



Latest regulatory agenda offers few surprises for retirement plans

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The Biden administration's fall 2021 update to the regulatory agenda contains several items of interest to retirement plan sponsors, including proposed regulations relating to environmental, social and governance (ESG) investing, a surprise final regulation on nondiscrimination testing relief for closed defined benefit (DB) plans, and a number of items related to the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 ([Div. O of Pub. L. No. 116–94](#)). This article highlights some of the retirement plan items on the updated agendas for the Department of Labor (DOL)'s Employee Benefits Security Administration (EBSA), the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corp. (PBGC), but omits some routine items. While the agendas often specify anticipated completion dates within the next year, those dates are generally aspirational.

EBSA

Proposed rules and prerule items

The EBSA agenda includes several retirement plan proposals that have been the focus of the agency's recent activity:

- **ESG investing.** On Oct. 14, 2021, EBSA issued proposed regulations that would clarify when ERISA plan fiduciaries can consider [ESG factors](#) in investment selection and proxy voting. EBSA anticipates completing its analysis of the large volume of [public comments](#) by March 2022, but gave no indication when final regulations may be published.
- **Form 5500 updates.** [Changes to Form 5500](#) proposed on Sept. 15, 2021, would implement a new group-filing alternative for certain single-employer individual account and defined contribution (DC) plans under the SECURE Act, require enhanced reporting for multiple-employer plans (MEPs), and make other unrelated changes. It seems unlikely that final regulations relating to these changes will

be issued in December 2021 as indicated in the agenda. A [separate, broader item](#) — transferred from EBSA's long-term action list — would modernize financial and annual reporting requirements and make investment and other information more accessible for data mining.

- **Fiduciary rule.** EBSA intends to propose a new definition of [investment advice fiduciary](#), including related amendments to existing prohibited transaction exemptions and new exemptions. This follows DOL's recent [extension](#) of its temporary nonenforcement relief for ERISA investment advice fiduciaries relying on a new prohibited transaction exemption ([PTE 2020-02](#)) that took effect earlier this year.

EBSA's agenda also includes two new prerule items for retirement plans:

- Possible regulatory and subregulatory guidance to help facilitate the establishment and operation of [pooled employer plans](#) (PEPs) under the SECURE Act
- A wide-ranging project examining ways to improve the effectiveness of ERISA's numerous [retirement plan disclosures](#) for participants and beneficiaries, including the content, design and delivery of the disclosures

Notably, the EBSA agenda doesn't include a prerule item currently under review by the Office of Management and Budget described as [possible agency actions to protect life savings and pensions from threats of climate-related financial risk](#).

Final rules

EBSA's agenda includes a final rule on [lifetime income disclosures](#) as required by the SECURE Act. Although DOL had intended to publish the final rule before the interim final rule took effect on Sept. 18, 2021, EBSA now anticipates publication by February 2022. The agenda also includes two interim final rules that have been on the agenda for several years:

- Restatement of the [Voluntary Fiduciary Correction Program](#) (VFCP), originally adopted in 2002 and last revised in 2006
- Amendments to DOL's program for [abandoned individual account plans](#), originally proposed in 2012

No long-term actions

EBSA currently has no items listed as long-term regulatory projects.

IRS

Proposed rules

IRS officials recently indicated the agency intends to focus its efforts on much-needed regulatory guidance for various provisions of the SECURE Act. These items will likely be the agency's priority in 2022.

- **Required minimum distributions (RMDs).** The SECURE Act increased the age that triggers RMDs from 70-1/2 to 72 for participants born after June 30, 1949, necessitating extensive revisions to the regulations under Internal Revenue Code (IRC) Section 401(a)(9). IRS's [proposal](#) to address these changes also includes an update to the rollover regulations under IRC Section 402(c) to reflect statutory changes since the regulations were first issued in 1995, including the expanded period to roll over plan loan offsets under the Tax Cuts and Jobs Act of 2017. The agenda targets December 2021 for this proposal, but it doesn't appear IRS will meet this publication date.
- **401(k) plans.** The SECURE Act also made several significant changes to certain 401(k) plan rules. IRS intends to tackle the regulatory guidance for many of these items in one [package](#) covering the following:
 - Increase in the maximum permissible auto-deferral rate for a qualified automatic contribution arrangement (QACA)
 - Elimination of the safe harbor notice requirement for certain plans that satisfy the actual deferral percentage (ADP) with nonelective contributions
 - Option for sponsors to adopt 3% (or greater) safe harbor NECs after the start of the plan year
 - Portability of lifetime income options scheduled for elimination from a plan's investment lineup
 - Expanded coverage for part-time employees who work at least 500 hours in three consecutive 12-month periods
 - Availability of penalty-free withdrawals after the birth or adoption of a child

The agenda notes March 2022 as the target date for publication of these proposed regulations.

- **"One bad apple" rule for MEPs.** Under the IRC, a violation of the plan qualification requirements by one participating employer in a MEP can jeopardize the entire MEP's tax-qualified status. The SECURE Act provides relief from this rule for MEPs, including PEPs, if benefits and liabilities attributable to the non-compliant employer's employees (and their beneficiaries) are spun off to a separate plan or individual IRAs. IRS's agenda includes [proposed regulations](#) on this relief, targeted for April of 2022. This proposal will update IRS's 2019 proposal, which was issued before enactment of the SECURE Act.

The IRS agenda includes a new item relating to [mortality tables](#) for determining DB plans' minimum required contributions under IRC Section 430. These tables are used to determine minimum lump sums under IRC Section 417(e). Although the proposal provides no specific information as to what changes are under consideration, IRS might be contemplating incorporating the new Pri-2012 mortality tables released by the Society of Actuaries in 2019.

A number of noteworthy items IRS moved to its long-term actions list in spring 2021 are now back on the latest agenda:

- [Income inclusion](#) and [calculation of taxes](#) under Section 409A
- Changes to the [minimum vesting standards](#) for qualified plans
- Allocation and use of [forfeitures in qualified DC plans](#)
- Updated guidance for single-employer DB plans relating to the [determination of benefits and liabilities](#) for minimum funding purposes, the use of funding balances, and Section 436 benefit restrictions
- Requirements for [employee stock ownership plans](#) (ESOPs)
- Guidance on [substantial risk of forfeiture](#) under IRC Section 457(f) nonqualified deferred compensation plans of state and local governments and tax-exempt entities

The agenda also includes some familiar items that have been on IRS's to-do list for a while:

- Determining [governmental plan status](#) under IRC Section 414(d) and [church plan status](#) under Section 414(e)
- Providing individual statements to [terminated vested participants](#)
- Addressing nondiscrimination testing, Section 411(b) backloading rules, plan termination rules, Section 436 benefit restrictions and top heavy rules for [statutory hybrid plans](#)

Final rules

The agenda indicates that IRS is working on final regulations reflecting the SECURE Act's [nondiscrimination testing relief](#) for closed DB plans and replacement nonelective contributions, and also the IRC's minimum participation requirement. This may come as a surprise to employers, since the agency never issued proposed regulations reflecting the SECURE Act's relief. The IRS proposed regulations offering testing relief in 2016, and while there are some similarities between the two sets of rules, there are also significant differences. For example, the SECURE Act allows aggregating plans with different plan years and testing a DB plan on an aggregated basis with matching DC contributions or an ESOP, but the 2016 proposal includes neither of these options. These changes are novel and complicated, and arguably should be the subject of a proposed rulemaking with a notice and comment period.

The IRS agenda also includes final rules for the following items, though they have been on the agenda in some form for years and may not be top agency priorities:

- Updates to the Section 417(e) [minimum present value rules](#) for changes made by the Pension Protection Act of 2006 (PPA)
- Application of the normal retirement age regulations to [governmental plans](#)

Long-term actions

IRS's list of long-term actions continues to include items on [notifying participants](#) of the consequences of failing to defer receipt of distributions, [affiliated service groups](#) under Section 414(m) and [Indian tribal government plans](#).

PBGC

Proposed rules

PBGC's agenda includes a new proposed rule that would provide [actuarial assumptions](#) to determine withdrawal liability for participating employers in a multiemployer plan. The PBGC's agenda lists several other proposals, all of which have previously appeared, including:

- Determination of guaranteed benefits for [multiemployer plan participants](#)
- Codification of PBGC's policy for [assessing and waiving penalties](#) for failure to provide certain required notices
- [Miscellaneous updates, clarifications and improvements](#), including SECURE Act changes to premium rates for cooperative and small-employer charity (CSEC) plans

Final rules

PBGC's agenda includes a final rule on the [special financial assistance](#) for multiemployer plans provided under the American Rescue Plan Act of 2021. PBGC issued an interim final rule on July 12, 2021, and the agenda anticipates a final rule in January 2022.

No long-term actions

- PBGC currently has no items listed as long-term regulatory projects.

Related resources

Non-Mercer resources

- [DOL regulatory agenda](#) (Office of Management and Budget, Dec. 13, 2021)

- [IRS regulatory agenda](#) (Office of Management and Budget, Dec. 13, 2021)
- [PBGC regulatory agenda](#) (Office of Management and Budget, Dec. 13, 2021)

Mercer Law & Policy resources

- [DOL transition relief for investment advice fiduciaries rolls over to 2022](#) (Nov. 8, 2021)
- [Extended pension interest rate relief to become law; other reforms pending](#) (Nov. 8, 2021)
- [DOL proposes to warm the climate for ESG investing](#) (Oct. 26, 2021)
- [Form 5500 proposal reflects SECURE Act changes and more](#) (Sept. 29, 2021)
- [Multiemployer plans get guidance on special financial assistance](#) (Aug. 3, 2021)
- [DOL issues FAQs on lifetime income disclosures](#) (July 28, 2021)
- [IRS issues Q&As on SECURE Act safe harbor 401\(k\) plan changes](#) (Dec. 21, 2020)
- [SECURE, CARES acts change rules on required minimum distributions](#) (April 7, 2020)
- [SECURE Act set to become law](#) (Dec. 19, 2019)
- [IRS proposes relief from 'one bad apple' rule for DC multiple-employer plans](#) (July 3, 2019)

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