Defined contribution legislative and regulatory update

We are committed to providing the information and tools you need to meet your fiduciary responsibilities as a plan sponsor and offer your employees an exceptional retirement plan.

This newsletter is designed to inform you about the latest legislative and regulatory developments that may affect your plan.

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A note about SECURE 2.0 implementation

With the delay in the Roth/catch-up provision until January 1, 2026, Empower remains focused on mandatory provisions effective in 2023 and by January 1, 2024. We will continue to provide you with updates on provisions that become effective or made available at later dates. Please consult with your Empower representative for timing updates before considering optional provisions. We expect to make additional provisions available in 2024 and will keep you informed as those updates occur. Empower remains committed to helping you navigate the implications of SECURE 2.0 and expected guidance in coming years.

After SECURE and SECURE 2.0, what's next?

Within a three-year period, we saw two major pieces of retirement legislation signed into law: the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) and the SECURE 2.0 Act of 2022. While pension-related legislation generally enjoys bipartisan support, it is typically not a high priority. Usually, this legislation makes it to the president's desk as part of a "must pass" year-end bill.

We've spent 2023 and part of 2022 discussing SECURE 2.0, analyzing its provisions, defining the implementation process, and identifying the areas where further guidance is needed. In this article, we're going to take a look at some recently introduced legislation that may become part of a future retirement legislation package.

We'll be looking at three bills:

- The Retirement Fairness for Charities and Educational Institutions Act of 2023
- The Automatic IRA Act of 2023
- The Women's Retirement Protection Act of 2023

Each of these bills was considered during the development of SECURE 2.0, but for various reasons, they were not included in the final version.

The Retirement Fairness for Charities and Educational Institutions Act of 2023 was reported favorably out of the House Financial Services Committee on May 24, 2023. The bill had bipartisan support, with nine Democrats joining all Republican committee members to move the bill out of committee by a 35 – 12 vote. The bill would address changes made to the final version of SECURE 2.0. Early versions of the bills that would become SECURE 2.0 would have allowed 403(b) plans maintained by tax-exempt organizations to invest in insurance separate account products and collective investment trusts (CITs), investment options that are currently available to 401(k) plans. This was accomplished by amending both the Internal Revenue Code (IRC) and securities law. The amendments to securities law were removed in 2022 at the request of the Financial Services Committee, which asserted jurisdiction over the issue. While the final version of SECURE 2.0 did include the IRC amendments, without the corresponding securities law amendments, the end result was that insurance separate accounts and CITs are not available to tax-exempt 403(b) plans. With the change in House leadership, the new bill would restore the securities law amendments and permit tax-exempt plans to utilize the same investment vehicles currently available to 401(k) plans.

The Automatic IRA Act of 2023 represents the latest effort of House Ways and Means Committee ranking member Richard Neal (D-MA) to require almost all employers to offer a workplace savings arrangement: either a defined contribution plan allowing participant contributions or an automatic-enrollment IRA. Exceptions would be made for small employers with 10 or fewer employees, employers in existence for two years or less, churches, and governmental entities. The plans and IRAs would be required to automatically enroll participants at a rate of at least 6% and automatically increase contributions annually until they reached at least 10%. Plans in existence prior to the bill's enactment would not be required to add automatic enrollment. SECURE 2.0 did include a provision that would require plans established after the enactment date, December 29, 2022, to include automatic enrollment and automatic increase of contributions, but stopped short of requiring employers to adopt some form of workplace retirement savings. Mr. Neal's past efforts have been met with Republican opposition and have failed to move forward.

The Women's Retirement Protection Act of 2023 was introduced in both the Senate and the House. The Senate version is sponsored by Senators Patty Murray (D-WA) and Tammy Baldwin (D-WI). Representative Lauren Underwood (D-IL) sponsored the House Bill. Prior versions of the bill were introduced in the last two congresses. The bill seeks to expand spousal rights in defined contribution plans and provide assistance to women in preparing for retirement. The bill would require spousal consent, similar to what is currently required in defined benefit plans, for most distributions from an individual account in a defined contribution plan. A grant program would also be established to improve financial literacy for women and provide assistance in obtaining qualified domestic relations orders.

SEC proposed rule: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

On July 26, 2023, the Securities and Exchange Commission (SEC) revealed its Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers proposed regulation (Proposed Rule). The Proposed Rule represents the SEC's attempt to regulate broker-dealer and investment adviser use of predictive data analytics (PDA) in investor interactions by requiring firms to conduct comprehensive evaluations of PDA use, determining conflicts of interest, and eliminating or neutralizing certain conflicts of interest.

Specifically, the Proposed Rule requires SEC-registered broker-dealers and investment advisers to address "conflicts of interest" associated with using "covered technologies" in "investor interactions."

The definition of "investor" within the Proposed Rule is not uniform between broker-dealers and investment advisers. For broker-dealers, the investor is considered a natural person (or legal representative thereof) "who seeks to receive or receives services primarily for personal, family, or household purposes."[1] This definition would include retirement plan participants.

Alternatively, "investor" under the investment advisor portion of the Proposed Rule would include "any prospective or current client of an investment adviser or any prospective or current investor in a pooled investment vehicle ... advised by the investment adviser."[2] This definition would appear to include interactions with both plan sponsors and participants.

The Proposed Rule broadly defines "investor interactions" to include "engaging or communicating with an investor, including exercising discretion with respect to an investor's account, providing information to an investor, or soliciting an investor ..."[3] However, the definition excludes interactions solely for the purposes of meeting legal or regulatory requirements or providing clerical, ministerial, or general administrative support.

The unique aspect of the Proposed Rule is that it would impose conflict-of-interest obligations on broker-dealers and investment advisers for interactions beyond the scope of merely providing investment recommendations and advice (conflicts of interest associated with recommendations already exist for broker-dealers through Regulation Best Interest and, for investment advisers, through the Advisers Act and accompanying SEC guidance). For example, if the Proposed Rule was finalized, many plan-participant investment-education tools offered by broker-dealers or investment advisers would be subject to the rule.

The Proposed Rule would require both broker-dealers and investment advisers to:

1. Evaluate any use or reasonably foreseeable use of a covered technology. Covered technology is also broadly defined in the Proposed Rule to include any analytical, technological, or computational function like an algorithm or model that would predict, guide, forecast, or direct investment behaviors or outcomes.
2. Determine any conflict of interest that places the interest of the broker-dealer or investment adviser (or representative of the firm) ahead of the interest of investors.
3. Eliminate or neutralize the effect of any conflict of interest.

The Proposed Rule also would place substantial new policies and procedures and books and records requirements on both broker-dealers and investment advisers, ranging from documenting uses (and foreseeable uses) of covered technology to documenting the identification of those conflicts of interest that place the firm's or representative's interests ahead of the investor and how those conflicts are eliminated or neutralized.

The Proposed Rule is open for comment until October 10, 2023.

Forfeitures in defined contribution plans: Ready, set, start the clock

In February 2023, the IRS issued proposed regulations on the use of forfeitures in defined contribution plans. The proposed regulations clarify that, for timing purposes, a forfeiture must be used by the end of the plan year following the year in which the forfeiture arises. The regulations are proposed to be effective for plan years beginning on and after January 1, 2024, but may be relied upon by plan sponsors in the interim.

Prior to the proposed regulations, IRS guidance on the use and timing of forfeitures in defined contribution plans was informal in nature and came through a Conference Report accompanying the Tax Reform Act of 1986 and a 2010 Plan Sponsor Newsletter published by the IRS Employee Plans division. With respect to the use of forfeitures, the IRS noted in the Conference Report that forfeitures may not revert to the employer, and permitted uses include reallocation to participants in accordance with plan terms to pay administrative expenses or reduce employer contributions. With respect to timing, the 2010 Plan Sponsor Newsletter indicated that a forfeiture should be used no later than the year in which the forfeiture is incurred.

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The proposed regulations reiterate the same permitted uses for forfeitures, but they give plan sponsors flexibility on the timing for the use of forfeitures. Under the proposed regulations, plan sponsors must use a forfeiture no later than 12 months after the close of the plan year in which the forfeiture is incurred. This relief is intended to alleviate the administrative burden of handling forfeitures that arise at the end of a plan year. Additionally, a transition rule for forfeitures that arose in any plan year prior to January 1, 2024, would treat such prior plan-year forfeitures as if they arose during the first plan year that begins on or after January 1, 2024. For calendar year plans, this means that plan sponsors have until December 31, 2025, to use any forfeitures that arose in a plan year prior to January 1, 2024, plus any forfeitures that arose during the 2024 plan year.

Plan sponsor considerations

The proposed regulations clarify that the IRS expects plan sponsors to use forfeitures timely and in accordance with the plan's provisions. In the preamble to the proposed regulations, the IRS reminds plan sponsors to make sure their plan document is clear about how the plan will use forfeitures. And they specifically warn against a plan that is drafted with limited uses for forfeitures. For example, if the plan uses forfeitures consistent with its current terms (e.g., the plan provides for only one permitted use) but excess forfeitures remain, the plan may incur an operational error absent additional corrective action from the plan sponsor, such as amending the plan to provide for additional uses for the forfeiture excess. If you have questions concerning the use of forfeitures in your plan, please contact your Empower representative, who will partner with you to discuss.

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1 88 Fed. Reg. 54022 (August 9, 2023).

2 88 Fed. Reg. 54023 (August 9, 2023).

3 88 Fed. Reg. 54022; 54023 (August 9, 2023).