SPARK INSTITUTE
SHAPING AMERICA'S RETIREMENT

Washington Legislative and Regulatory Outlook

2022 Preview: Significant Legislative and Regulatory Action Expected

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In just a few weeks, a professional golfer named Hideki Matsuyama will try to defend his title at the Masters golf tournament, one of the sport's four major championships. Not only is Matsuyama the first Japanese player to win the Masters, he is also known for a distinct "pause" at the top of his backswing. This means that before hitting the golf ball, Matsuyama slowly takes his club away from the ball, *pauses for an instant*, and then powerfully swings his club forward at 115 miles per hour.

In many respects, this signature pause is an appropriate metaphor for the state of retirement savings policy as we write this article at the very start of 2022. That is, even if it is just for a moment, these early days of 2022 have been a brief pause between the agenda setting and preparation of 2021 and the impending rush of legislative and regulatory developments that are expected to unfold in 2022.

In this Washington Legislative and Regulatory Outlook, we would like to take this opportunity to discuss the legislative and regulatory developments that we expect to see in 2022, the ways in which the SPARK Institute has played an active role in shaping their development, and the steps that we plan to take throughout the year to continue serving as the voice of the retirement savings industry in Washington.

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Significant Retirement Legislation Possible in 2022

Reconciliation Still on the Table. Although 2021 faded with a whimper, as Congress and the President failed to deliver on their vision for the Build Back Better Act (BBBA), 2022 is shaping up to be a particularly busy year for legislative developments impacting retirement savings policy. To start, Congress is expected to pick up in 2022 where it left off, with Democrats devoting significant time and efforts to passing a reconciliation bill that would push at least some of their goals across the finish line.

While things can always change, any retirement provisions to be included in a potential reconciliation package will likely be limited to those proposals that were previously included in the 2021 House-passed version of the BBBA – i.e., the $10 million cap on defined contribution plan and IRA balances; the elimination of after-tax Roth conversions (and all Roth conversions for high income individuals); and changes to the IRA prohibited transaction rules. Ways and Means Committee Chairman Richard Neal's (D-MA) retirement plan mandate is not expected to be resurrected, and Finance Committee Chairman Ron Wyden's (D-OR) proposal to make the Saver's Credit refundable also is not expected to return. Whether a reconciliation package can be successful, of course, comes down to whether Senate Democrats can get all 50 Senators to a "yes" on a deal that would include substantial government spending and whether House Democrats can remain united in approving a package narrower in scope than their original vision.

Bipartisan Retirement Proposals/SECURE 2.0. The early focus on reconciliation will likely slow congressional efforts to advance a bipartisan SECURE 2.0 package. Nevertheless, we still anticipate that action on bipartisan retirement legislation will occur in 2022.

The SPARK Institute has actively engaged Members of Congress and their staffs as they have worked to develop a bipartisan SECURE 2.0 package in recent years. This has included SPARK's early support for the House Ways & Means Committee's Securing a Strong Retirement Act, commonly referred to as "Neal-Brady," while noting our opposition to the proposed annual paper benefit statement mandate. On the Senate side, SPARK endorsed the Retirement Security and Savings Act, commonly referred to as "Cardin-Portman." In recent months, the SPARK Institute supported the Retirement Improvement and Savings Enhancement (RISE) Act, which the House Education and Labor Committee unanimously approved on November 10, 2021. Following the Education and Labor Committee's successful mark-up for the RISE Act, we were very thankful to be given a debrief by the Committee's majority and minority staff during the December call of SPARK's Government Relations Committee.

In the coming months, we understand that the Senate Finance Committee and Senate Health, Education, Labor, & Pensions (HELP) Committee intend to hold their own mark-ups on retirement legislation. For the Finance Committee's mark-up, the Cardin-Portman bill is likely to provide the foundation for early discussions. The intended focus of the Senate HELP Committee, by comparison, is more uncertain. The RISE Act from the House side could provide a rough blueprint for any bipartisan retirement legislation that would be considered by the Senate HELP Committee. However, the details of any eventual package will need to be hammered out by the HELP Committee over the next few months and will, of course, reflect the unique views of the Committee's leaders and members.

In the near future, it is also expected that the House will attempt to hold a full House vote on a SECURE 2.0 package that would involve some merged version of the Neal-Brady package and the Education and Labor Committee's RISE Act. While those bills include many similarities, there are a number of important differences that will need to be worked out, including with respect to electronic delivery and missing participant issues.

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At the start of 2022, we remain optimistic that a bipartisan SECURE 2.0 package can get across the finish line this year. SPARK strongly supports Congress's SECURE 2.0 efforts because many of the proposals that are being considered as part of that package would advance the SPARK Institute's Legislative & Regulatory Agenda, which was established in 2021 thanks to the thoughtful input of SPARK's members. Current SECURE 2.0 proposals include, for example, provisions supported by SPARK that would integrate student loan repayment solutions into workplace retirement plans, expand the small business start-up credit, eliminate unnecessary notices for unenrolled participants, and permit 403(b) plans to invest in collective investment trusts (CITs).

Before any of these changes can become law, however, the Senate must first develop its own SECURE 2.0 package, and then reconcile it with a mostly formed House package. Key retirements, including Senator Rob Portman (R-OH), Ways & Means Committee Ranking Member Kevin Brady (R-TX), and potentially Way and Means Committee Chairman Richard Neal (D-MA) increase the chances of SECURE 2.0's passage, but do not guarantee that Congress will be able to pass such a bill before the end of the year. As this process unfolds, the SPARK Institute will continue to engage with members of Congress and their staffs to advance the SECURE 2.0 provisions that would deliver on the SPARK Institute's Legislative and Regulatory Agenda.

Significant Regulatory Action Expected in 2022

Upcoming DOL Action. In contrast to the unpredictable nature of the legislative process, federal regulators are more predictably expected to take a number of actions in 2022 that will affect retirement saving policy. The Department of Labor (DOL)

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is, for example, expected to act on three types of issues in 2022: (1) projects that implement the Biden Administration's early priorities; (2) projects that implement the SECURE Act's changes; and (3) a new set of projects that have recently been unveiled by DOL in its Fall 2021 Regulatory Agenda.

- **Early Priorities.** Consistent with announcements made in the early days of the Biden Administration, in the first few months of 2022, DOL is expected to release a new fiduciary proposal. This project is likely to revisit the five-part test for fiduciary investment advice, the conditions of DOL's new advice exemption (PTE 2020-02), and other exemptions that are relevant to advice providers, such as PTE 84-24 for annuity sales and PTE 77-4 for advice on mutual funds. Over the past decade, the SPARK Institute has kept its members up to date on all aspects of the fiduciary saga, responded to regulatory proposals and requests for information through comment letters and in-person testimony, and facilitated working groups and meetings to provide SPARK's members with the resources that they need to prepare for regulatory shifts. As this issue unfolds in the coming months, SPARK will continue to update it members on all of the latest fiduciary happenings and continue to serve as the voice of the recordkeeping industry on this issue.

  In addition to its new fiduciary proposal, in 2022, DOL is expected to finalize amendments to its ESG/Proxy Voting Rule, which were first proposed in October 2021. In December of last year, the SPARK Institute submitted comments in support of DOL's proposed changes because they would eliminate some of the Trump-era provisions that are likely to discourage fiduciaries from selecting investments that consider ESG factors, even when such investments may ultimately be in the best interest of participants. (Of course, we also had some comments to improve the proposal further.) Although the retirement industry hopes that DOL's final rule will provide a permanent framework for handling ESG issues, given strong negative reaction to the proposal from congressional Republicans, it seems likely that this issue will be revisited by future Republican administrations.

- **SECURE Act Implementation.** In the coming year, DOL is also expected to make progress on at least two projects that were necessitated by the enactment of the SECURE Act at the end of 2019. First, DOL is expected to issue final rules on the new lifetime income illustrations (LIIs) that must be added to pension benefit statements pursuant to the SECURE Act. Although DOL published an interim final rule (IFR) in 2020 that explains how plans should calculate LIIs that must appear on benefit statements no later than the deadline for furnishing statements for the second quarter of 2022, DOL is likely to make at least some changes to its IFR before then. DOL's latest regulatory agenda lists February 2022 for release of a final rule, but it seems increasingly unlikely DOL will make this target.

  Second, DOL will be working to finalize changes to the Form 5500 that are needed to implement the SECURE Act's consolidated Form 5500 relief for defined contribution groups (DCGs), also known as groups of plans (GOPs). Although DOL proposed rules that would implement the SECURE Act's relief for DCGs and make other changes to the Form 5500 last fall, the final 2021 Form 5500 instructions that were released at the very end of 2021 only addressed a narrow set of issues, and did not address DCG reporting. Instead, DOL announced that the DCG changes and other changes included in DOL's 2021 proposal would be the subject of one or more future notices from the Department.

  How DOL proceeds from here on its Form 5500 revisions is currently uncertain. DOL could, for example, finalize the relief for DCGs and some of its other proposed changes, including proposed changes to the Schedules H and R, as part of a single regulatory package. In the alternative, DOL could choose to finalize the DCG changes in the next few months as a stand-alone release, and subsequently make other changes to the Form 5500 as part of a broader rulemaking in the future. DOL's Fall 2021 Regulatory Agenda newly includes a project that would overhaul the Form 5500 to make it more "data mineable." This broader project could be similar to the Form 5500 changes proposed at the end of the Obama Administration and DOL may choose to lump all of its non-SECURE Act changes into this broader project. Regardless of how DOL proceeds on this issue, the SPARK Institute understands that its members are very involved in Form 5500 preparation and we will continue to urge DOL to proceed with its Form 5500 changes in a way that appropriately accounts for the costs and administrative burdens that are created by such changes.

- **New DOL Projects.** As part of its Fall 2021 Regulatory Agenda, DOL identified two new projects that are worth highlighting in this update.

  First, DOL's latest Regulatory Agenda indicates that the Department has a project to explore the need for regulatory or other guidance regarding pooled employer plans (PEPs), including a review of actions that would facilitate the establishment and operation of PEPs. Although this project is framed in terms of facilitating PEPs, which the SPARK Institute strongly supports, we know that there are also some concerns about how some PEPs have been organized since the SECURE Act became law. The SPARK Institute will continue to monitor this project as it develops and encourage DOL to take actions that support the development of PEPs and avoid guidance that would favor one business model or investment product over any others in the PEP marketplace.

  Second, DOL's latest Regulatory Agenda indicates that the Department will soon be exploring ways to improve the effectiveness of retirement plan disclosures, balanced with the costs to plans and plan participants. This project will also explore how the content and delivery of such disclosures may be improved to enhance participant outcomes. The SPARK Institute has long pushed to expand the use of electronic media to deliver retirement plan disclosures and to make retirement plan disclosures more efficient, effective, and understandable. Although we look forward to working with DOL on this project to help make participant disclosures more efficient, effective, and understandable, we will also be working to promote and defend the use of default electronic delivery for retirement plan disclosures, especially when there are appropriate consumer protections.

Upcoming IRS Action. The Treasury Department and Internal Revenue Service (IRS) are also setting up to have a very busy year in terms of retirement savings policy. Much of this activity is expected to involve SECURE Act implementation, but guidance that goes beyond the SECURE Act is also likely to be released throughout the year.

Most notably in terms of SECURE Act guidance, in 2022, we expect the IRS to issue a regulatory proposal implementing the SECURE Act's changes to the required minimum distribution (RMD) rules that apply to defined contribution retirement plans after the death of a participant. We understand that this proposal will not only address the after-death RMD rules, but also substantially rewrite the portions of the RMD regulations that are unrelated to SECURE's changes. We expect this proposal to be lengthy and require careful study. Once these proposed regulations are released, the SPARK Institute's Government Relations Committee will hold a call (or calls) to discuss the proposal's impact and draft a comment letter to respond to the proposed changes.

The IRS is also expected to work on, and perhaps issue, additional guidance on other SECURE Act provisions. This could include, for example, guidance on the so-called one-bad-apple-rule for multiple employer plans (MEPs) and the SECURE Act's changes to other rules impacting 401(k) plans, including the changes to safe-harbor 401(k) plans and the change that requires long-term part-time employees to have the opportunity to make elective deferrals under a 401(k) plan.

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Beyond SECURE Act implementation, the IRS is poised to take on a wide range of topics that have the potential to impact recordkeepers. We know, for example, that the IRS currently has a project on its Priority Guidance Plan to update its electronic delivery rules for retirement plan disclosures and elections. Based on informal comments from IRS officials, we understand that IRS is considering ways to harmonize its own document delivery standards with the DOL's standards. The SPARK Institute has previously written to the IRS to request this harmonization and is hopeful that the IRS can follow through on its electronic delivery project in 2022.

Outlook

Although the framework for retirement policy in 2022 is starting to take shape, we know that it is also safe to expect some surprises along the way. New priorities will emerge, existing priorities will be reshuffled, and some proposals may be abandoned altogether. As the new year unfolds, we look forward to providing SPARK's members with all of the latest information on these developments and working alongside SPARK's members to serve as the leading voice for the retirement plan industry in Washington.