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RETIREMENT LEGISLATION & REGULATION

Quarterly Bulletin – Q1 2021

Prepared for Franklin Templeton by Davis & Harman LLP

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We believe it is important to keep you informed on the latest proposals and regulations impacting the retirement industry, as well as implications to your business. As such, we are pleased to share the latest edition of the *Retirement Legislation and Regulation Quarterly Bulletin*, prepared by experts at Davis & Harman LLP.

In the leadup to the November 2020 elections, the retirement community was eager to learn who would control the direction of federal retirement policy for the next two years. President Biden's win and the Democrats' hold of control in the House (albeit by an even slimmer margin) soon became clear following the November 3rd elections, but the need to hold runoff elections for both Georgia U.S. Senate seats meant that control of the Senate was ultimately not known until January 6th. Although many in Washington expected that Republicans would likely maintain control of the Senate in the 117th Congress, Georgia upended those predictions by electing both Democratic candidates. With those results, the Senate is now split 50-50, and Vice President Harris's tie-breaking vote gives Democrats control by the narrowest possible margin.

As discussed below, having control of the White House and Congress opens up more options to Democrats in many regards, including with respect to retirement policy. The initial months of President Biden's presidency will be key in beginning to understand how the Department of Labor (DOL), Treasury Department, and Internal Revenue Service (IRS) could prioritize, redirect, or reverse certain initiatives affecting retirement, or take on new ones. Many of those decisions will be made by the individuals who ultimately fill key roles, such as the Assistant Secretary for DOL's Employee Benefits Security Administration (EBSA). We also expect to begin learning in the coming months how the 117th Congress might approach retirement legislation, which often enjoys bipartisan support. Democrats, however, may take this opportunity to pursue retirement ideas that have historically found less support among Republicans.

With the retirement outlook for 2021 still taking shape, this issue of the *Quarterly Bulletin* briefly reviews some of the key retirement-related developments that occurred in the federal agencies and Congress in the final months of 2020 and considers how the Georgia election results could impact those developments going forward.

2020 Year-End Regulatory and Legislative Developments

Regulatory Updates

As discussed in the Q3 2020 *Quarterly Bulletin*, in the final months of a presidential administration, the federal agencies are under the clock to conclude outstanding projects as soon as possible. The last quarter of 2020 was no exception, with both DOL and Treasury/IRS scrambling to release as many regulations and other guidance as possible (efforts known as "midnight rulemaking") before President Biden took office. Incoming administrations have a history of halting the prior administration's regulatory projects that have not yet been published as final and delaying the effective date of final regulations that have not yet taken effect. President Biden was no exception to this, as he followed suit in doing so on his first day in office.

Retirement-related regulations and other guidance that were issued in late 2020 include the following:

Exclusive purpose. DOL's existing investment duties regulation describes the actions plan fiduciaries must take with respect to a plan investment in order to satisfy ERISA's duty of prudence. Under the proposed amendments, the regulations would also incorporate ERISA's exclusive purpose requirement.

- **Financial Factors in Selecting Plan Investments.** DOL published final regulations amending its "investment duties" regulation to address financial factors in selecting plan investments (also known as the "ESG rule"). The amendments confirm that ERISA plan fiduciaries must evaluate investments and investment courses of action based only on pecuniary factors. (On his first day in office, President Biden directed a review of this regulation as part of an executive order on climate change.)

- **Pooled Plan Provider Registration Rules**. DOL published a final rule setting forth the registration requirements for pooled plan providers in connection with pooled employer plans (PEPs), the new type of "open" multiple employer plan created by the SECURE Act and first available in 2021.
- **Fiduciary Rule**. DOL published its final prohibited transaction exemption (PTE) on Improving Investment Advice for Workers and Retirees (PTE 2020-02). The final exemption is very similar to the exemption proposed in July. (This exemption is one that could be delayed by the new administration, because it has not yet gone into effect.)
- **Shareholder Rights Associated with Plan Investments**. DOL published another set of final amendments to its "investment duties" regulation to address the application of ERISA's fiduciary duties with respect to proxy voting and the exercise of other shareholder rights. As with the ESG rule above, the proxy voting rule emphasizes DOL's view that ERISA's duties of prudence and exclusive purpose require plan fiduciaries to act solely for the economic benefit of plan participants and beneficiaries when managing plan assets.
- **Remote Notarization Relief**. IRS issued Notice 2021-03, which extends through June 30, 2021, the temporary relief in Notice 2020-42 from the physical presence requirement for spousal consent. As under the prior relief, spousal consent may be obtained either by remote notarization consistent with state law that applies to the notary or through the use of audio-video technology in the case of a plan representative witness.
- **Qualified Plan Loan Offsets**. The Treasury Department and IRS released final regulations addressing the eligible rollover distribution rules for qualified plan loan offsets (QPLOs) under Code section 402(c)(3)(C). This section was added by the Tax Cuts and Jobs Act and extends the normal 60-day rollover period in the case of a QPLO amount to the due date (including extensions) for filing the federal income tax return for the year in which the offset occurs.

Legislative Updates

In the final months of 2020, the 116th Congress will likely be remembered for its passage of the Consolidated Appropriations Act, 2021 (CAA), a $2.3 trillion package that included $900 billion in additional COVID-19-related relief and was signed by President Trump on December 27, 2020. Despite the enormity of the package, the CAA contained only a handful of retirement provisions, including partial plan termination relief for plans. Although no significant retirement provisions were enacted at the end of 2020, Congress was nevertheless busy laying the groundwork for retirement legislation in the 117th Congress. In October, House Ways and Means Committee Chairman Richard Neal (D-MA) and Ranking Member Kevin Brady (R-TX) introduced the much-anticipated Securing a Strong Retirement Act (SSRA), also referred to as "SECURE 2.0," a comprehensive retirement package that addresses issues ranging from automatic enrollment to increased business start-up credits and saver's credits. In November, Chairman Neal released an updated discussion draft of his Automatic Retirement Plan Act, which would generally require most employers to maintain a retirement plan or IRA arrangement.

Implications of Georgia's Runoff Elections for Retirement Policy in 2021

The results of Georgia's runoff elections have brought into play two additional options for Democrats that could affect retirement policy in the 117th Congress. First, the Democratic Party's control of Congress and the White House makes it more likely that the Congressional Review Act (CRA) could be successfully used to invalidate regulations that were finalized by the Trump Administration over the last several months. Although we do not anticipate that any of the recently finalized retirement regulations will be a prime target of a CRA challenge, it remains possible. Second, Democrats' slim majorities in Congress make it possible to advance legislation using the budget reconciliation process, which provides an exception to the Senate's filibuster rules. Budget reconciliation will allow Democrats to advance tax, entitlement, and debt limit proposals (including many employee benefit policy proposals) with only 50 votes in the Senate if they are part of a reconciliation bill. With the budget reconciliation process now a feasible option, it opens the door for Democrats to push for some of their bolder retirement policy ideas along with – or perhaps ahead of – the more bipartisan retirement proposals that have been in development.

Franklin Templeton is committed to bringing you timely updates on the latest legislative and regulatory activity impacting the retirement industry. Visit our website for additional information.

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