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Outlook for New Abortion Restrictions 2023

Divided government will return to Washington when the 118th Congress convenes in January. Among other things, that means President Biden and Congressional Democrats will not be able to advance federal legislation to guarantee minimum abortion rights, and Republicans will not be able to enact federal abortion restrictions either. For the next two years, any new restrictions on abortions and any related attempts to prevent employers and others from helping women travel to other states to obtain legal abortions will happen at the state level – if at all.

What States Might Take Action?

The states where new abortion and related restrictions are most likely to be considered are those where Republicans have full political control – i.e., control of both the state's executive and legislative branches. In 2023, that will be the case in at least 22 states (with Alaska still undecided).

Twelve of those 22 states already ban abortions in most circumstances. Further, legislators in some of those states – including Texas, Oklahoma, Mississippi, and Missouri – have expressed interest in so-called "aiding and abetting" laws, which would attempt to prevent employers and other third parties from helping people travel to other jurisdictions for legal abortions.

The outlook in the other ten states is far from certain. Voters in two of those states specifically rejected ballot initiatives that were favored by abortion opponents. In Kentucky, a proposed amendment to the state constitution to permit more regulation of abortion was rejected by more than 52% of voters. Montana voters rejected a proposed law that would have required doctors to perform lifesaving measures on a fetus or embryo "born alive" following a failed abortion by a similar margin.

One other state to watch is Georgia, where a judge recently ruled a "trigger" ban that went into effect after the Supreme Court's decision in *Dobbs* is unconstitutional. For now, that means abortions are permitted in Georgia until viability. But the ruling is being appealed, and the Georgia legislature could try to enact a new law when it convenes in January.

Other Abortion-Related Ballot Initiatives

The following three other states approved ballot initiatives to protect abortion rights on November 8:

- California: Proposition 1, which received approximately 67% of the vote, will amend the California constitution to prohibit the state from denying or interfering with a person's reproductive freedom, and guaranteeing the fundamental right to choose whether to have an abortion and to use contraceptives. Even before the amendment, the California Supreme Court ruled the state's constitution protected abortion rights.
- Michigan: Proposal 3, which passed by a 56% to 44% margin, will amend the Michigan constitution to provide a specified right to "reproductive freedom," which includes "the right to make and

effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care." Regarding abortion, the amendment reserves to the state the right to regulate abortion after a fetus is viable (unless the mother's physical or mental health is in jeopardy), which is consistent with current Michigan law. The amendment may resolve lingering questions about a 1931 law that was previously enjoined by two different Michigan state courts.

- Vermont: Proposal 5, which passed by a 77% to 23% margin, will amend the Vermont constitution to guarantee the right to "reproductive autonomy" will "not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means."

SEC Revives "Hard Close" Proposal

On November 2, 2022, the Securities and Exchange Commission ("SEC") published a proposed rule that would impose a "hard close" time cut-off for investors' orders to purchase or redeem mutual fund shares and would create rules regarding mutual fund liquidity and so-called "swing pricing." A similar "hard close" rule was first proposed in the early 2000's but was never finalized.

Background

Open-end investment companies, or mutual funds, calculate their net asset value ("NAV") once per day, typically at 4 p.m. Eastern time. When an investor purchases or redeems share of a mutual fund on a particular day, the investor is generally able to do so at the share price that was calculated at the end of the day. A fund generally may not allow an investor to obtain that day's price if the trade comes in after the deadline set by the fund. Many trades are made through intermediaries (rather than directly through the mutual fund), who receive trades and aggregate them to send to the mutual fund's transfer agent. One type of intermediary is defined contribution plan recordkeepers, who receive purchase and redemption orders from individual participants, which are then aggregated and sent to the mutual fund transfer agent at the end of the day. Because that process is not immediate and could in theory prevent retirement plan participants from putting in orders just before the end of the day, mutual funds generally accept trades after the 4 p.m. deadline provided the trade was actually placed with the intermediary by 4 p.m.

Proposed Rule

The proposed rule would modify SEC Rules 22e-4 (requiring exchange-traded funds ("ETFs") or mutual funds to assess and manage liquidity risk) and 22c-1 (requiring funds to sell and redeem fund shares at a price based on the NAV). Specifically, the proposal would implement so-called "swing pricing," under which a mutual fund would generally be required to adjust its NAV so that the transaction price reflects costs stemming from shareholder purchases and shares. The reason cited by the SEC for this proposal is to prevent situations

like those at the beginning of the COVID-19 pandemic, when large redemptions occurred and which the SEC believes resulted in costs to shareholders who stayed in the mutual funds. The proposal would require every open-end mutual fund (with certain exclusions, including money market funds and ETFs) to establish and implement swing pricing policies and procedures that adjust the fund's current NAV per share by a "swing factor" if the fund has net redemptions or if it has net purchases that exceed an identified threshold.

Perhaps most significantly, the proposed rule would require a so-called "hard close" with respect to mutual funds that are required to implement swing pricing. Under the proposed rule, an investor's order to purchase or redeem a fund's shares would be eligible for the day's price only if the fund, its "designated transfer agent," or a registered securities clearing agency receives the order *before* the time at which the fund calculates its NAV (i.e., typically 4 p.m.). Some retirement plan recordkeepers would be considered "designated transfer agents," but many would not. Therefore, a plan's recordkeeper would need to send an order to the mutual fund or the designated transfer agent by 4 p.m. In effect, this would mean that defined contribution plan participants need to place their orders well in advance of other shareholders in the mutual fund.

The proposal would also modify rules regarding mutual fund liquidity and certain reporting and disclosure requirements under the Investment Company Act of 1940.

Impact

The SEC states that the "hard close" rule would help prevent late trading of fund shares and help operationalize its swing pricing proposal by ensuring that funds receive information in a timely manner.

The proposal has elicited concern because of its potential negative impact on recordkeepers and participants in 401(k), 403(b), and 457(b) plans. The concern centers around the feasibility of implementing the "hard close" rule using existing plan processing systems and hardware. As acknowledged by the SEC within the proposed rule, due to limitations of such systems and hardware, it currently could take upwards of six hours for some recordkeepers to process participants' orders and submit them to the fund. The SEC appears to recognize this concern, noting in the proposal that retirement plan recordkeepers "may face particular challenges with adhering to the proposed hard close requirement."

In effect, unless the recordkeeping industry overhauls its systems to reduce processing times by several hours, retirement plan participants would be at a disadvantage compared to other institutional investors who could place a purchase or redemption order much closer to the "hard close" deadline and thereby take advantage of market developments throughout the day. If, for example, a participant placed an order at 3 p.m., but the recordkeeper was not able to process and deliver the order to the mutual fund by the 4 p.m. "hard close," the trade would need to be held and processed the following day at that day's price. This could be particularly harmful on days where the market is volatile.

The SEC proposed a similar rule in 2003. but it was never adopted, largely because of concerns relating to negative impacts on retirement and other individual savers.

IRS Extends Determination Letter Program to Individually Designed 403(b) Plans

On November 7, 2022, the Internal Revenue Service ("IRS") released Revenue Procedure 2022-40, which opens up the IRS determination letter program to individually designed 403(b) plans. The Revenue Procedure also modifies other rules under the determination letter program, such as those relating to remedial amendment deadlines and the scope of the IRS's review under the program.

Background

Under the IRS's determination letter program, certain individually designed and pre-approved retirement plans can request a letter from the IRS that expresses an opinion on the qualified status of the plan document. The IRS has issued opinion letters for pre-approved 403(b) plans since 2013, but prior to the recent expansion of the program pursuant to Revenue Procedure 2022-40, as described below, it did *not* issue opinion letters for individually designed 403(b) plans.

Revenue Procedure

Under Revenue Procedure 2022-40, the IRS has expanded its determination letter program to apply to individually designed 403(b) plans. Individually designed 403(b) plans will be permitted to apply for a determination letter for an initial plan determination, for a determination upon plan termination, and in certain other circumstances identified in IRS guidance (i.e., the same situations in which the IRS will consider determination letters for Qualified Plans). The primary advantage of a determination letter is that it provides assurances that the plan document is consistent with all applicable section 403(b) requirements as of the time the determination letter is issued. Since 2008, most 403(b) plans (with the exception of certain church plans) have been required to have a written plan document.

The IRS is implementing this change via staggered effective dates based on the plan sponsor's Employer Identification Number ("EIN"). A plan sponsor may submit an application to the determination letter program for its 403(b) individually designed plan beginning on June 1, 2023, June 1, 2024, or June 1, 2025, depending on the last digit of the plan sponsor's EIN.

The Revenue Procedure also makes other, more modest changes to the determination letter program. For example, the Revenue Procedure extends the remedial amendment deadline for correcting mistakes in newly adopted plans to make it consistent with the existing deadlines for correcting those types of mistakes in the case of 403(b) plans. The new remedial amendment deadline for Qualified Plans and 403(b) plans is: (a) the last day of the second calendar year following the calendar year in which the plan is put into effect; or (b) if later for a governmental plan, 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the plan's initial plan year. Second, the Revenue Procedure modifies the eligibility rules for a plan sponsor to obtain an individual plan determination; under the new rules, a plan sponsor that maintains an individually designed plan for which a determination letter has been issued as

a result of filing a Form 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans) is now eligible to submit that plan for a determination letter for an initial plan determination on a Form 5300 (Application for Determination for Employee Benefit Plan). Third, the Revenue Procedure modifies the scope of the IRS's review of determination letter applications for individually designed plans. Under the new modifications, the IRS generally will consider all requirements that are in effect, or that have been included on a Required Amendments List, on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted.

The Revenue Procedure also asks for comments on circumstances where the IRS should consider accepting additional determination letter applications.

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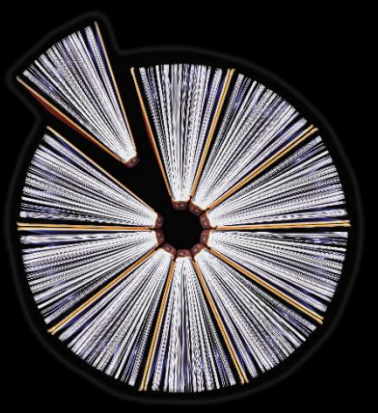

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