

MEMO# 32885

November 2, 2020

Ways and Means Leadership Introduces "Secure Act 2.0" Legislation

[32885]

November 2, 2020 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Ways and Means Leadership Introduces "Secure Act 2.0" Legislation

The Chairman and Ranking Member of the House Ways and Means Committee (Chairman Richard E. Neal (D-MA) and Ranking Member Kevin Brady (R-TX)) recently introduced the "Securing a Strong Retirement Act of 2020," a retirement bill that includes provisions intended to promote increased retirement savings, preserve retirement balances in retirement and reduce administrative burdens associated with plan sponsorship.[\[1\]](#) The bill includes a number of provisions promoted by the Investment Company Institute and builds on the Setting Every Community Up for Retirement Enhancement (SECURE) Act,[\[2\]](#) which was enacted at the end of 2019.

Approximately 75 percent of the provisions in the new bill come from previously introduced legislation. Many of the provisions contained in the bill were previously included in (or modified from) the Retirement Security and Savings Act of 2019, introduced last year by Senators Portman (R-OH) and Cardin (D-MD) ("Portman Cardin bill").[\[3\]](#) Other provisions reflect the concerns of particular constituent groups and appear intended to garner bipartisan support for the overall bill.

The specific provisions are described in more detail below.

Description of Bill Provisions

The Securing a Strong Retirement Act of 2020 would do the following:

1. Provisions Intended to Expand Coverage and Increase Retirement Savings

- *Require automatic enrollment in retirement plans (§101).* The bill would require newly established 401(k) plans, SIMPLE IRAs, and 403(b) annuity contracts to automatically enroll participants. The plan must allow permissible withdrawals.[\[4\]](#) The plan must set the default contribution rate between three and ten percent of compensation for the first year of participation, increasing the rate by one percent each year, up to ten percent. The following plans will not be subject to this requirement:
 - Governmental and church plans;

- Plans adopted by businesses in existence for less than 3 years; and
 - Plans adopted by businesses that employ ten or fewer employees.
- *Modify credit for small employer pension plan startup costs (§102).*[\[5\]](#) The bill would modify the existing tax credit for small businesses that adopt a new qualified plan. For employers with no more than 50 employees, the credit would equal 100 percent (increased from 50 percent) of startup costs. For defined contribution (DC) plans, an additional credit would be provided, based on the amount contributed by the employer on behalf of employees.[\[6\]](#)
 - *Simplify and increase Saver's Credit (§103).* The bill would amend the Saver's Credit to use a single credit rate of 50 percent (currently, the credit may be 10 percent, 20 percent, or 50 percent of the contribution). The bill also would increase the maximum credit amount from \$1,000 to \$1,500 and would raise the income eligibility thresholds and adjust them for inflation after 2021.
 - *Expand permissible 403(b) investments (§104).* The bill would amend IRC section 403(b) to permit 403(b) custodial accounts to invest in group trusts (which include collective investment trusts), in addition to regulated investment company stock. It would also amend the Investment Company Act of 1940 (1940 Act) to provide that 403(b) plans could invest in collective trusts and separate accounts without causing such trusts and accounts to lose their exclusions under the 1940 Act, provided that: (1) the 403(b) plan is subject to ERISA, (2) the 403(b) plan sponsor accepts fiduciary responsibility for selecting the investments that participants can select under the plan, (3) the plan is a governmental plan, or (4) the plan has a separate exemption from the securities rules.[\[7\]](#)
 - *Increase the age for beginning required minimum distributions (RMDs) (§105).* The bill would change the age at which IRA owners and plan participants must begin taking RMDs to age 75. The SECURE Act generally increased the beginning age to 72.[\[8\]](#)
 - *Allow tax deferral for certain sales of employer stock to ESOPs sponsored by S corporations (§106).* The bill would allow individual owners of stock in a non-publicly traded S corporation that sponsor an employee stock ownership plan (ESOPs) to elect to defer the recognition of gain from the sale of such stock to the ESOP if the seller reinvests the sales proceeds into "qualified replacement property." Currently, this option only applies to C corporation ESOPs.
 - *Index IRA limit for catch-up contributions (§107).* The bill would require the Internal Revenue Service (IRS) to annually adjust the \$1,000 limit for IRA catch-up contributions for increases in the cost of living, in the same manner as it adjusts the (non-catch-up) IRA contribution limit.[\[9\]](#)
 - *Apply higher catch-up limit at age 60 (§108).* The bill would increase the limit for catch-up contributions for participants who have reached age 60[\[10\]](#) (from \$6,000 to \$10,000 in the case of 401(k) and 403(b) plans; from \$3,000 to \$5,000 in the case of SIMPLE plans). The bill would also instruct IRS to adjust these higher catch-up contribution limits annually for increases in the cost of living.
 - *Permit multiple employer 403(b) plans (§109).* The bill would allow 403(b) plans to participate in multiple employer plans (MEPs) under rules similar to the MEP provisions enacted under the SECURE Act.
 - *Allow employer matching contributions based on student loan payments (§110).* The

bill would allow employers to modify their 401(k), 403(b), SIMPLE IRA, or 457(b) plans to provide that employer matching contributions under the plan will be made on behalf of employees who make payments on their student loans (to apply, for this purpose only, as if the employees had made elective deferrals). The employees must certify that they have made the loan payment.[\[11\]](#)

- *Allow credit for small employer pension plan startup costs for employers which join an existing plan (§111).* The bill would allow the existing tax credit for small businesses that start a qualified retirement plan to be available for employers that join an existing multiple employer plan. The credit currently is available for the first three years a plan is in existence; the bill would apply this provision with respect to each eligible employer.
- *Create small employer tax credit for military spouse retirement plan eligibility (§112).* The bill would create a new tax credit for small employers with DC plans that (1) make military spouses immediately eligible for plan participation within two months of hire, (2) upon plan eligibility, make the military spouse eligible for any matching or nonelective contribution that they would have been eligible for otherwise at two years of service, and (3) make the military spouse immediately fully vested in all employer contributions. The employer would be eligible for a maximum credit of \$500 for three years with respect to each military spouse who is a non-highly compensated employee. The employer would be permitted to rely on the employee's certification that the employee's spouse is a member of the uniformed services
- *Allow small immediate financial incentives for contributing to a plan (§113).* The bill would allow employers to offer small incentives (e.g., a gift card) to induce employees to enroll in the plan.[\[12\]](#)
- *Create safe harbor for corrections of employee elective deferral failures (§114).* The bill would create a new safe harbor for reasonable administrative errors in implementing automatic enrollment or automatic escalation features in qualified plans, 403(b) plans, 457(b) plans, and IRAs. Under the safe harbor, the error must be corrected within nine and ½ months after the end of the plan year in which the error occurred, must be corrected "in a manner that is favorable to the participant" (to be defined by the IRS in regulations), and must be corrected similarly for all similarly situated participants in a non-discriminatory manner. The correction may be made after that participant has terminated employment and even if the error is identified by the IRS.
- *Reduce period of service requirement for long-term, part-time workers. (§115).* The bill would amend a provision from the SECURE Act that requires 401(k) plans to permit participation by workers who complete at least three consecutive years of service with at least 500 hours of service each year. The bill would reduce the three-year requirement to two years. As under the SECURE Act, such workers do not need to be included in testing for nondiscrimination and coverage requirements or application of the top-heavy rules.
- *Allow governmental plans to include certain firefighters, emergency medical technicians, and paramedics (§116).* The bill would amend the statutory definition of "governmental plan" to include plans established by a state or political subdivision thereof and maintained by a public safety agency, where all of the participants are employees of such agency and are emergency response providers, substantially all of whose services as emergency response providers are in the performance of

firefighting services or out-of-hospital emergency medical services.

2. Provisions Intended to Promote Lifetime Income

- *Review RMD barriers for life annuities (§201).* The bill would modify the statutory and regulatory RMD provisions that generally disallow annuities that provide payments that increase over time.[\[13\]](#)
 - The bill would amend the statute to expressly permit, under the RMD rules, commercial annuities (i) whose payments increase by a constant percentage (less than five percent per year); (ii) which allow lump sum payments as a result of commutation or acceleration of the future payments; (iii) which pays a dividend or similar payments; or (iv) which provides certain lump sum return of premium death benefits.
 - The bill would direct Treasury to make certain changes to the regulations, including providing that a commercial annuity whose initial payment is as much or higher than the RMD amount that would be required under the DC plan RMD rules would be deemed to satisfy the RMD requirements.[\[14\]](#)
- *Modify QLAC rules (§202).* The bill would direct Treasury to modify its regulations on qualifying longevity annuity contracts (QLACs) to do the following[\[15\]](#):
 - Remove the existing 25 percent limit and raise the current limit from \$130,000 to \$200,000 and to adjust this dollar limit for inflation (current rules limit the amount of QLAC annuity premiums that can be excluded from the RMD rules to the lesser of \$130,000 (across all his or her IRAs or plan accounts) or 25 percent of the individual's IRA plan balance).
 - Clarify that a QLAC may include a free look period of not more than 90 days.
 - Clarify the treatment of a divorce or separation for a joint and survivor annuity QLAC.
- *Permit insurance-dedicated ETFs (§203).* The bill would direct Treasury to modify its regulations to remove certain barriers that generally preclude ETFs from being available through variable annuities.[\[16\]](#)

3. Provisions Intended to Simplify and Clarify Retirement Plan Rules

- *Allow recovery of retirement plan overpayments (§301).* The bill would permit plans to determine whether or not to seek recoupment of mistaken overpayments; would impose protective conditions on any recoupment of overpayments, such as prohibiting plans from seeking interest on the overpayments, limiting the annual amount that could be recouped through reduction of future payments, prohibiting the recoupment from beneficiaries of overpayments made to participants, and prohibiting recoupment where the first overpayment occurred more than three years before the participant is notified of the error; and would provide rollover relief with respect to overpayments.
- *Reduce excise tax on certain accumulations in qualified retirement plans (§302).* The bill would reduce the penalty for failure to take an RMD from a plan or IRA from 50 percent to 25 percent and would further reduce the penalty to 10 percent in the case of an IRA where the taxpayer corrects the failure during a specified correction window.[\[17\]](#)
- *Modify performance benchmarks for asset allocation funds (§303).* The bill would direct the Department of Labor (DOL) to modify its participant-level fee disclosure regulation—specifically, the requirement to compare each designated investment

alternative against an appropriate broad-based securities market index.[\[18\]](#) The change would allow investments such as target date funds, that include a mix of asset classes, to be benchmarked against a blend of broad-based securities market indices, provided certain conditions are met.

- *Review and report to the Congress relating to reporting and disclosure requirements (§304).* The bill would direct DOL, Treasury and the Pension Benefit Guaranty Corporation (PBGC) to review the reporting and disclosure requirements in ERISA and the IRC applicable to qualified plans and, within 18 months, to provide a joint report to Congress with recommendations to “consolidate, simplify, standardize, and improve” the requirements.[\[19\]](#) The agencies would be required to consult with a balanced group of participant and employer representatives and to collect plan data, as needed, to assess the effectiveness of disclosure requirements.
- *Eliminate unnecessary plan requirements related to unenrolled participants (§305).* The bill would modify the notice requirements under ERISA and the IRC to provide that plans would not be required to provide certain notices to employees who are eligible to participate but have not enrolled in the plan.[\[20\]](#) The plan would have to provide such employees with notices required in connection with the employee’s initial eligibility under the plan (including the summary plan description), and an annual notice reminding the employee that he or she is eligible to participate in the plan.
- *Create retirement savings lost and found (§306).* The bill would create a national online registry for “unclaimed” accounts of terminated employees and beneficiaries, worth \$6,000 or less, to be operated by the PBGC. The bill would allow transfer of unclaimed accounts worth less than \$1,000 to the PBGC for investment in Treasury securities. For accounts with a value of \$1,000 to \$6,000 (raised from the current cash-out limit of \$5,000), involuntary cash-outs would have to be transferred to an IRA on behalf of the participant or beneficiary, with the possibility of investing the account in a target date or life cycle fund if provided for in future DOL guidance.
- *Exempt individuals with certain account balances from RMD rules (§307).* The bill would provide that a participant whose combined balance in his or her IRAs and DC retirement plans does not exceed \$100,000 (indexed for inflation), as of December 31 of the year before the year of attaining age 75, would not be required to take RMDs.[\[21\]](#) As long as the participant does not make additional contributions or receive transfers of amounts not previously taken into account, the initial determination would continue to apply for all subsequent years, even if the account value appreciates. Plans could rely on a certification from the participant as to the total value of his or her accounts. This exemption would apply only to the original account owner or plan participant, and not to beneficiaries. The bill would impose a new annual reporting requirement on plan administrators and IRA trustees with respect to participants and IRA owners who have attained age 74 as of the end of the preceding calendar year.
- *Expand Employee Plans Compliance Resolution System (§308).* The bill would expand the IRS Employee Plans Compliance Resolution System (EPCRS), deeming EPCRS amended to allow plans to self-correct inadvertent plan violations, except where the error is identified by IRS prior to the plan initiating self-correction or in egregious or abusive situations.[\[22\]](#) Further, the bill directs IRS to expand EPCRS (1) to allow IRA custodians to address certain inadvertent failures for which the IRA owner was not at fault, and (2) to allow plans and IRAs to self-correct any inadvertent RMD failures, where a distribution is made no more than 180 days after it was required.

- *Eliminate the “first day of the month” requirement for governmental section 457(b) plans (§309).* The bill would remove the rule that 457(b) plan participants must request changes in their deferral rate prior to the beginning of the month in which the deferral will be made.[\[23\]](#)
- *Permit one-time election for qualified charitable distribution to split-interest entity; increase qualified charitable distribution limitation (§310).* The bill would raise the annual cap on IRA qualified charitable distributions from \$100,000 to \$130,000. The bill also would permit a one-time election to make a qualified charitable distribution to a “split-interest entity,” including a charitable remainder trust or a charitable gift annuity, if certain conditions are met.
- *Permit retirement plan distributions for charitable purpose (§311).* The bill would extend the IRA qualified charitable distribution rules to apply to employer plans.[\[24\]](#) Accordingly, IRA owners and plan participants over age 70 ½ could direct up to \$130,000 per year from the plan or IRA to be paid directly to a qualified charity, and such amounts would satisfy all or part of the RMD from the plan or IRA.
- *Remove penalty for distributions to private-sector firefighters (§312).* The bill would modify the rules regarding the ten percent early withdrawal penalty. The change would expand the existing exception for “distributions to qualified public safety employees in governmental plans” to include private sector firefighters who terminate after age 50 and take a distribution from a retirement plan.[\[25\]](#)
- *Permit exclusion of certain disability-related first responder retirement payments (§313).* The bill would allow certain first responders to exclude from gross income service-connected disability payments from a retirement plan after reaching retirement age.
- *Address IRA statute of limitations for excise tax on excess contributions, certain accumulations, and prohibited transactions (§314).* The bill would modify the statute of limitation rules for IRAs to ensure that the three-year statute of limitations begins running when a when an income tax return is filed (or would have been filed, if the individual is not required to file) for the year in which the violation occurred, for purposes of prohibited transactions, excess contributions, or RMD failures.[\[26\]](#)
- *Require paper statements in certain cases (§315).* For DC plans, the bill would require that each year, one participant benefit statement must be provided in paper (unless a participant opts out to electronic delivery). The other three quarterly statements could continue to take advantage of the current safe harbors for using electronic forms of communication. There are two exceptions to this rule: (1) where a participant has affirmatively opted into electronic delivery and (2) where the plan is providing electronic delivery under the 2002 safe harbor (i.e., participants for whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties). For defined benefit plans, the paper statement would be required once every three years unless the participant opts for electronic delivery. This appears focused on modifying DOL's recent e-delivery efforts.[\[27\]](#)

4. Technical Amendments

- *Make technical corrections to SECURE Act of 2019 (§401).* The bill would make certain technical amendments to the SECURE Act. First, with respect to section 114 of the SECURE Act (increase in RMD age to 72), it would clarify that participants in defined benefit plans who retire after age 70 ½ (except for 5 percent owners) would receive

an actuarial adjustment for the period after age 70 ½ during which they receive no benefits. Second, with respect to section 116 of the SECURE Act (treating difficulty of care payments as compensation for IRA contribution purposes), the bill would make a corresponding amendment to IRC section 4973 (excise tax on excess IRA contributions) to reflect the treatment of such payments as compensation. Third, with respect to section 113 of the SECURE Act (qualified birth or adoption distributions), the bill would correct an incorrect statutory cross reference.

5. Administrative Provisions

- *Provide plan amendment relief (§501).* The bill would give plan sponsors until the end of 2022 (2024 in the case of governmental plans) to amend the plan document for changes made by the bill.

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endnotes

[1] The bill text is available [here](#). The Committee's section-by-section summary of the bill is available [here](#).

[2] For a summary of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at https://www.ici.org/my_ici/memorandum/memo32118.

[3] For a summary of the Portman Cardin bill, see ICI Memorandum No. 31827, dated June 27, 2019, available at https://www.ici.org/my_ici/memorandum/memo31827.

[4] Under Internal Revenue Code (IRC) § 414(w), qualified plans, 403(b) plans, and governmental 457(b) plans may provide participants with the opportunity to withdraw contributions made under an "eligible automatic contribution arrangement," or EACA, no later than 90 days after the first elective contribution is made under the EACA.

[5] Note that the SECURE Act increased the maximum credit amount from \$500 to \$5,000 per year, available for the first three years a plan is in existence.

[6] The additional credit would equal the "applicable percentage" of the amount contributed by the employer on behalf of employees, up to a per-employee cap of \$1,000. This credit would be phased out for employers with between 51 and 100 employees. The applicable percentage would be 100 percent in the first and second years, 75 percent in the third year, 50 percent in the fourth year, and 25 percent in the fifth year.

[7] This provision was included in the Portman Cardin bill (section 117).

[8] For a summary of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at https://www.ici.org/my_ici/memorandum/memo32118. A similar provision was included in the Portman Cardin bill (section 108).

- [9] This provision was included in the Portman Cardin bill (section 120).
- [10] Individuals become eligible to make catch-up contributions in the year in which they attain age 50. This provision was included in the Portman Cardin bill (section 121).
- [11] This provision was included in the Portman Cardin bill (section 112).
- [12] This provision was included in the Portman Cardin bill (section 119).
- [13] This provision was included in the Portman Cardin bill (section 202).
- [14] Annuity payments paid from DC plans are tested under the RMD rules for defined benefit plans.
- [15] This provision was included in the Portman Cardin bill (section 201). Note that this bill does not include the related QLAC provision that would allow variable and indexed annuities to qualify as QLACs, provided that they include certain guarantees.
- [16] This provision first appeared in the Portman Cardin bill (section 204).
- [17] A similar provision was included in the Portman Cardin bill (section 310).
- [18] This provision was included in the Portman Cardin bill (section 303).
- [19] A similar provision was included in the Portman Cardin bill (section 301).
- [20] A similar provision was included in the Portman Cardin bill (section 322).
- [21] A similar provision was included in the Portman Cardin bill (section 317).
- [22] A similar provision was included in the Portman Cardin bill (section 116).
- [23] This provision was included in the Portman Cardin bill (section 305).
- [24] A similar provision was included in the Portman Cardin bill (section 502).
- [25] A similar provision was included in the Portman Cardin bill (section 321).
- [26] A similar provision was included in the Portman Cardin bill (section 319).
- [27] For a description of DOL's new safe harbor for electronic delivery of ERISA disclosures, see ICI Memorandum No. 32478, dated May 21, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32478.