



Legislative and Regulatory Report

A monthly review of the latest information of importance to retirement plan sponsors

May 2023

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IRS issues temporary guidance on SECURE 2.0 EPCRS provision

On May 25, the IRS released [Notice 2023-43](#), which provides interim guidance on section 305 of the SECURE 2.0. Section 305 expands the IRS’s Employee Plans Compliance Resolution System (EPCRS) to provide that generally any inadvertent tax compliance failure by a qualified plan, 403(b) plan, SEP or SIMPLE IRA plan may be self-corrected under EPCRS without a submission to the IRS. Among other changes, section 305 also directs the Treasury to expand EPCRS to allow IRA custodians to address inadvertent failures with respect to an IRA. Notice 2023-43 confirms that plan sponsors may self-correct an “eligible inadvertent failure” before the IRS updates EPCRS to reflect the changes made by section 305 of SECURE 2.0, subject to certain conditions, exceptions and restrictions.

Financial Services Committee advances 403(b) CIT fix

On May 24, the House Financial Services Committee, on a bipartisan basis, [advanced](#) H.R. 3063, the Retirement Fairness for Charities and Educational Institutions Act. The bill would enable 403(b) plans to offer CITs. Previously, SECURE 2.0 included tax law changes to enable CITs in 403(b)s but did not include necessary securities law changes. The bill would amend the securities law registration exemptions to treat 403(b) plans like 401(k) plans with respect to their ability to invest in unregistered collective investment trusts and insurance company separate accounts, provided that: (1) the plan is subject to ERISA; (2) the plan sponsor accepts fiduciary responsibility for selecting the investments that participants may select under the plan; or (3) the plan is a governmental plan.

Tip: Click on highlighted words to go to the topic being discussed.

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Congressional leaders indicate plans for a SECURE 2.0 technical corrections package

On May 24, the Chairs and Ranking Members of the Ways & Means and Finance Committees [sent a letter](#) to Treasury and the IRS regarding technical corrections to SEURE 2.0. The letter states that the signatories “intend to introduce technical corrections legislation to correct erroneous statutory language, which may include items not addressed in this letter, so that the provisions carry out Congressional intent.” The purpose of the letter is to provide Treasury and the IRS with a basis to make a formal announcement that it will enforce the laws in accordance with Congressional intent with respect to the four issues identified: (1) catch-up contributions; (2) SEP and SIMPLE Roth IRA limits; (3) RMDs; and (4) the new contribution-based start-up credit. Treasury and IRS may issue guidance soon.

DOL drops appeal of fiduciary lawsuit

On May 15, DOL [voluntarily dismissed its appeal](#) of the decision in the American Securities Association (ASA) lawsuit challenging two FAQs issued by the department regarding the definition of fiduciary and PTE 2020-02. In early 2022, ASA sued to invalidate two specific FAQs issued by DOL regarding the fiduciary definition and Prohibited Transaction Exemption 2020-02. The suit was filed in the U.S. District Court for the Middle District of Florida (in the 11th Circuit). In February of this year, the court issued a decision that invalidated DOL's interpretation of a fiduciary in the context of rollover advice. A broader lawsuit challenging the 2020-02 preamble definition of a fiduciary is still pending. This decision to drop the appeal follows news reports that EBSA Secretary Lisa Gomez reiterated that a new fiduciary proposal is a “huge priority” for DOL and is coming “soon.” Still, with Julie Su's nomination for Labor Secretary stalled, the timing and substance of a new fiduciary proposal remains in flux.

References and source material used in this publication

“Guidance on Section 305 of the SECURE 2.0 Act of 2022 with Respect to Expansion of the Employee Plans Compliance Resolution System,” Notice 2023-43, Internal Revenue Service, [N-2023-43 \(irs.gov\)](https://www.irs.gov/notice/2023-43) (May 2023).

“Markup of H.R. 3556, H.R. 3564, H.R. 2622, H.R. 1553, H.R. 3063, H.R. 2627,” Financial Services Committee, <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408804> (May 24, 2023).

“SECURE 2.0 Technical Corrections Legislation Coming Soon,” 401(k) Specialist Magazine, <https://401kspecialistmag.com/secure-2-0-technical-corrections-legislation-coming-soon/> (May 24, 2023).

“DOL Drops Appeal in ASA Lawsuit,” American Securities Association, <https://www.americansecurities.org/post/dol-drops-appeal-in-asa-lawsuit> (May 15, 2023).

Keeping watch

You can find the most recent information on issues affecting governmental defined contribution plans, plan sponsors and plan participants on the Employer page of our plan website, [NRSforu.com/plansponsor](https://nrsforu.com/plansponsor).



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