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INTRODUCTION

With Democrats Jon Ossoff and Raphael Warnock winning their Senate runoff races in Georgia on January 5, President Joe Biden will have a razor-thin Democratic majority in both the House of Representatives and the Senate. The Democratic victories in the two Senate races give fresh momentum to broad retirement policy priorities supported by Biden that were unlikely to advance had the Senate remained under Republican control. However, even with the Senate under Democratic control, there remain challenges to the enactment of sweeping policy changes.

The House Democratic majority is reduced in size, leaving a narrower path for partisan legislation to pass. The Senate is now split 50-50 with Vice President Kamala Harris able to cast a tie-breaking vote, handing control of the upper chamber to Democrats for the first time since 2014. Although the rules governing the organization of the 50-50 Senate split have not yet been finalized, incoming Senate Majority Leader Charles Schumer (D-NY) will be able to set the legislative agenda and Democrats will hold the gavels on the committees. Importantly, Senate Democrats will also set the agenda for consideration of nominations and have the means to confirm nominations rather quickly on a party-line vote, facilitating timely approval of key positions within the agencies. Although many high-level nominees have been announced, with Democrats in control of the confirmation process, remaining nominees may prove to be more progressive or controversial than would have been considered under Republican control.

The influence of a unified Democratic government suggests that significant legislative changes will be proposed and pursued with great urgency in the next session of Congress, including initiatives with significant implications for employee benefits policy. The first order of business for the Biden administration and new Congress is expected to be additional COVID-19 relief and economic stimulus legislation. Biden will be able to obtain support for more of his agenda than would be the case if either Democrat had lost his race in Georgia. However, he will likely face strong headwinds in any attempt to pass strictly partisan legislation.

Although the Democrats have the majority in the Senate with Harris’ tie-breaking vote, they failed to achieve a 60-vote “supermajority,” which means the Republicans will be able to filibuster and block the advance of legislation. This means that the incoming Democratic majority will need to (1) entreat moderate Republican senators to cross the aisle and vote with Democrats, (2) use the “budget reconciliation” process, which only requires a simple majority but requires that the underlying legislation have a measurable revenue effect (as was done for the Tax Cuts and Jobs Act and key parts of the Affordable Care Act (ACA)), or (3) change the Senate rules to eliminate the longstanding filibuster rule.
Even if Democrats operate under rules that require a simple majority to pass legislation, finding consensus within the Senate Democratic caucus and its progressive and more moderate wings may prove challenging. Democratic Senators hailing from traditionally “red” or “purple” states will likely serve as critical votes and be more reluctant to pursue more progressive policies. Furthermore, turning to the budget reconciliation process to pass health policy changes presents a challenge due to the so-called “Byrd Rule” that prevents a reconciliation bill from containing non-budgetary provisions or increasing deficits beyond the budget time frame. The Senate can waive any objections raised with respect to the “Byrd Rule,” but this would require 60 votes, meaning bipartisan support would be necessary.

The following is a detailed summary of the probable impact of the election on retirement policy. (For the corresponding summary relating to health and paid leave policy, click here.)

**EXECUTIVE SUMMARY**

Retirement policy has experienced more bipartisanship than most areas of legislative activity and that is likely to continue. However, the results of the election improve the prospects for moving legislation that reflects a number of Democratic priorities. A Biden administration will also mean a shift in the regulatory agenda. The Council has analyzed numerous policy areas to provide members with an outlook of what may come.

**Retirement-Related Tax Changes**

During the presidential campaign support was expressed for “equalizing” the tax treatment of contributions to defined contribution plans, including 401(k) plans. The argument is that individuals with higher incomes should receive no more tax benefit through deferral of their tax than individuals with lower incomes. Using a tax credit in lieu of a deferral or capping itemized deductions and exclusions are two ways to achieve this change. But these approaches thus far do not appear to have real traction. Rather, congressional Democrats have long favored expanding the Saver’s Credit and making it refundable, which we expect to be included in a budget reconciliation bill.¹

Another idea that could possibly surface during a Biden administration is imposing an overall cap on retirement benefits as suggested in the Obama administration or more likely a cap, such as $3 million or $5 million, on total savings in an individual’s defined

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contribution plans and IRAs. An additional, but less likely proposal is reducing the benefits or contribution limits at least for higher earners, though a reduction in the compensation limits seems more possible. Other tax changes that could be considered include further restricting Roth conversions for higher income individuals and limiting catch-up contributions for higher earners. In the context of the budget reconciliation, proposals like these that raise revenue can be expected to be considered seriously.

Reducing Barriers to Savings

Two barriers to savings rise to the top of the list: emergency savings\(^2\) and student loans. One proposal would create emergency savings accounts. Another idea is to allow access to some portion of existing retirement savings in a 401(k) plan that can be used penalty-free for emergencies without having to qualify for a loan or hardship. A bipartisan, bicameral proposal in the prior Congress that would allow employers to match in a 401(k) plan based on a participant paying a student loan strengthens the likelihood of inclusion of the proposal should comprehensive legislation move forward. A five-year extension of the temporary expansion of the tuition assistance exclusion from income to include payment of student loans through Internal Revenue Code Section 127 Employer Provided Educational Assistance was included in the Consolidated Appropriations Act, 2021 (enacted at the end of 2020) but further extension or permanence of this provision is also possible.

An emergency savings proposal could possibly be included in a budget reconciliation bill, though the absence of a widely supported proposal makes that uncertain. The student loan matching provision will likely remain in “SECURE 2.0”\(^3\) (discussed below), but there remains a possibility that some revenue-affecting provisions in SECURE 2.0 could be moved to a budget reconciliation bill.

Access to Retirement Savings Plans

The most prominent proposal to provide greater access to retirement savings plans is House Ways and Means Committee Chairman Richard Neal’s (D-MA) proposal to

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\(^3\) We use the term “SECURE 2.0” in this paper to refer to the combination of the Neal/Brady bill (H.R. 8696), the Portman/Cardin bill (S. 1431), and other bipartisan bills that may be considered by the House and Senate in 2021. The original Setting Every Community Up for Retirement Enhancement (SECURE) Act was a bipartisan retirement policy bill signed into law on December 20, 2019.
require most employers to offer a plan or automatic IRA.\(^4\) Efforts are underway to determine if this can be included in a budget reconciliation bill.

Providing a way for caregivers who have no earned income to save was raised during the presidential campaign and could certainly be addressed either in budget reconciliation or, more likely, bipartisan legislation.

A reduction in the number of years over which a part-time worker must work at least 500 hours – from three to two years – to be eligible to participate in a plan is likely to be pursued (and is already included in bipartisan, bicameral legislation).\(^5\) This proposal might get inserted into budget reconciliation or could stay in SECURE 2.0.

Mandating automatic enrollment and automatic escalation in new 401(k) plans is currently included in bipartisan legislation, but inclusion of this requirement could face opposition from Republican lawmakers.

There will likely be continued support from the Biden administration for state and local-sponsored retirement programs for private-sector employees.

**Other Retirement Savings Initiatives**

It is certainly expected that Congress will revisit a solution to the multiemployer crisis. With that there will likely be support for addressing funding reform for single employer plans, including (1) changes to the interest rate used to calculate funding obligations so that it is more in line with historic norms, and (2) lengthening the period of amortization for plan losses. It is expected that some of these reforms could be included in the budget reconciliation process, but other components may require bipartisan agreement, which has been hard to achieve.

Congress, with the support of the administration, may also address spousal protections in the consent rules for defined contribution plan accounts, improve access to long-term care, consider the status of retirement plan participants in bankruptcy affecting defined benefit pension plans and provide requirements around cybersecurity. All of these proposals, except long-term care tax changes, would need to be included in bipartisan legislation, which could affect their short-term prospects.

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Regulatory Action

We anticipate an extremely active regulatory agenda. As part of that effort, the Biden administration will likely take steps to revise or undo many rules published by the prior administration, such as those on electronic disclosure, environmental, social and governance investments, proxy voting, use of private equity in 401(k) plans, independent contractor guidance, and the fiduciary definition and related exemption. It may also return to some proposals that were dormant during the prior administration, such as brokerage window restrictions and expansion of Form 5500 reporting.

OVERVIEW

Retirement policy has experienced more bipartisanship than most areas of legislative activity. This cooperative approach has led to several comprehensive proposals over the past 25 years. Many proposals have been enacted, though some have languished for years at a time – not due to substantive disagreement but, rather, because they have been attached to legislative vehicles that have stalled as a result of partisan disagreements over other unrelated provisions. With single-party control of both the White House and Congress, the prospects for getting retirement policy legislation through the legislative process are enhanced in some respects and adversely affected in others. Democratic priorities that can pass through the budget reconciliation process become more likely. On the other hand, bipartisan efforts, like SECURE 2.0, may be delayed by the budget reconciliation process and could be hurt if the likely partisanship of the reconciliation process undermines the bipartisanship needed for SECURE 2.0. The Biden administration also is expected to make significant changes through the regulatory process.

During the campaign, concerns resurfaced that the current tax deferral for 401(k) plans does not fairly allocate the tax benefits since the value of the deferral is greater for those in higher tax brackets. Support for addressing this issue was expressed by then-candidate Biden. Recommendations for changing the tax deferral to a flat tax credit has been raised for a number of years but has failed to gain any real support in Congress. This is not expected to change even with Biden as president. The far more likely legislative approach is expanding and making refundable the Saver’s Credit. There are other narrower changes to the tax treatment of high earners that may come up, even in the context of bipartisan legislation, such as a limit on catch-up contributions for higher earners.

Both Democrats and Republicans have expressed concern about retirement plan coverage. But Democrats have been more supportive of federal requirements for maintenance of a 401(k) or other type of retirement savings plan or of an automatic
payroll deduction IRA (but not a requirement for employer contributions.) As noted, we expect this issue to be a Democratic priority that will be considered in the context of a budget reconciliation bill. Additionally, both parties have expressed interest in legislation addressing barriers to savings like student loan debt. Democratic concerns about participant protections, including fiduciary obligations and cybersecurity responsibilities, will likely be a regulatory priority.

Many of the regulatory issues identified below are issues that the current and past administrations have also addressed. In some cases, it will be a matter of pushing back moderately on changes that have been made and, in other instances, significant changes are likely. Some issues that have played out through the regulatory process may be addressed legislatively, such as creating a data registry for missing plan participants. Additional restrictions on the use of electronic delivery is another issue that could be addressed through the legislative and regulatory processes.

Discussed below are brief summaries of both significant issues likely to be considered, as well as matters that may be lower priorities but would have an impact on design and operation of retirement plans. Because there are many stakeholders, major retirement policy legislation tends to cover a wide range of topics such as encouraging plan formation, expanding coverage, increasing savings, addressing fairness, extending participant protections and simplifying the rules.

Many, but certainly not all, of the initiatives noted below are included in SECURE 2.0 proposals, i.e., the bipartisan Securing a Strong Retirement Act, introduced at the end of the prior Congress Ways and Means Committee Chairman Neal and ranking Republican Kevin Brady (R-TX), and the bipartisan Retirement Security and Savings Act, introduced by Senators Rob Portman (R-OH) and Ben Cardin (D-MD). Both bills, which contain many provisions originally proposed or supported by the Council, are expected to be reintroduced in the new Congress. Inclusion of these proposals in bipartisan, bicameral legislation certainly increases the likelihood of receiving serious consideration, but to some degree priorities have shifted and there may be some more emphasis early on a partisan budget reconciliation bill.

Again, much of the analysis below is drawn from memoranda prepared by Kent Mason, partner with Davis & Harman LLP.

**RETIREMENT-RELATED TAX CHANGES**

**Bipartisan Legislation (SECURE 2.0)**

On October 27, 2020, Neal and Brady introduced the *Securing a Strong Retirement Act of 2020*, which contains many provisions that the Council supports. In 2019, Senators
Portman and Cardin introduced their own broad bipartisan bill, the *Retirement Savings and Security Act*, which overlaps in substantial ways with the Neal/Brady bill and also contains many provisions that would very significantly improve retirement security. These bills are expected to be reintroduced, with work continuing and enactment still possible.

However, the politics of 2021 are uncertain. With a Democratic majority, there undoubtedly will be shifting priorities and so the level of attention and timing given to this effort could drop. In addition, these bills are scored to lose substantial federal revenue and that issue will need to be addressed at some point.

**Expanding the Saver’s Credit**

Under current law, the Saver’s Credit is a specified percentage of retirement savings contributions, up to $2,000 (not indexed), made by certain individuals. The specified percentage is 50%, 20%, 10%, or 0%, based on the taxpayer’s adjusted gross income (AGI). For example, married taxpayers filing jointly are eligible for a 50% credit if their AGI does not exceed $39,500, 20% if AGI is between $39,501 and $43,000, 10% if AGI is between $43,001 and $66,000, and 0% if AGI is over $65,000. While this issue was not discussed during the campaign, it is of interest to both Democrats and Republicans and is something on which they are likely to agree in many – but not all -- respects. Neal/Brady would:

- Increase the $2,000 limit on contributions to $3,000.
- Index that amount.
- Make the credit a straight 50% until it starts to phase out.
- Begin the phase-out of the credit at $40,000 (indexed) of AGI for single taxpayers, and $80,000 (indexed) for joint returns. (The credit is phased out over $20,000 of AGI, so that joint returns with $100,000 or more of AGI receive no credit).
- Direct the U.S. Department of Treasury to increase awareness of the credit.

The one Democratic priority that was not in Neal/Brady but was included in Portman/Cardin is making the tax credit refundable and payable to a plan or IRA.

A Biden administration and a Democratic Congress can be expected to support expansion and refundability of the Saver’s Credit, as well as directing the credit directly to a plan or IRA. This proposal is likely to have more traction than a major change to “equalize” the tax benefits. Refundability, however, could trigger Republican concerns, which is why this proposal is likely to be included in a budget reconciliation bill.
Equalizing the Tax Benefits of Defined Contribution Plans

During the Democratic presidential primary campaign, numerous candidates expressed support for “equalizing” the tax treatment of contributions to defined contribution plans, including 401(k) plans, such that individuals with higher incomes receive no more tax benefit through deferral of their tax than individuals with lower incomes. This goal could be achieved either by eliminating the current tax exclusion for retirement savings and replacing it with a flat tax credit, or by capping itemized deductions and exclusions at a relatively low percentage, such as 22%. It should be noted that this approach has not thus far received traction among lawmakers who are expected to continue in key roles in the new Congress. There is far greater interest in expanding and making refundable the Saver’s Credit (as noted above).

Imposing an Overall Cap on Retirement Benefits

The Obama administration previously proposed a cap on the aggregate benefits that can be accumulated in a taxpayer’s IRAs and Section 401(a) plans – including 401(k) plans), 403(b) plans, and/or funded 457(b) plans (“qualified arrangements”). Additional contributions (or accruals in the case of a defined benefit plan) generally would not be permitted if an individual’s aggregate benefits in qualified arrangements reached the cap. The proposed cap would be the present value of the maximum annual benefit permitted under a defined benefit plan in the form of a joint and 100% survivor benefit commencing at age 62, which is $230,000 per year for 2021. Under this rule, the maximum aggregate account balance permitted would vary dramatically based on the age of the individual and interest rates.

An alternative proposal to cap retirement savings was to impose a specific dollar cap on aggregate savings in defined contribution plans, such as at $3 million or $5 million. These proposals could resurface in 2021, such as in the context of a reconciliation bill.

Eliminating Catch-up Contributions for High-Income Taxpayers

A proposal to eliminate catch-up contributions for high-income taxpayers could be offered. For example, a cap could be put in place for individuals with wages over $500,000 in the preceding year, or potentially a lower income level. This has been previously suggested for inclusion in tax legislation but the bipartisan Neal/Brady legislation referenced above increases the catch-up contribution for those age 60 and older to $10,000. This indicates that increases for some participants are certainly possible but limits could be placed on others depending on income level, especially in the context of a reconciliation bill.
Eliminating Roth Conversions for High-Income Taxpayers

A Roth conversion refers to taking all or part of the balance of a traditional pre-tax retirement savings account and moving it to a Roth (or after-tax) account. Roth arrangements have many tax advantages such as tax-free withdrawals. Many Democrats have expressed reservations about Roth conversions because of concerns that primarily higher income individuals can afford to make them. It is possible that the ability to make a Roth conversion could be limited or eliminated for some income thresholds, especially in the context of a reconciliation bill.

Repealing the ESOP Dividend Deduction for Public Companies

Under current law, dividends paid on employer stock held in an employee stock ownership plan (ESOP) are deductible under certain circumstances. A 2017 proposal by the Obama administration would have repealed this deduction with respect to employer stock held by an ESOP that is sponsored by a publicly traded corporation. This proposal could resurface, especially in the context of a reconciliation bill, but the chances of this proposal moving forward may be less than the chances of the preceding proposals aimed at high paid employees.

Reducing Retirement Contributions, Benefits or Compensation Limits

Instead of (or in addition to) an overall cap on retirement savings, Congress or the new administration could seek to reduce contribution or benefit limits. This has been done in the past, but this idea is not the prevailing direction the most recent Congresses wanted to pursue. But it is worthwhile to note because it certainly has been done in the past and could be proposed again, especially in a reconciliation bill. If enacted, it would raise revenue to offset the cost of other measures. It also could be limited to higher earners. Another more possible legislative approach, again probably for a reconciliation bill, would be to reduce the limit on the amount of compensation that may be taken into account on behalf of an individual for purposes of retirement benefits.

Supporting Employer-Sponsored Emergency Savings Programs

There is growing bipartisan interest on Capitol Hill in helping workers save for emergencies through employer programs. To date there has not been a specific proposal that has attracted broad congressional interest. A bipartisan Senate bill introduced in
the last Congress would have created emergency savings accounts, but the bill did not appeal to employers because it included employer burdens and liabilities but lacked tax incentives. There has been some consideration given to the idea of allowing some portion of a 401(k) plan to be used as emergency savings. This approach is certainly simpler, but some opponents have expressed concern that it provides an incentive to pull savings out of a retirement plan and they have noted that employees can already direct a portion of their income to personal savings accounts.

In addition, access to retirement funds for emergencies is complicated by the recent access permitted through the coronavirus related distribution provisions of the CARES Act and possible consideration of extending that provision. Given the significant concern about the need to make up for financial setbacks (such as those caused by the pandemic), more proposals around emergency savings are expected but so far there has not been an approach that has emerged that seems to have momentum.

**Student Loans as a Barrier to Savings**

Early in the presidential campaign, candidates raised concern about the size and impact of student loans on savings. A proposal is included in Neal/Brady that would allow employers to help employees with student debt by allowing the plan sponsor to make a matching contribution based on student loan repayments. This proposal is also included in legislation introduced in the last Congress by Portman and Cardin, Senator Ron Wyden (D-OR) and Representatives Rodney Davis (R-IL) and Darin LaHood (R-IL).

Support might also be lent to a permanent extension of the temporary expansion of Internal Revenue Code Section 127 which allows employers to pay up to $5,250/year tax-free for student loan payments made by an employee. The temporary expansion, originally scheduled to expire at the end of 2020 under the Coronavirus Aid, Relief and Economic Security (CARES) Act, was extended through the end of 2025 under the Consolidated Appropriations Act, 2021.

**Other Retirement Savings Proposals**

**Expanding Rules for Long-Term Part-Time Employees**

Generally, under the Setting Every Community Up for Retirement Enhancement (SECURE) Act – enacted in 2019 – employers maintaining a 401(k) plan must provide a dual eligibility feature under which an employee can become eligible to participate in the plan by completing either one year of service of at least 1,000 hours, or three consecutive years in which the employee completes at least 500 hours of service. It is possible that the reference to three-years of at least 500 hours of service could be
reduced to two consecutive years. This proposal is included in Neal/Brady and Portman/Cardin and is likely to be considered by the new Congress either in a budget reconciliation bill or in SECURE 2.0.

**Auto IRA and Coverage Requirement for Employers**

There may well be a renewed effort in the context of budget reconciliation to adopt a federal requirement that almost all employers offer an automatic IRA arrangement or a 401(k) or similar plan that satisfies certain requirements. A discussion draft released by Neal in the last Congress, the Automatic Retirement Plan Act of 2020, would not require employer contributions, would provide a tax credit for small employers, require automatic enrollment and escalation and as well as a distribution option with a lifetime income guarantee. There would likely be a grandfather rule for existing plans in any new legislation and possibly a preemption provision with respect to states and locales that have not already enacted laws with retirement plan requirements.

**Expanding Opportunities for Caregivers Saving for Retirement**

As a presidential candidate Biden offered the “Plan for Older Americans” which recommends that people who work as caregivers without receiving wages should have tax breaks for retirement saving. Under this proposal and similar to bipartisan legislation, caregivers would be allowed to make catch-up contributions to retirement accounts even if they are not earning income in the formal labor market. This could conceivably end up in SECURE 2.0 or in budget reconciliation.

**Multiemployer Plans, Single Employer Plans and Public Pension Plan Relief**

Multiemployer pension plans have very different funding rules and much lower Pension Benefit Guaranty Corporation (PBGC) guarantee levels than single-employer plans. Because these plans are funded by numerous employers who are typically responsible for only a small share of the funding, as plans begin to fail, the remaining employers can become required to make up huge funding deficiencies. With a number of large multiemployer plans seriously underfunded, the burden on the PBGC of covering retirees’ benefits even at the current low guarantee amounts is expected to exhaust the multiemployer insurance system. The Biden administration is expected to support congressional efforts to address the multiemployer crisis and Congress is likely to look for an early opportunity to act. This includes finding ways to subsidize the multiemployer plan shortfalls so retirees are not harmed financially.

The prior Congress undertook an extensive effort on multiemployer plan legislation, but the parties failed to agree. Most recently comprehensive multiemployer reform was
included in the House-passed HEROES Act of May 2020 and again in a narrower bill introduced in the House in September. Prospects for action on single-employer plan reforms are largely tied to multiemployer plan reform. The two single-employer plan proposals most likely to be considered are (1) a delay in the phase-out and reform of the interest rate corridor to better align the interest rate for funding purposes with historical norms and (2) a longer amortization period for recognizing losses. Parts of these proposals may be eligible to be included in a budget reconciliation bill, making passage of those parts more likely.

Cyber Security and Data Security for Retirement Plans

Key Democrats in Congress have expressed an interest in elevating the requirements for plan sponsors, recordkeepers, and other service providers to protect plan participants from data breaches. The Government Accountability Office (GAO) is expected to issue a report on these issues in early 2021. This report could serve as the basis for future legislative action. The U.S. Department of Labor (DOL) is expected to initiate a guidance project on cybersecurity and fraud prevention beyond the audit efforts it has undertaken thus far. This project would be expected to continue to be pursued by the Biden administration. Other regulatory agencies could also be encouraged to act on these issues. Since legislation would be unlikely to be eligible to be included in a budget reconciliation bill, the future of legislation in this area seems more uncertain.

Expanding Access to Long-Term Care Insurance

The Biden Plan for Older Americans offered during the campaign would increase the generosity of tax benefits for older Americans who choose to buy long-term care insurance and pay for it using their savings for retirement. This proposal is not fully developed but could possibly be pursued legislatively, such as in the context of budget reconciliation.

Federal Support for the Expansion of State and/or City Run Retirement Programs

Democrats have supported the growth of state and local programs given the challenge of passing mandatory retirement savings programs at the federal level. This can be expected to continue in a Biden administration. The Democratic platform states, “We will support approaches to retirement saving that enable workers and retirees to prepare for and prosper in retirement, including reforms that will allow states and municipalities to create public individual and pooled retirement account options that are easy for workers to access and understand.” This indicates support for building on existing state and local programs, but legislative action in this regard may be difficult
since it might be hard to include such a proposal in budget reconciliation. Regulatory action may also be hard, since the use of the Congressional Review Act to invalidate an Obama pro-state regulation precludes DOL from providing similar help to the states in the future.

Application of Defined Benefit Spousal Consent Rules to Defined Contribution Plans

As a senator, Vice President Kamala Harris co-sponsored legislation that would have required spousal consent for distributions from defined contribution plans. Given strong interest among several Senate Democrats to address what participant groups argue is a flaw in the consent rules, the Biden administration and congressional Democrats are likely to recommend such a requirement but it is unlikely such legislation could be included in a budget reconciliation bill, making passage problematic.

Bankruptcy Reform and Retirement Plans

The Democratic platform supports amending federal bankruptcy laws to protect workers’ earned pensions from being “taken away” by employers going through bankruptcy. There is often a concern expressed that participants are too low on the list of creditors. So presumably efforts would focus on ensuring that they have earlier recognition in the event of bankruptcy. This remains a very difficult proposal to move forward, since it cannot be included in budget reconciliation.

Stopping/Delaying Regulatory Projects

The Biden administration will quickly issue a memorandum stopping the issuance or publication of any new regulations and directing the agencies to delay, or consider delaying, the effective date for regulations that are final but not yet effective. Although delaying final regulations may be questionable under the Administrative Procedures Act, this has been done for years by incoming presidents without challenge.
Electronic Delivery

In May 2020, the DOL issued long-awaited final regulations which allow retirement plan sponsors to satisfy disclosure requirements electronically if certain requirements are met. Participants can opt-out and choose to receive paper disclosures.

The Biden administration, and possibly Congress, may re-open the electronic delivery rules to restore paper delivery as the default option with respect to at least certain disclosures, such as at least one benefit statement per year and fee disclosures. In fact, a requirement to provide one paper benefit statement per year was included in Neal/Brady. The two safe harbors contained in the final DOL electronic delivery regulations generally allow plan sponsors to notify participants and beneficiaries that the information will be made available on a website or provide the disclosure via an attachment to an email.

Environmental, Social and Governance (ESG) Investments/Proxy Voting

In October 2020, the DOL issued final regulations amending the DOL’s investment duties regulation by placing new requirements on environmental, social and governance (ESG) investing under ERISA (although the final regulations were modified in some ways from the proposed regulations, including eliminating the direct reference to ESG and focusing instead on pecuniary factors). This was achieved in part by requiring fiduciaries to “select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment,” and not on ESG considerations unless they are pecuniary in nature. The DOL also issued final proxy voting regulations in December 2020 which amended the investment duties regulation and echoed themes from the ESG proposal, indicating that proxy voting should not be used “to promote goals unrelated to the financial interests of the plan’s participants and beneficiaries or the purposes of the plan.” Many key Democrats have been very vocal in their opposition to the above rules. For many years, policies relating to ESG investments have changed under succeeding administrations. This pattern could continue by modifying the recent final regulations to:

- Return the law to the Obama administration position where ESG factors could function as a legitimate tie-breaker between comparable investments.
- Allow proxy voting in more situations.
- Provide more guidance on the importance of taking into account long-term trends such as climate change.
• Make it easier to permit ESG options to be qualified default investment alternatives (QDIAs).

• Seek to expand ESG reporting to the Securities and Exchange Commission (SEC) for public companies.

Private Equity in 401(k) Plans

Significant political concerns have been raised by Democrats with the recent DOL letter approving the use of private equity as a component of an available plan investment option. The DOL with new leadership could issue guidance putting a higher burden on plan fiduciaries to determine that such a component is appropriate. The burden could be framed in such a way to make it unlikely that many fiduciaries would attempt to include private equity.

Missing Participants

On January 12, the DOL issued a non-binding “best practices” document regarding missing participants as well as a compliance assistance release describing the current audit process and a Field Assistance Bulletin (FAB 2021-01) announcing a temporary non-enforcement policy for terminating defined contribution plans that use the PBGC’s Missing Participants Program. However, the DOL could further enhance its enforcement of fiduciary duties in locating missing participants and could possibly enhance such duties in the new administration. This area has been a high priority for certain participant groups.

The PBGC could also further expand and more fully implement its existing Missing Participant Program. Creation of a national online “lost and found” for participants to find their missing benefits was included in the bipartisan Neal/Brady legislation. It is therefore possible the issue may be addressed by the new Congress as well as part of SECURE 2.0.

Form 5500 Expansion

This DOL-led project was started previously under the Obama administration and was shelved by the Trump administration. The Biden administration could restart this effort to expand the amount and types of data that must be reported on the Form 5500.
Defined Benefit Plan Risk Transfers Limitations

Risk transfers for defined benefit pension plans are done in one of two ways: (1) offer former employees a lump sum in lieu of their monthly payments or (2) purchase and distribute annuities to former employees to discharge the pension plan’s obligation. Risk transfer transactions may become more difficult under a new administration. For example, the IRS could reinstate a withdrawn notice effectively prohibiting offering a lump sum to former employees who are in pay status. The DOL could also enhance disclosure obligations with respect to both forms of risk transfers – emphasizing, for example, the risks associated with taking a lump sum and the loss of PBGC and ERISA protections in the case of an annuity purchase.

Brokerage Window Restrictions

The new administration could revisit the treatment of brokerage windows in retirement plans since the Obama administration attempted unsuccessfully to address this area. The issues that could resurface include possible fiduciary obligations for employers to:

- Monitor the use of such windows and investments made under the windows,
- Evaluate whether employees are being exposed to too much risk under such windows, and/or
- Provide additional disclosures and/or have fiduciary responsibility regarding heavily used options under such windows.

Fiduciary Rule

In June 2020, more than two years after Obama-era rules were invalidated by a federal Fifth Circuit Court of Appeals decision, the DOL issued a final rule which reinstated the pre-2016 “five-part test” for determining fiduciary status. Under this standard the fiduciary must:

- Provide recommendations regarding investment decisions,
- On a regular basis,
- Pursuant to a mutual agreement or understanding with the plan or plan fiduciary that
- The advice will serve as a primary basis for investment decisions, and
• The advice will be individualized to the particular needs of the plan or IRA

The Obama-era rules had virtually eliminated the regular basis, mutual agreement and primary basis portions of the prior rule. Thus, many who would be deemed a fiduciary under the Obama-era rule would not be a fiduciary under the five-part test. On the other hand, there is controversial language in the preamble to a Prohibited Transaction Exemption 2020-2 that arguably revives much of the Obama-era fiduciary definition. The 2020 guidance also reinstated Interpretive Bulletin 96-1 regarding what constitutes non-fiduciary investment education. It also revokes Advisory Opinion 2005-23 which generally stated that rollover advice is not fiduciary advice unless provided by an entity that is otherwise a fiduciary.

The Biden administration could attempt to (1) resurrect much of the Obama-era fiduciary rule or perhaps even expand it, and (2) delay and then modify PTE 2020-2 and replace it with something closer to the Obama Best Interest Contract Exemption. For example, new rules could provide a rebuttable presumption that advice to roll over assets from a plan is not in the best interest of the participant. Many proponents of the Obama-era rule, including some within the DOL, believe the DOL is not bound by the Fifth Circuit court decision since it only is the standard within the region covered by that circuit court.