AMERICAN BENEFITS COUNCIL

WHAT'S NEXT?

The Post-Election Future of Employee Benefits Policy

Retirement Policy Edition

November 6, 2020

While the tallying of votes continues and recounts and legal challenges ensue, it appears that former Vice President Joe Biden will be deemed the winner of the presidency. Likewise, it appears the Senate will remain in Republican hands while the Democrats will definitely hold the majority in the House of Representatives. As this document is written, certainly one (and possibly two) Senate races in Georgia may be headed for a runoff election on January 5. This could leave Senate control in limbo until early 2021.

The following is a detailed summary of the probable impact of the election on retirement policy ***on the assumption that there will be a Biden presidency, the House retains a Democratic majority and the Senate retains a Republican majority.*** Much of the analysis is drawn from memoranda prepared by Kent A. Mason, partner, Davis and Harman, LLP. (For a corresponding summary relating to health and paid leave policy, **click here**.)

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EXECUTIVE SUMMARY

Retirement policy has experienced more bipartisanship than most areas of legislative activity and that is likely to continue. However, a Democratic White House, despite a Republican-controlled Senate, improves the prospects for consideration of many 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:** A lot of attention has been given recently to the fact that 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 would likely be met with stiff opposition. Rather, congressional Democrats have long favored expanding the Saver's Credit and making it refundable. A Republican majority in the Senate further underscores the likelihood of no wholesale change in the tax structure of retirement savings. Other ideas likely to surface from a Biden administration, but which would have a more difficult path to enactment include imposing an overall cap on retirement benefits as suggested in the Obama administration and reducing the benefits or contribution limits at least for higher earners. Other tax changes that could be considered include further restricting Roth conversions for higher income individuals and limiting catch-up contributions for higher earners.

- **Reducing Barriers to Savings:** Two barriers to savings rise to the top of the list: emergency savings and student loans. One existing 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 for emergencies without having to qualify for a loan or hardship. An existing bipartisan, bicameral proposal 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 permanent or further extension of the temporary expansion of the tuition assistance exclusion from income to include payment of student loans is also possible.

- **Access to Savings**: There is a desire to provide greater access to retirement savings plans. Providing a way for caregivers who have no earned income to save was raised during the presidential campaign and could certainly be addressed in 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), as is mandating automatic enrollment and automatic escalation in new 401(k) plans (which is currently included in bipartisan legislation). Proposals to require payroll deduction IRAs could resurface but with a Republican majority in the Senate it is not as likely to be approved. 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 likely 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. Congress, with the support of the administration, may also address spousal protections in the consent rules, improve access to long-term care, consider the status of retirement plan participants in bankruptcy and provide requirements around cybersecurity.

- **Regulatory Action:** With a Biden administration and Republican majority in the Senate, we anticipate an extremely active regulatory agenda. Faced with legislative roadblocks, the Biden administration will pursue many of its policy priorities through the regulatory process. 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 and the fiduciary definition. It may also return to some proposals that were dormant during the current 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 continued split party control of the two houses of Congress, the challenges to getting retirement policy legislation through the legislative process will likewise continue. The parties are expected to continue to work on bipartisan areas of retirement policy as well as address the multiemployer plan crisis and single employer plan funding issues to the extent

these are not addressed in the lame duck session this year – and right now that prospect is very unclear.

During the campaign, concern 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 resurfaced and 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. What is a far more likely legislative approach is expanding and making refundable the Saver's Credit. There are a number of other more narrow changes that may come up even in the context of bipartisan legislation such as a limit on catch-up contributions for higher earners, but there will be ample opportunity for full vetting of the impact of these proposals.

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 and required payroll deduction IRAs (but not a requirement for employer contributions.) While a Biden administration creates opportunity for mandated proposals to be raised, a Republican majority in the Senate limits any real chance of their moving forward. There will likely be more focus on using automatic enrollment and escalation as a tool in new plans. To the extent there are any mandates, federal requirements are likely to be layered on top of existing state and local retirement programs. Additionally, both parties have expressed interest in addressing barriers to savings like student loan debt.

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 and providing a safe harbor for plan sponsors looking for 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 the bipartisan Securing a Strong Retirement Act (SSRA), introduced recently by U.S. House of Representatives Ways and Means Committee Chairman Richard Neal (D-MA) 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.

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

RETIREMENT-RELATED TAX CHANGES

Bipartisan Legislation (SECURE 2.0)

On October 27, 2020, Ways and Means Chairman Richard Neal (D-MA) and Ranking Member Kevin Brady (R-TX) introduced a bipartisan bill "Securing a Strong Retirement Act of 2020" (Neal/Brady) which contains many provisions that the Council supports. Last year, Senators Rob Portman (R-OH) and Ben Cardin (D-MD) introduced their own broad bipartisan bill, the Retirement Savings and Security Act (Portman/Cardin) 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 possible.

However, the politics of 2021 could be uncertain. Congress could possibly be focused more on partisan messaging than legislating and there will be competing priorities. In addition, these bills would lose substantial 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 are eligible for a 50% credit if their AGI does not exceed $39,000, 20% if AGI is between $39,001 and $42,500, 10% if AGI is between $42,501 and $65,000, 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 respects. The SSRA 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 is not in the bill but is included in Portman/Cardin is making the tax credit refundable and payable to a plan or IRA.

A Biden administration and a split 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, but the refundability could trigger Republican concerns.

Equalizing the Tax Benefits of Defined Contribution Plans

During the presidential 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 next 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 2020. 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 a Biden administration but a Republican controlled Senate would lessen the likelihood of passage. The limit would need to be high enough not to draw strong objections from Republicans to move forward in a divided Congress.

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 SSRA 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.

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 and a waiver of the lifetime required minimum distributions rule, as well as other benefits. Many Democrats have expressed concern 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 even with Republican control of the Senate.

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 in the context of a larger retirement bill because it is scored to raise tax revenue and has been supported by both parties.

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 again this idea has not come up in recent bipartisan discussions

and is not the prevailing direction the current Congress has wanted to pursue. But it is worthwhile to note because it certainly has been done in the past and could be proposed again and, if enacted, would raise revenue to offset the cost of other measures. It also could be limited to higher earners. Another possible legislative approach 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.

Reduction of Barriers to Savings

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 would create emergency savings accounts, but the bill does not appeal to employers because it includes employer burdens and liabilities but lacks tax incentives. There has been some consideration given to the idea of allowing some portion of a 401k) 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. 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 a bipartisan workable approach that has emerged.

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 the SSRA 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 by Portman and Cardin, Senator Ron Wyden (D-OR) and Representatives Rodney Davis (R-IL) and Darin LaHood (R-IL). Under a Biden administration, additional changes could be supported even with a split in the control of Congress.

Support might also be lent to an 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, through the end of 2020, was included in the Coronavirus Aid, Relief and Economic Security (CARES) Act.

Tax Credit for not Reducing Benefits during the Pandemic

A bipartisan bill introduced in the current Congress would provide economically challenged small employers with a tax credit for not reducing benefits during the pandemic. The desire to do this is driven by concern over the loss of an important savings incentive: the employer's match. This legislation may well advance in 2021, depending on the ongoing economic effects of the pandemic crisis.

OTHER RETIREMENT SAVINGS PROPOSALS

Expanding Rules for Long-Term Part-Time Employees

Generally, under the Setting Every Community Up for Retirement Enhancement (SECURE) Act, 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 the SSRA and Portman/Cardin and is likely to be considered by the next Congress.

Mandating Auto Enrollment and Auto Escalation for New Plans

Short of requiring all retirement employers to offer a retirement plan, the Biden administration might recommend that automatic enrollment and automatic escalation be included in all new defined contribution plans. This proposal was also included in the SSRA and likely will be considered by the next Congress.

Auto IRA and Coverage Requirement for Employers

There could be an effort to adopt a federal requirement that employers offer uncovered employees an automatic payroll deduction IRA. This mandate would likely be combined with a formal mechanism under which the requirement could be satisfied by the adoption of another type of plan, such as a 401(k) plan, that meets certain standards. However, a Republican controlled Senate would likely block passage.

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.

Multiemployer Plans, Single Employer Plans and Public Pension Plan Relief

The Democratic platform states that public pension plans and private multiemployer pensions should be protected to ensure workers keep the benefits they have earned. 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. In addition, Congress is interested in finding ways to subsidize the multiemployer plan shortfalls so retirees are not harmed financially.

The current Congress has already undertaken an extensive effort on multiemployer plan legislation, but the parties have failed to agree. Most recently comprehensive multiemployer reform was included in the House-passed HEROES Act 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. The Biden administration can be expected to support multiemployer legislation. Given the likely future failure of a number of multiemployer plans Congress is expected to continue to try and find a solution. This presumably could result in enactment of single-employer funding reform as well.

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 by the end of this year or 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 its 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.

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 is likely to be pursued by the Biden administration.

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 and to the extent there is less opportunity for federal solutions to coverage in the upcoming Congress more support could be given to state and local governments.

Application of Defined Benefit Spousal Consent Rules to Defined Contribution Plans

As a senator, Vice-President elect 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 even if the chances of it moving forward are limited in the Senate.

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. Details of this proposal have not been revealed but 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. A split Congress is one challenge and another is the number of stakeholders involved in such a proposal.

RETIREMENT REGULATORY CHANGES

Stopping/Delaying Regulatory Projects

The Biden administration would be expected to 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 the SSRA. The two safe harbors contained in the final DOL electronic delivery regulations generally allow:

- Notifying participants and beneficiaries that the information will be made available on a website, OR
- Providing 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 proposed proxy voting regulations in September 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 and proposed 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.
- Expressly 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

The DOL could further enhance its enforcement of fiduciary duties in locating missing participants and could possibly enhance such duties. 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 SSRA legislation. It is therefore possible the issue may be addressed by the new Congress as well.

Form 5500 Expansion

This DOL-led project was started previously under the Obama administration and was shelved by the current administration. The Biden administration could restart this effort to expand the data reporting 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. 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 resurrect much of the Obama-era fiduciary rule or perhaps even expand it. 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.