

MEMO# 33589

June 15, 2021

DOL and Treasury Release Spring 2021 Regulatory Agendas

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension

Tax RE: DOL and Treasury Release Spring 2021 Regulatory Agendas

The Department of Labor (DOL) and the Treasury Department and Internal Revenue Service (IRS) recently issued their updated Spring 2021 Semi-Annual Regulatory Agendas (Agendas), which include projected dates for issuance of proposed and final regulations.[\[1\]](#) As described in more detail below, both DOL and Treasury/IRS expect to issue several proposed and final rules by the end of 2021.

Department of Labor Agenda

DOL includes the following regulatory projects under its Employee Benefits Security Administration (EBSA) on the current Agenda:

- **Definition of the Term “Fiduciary” and Related Prohibited Transaction Exemptions (PTEs).** The Agenda confirms that DOL intends to amend the regulatory provision defining who is a fiduciary as a result of rendering investment advice for a fee (known as the five-part test).[\[2\]](#) The Agenda explains that “[t]he amendment would take into account practices of investment advisers, and the expectations of plan officials and participants, and IRA owners who receive investment advice, as well as developments in the investment marketplace, including in the ways advisers are compensated that can subject advisers to harmful conflicts of interest.” DOL also may consider amending existing exemptions or new exemptions in conjunction with the rulemaking. DOL expects to issue a proposal by December 2021.
- **Prohibited Transaction Exemption Procedures.** The Agenda indicates that DOL is updating its Prohibited Transaction Exemption Procedures Regulation (29 CFR Part 2570) to improve operation of the prohibited transaction exemption program. DOL indicates that it will issue a proposed rule by December 2021.
- **ESG Investments and Proxy Voting.** This Agenda item is described as the implementation of Executive Orders 13990 and 14030.[\[3\]](#) DOL will undertake a review of two regulations: “Financial Factors in Selecting Plan Investments”[\[4\]](#) and “Fiduciary

Duties Regarding Proxy Voting and Shareholder Rights”[\[5\]](#) and expects to issue a proposed rule in September 2021 (we understand from prior conversations with EBSA staff that it is likely to issue the two proposals separately, although the Agenda item does not confirm this—it is listed as one item with one estimated issuance date). In March 2021, DOL announced that it would not enforce either regulation, pending its review.[\[6\]](#)

- **SECURE Act Implementation and Related Revisions to Form 5500 Reporting.** The Setting Every Community Up for Retirement Enhancement Act (“SECURE Act”)[\[7\]](#) directs the IRS and DOL to work together to modify Form 5500, Annual Return/Report of Employee Benefit Plan, so that all members of a group of defined contribution plans meeting certain requirements (including having the same trustee, named fiduciary, and plan administrator) may file a single consolidated Form 5500. The consolidated Form 5500 must be implemented not later than January 1, 2022 and shall be effective for returns and reports for plan years beginning after December 31, 2021. While the Agenda makes clear that the principal focus of this project is implementation of the SECURE Act, it appears that additional revisions may be included with the proposal. DOL’s Agenda estimates that DOL will issue a proposed regulation in June 2021.[\[8\]](#)
- **Pension Benefit Statements—Disclosure Regarding Lifetime Income, SECURE Act.** The SECURE Act requires defined contribution plans to include an annual lifetime income stream estimate on participant benefit statements, setting forth the lifetime income stream equivalent of the participant’s total account balance under the plan.[\[9\]](#) The lifetime income illustration required under the bill mandates a calculation based on an annuity payout. The SECURE Act requires DOL to provide a model lifetime income disclosure, issue rules, and prescribe assumptions. In August 2020, DOL issued an interim final rule, which will become effective on September 18, 2021;[\[10\]](#) however, DOL indicated that it intends to issue a final rule in advance of the September effective date. ICI submitted comments on the interim final rule in November 2020.[\[11\]](#) DOL’s Agenda estimates that it will issue a final rule by July 2021.[\[12\]](#)
- **Adoption of Amended and Restated Voluntary Fiduciary Correction Program.** DOL plans to amend and restate its Voluntary Fiduciary Correction Program (VFCP), which is designed to encourage the voluntary correction of fiduciary violations by permitting persons to avoid civil actions and penalties if they take steps to correct identified violations. According to the Agenda, “[t]he amendments will expand the scope of some transactions currently eligible for correction and streamline correction procedures for certain others.” This project has remained on DOL’s regulatory agenda for a number of years, and DOL currently estimates that it will issue an interim final rule by September 2021.[\[13\]](#)
- **Abandoned Plan Program.** In December 2012, DOL issued proposed amendments to the abandoned plan regulations, which focused primarily on the ability of a chapter 7 bankruptcy trustee to act as a Qualified Termination Administrator and utilize the existing abandoned plan program to terminate abandoned plans and distribute benefits.[\[14\]](#) ICI submitted a comment letter in response to the proposed amendments.[\[15\]](#) The Agenda indicates that DOL expects to issue an interim final rule in November 2021. Note that this agenda item had previously been on DOL’s regulatory agenda, but it was removed in 2019.

Treasury Department and IRS Agenda

The Treasury/IRS Agenda includes several retirement savings items, including:

- **Guidance on 401(a)(9) Required Minimum Distributions (RMDs).** The SECURE

Act made a number of changes to the RMD rules.^[16] IRS intends to issue proposed regulations in September 2021 to provide guidance on these changes. The proposal will also address statutory changes to the rollover rules of section 402(c) that have been made since regulations were first issued.

- **MEPs and the Unified Plan Rule.** In July 2019, the IRS proposed changes to the regulations relating to the unified plan rule (also known as the “one bad apple” rule) that would provide a process for dealing with violations of qualification requirements by one or more participating employers in a defined contribution multiple employer plan (MEP), without jeopardizing the tax-qualified status of the entire MEP.^[17] The SECURE Act, enacted after the proposal was issued, modified the unified plan rule, allowing pooled employer plans (PEPs) (as well as other MEPs consisting of related employers) to continue to be treated as satisfying the tax qualification requirements despite the violation of those requirements with respect to one or more participating employers. In the case of a violation of the tax qualification requirements by a participating employer, the SECURE Act allows the plan to spin off the portion of the plan’s assets attributable to that participating employer, into a separate plan maintained by that employer. According to the guidance plan, IRS plans to re-propose the 2019 regulation by September 2021.
- **SECURE Act Modifications to Certain Rules Governing 401(k) Plans.** The SECURE Act included several provisions that modify the 401(k) plan rules, including to: increase the auto-enrollment safe harbor cap on auto-escalation (§102); ease rules for safe harbor 401(k) plans (§103); permit distributions upon elimination of certain lifetime income investment options (§109); allow 401(k) plan participation by long-term part-time workers (§112); and exempt from the early withdrawal penalty certain distributions for birth or adoption of a child (§113).^[18] IRS expects to issue a proposed regulation to implement these provisions by December 2021.
- **Guidance on Rules Applicable to IRAs and Roth IRAs.** The IRS intends to update the regulations for IRAs and Roth IRAs to incorporate the statutory changes that have been enacted since the regulations were issued. The IRS expects to issue proposed regulations by December 2021.
- **Section 72(t) 10 Percent Additional Tax Regulations.** The IRS intends to issue proposed regulations under section 72(t) of the Internal Revenue Code, regarding the application of the 10 percent additional tax to that portion of a distribution includible in gross income and received by a taxpayer before attaining the age of 59-1/2 from a qualified retirement plan. A proposed rule is expected in December 2021.
- **Reporting and Notice Requirements for Deferred Vested Benefits Under Section 6057.** In June 2012, the IRS issued proposed regulations regarding the filing of Form 8955-SSA, “Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits.” The IRS plans to finalize these regulations by December 2021.

endnotes

[1] DOL's Spring 2021 Agency Rule List is available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=202104&showStage=active&agencyCd=1200. The Treasury Spring 2021 Agency Rule List is available at

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=202104&showStage=active&agencyCd=1500.

[2] Following the Fifth Circuit's vacatur of the Obama era fiduciary rulemaking package, DOL reinstated the five-part test in 2020. See ICI Memorandum No. 32581, dated July 6, 2020, available at <https://www.ici.org/memo32581>. In the preamble to the PTE finalized in December 2020, DOL provided additional commentary regarding its interpretation of the five-part test. See ICI Memorandum No. 32999, dated December 18, 2020, available at <https://www.ici.org/memo32999>. DOL provided additional guidance regarding the application of the five-part test in the form of FAQs issued in April 2021. See ICI Memorandum No. 33485, dated April 19, 2021, available at <https://www.ici.org/memo33485>.

[3] Executive Order 13990, dated January 20, 2021, titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," is available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>. This EO directs federal agencies to review existing regulations promulgated, issued, or adopted between January 20, 2017 and January 20, 2021 that may be inconsistent with the Climate-related policies described in the EO. A separate Fact Sheet, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-f-agency-actions-for-review/>, specifies that the Financial Factors in Selecting Plan Investments regulation should be included for review. Executive Order 14030, dated May 20, 2021, titled "Climate-Related Financial Risks," is available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>. This EO directs DOL to "consider publishing, by September 2021, for notice and comment a proposed rule to suspend, revise, or rescind" both final rules listed in this Agenda item and to provide a report on its actions within 180 days.

[4] For a description of the final rule, see ICI Memorandum No. 32888, dated November 3, 2020, available at <https://www.ici.org/memo32888>.

[5] For a description of the final rule, see ICI Memorandum No. 32984, dated December 15, 2020, available at <https://www.ici.org/memo32984>.

[6] For a description of DOL's Enforcement Policy Statement, See ICI Memorandum No. 33176, dated March 10, 2021, available at <https://www.ici.org/memo33176>.

[7] For an overview of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at <https://www.ici.org/memo32118>.

[8] Note that this Agenda item is unrelated to the 2016 proposal to more broadly revise and modernize the Form 5500. The finalization of the 2016 proposal had been removed from the DOL's long-term agenda in 2019. In the Spring 2021 Agenda, modernization of the Form 5500 has been added back to DOL's long-term agenda, estimating that DOL, along with IRS

and PBGC, will issue a new proposal in May 2022. For a summary of the 2016 proposal, which would have significantly increased plans' reporting burden, see ICI Memorandum No. 30071 dated July 25, 2016, available at <https://www.ici.org/memo30071>.

[9] For an overview of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at <https://www.ici.org/memo32118>.

[10] See ICI Memorandum No. 32686, dated August 19, 2020, available at <https://www.ici.org/memo32686>.

[11] See ICI Memorandum No. 32915, dated November 17, 2020, available at <https://www.ici.org/memo32915>.

[12] This project on the Agenda is listed as a continuation of the Pension Benefit Statements project that appeared on the EBSA's long-term agenda in Fall 2019. Previously, the project related to DOL's Advance Notice of Proposed Rulemaking (ANPRM) regarding lifetime income stream illustrations in May 2013. For a description of the ANPRM, see ICI Memorandum No. 27228, dated May 8, 2013, available at <https://www.ici.org/memo27228>. For a description of ICI's comment letter responding to the ANPRM, see ICI Memorandum No. 27446, dated August 7, 2013, available at <https://www.ici.org/memo27446>.

[13] For a description of the latest revision to the VFCP, see ICI Memorandum No. 20012, dated May 5, 2006, available at <https://www.ici.org/system/files/attachments/pdf/memo20012.pdf>.

[14] For a description of the proposed amendments, see ICI Memorandum No. 26799 dated December 20, 2012. Available at <https://www.ici.org/memo26799>.

[15] See ICI Memorandum No. 27050, dated February 26, 2013. Available at <https://www.ici.org/memo27050>.

[16] For an overview of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at <https://www.ici.org/memo32118>.

[17] For a summary of the proposed rule, see ICI Memorandum No. 31843, dated July 9, 2019 available at <https://www.ici.org/memo31843>. For a summary of ICI's comments on the proposal, see ICI Memorandum No. 31990, dated October 1, 2019, available at <https://www.ici.org/memo31990>.

[18] For more information on these SECURE Act provisions, see ICI Memorandum No. 32118, dated December 20, 2019, available at <https://www.ici.org/memo32118>. [Note that in 2020](#). Note that in 2020, IRS issued Notice 2020-68, which provided initial guidance relating to §112 and §113. See ICI Memorandum No. 32741, dated September 4, 2020, available at <https://www.ici.org/memo32741>. IRS also issued Notice 2020-86, which provided initial guidance relating to §102 and §103. See ICI Memorandum No. 32978, dated December 11, 2020, available at <https://www.ici.org/memo32978>.