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Glitch-Fixing: How 2024 Catch-Up Contributions Could Be Restored in SECURE 2.0

Two likely (and one unlikely) solutions identified to correct drafting error that jeopardizes all 401(k) catch-up contributions starting in 2024

 by **Brian Anderson, Editor-in-Chief** · January 30, 2023 · 14 shares · 4 minute read

Image credit: © Golubovy I Dreamstime.com

When the American Retirement Association discovered a glitch in the text of the SECURE 2.0 Act of 2022 last week that—if not fixed—would eliminate the ability for 401(k) participants to make catch-up contributions in 2024, the alarm bells started ringing.

ARA immediately alerted the Treasury Department and the Joint Committee on Taxation to the issue, with the latter acknowledging that it does, in fact, appear to be a technical error.

In a bill consisting of 130 pages, there are bound to be some drafting errors that create unintended consequences that need to be resolved. After all, SECURE 2.0 itself included some technical corrections to the original SECURE Act passed in 2019.

But fixing a "significant technical error" in a bill—even when it is clearly accidental—isn't always easy for Congress, and there are a variety of ways it may be addressed in an effort to prevent unintended consequences.

Before we get to the options, a quick look back at the problem.

The bill's Section 603, which is intended to require that all catch-up contributions be Roth contributions, contains a mistake that inadvertently means no participants will be able to make catch-up contributions (pre-tax or Roth) beginning in 2024. The accidental elimination of a subparagraph in the text of the bill creates the problem.

"We are hopeful it can be addressed as part of regulatory guidance clarifying catch-up contributions are still permitted and/or a future legislative technical correction."

Groom Law Group's Brigen L. Winters

Per the ARA article, Section 603(b)(1) makes an amendment attempting to align the language (a "conforming amendment") to the Internal Revenue Code by deleting subparagraph (C) of IRC §402(g)(1). IRC §402(g) generally provides for the exclusion of elective deferrals from a participant's taxable income. The first two subparagraphs of IRC §402(g)(1) set the general limits on the amount of elective deferrals an individual may exclude from income. The third subparagraph, which was deleted as part of the Act, increased the general pre-tax deferral limit by the amount of any catch-up contributions—and thus the elimination of that subparagraph technically eliminated the ability to make ANY pre-tax catch-up contributions (even for those who earn less than or equal to $145,000).

"While the elimination of a certain section of the Internal Revenue Code creates a potential error, we believe there was a clear intention by Congress in the SECURE 2.0 legislation to allow for catch-up contributions going forward," said Brigen L. Winters, Principal at Groom Law Group, Chartered, in Washington D.C. "We understand that Congressional staff and the Department of the Treasury are aware of this potential error, and we are hopeful it can be addressed as part of regulatory guidance clarifying catch-up contributions are still permitted and/or a future legislative technical correction.

"Obviously, this significant technical drafting error was not intended, and it is going to need to get corrected," ARA CEO Brian Graff said in ARA's coverage of the issue. "The real question is when there will be a legislative vehicle in this Congress to get this done. In the meantime, it is unclear to us whether Treasury has the regulatory authority to ignore this error in the interim which potentially puts 2024 catch-up contributions at risk if Congress does not act before then."

Potential catch-up glitch fixes

In a Jan. 25 article posted on Forbes, noted ERISA attorney Marcia Wagner of The Wagner Law Group outlines three possible ways the glitch might be resolved.

"The first and most straightforward would be for Congress to enact a technical correction to address this mistake," Wagner said in the article. "On the substance of the modification, there should be unanimous agreement because no member of Congress believed that they were voting to eliminate catch-up contributions in 2024. Technical corrections legislation is generally not enacted on an accelerated basis, although the potential magnitude of this error should result in a quick fix."

If this is the preferred resolution, it likely needs to hitch a ride on another bipartisan bill moving through Congress this year. Because SECURE 2.0 didn't move by unanimous consent, there's no quick and easy shortcut to fixing the glitch.

Wagner suggested another solution could be specific guidance on the issue from the IRS. What's not clear, she said, is whether the IRS actually has the regulatory authority to interpret the statutory language in a relief ruling to reflect what was *intended*, rather than what was drafted.

"IRS might rely on a rarely applied rule of statutory interpretation, that the plain, literal meaning of a statute should not be followed if it would lead to an absurd result or a result that could not possibly have been intended," she said.

A third option Wagner mentioned is that, absent a formal correction, plan sponsors follow the intended meaning of the law, in the reasonable assumption that even if the error was not fixed in 2023, the error will eventually be corrected.

This would seem to clearly be “Plan C,” as it could open plan sponsors or TPAs to unknown fiduciary liability by circumventing SECURE 2.0’s precise language.

So, with Congressional staffers and the Treasury Department aware of the problem and not wanting to create unintended consequences, they have essentially the rest of 2023 to fix it. While they will no doubt look to address the problem sooner rather than later, a legislative fix could end up being attached to another end-of-the-year, must-pass spending bill (much like the 2019 Secure Act and the SECURE 2.0 Act of 2022).

Absent such a fix, the IRS could step in and issue guidance to circumvent the glitch. Stay tuned.

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• The Most Impactful SECURE 2.0 Provision—and the Big Problem With It: The Carson Group’s Jamie P. Hopkins

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Brian Anderson, Editor-in-Chief

Veteran financial services industry journalist Brian Anderson joined 401(k) Specialist as Managing Editor in January 2019. He has led editorial content for a variety of well-known properties including Insurance Forums, Life Insurance Selling, National Underwriter Life & Health, and Senior Market Advisor. He has always maintained a focus on providing readers with timely, useful information intended to help them build their business.

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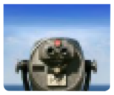

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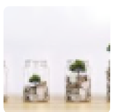

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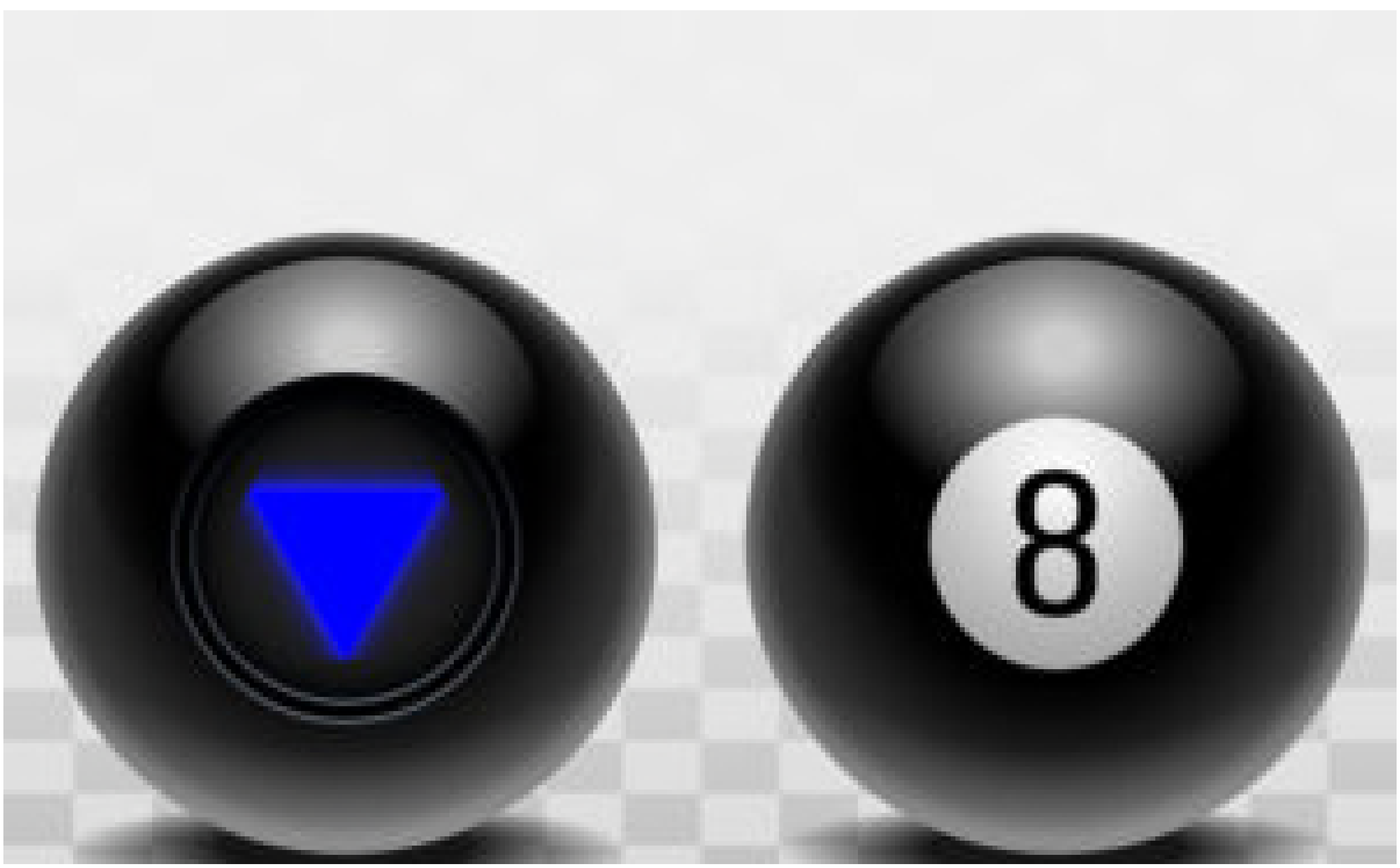

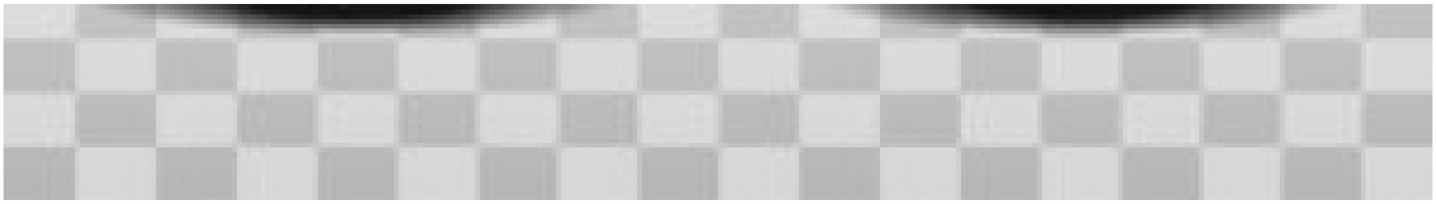

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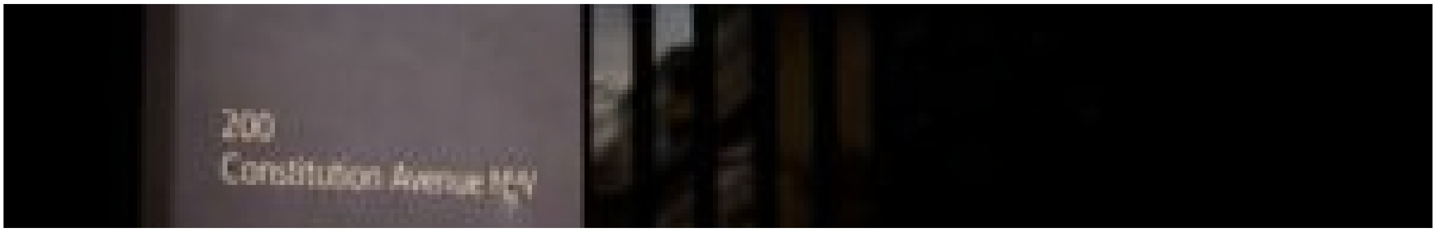

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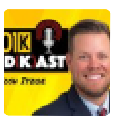

Josh Itzoe’s Been Busy, and 401(k) Advisors are Reaping the Benefits

by Brian Anderson, Editor-in-Chief

Josh Itzoe’s Been Busy, and 401(k) Advisors are Reaping the Benefits

Former TAPO honoree Josh Itzoe is now spending his days helping other 401(k) advisors.

As the Founder & CEO of FiduciaryWor(k)s and its FiduciaryRx platform, he focuses on developing insights, research, technology, fiduciary consulting, and practice management coaching in the areas of fiduciary responsibility and workplace retirement.

It seems he’s constantly launching new products and enhancements all geared toward making life easier for advisors—and he talks about the rewarding transition and his busy agenda in this week’s *401(k) Specialist* Pod(k)ast.

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Veteran financial services industry journalist Brian Anderson joined 401(k) Specialist as Managing Editor in January 2019. He has led editorial content for a variety of well-known properties including Insurance Forums, Life Insurance Selling, National Underwriter Life & Health, and Senior Market Advisor. He has always maintained a focus on providing readers with timely, useful information intended to help them build their business.

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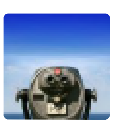

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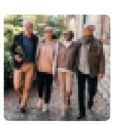

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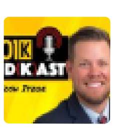

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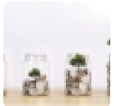

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Coalition of 25 States Sue Biden Administration on ESG Final Rule

25 states are listed in a lawsuit challenging the DOL final rule that allows fiduciaries to consider ESG factors in 401(k) investments

by Amanda Umpierrez · January 27, 2023 · 2 shares · 3 minute read

Image Credit: © Marina Putilova | Dreamstime.com

Over two dozen states are suing the Biden Administration in an effort to halt the Department of Labor (DOL) Environmental, Social and Governance (ESG) final rule that would allow plan fiduciaries to consider climate change and ESG factors when selecting investments.

Utah Attorney General Sean Reyes (R-UT) and Texas Attorney General Ken Paxton (R-TX) filed the lawsuit in a federal district court in Texas on Thursday and asked the court for a preliminary injunction to stop the rule from going into effect this Monday, January 30. The lawsuit is also seeking "permanent relief in the form of a declaration that the ESG Rule violates the APA and ERISA and is arbitrary and capricious."

In the suit, plaintiffs allege that the rule violates the Employee Retirement Income Security Act of 1974 (ERISA) and the Administrative Procedure Act and accuse the Labor Department of overstepping its statutory authority.

In a press statement announcing the filing, Paxton accused the rule of prioritizing "woke Environmental, Social and Governance investing over protecting the retirement savings of approximately two-thirds of the U.S. population." Paxton also called the move towards sustainable practices illegal on his Twitter account, and said it "sacrifices Americans' retirement accounts on the altar of woke corporations' radical leftist agenda."

Additional Plaintiffs

The coalition of states suing the Biden Administration include Utah, Virginia, Louisiana, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, South Carolina, Tennessee, Texas, West Virginia, and Wyoming. All the states are led by Republican attorney generals.

Publicly traded energy company Liberty Energy and its subsidiary Liberty Oilfield Services, along with oil and gas non-profit Western Energy Alliance, are also named as plaintiffs in the lawsuit.

Liberty Oilfield Services, who is a plan sponsor, argues in the lawsuit that as a result of the new rule, they will "be forced to expend additional time and resources monitoring and reviewing recommendations from its investment advisors, without the benefit of recordkeeping requirements or clearer fiduciary duty regulations, to ensure they are focusing explicitly on pecuniary considerations and not collateral ESG factors."

Another Challenge to ESG

The lawsuit marks another challenge in the sustainability space, which has largely driven a wedge among leaders in the retirement space. Large asset managers including BlackRock, State Street, and Vanguard have all lead efforts in the ESG movement.

As a result of these increasing interests towards sustainability, Republican-led states have doubled down on challenging ESG. Last week, Governor Ron DeSantis (R-FL) approved measures barring state-run fund managers in Florida from considering ESG factors in investments. DeSantis also proposed legislation to codify his actions.

The final rule—Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights—was announced in November of last year, after the Biden Administration reversed Trump-era regulations that prevented ESG involvement in 401(k) plans. The Trump Administration had previously said that plan fiduciaries could not invest in "non-pecuniary" vehicles that sacrificed investment returns or take on additional risk. "Removing the prior administration's restrictions on plan fiduciaries will help America's workers and their families as they save for a secure retirement," said Secretary of Labor Marty Walsh, at the time of the announcement.

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Amanda Umpierrez

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Amanda Umpierrez is the Managing Editor of 401(k) Specialist magazine. She is a financial services reporter with over six years of experience and a passion for telling stories and reporting news. Amanda received her degree in journalism and government and politics at St. John's University. She is originally from Queens, New York, but now resides in Denver, Colorado with her partner. In her free time, Amanda enjoys running, cooking, and watching the latest drama show.

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