) and up to a 4% federal matching contribution via a refundable federal tax credit, phased out for those with income above certain levels.
- Accounts would remain attached to workers throughout their lifetimes, and workers would be able to stop and start contributions at will.
- The accounts would be the property of the worker and the assets could be passed down to future generations to help them build wealth and financial security.
- Participants would be given a menu of simple, low-fee investment options to choose from, including lifecycle funds tied to a worker’s estimated retirement date, or index funds made of stocks and bonds.

While the provisions in the bill have bipartisan support, there is some skepticism in the industry as to whether a government-run retirement savings plan would be in the best interest of investors. Even more reason for business owners who do not offer a retirement plan to consider sponsoring their own workplace retirement plans now before a federally- mandated plan takes form.

Bill would allow employees to participate in 401(k) plans as early as age 18

On November 17, Senator Bill Cassidy (R-LA), the Ranking Member of the Senate Health, Education, Labor and Pensions (HELP) Committee, and Senator Tim Kaine (D-VA), a member of that committee, introduced the [Helping Young Americans Save for Retirement Act](#). If the bill is enacted, the changes would take effect in 2026. While this proposal is unlikely pass as a standalone bill, odds are that it will be considered in the next round of broad-based, bi-partisan retirement policy legislation.

The bill would require 401(k) plan sponsors to allow employees as young as 18 to make contributions. The following conditions also would apply.

Not applicable to part-time employees

The long-term part-time coverage rule that allows an employee to participate if he or she has two years of part-time service of at least 500 hours per year would not apply until age 21.

Nondiscrimination and top-heavy rules would not apply

Plan sponsors could elect to exclude this group of young participants from nondiscrimination testing, including 401(k) actual deferral percentage (ADP) and actual contribution percentage (ACP) testing, and from consideration under the Top-Heavy rules.

Not counted towards the audit requirement for Forms 5500 initially

Sponsors of plans with 100 or more participants must, in connection with filing the Form 5500 annual report, include an audit report of the plan’s financials from an independent qualified public accountant. For purposes of this reporting rule, employees participating solely by reason of this bill would not be taken into account until five years after they first entered the plan.

If the bill is enacted, the changes would take effect in 2026. While this proposal is unlikely pass as a standalone bill, odds are that it will be considered in the next round of broad-based, bi-partisan retirement policy legislation.

PBGC Announces 2024 Maximum Benefit Limits

The Pension Benefit Guaranty Corporation (PBGC) has updated its maximum monthly benefit guarantees for 2024 in [a table](#) published on its website. For example, a 65-year old whose pension benefit is payable from the PBGC in the form of a straight-life annuity for 2024 would receive a monthly maximum of \$7,107.95. The PBGC maximum guarantee is determined using a formula in federal law tied to the Social Security index. The formula provides lower amounts for younger ages because younger people are expected to receive more monthly pension checks over their lifetime.

Conversely, amounts are higher for older ages. In addition, amounts are lower for retirees who choose an annuity with survivor benefits.

2023 Forms 5500 Released

The U.S. Department of Labor's Employee Benefits Security Administration, the IRS and the Pension Benefit Guaranty Corporation recently released [informational copies of the 2023 Form 5500, Form 5500-SF, IRS Form 5500-EZ, IRS Form 5558 and their related instructions](#) online. The IRS will release paper copies of the 2023 Form 5500-EZ and its instructions separately and provide the form's instructions on the agency's website after January 1, 2024.

The "Changes to Note" section of the 2023 instructions for each of the forms highlights important modifications to the forms, schedules and instructions. The Form 5500 and Form 5500-SF Changes to Note sections include changes related to the following:

- A new Schedule DCG for defined contribution group reporting arrangements,
- A new Schedule MEP for multiple-employer pension plans,
- Revised small plan audit participant count method,
- Improved Schedule H administrative expense transparency,
- Schedule MB regarding asset reporting for plans receiving special financial assistance,
- Schedule R tax compliance questions and revisions to asset allocation reporting and
- Schedule SB target normal cost reporting clarifications.

[Read a fact sheet with details on the 2023 changes.](#)

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Links:

<https://www.congress.gov/118/bills/hr6065/BILLS-118hr6065ih.pdf>

https://www.help.senate.gov/imo/media/doc/helping_young_americans_save_for_retirement_act.pdf

<https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee>

<https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500>

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