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Secure Act 2.0 Follow-Up Guidance Anticipated

On May 23, 2023, the Chairs and Ranking Members of the Senate Finance and House Ways and Means Committees sent a letter to the Secretary of the Treasury and the Commissioner of Internal Revenue, identifying SECURE Act 2.0 provisions with respect to which they intended, ". . . to introduce technical corrections legislation to correct erroneous statutory language . . .," and ". . . ensure that (e.g., with respect to IRS SECURE Act 2.0 guidance) Congressional intent is carried out." The letter identified four issues to be clarified:

1. The $1,000 credit for small employer contributions is not subject to the $5,000 startup credit annual limit;
2. The applicable age for required minimum distributions (RMDs) increases from 72 to 73 for individuals who turn 72 after December 31, 2022, and, further, the applicable age for RMDs increases from 73 to 75 for individuals who turn 73 after December 31, 2032;
3. Contributions (including after-tax Roth contributions) to a savings incentive match plan for employees (SIMPLE) IRA or simplified employee pension (SEP) plan are not taken into account for purposes of the otherwise applicable Roth IRA contribution limit;
4. Require catch-up contributions to be made on a Roth basis for participants whose wages from the employer sponsoring the plan exceeded $145,000 for the preceding year, and to permit other participants to make catch-up contributions on either a pretax or a Roth basis (see following coverage of IRS Notice 2023-62).

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Delay in Roth catch-up rule until 2026

SECURE Act 2.0 provides that, beginning in 2024, employees with more than $145,000 in prior-year compensation may only make catch-up contributions on a Roth basis. This will require numerous, costly and time-consuming changes to plan and payroll processing systems to accommodate the provision. Many stakeholders raised their concern with the Administration. For example, the American Benefits Council filed an active request, signed by over 100 industry groups, with the House Ways and Means Committee to delay the effective date of this provision because of systems challenges. The request sought a two-year delay of the Roth catch-up requirement, plus any additional time necessary to:

1. Give state and local governments the opportunity to consider and enact needed legislation and
2. Avoid requiring changes during the term of a collective bargaining agreement or other applicable binding agreements.

A welcome response and reprieve came in the form of IRS Notice 2023-62, released August 25, 2023. The notice provides, among other things, a two-year "administrative transition period" (until taxable years beginning after December 31, 2025) under which participants affected by the new SECURE 2.0 "Roth-only catch-up contribution" rule may continue to make non-Roth catch-up contributions.

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In essence, the new SECURE 2.0 Roth-only catch-up contribution rule will not apply until 2026.
The notice also addressed three areas related to the Roth-only catch-up contribution rule. First, the guidance clarified that the rule would not apply in the case of an eligible participant who does not have IRC Sec. 3121(a) wages [i.e., wages for purposes of the Federal Insurance Contributions Act (FICA)] for the preceding calendar year from the employer sponsoring the plan. This primarily affects partners (or other self-employed individuals) receiving self-employment income and state and governmental workers.

Second, with respect to a participant to whom the rule applied, the plan administrator/employer could treat a pre-tax catch-up contribution election as a Roth contribution election.

Third, where a plan is maintained by more than one employer, the notice confirms that wages from one employer would not be aggregated with wages from another participating employer for purposes of the $145,000 compensation limit.

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Bill would clear the way for 403(b) collective trust investments

SECURE Act 2.0 included a provision amending the Internal Revenue Code to allow 403(b) plans to invest in collective trusts and insurance company separate accounts. Certain obstacles to implementing this change remain under current securities laws. On May 24, 2023, the House Financial Services Committee (on a bi-partisan vote) approved H.R. 3063 legislation (the Retirement Fairness for Charities and Educational Institutions Act) that would eliminate those obstacles. The next step is for House leadership to bring this bill to a floor vote.

Auto Reenroll Act of 2023

In July, Senators Bill Cassidy, R-La., and Tim Kaine, D-Va., introduced legislation (the Auto Reenroll Act of 2023) that, if enacted, would allow retirement plan sponsors to reenroll nonparticipants in retirement plans at least once every three years, unless the participant opts out again. The proposal (S.2512) has been referred to the Committee on Finance.

Women's Retirement Protection Act of 2023

A House bill (H.R. 5060) entitled Women's Retirement Protection Act of 2023 would ensure that a spouse could not deplete a retirement savings account without his or her partner's consent. Rep. Lauren Underwood, D-Ill. and Sen. Tammy Baldwin, D-Wis., introduced the bill on July 27, 2023. It has since been referred to the Committee on Education and the Workforce, the Committees on Financial Services, and Ways and Means.

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DOL's Regulatory Agenda

On June 13, 2023, the Department of Labor (DOL) released its Spring 2023 Regulatory Agenda. Initiatives are categorized as in the pre-, proposed or final rule stages of release. Topics under the purview of the Employee Benefits Security Administration (EBSA), a subdivision of the DOL with authority over retirement plans, include the following:

- Improving Participant Engagement and Effectiveness of ERISA Retirement Plan Disclosures Pooled Employer Plans
- Emergency Savings Accounts Linked to Individual Account Plans
- Plan Reporting for Retirement Savings Lost and Found
- Worker Ownership, Readiness, and Knowledge
- Exemption for Certain Automatic Portability Transactions
- Review of Pension Risk Transfer Interpretive Bulletin 95-1
- Adoption of Amended and Restated Voluntary Fiduciary Correction Program
- Improvement of the Form 5500 Series and Implementing Related Regulations Under the Employee Retirement Income Security Act of 1974 (ERISA)
- Conflict of Interest in Investment Advice

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Regarding the fiduciary advice proposal

Scheduled for DOL release in August 2023 is a proposed regulation on "Conflict of Interest in Investment Advice" that will again attempt to comprehensively revise the five-part test for determining when financial advisors deliver fiduciary investment advice to plans, participants and IRA owners, including among other things, addressing the issue of the fiduciary status of persons giving advice with respect to rollovers. On this topic, the DOL intends to "evaluate available prohibited transaction class exemptions and propose a mendments or new exemptions to ensure consistent protection of employee benefit plan and IRA investors."

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IRS's Regulatory Agenda

The IRS has a massive amount of regulatory work to do with respect to SECURE Act 2.0 and remaining issues under SECURE Act 1.0, including:

- Guidance on SECURE 1.0 and 2.0 modifications to 401(k) rules (e.g., matching contributions for student loans, emergency savings accounts, Roth contributions, Federal Saver's Match contributions, changes to catch-up limits, starter 401(k)s, and modifications to 401(k) safe harbor plans;
- Updates to RMD rules required by SECURE 2.0 to address eliminating a penalty on partial annuitizations, reducing the penalty for failing to take RMDs, eliminating RMDs from designated Roth accounts, and allowing surviving spouses to elect to be treated as the deceased employee for RMD purposes.
- Including long-term, part-time employees in 401(k) plans.

Other IRS regulatory projects include:

- Finalizing guidance on the allocation of forfeitures, and
- Finalizing remote spousal consent rules.

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IRS Notice 2023-54 Brings Clarity to Key RMD Questions

A July 18, 2023, IRS notice (2023-54) provides three important updates to RMD rules. The notice:

1. Clarifies changes in the required beginning date (RBD) for RMDs in light of certain SECURE Act 2.0 provisions;
2. Offers guidance related to certain "specified RMDs" for 2023; and
3. Indicates the anticipated final RMD regulations will apply for calendar years beginning no earlier than 2024.

Transition Relief for Those Born in 1951

Effective January 1, 2023, the age to begin RMDs increased from 72 to 73 under the SECURE Act 2.0. Individuals born in 1951 would have had an RMD due for 2023 had it not been for the change. Some plans may have mistakenly issued 2023 RMDs to individuals born in 1951. The IRS is providing relief to plan administrators for distributions made between January 1, 2023, and July 31, 2023, to a participant born in 1951 (or that participant's surviving spouse) that otherwise would have been an RMD but for the change in the RMD beginning age to 73. The IRS will not consider a payor or plan administrator as failing to satisfy the requirements of an eligible rollover distribution, including notice and withholding requirements because it did not treat such distributions as eligible rollover distributions.

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Additionally, the IRS is extending the rollover deadline to September 30, 2023, for any distribution between January 1, 2023, and July 31, 2023, incorrectly treated as an RMD, as described above. If the mischaracterized distribution was from an IRA, a rollover is permitted even if the IRA owner or surviving spouse has completed a rollover within the last 12 months but will preclude another rollover distribution in the next 12 months. In that case, that individual could still make a direct trustee-to-trustee transfer.

Relief for 2023 Specified RMDs

The 2022 proposed RMD regulations state that if an IRA owner or plan participant dies on or after his or her RBD, beneficiaries who are subject to the 10-year payout rule must take annual life expectancy payments during the first nine years (in general, “specified RMDs”) and deplete the account in the tenth year.

Under Notice 2023-54, the IRS will not treat retirement plans as failing to satisfy RMD requirements in 2023 if they did not distribute specified RMDs under the 10-year rule to designated beneficiaries. Further, the IRS will not enforce the IRC Sec. 4974 excess accumulation penalty tax for designated beneficiaries who do not take their life expectancy payments under the 10-year rule.

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A specified RMD is a 2023 plan or IRA distribution due to a designated beneficiary if the:

- Account owner died on or after his or her RBD in 2020, 2021, or 2022, and
- Designated beneficiary is not taking lifetime or life expectancy payments.

This relief also applies to successor beneficiaries of an eligible designated beneficiary if the eligible designated beneficiary died in 2020, 2021, or 2022, and was taking lifetime or life expectancy payments.

Final RMD Regulations to be Issued

The IRS intends to issue final RMD regulations that will apply for calendar years beginning no earlier than 2024.