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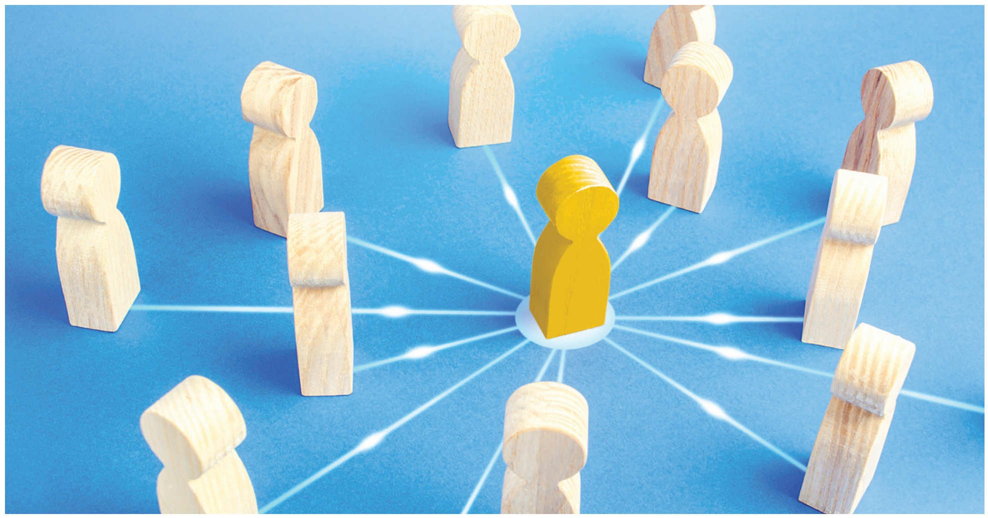

SECURE 2.0 Act includes major changes for retirement plans

The SECURE 2.0 Act of 2022 builds on the provisions of the original SECURE Act from 2019 to help more Americans save for retirement and increase the amount they can save. SECURE 2.0 does this by expanding on automatic enrollment programs, helping ensure small employers can easily and efficiently sponsor plans for employees and enhancing various credits to make saving for retirement beneficial to plan participants and sponsors. It also improves investment options for plan participants, streamlines plan administration for plan fiduciaries and makes important changes to required minimum distributions (RMDs) that will help retirees with plan selection and decisions letting them make better use of their retirement savings.

Increasing plan participation and savings

Automatic enrollment

One of the most broadly applicable provisions of SECURE 2.0 requires that, effective for plan years beginning after 2023, 401(k) and 403(b) sponsors automatically enroll employees in plans once they become eligible to participate. Under the requirement, the amount at which employees are automatically enrolled cannot be less than 3% of salary or more than 10%. The amount of employee contributions is increased by 1% every year after automatic enrollment, up to a maximum contribution of 10%. Employees can opt out of automatic enrollment.

Saver's credit

For tax years beginning after 2026, the saver's credit is simplified from its current three-tier structure based on income amounts to a unified 50% credit amount with a phase-out for higher incomes. As with the current version of the credit, the phase-out amounts are adjusted annually for inflation beginning in 2028.

Small incentives

Under the new law, after the date of enactment, employers are no longer prohibited from offering small immediate incentives, such as gift cards, in exchange for employee elective deferrals.

> "SECURE 2.0 adjusts the IRA catch-up amount annually for inflation for tax years beginning after 2023."

Catch-up limits

The annual amount that can be contributed to a retirement plan is limited and generally subject to annual adjustments for inflation. For plan participants age 50 or older, the contribution limitation is increased. For 2023, this catch-up contribution is limited to $7,500 for most retirement plans and $3,500 for SIMPLE plans, and is subject to inflation increases. Under SECURE 2.0, a second increase in the contribution amount will be available for participants ages 60-63, effective for tax years after 2024. For most plans, this second catch-up limitation will be $10,000, and for SIMPLE plans it will be $5,000. Like the standard catch-up amounts, these limitations will also be subject to inflation adjustment.

The annual limit on contributions to individual retirement accounts (IRAs) is also increased for participants age 50 and older. The catch-up limit for IRAs is $1,000. Unlike the catch-up amount for other plans, this amount is not subject to increases for inflation under current law. SECURE 2.0 adjusts the IRA catch-up amount annually for inflation for tax years beginning after 2023.

Finally, the act requires, effective for tax years beginning after 2023, that all catch-up contributions are subject to Roth (i.e., after-tax) rules, rather than only when allowed by the plan.

SIMPLE plans

SECURE 2.0 allows employers to make nonelective contributions of a uniform percentage to a SIMPLE IRA or 401(k) plan up to 10% of compensation with an inflation-adjusted cap of $5,000. Contribution amounts to SIMPLE IRA and 401(k) plans are also increased for certain smaller employers.

Matching student loan payments

For plan years beginning after 2023, the new law provides that employers may make payments to qualified plans that match qualified student loan payments by employees. To qualify for the matching contributions, the employees must be otherwise eligible for matching contributions by an employer, and the employer must make matching contributions for student loan payments at the same rate as those for elective deferrals.

Small employers

Currently, as established by the original SECURE Act, for the first three years an eligible small employer establishes an eligible plan, it can claim a credit of 50% of start-up costs, not to exceed the greater of (1) $500 or (2) the lesser of $5,000 or $250 for each employee eligible to participate in the plan who is not highly compensated.

Under SECURE 2.0, effective for tax years beginning after 2022, the time for which the credit can be claimed is extended to five years for employers with 50 or fewer employees. Additionally, the amount of the credit is increased to 100% of start-up costs for employers with 50 or fewer employees, with a cap of $1,000 per employee. The 100% credit amount is phased out for employers with 51 to 100 employees and drops incrementally to 25% in the fifth year.

The act also retroactively makes the start-up credit (as expanded by the original SECURE Act) available to small employers that join a multiple employer plan (MEP) already in existence. Without this fix, the small employer would not have been eligible for the credit if the MEP had been in existence for three years. The fix is effective for tax years beginning after 2019.

The act provides a credit for small employers who make military spouses immediately available to participate in the employer's retirement plan. The credit is effective for tax years beginning after the date of enactment of the act.

Distributions and withdrawals

RMDs

Under current law, plan participants are required to begin taking RMDs at age 72. Under SECURE 2.0, the age at which participants must begin taking RMDs is increased over a period of 10 years. Starting in 2023, the age is increased to 73 for individuals who turn 72 after 2022 and 73 before 2033. For individuals who turn 74 after 2032, RMDs must begin at age 75.

Withdrawals

SECURE 2.0 makes permanent the ability of a taxpayer to make an early withdrawal without incurring a 10% penalty as result of a federally declared disaster. Such a withdrawal will be allowed if made within 180 days of the disaster, if the taxpayer's principal abode is within the declared disaster area and if the taxpayer has sustained an economic loss due to the disaster.

The act also allows for penalty-free early withdrawals, after 2023, by a victim of domestic abuse, up to the lesser of $10,000 or 50% of the present value of the accounts. After the date of enactment, a penalty-free early withdrawal may also be made by an individual diagnosed with a terminal illness within a period of 84 months after a physician certifies the diagnosis. After 2023, a penalty-free withdrawal of up to $1,000 is also allowed due to a personal financial emergency.

"After 2023, a penalty-free withdrawal of up to $1,000 is also allowed due to a personal financial emergency."

Under current law, a public safety officer is allowed to make an early withdrawal after age 50 (as compared to others, who must wait until age 55). The new law expands this exception to public safety officers who attain age 50 or have 25 years of service. The new law also treats private-sector firefighters and certain corrections officers as public safety officers for this exception.

The act also limits the time during which a penalty-free distribution to a participant in the event of a birth or adoption may be repaid. Under current law, there is no limit. Under the new law, the amount must be repaid within three years, generally effective for distributions after the date of enactment. ◆

Significant tax legislation impacting green energy

The Inflation Reduction Act includes the most significant tax legislation impacting green energy in U.S. history. It shifts from credits focusing on the source of the clean energy or electricity to a focus on zero or low emissions from any source. Not-for-profits, government entities and Indian tribal governments can receive direct payments rather than a tax credit, making the credits essentially refundable. Other types of entities can also provide a one-time transfer of the credit for a project to another entity or entities.

Extended and modified clean energy credits and deductions

Existing clean energy credits in the Tax Code that have been modified and extended include the Code Sec. 45 production tax credits, which can apply to wind, solar, geothermal and hydropower projects, and the Code Sec. 48 investment tax credit, which can apply to solar, battery storage, biogas and fuel cells. The Code Sec. 48C advanced energy project credit can apply to manufacturing of electric vehicle components, wind, solar, carbon recapture, fuel cells and electric grids.

The Code Sec. 45Q carbon capture credit applies to carbon oxide sequestration. Alternative fuels are addressed in Code Secs. 40, 40A, 6426 and 6427.

Modified energy efficiency provisions applicable to individuals include the Code Sec. 30D credit for electric vehicles and Code Sec. 30C credit for alternative fuel refueling stations, the Code Sec. 25C home improvement credit and the Code Sec. 25D residential clean energy credit. Modified provisions applicable to businesses include the Code Sec. 179D deduction for energy efficient commercial buildings and the Code Sec. 30C credit for alternative fuel refueling stations. Home builders can benefit from the expanded Code Sec. 45L energy efficient home credit.

New energy credits

Additionally, several new credits have been enacted. New clean energy credits include the Code Sec. 45U zero emission nuclear power production credit, the Code Sec. 45Y clean energy production credit and the Code Sec. 48E clean electricity investment tax credit. The Code Sec. 45X advanced manufacturing production credit applies to the manufacture of solar and wind components, storage batteries and related critical minerals. New energy focuses include the Code Sec. 45V clean hydrogen production tax credit, the Code Sec. 40B sustainable aviation fuel credit, and the Code Sec. 45Z clean fuel production credit. The Code Sec. 48D clean electricity investment credit demonstrates the focus on the credit result rather than the particular electricity source.

"Especially for these new credits, regulations will need to help define the basic terms to which the credits apply."

Individuals can benefit from the new Code Sec. 25E previously owned clean vehicles credit, and businesses from the new Code Sec. 45W qualified commercial clean vehicles credit. Especially for these new credits, regulations will need to help define the basic terms to which the credits apply.

Direct pay election

The Inflation Reduction Act provides a direct pay option to entities that typically would not be able to benefit from tax credits. Entities such as not-for-profits, governmental organizations and Indian tribal governments can now elect to take advantage of a direct pay option available as a payment of tax on the taxpayer's return. While direct pay is broadly applicable to many of the credits, some have limited effective dates for its use. IRS regulations will also need to further clarify the use of direct pay.

Transferability election

Taxpayers not eligible for the direct pay election may be able to transfer green energy credits to an unrelated taxpayer. The payments must be made in cash, can only be transferred once for a project and are neither includible in the gross income of the eligible taxpayer nor deductible by the transferee taxpayer. Similar to the direct pay election, the transferability election is available for a wide variety of the credits. However, the Code Sec. 45W credit for qualified commercial vehicles is excluded from eligibility. The election can be made for all or any portion of the credit and with more than one transferee.

Summary

It is not yet clear how much these new and expanded green energy tax credits, along with the availability of direct payment and transferability elections, will affect the structures of green energy projects. They will likely achieve their intended result of expanding the number of such projects, and the current players in the space are likely to expand their role in project development. However, the credits also appear to be sufficiently generous to attract new players into the area as project sponsors or investors. ◆

Conservation easements, listed transactions and the APA

It has long been believed that IRS guidance has protection from the notice and comment requirements of the Administrative Procedures Act (APA). This protection comes from the Anti-Injunction Act (AIA), which prevents taxpayers from challenging a tax in federal court before payment of the tax. An axiom of tax practice has been that if you want to challenge the payment of a tax beforehand, your only recourse is to file in Tax Court. If you want access to the federal courts, you must pay the tax and file a claim for refund.

Mayo

Over the past 10 years, IRS avoidance of APA compliance has been questioned in the courts. In *Mayo Foundation v. United States*,[1] the Supreme Court reaffirmed its prior *Chevron* standard.[2] In a two-prong test, the first question under the *Chevron* standard is whether the statute the regulation is interpreting is silent on the issue at hand. If the statute is silent, the second question is whether the regulation is a reasonable interpretation of the statute. If so, the regulation will be upheld. The *Mayo* decision also stated that the *Chevron* standard does not depend on whether Congress intended to delegate general or specific authority over the matter.

Listed transactions

In the 2004 Jobs Act, Congress enacted provisions to address abusive tax shelters. The legislation required disclosure of information on reportable transactions, including those the IRS identifies as listed transactions. Penalties, including criminal penalties, were also imposed on failure to report such transactions. The legislation did not address how the IRS would identify listed transactions.

The IRS has identified many listed transactions over the years. Most have been identified through IRS notices, as well as some through regulations or revenue rulings. In part, the use of notices reflects restricted IRS resources and the relative ease with which a notice can be issued compared to a revenue ruling or regulation.

Given the Supreme Court decision in *Mayo*, taxpayers began to challenge not the IRS position itself but how it was adopted — without the notice and opportunity for comment required by the APA. Notice 2007-83 involved employee benefit plans benefiting the principals of the business. Notice 2016-66 involved micro-captive insurance transactions. Notice 2017-10 concerned syndicated conservation easements, in which investors form an entity to purchase underutilized land and then donate the land to a charity, basing the charitable deduction on the best use value of the property, often many times the basis in the property.

In *CIC Services, LLC v. Internal Revenue Service*,[3] a unanimous Supreme Court allowed a challenge to the failure of Notice 2016-66 to comply with the APA. The Court held that the AIA did not apply, since the taxpayer was not challenging the payment of the penalty for failure to report a listed transaction but instead the method by which the notice was adopted. The taxpayer successfully argued that they would not fail to pay the penalty due to the risk of criminal exposure, so the only remedy was to challenge the notice adoption procedures. The Court held that the notice requirement was separate from the tax penalty, making the AIA not applicable, and the possibility of a criminal penalty forced the taxpayer to a pre-enforcement action. The Court did not decide the merits of the micro-captive insurance transaction, instead sending it back to the lower court.

> "The IRS is also likely to adopt the proposed regulation model for future listed transactions."

While the Supreme Court seemed to try to issue a narrow fact-specific ruling in *CIC Services*, the Sixth Circuit held in *Mann Construction, Inc. v. United States*[4] that Notice 2007-83 also failed to comply with the APA. The court held that the notice involved a legislative rule, not an interpretive rule. The court also rejected the IRS argument that the legislative statute intended to exempt listed transactions from the notice and comment requirements of the APA.

IRS and congressional response

In response to these court decisions, while continuing to fight the issue in court, the IRS has issued proposed regulations regarding syndicated conservation easements that would comply with the notice and comment requirements of the APA. Congress has also addressed conservation easements. The Consolidated Appropriations Act, 2023, passed by Congress on Dec. 23, 2022, includes a prohibition on partnerships treating a contribution as a charitable conservation easement if the value of the easement exceeds 250% of the sum of each partner's basis in the partnership allocable to the property on which the easement is placed. The prohibition applies to contributions made after Dec. 29, 2022, the date of enactment.

The IRS is also likely to adopt the proposed regulation model for future listed transactions. Some uncertainty would remain about whether the regulations adopted under APA procedures can apply to transactions entered before the regulations were adopted. ◆

[1] SCt, 2011-1 USTC ¶50,143, 562 US 44, 131 SCt 704 (2011).

[2] *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, SCt, 467 US 837, 104 SCt 2778 (1984).

[3] CA-6, 2021-1 USTC ¶50,150, 141 SCt 1582 (2021).

[4] CA-6, 2022-1 USTC ¶50,122 (2022).

The corporate alternative minimum tax and OECD Pillar II

The Organization for Economic Cooperation and Development (OECD) has been working on a worldwide plan to address base erosion and profit shifting through a two-pillar program. Pillar I would expand a country's authority to tax profits from companies that make sales into the country even if the company does not otherwise have a physical presence there. Pillar II would create a global minimum corporate tax. Both proposals have been making slow progress.

The Biden administration has been a strong supporter of Pillar II. The Build Back Better Plan included provisions to bring the United States into compliance with Pillar II. Treasury Secretary Yellen was a forceful advocate within the OECD to make the global minimum tax rate 15%. The effort was designed to make Pillar II focus less on large U.S. tech companies and instead more broadly on large corporations. As the Build Back Better Plan morphed into the Inflation Reduction Act to achieve passage, the international tax provisions increasingly deviated from the OECD model. The inability of the United States to adopt the OECD model highlights the difficulties the OECD will have in achieving unanimity on Pillars I and II.

> "The Build Back Better Plan included provisions to bring the United States into compliance with Pillar II."

The Inflation Reduction Act vs. the OECD model

The corporate alternative minimum tax (CAMT) adopted in the Inflation Reduction Act falls short of the Pillar II goal in several respects. The 15% rate and focus on financial profits are similar to the OECD model. However, CAMT applies to the worldwide income of U.S. companies, while the OECD model focuses on domestic income. The threshold of $1 billion is also different from the €750 million global revenue threshold in the OECD model. There are many other differences in allowed offsets.

Summary

The extension of the deadline for implementing Pillar II to the end of 2023 was not the first extension and may not be the last. If the EU can resolve its differences with Hungary and adopt Pillar II, it will put more pressure on the United States and other countries. Even as countries adopt Pillar II, variations may remain in the details of adoption that could create incentives for corporations to favor one country over another, leaving base erosion and profit shifting as potential (although hopefully reduced) problems.

As U.S. companies must now devote resources to address CAMT issues and delve into the meaning of adjusted financial statement income, it might be a relief that Pillar II has been put off at least another year. While Pillar II promises simplicity, that simplicity may not be fully realized, as we see with CAMT. ◆

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The All-Star Tax Series 2023-2024 schedule

Date	Course topic
May 17 & 24, 2023	Tax-advantaged medical expense accounts and other medical-related tax reduction strategies
June 7 & 15, 2023	Questions and issues for tax practitioners administering a client's estate
June 21 & 27, 2023	Loss limitation provisions impacting partnerships and S corporations
July 19 & 27, 2023	What tax practitioners should know about the status of IRS audits
Aug. 2 & 10, 2023	Tax issues related to buying and selling a business
Aug. 16 & 24, 2023	The Section 754 election and related adjustments to inside basis of partnership assets
Sept. 20 & 27, 2023	Medicare and Social Security: Update and planning
Oct. 18 & 26, 2023	The FAFSA, 529 plans and loan forgiveness: What tax practitioners need to know about college financing
Nov. 1 & 8, 2023	IRAs and retirement accounts for life-changing events: Marriage, divorce, retirement and death
Nov. 15 & 21, 2023	Individual tax update and planning strategies
Dec. 6 & 14, 2023	Business tax update and planning strategies
Jan. 10 & 18, 2024	Getting ready for tax season: New IRS forms and compliance requirements

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