

Washington Update

A Summary of Key Legislative and Regulatory Developments Affecting Retirement Savings

SEPTEMBER 2018

An Overview of the Agenda Heading Towards November 6th and the Midterm Elections

With less than two months before the midterm elections, Members of Congress will be spending as little time in Washington as possible, and focusing more on electoral politics in their states and districts as the campaign season moves into overdrive. With control of the 116th Congress at stake, Members running for re-election are at this time focused solely on Election Day.

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What this means for the legislative process is that it takes a back seat to electoral politics, and essentially grinds to a halt. Only bills deemed as “must pass” legislative items, such as funding for federal government operations (which has to be addressed prior to October 1), and the authorization for certain federal programs that expire periodically (e.g., authorization for the FAA to operate), are likely to be considered.

Legislative initiatives that may be in the pipeline and far along in the process, but don’t fit within the “must pass” category, will likely have to await consideration during the lame duck session following the mid-term elections, or await re-introduction in the 116th Congress. So, with the legislative process essentially on hold, and with most all primary contests now completed, we await the choice of the voters as to which party will be in control in the 116th Congress. When the 116th Congress convenes early next year, the 2020 Presidential campaign will have essentially already begun. That will drive the policy agenda forward for the next two years and, depending upon control, could have implications for tax and retirement policy in the near term.

A Focus on Retirement — via Tax Reform 2.0 or Otherwise

With the enactment of the Tax Cuts and Jobs Act (“TCJA”) late last year, it was assumed that tax issues (including tax code provisions that drive the private retirement system) would not be considered further during the remaining

months of the 115th Congress. Yet, Republicans in the House have put forth a series of legislative proposals, leading into the campaign season, which seek to build upon the Tax Cuts and Jobs Act. While the centerpiece of the Republican effort, in what has been termed “Tax Reform 2.0” is making permanent certain tax code changes included in the Tax Cuts and Jobs Act that pertain to individual taxpayers, another secondary component of this effort is focused on retirement security.

With regard to retirement security, the primary focus within Tax Reform 2.0 will be to start with the Retirement Security and Enhancement Act (RESA) that was introduced earlier this year in both the Senate and House as stand-alone legislation.ⁱ As we highlighted in the May 2018 Update, RESA enjoys bi-partisan support and will likely be the base upon which other retirement and/or savings proposals are added. Those other provisions will likely include a universal savings account feature to allow individuals to participate in a tax-advantaged savings program but without restrictions on distributions or use.

Legislative

S. 2526 and H.R. 5282, the Retirement Enhancement and Savings Act (RESA)

In March of this year, Senate Finance Committee Chair Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) re-introduced RESA in the Senate, with the companion bill introduced shortly thereafter in the House by Mike Kelly (R-PA) and Ron Kind (D-WI). The legislation as introduced this year is similar in many respects to that which was introduced in 2016, with the exception for the removal of provisions that were subsequently enacted in late 2017 as part of the Tax Cuts and Jobs Act, or in the Bipartisan Budget Act of 2018 enacted earlier this year.

RESA is primarily a private sector retirement-focused bill (it does include broader provisions such as those pertaining to the U.S. Tax Court), with its key provisions, as introduced, including the following:

- Would amend ERISA and the Internal Revenue Code (“Code”) to allow unrelated employers to participate in open Multiple Employer Plans (“MEPs”)
- Would change the automatic enrollment and automatic escalation provisions under the current nondiscrimination safe harbor, to eliminate the 10% cap for those years following the first year in which the employee is automatically enrolled
- Would require a benefit statement provided to a defined contribution plan participant to annually include a lifetime income disclosure statement
- Would allow plan fiduciaries for defined contribution plans to rely on representations from insurance companies, regarding their status under state insurance laws, in meeting their fiduciary duty in selecting an annuity provider
- Would provide for an increased startup tax credit for small business to encourage plan formation (up to \$5,000)
- Would eliminate the age 70½ limitation for making non-rollover contribution to a traditional IRA (would still need to have earned income to make such a contribution)
- Would require account balances in a defined contribution plan and/or an IRA to be distributed within 5 years of the death of the plan participant or IRA owner, unless the beneficiary is:
 - The spouse of the participant or IRA owner
 - A child who has not yet reached the age of majority
 - Disabled
 - Chronically ill, or
 - Not more than 10 years younger than the participant or IRA owner, or
 - Has less than \$450,000 (indexed) in aggregate savings across all of the decedent’s IRAs and defined contribution plans, calculated at the time of death.ⁱⁱ

For further information on S. 2526 and/or H.R. 5282, please access the legislative text via the following links:

<https://www.congress.gov/115/bills/s2526/BILLS-115s2526is.pdf>

<https://www.congress.gov/115/bills/hr5282/BILLS-115hr5282ih.pdf>

Other Legislation — Retirement-Focused

Retirement policy is always an area of keen interest to policymakers, and the number of bills introduced each Congress is a testament to that interest. Yet, for a variety of reasons, very few of these bills move beyond the introduction stage. Mindful of this, we highlight below some of the more recent bills (beyond RESA described above) that

have been introduced this Congress, and include any earlier bills that may still be considered at some stage of the legislative process before the 115th Congress adjourns sine die:

- Legislation to enhance retirement plans for small employers:
 - S. 3221 — The Retirement Security Flexibility Act
 - S. 3219 — The Small Business Employees Retirement Enhancement Act
 - S. 3197 — The SIMPLE Plan Modernization Act
- Legislation to address leakage from retirement plans:
 - S. 3218 — The Strengthening Financial Security Through Short-Term Savings Act
 - S. 2472 — The Retirement Savings Lost and Found Act
 - H.R. 3910 — Legislation to make lifetime income and managed account options within defined contribution plans portable
 - H.R. 2020 — The Savings Enhancement by Alleviating Leakage in 401(k) Savings Act
- Legislation pertaining to savings, including Individual Retirement Accounts (IRAs):
 - S. 3218 — The Strengthening Financial Security Through Short-Term Savings Act
 - S. 3220 — The Refund to Rainy Day Savings Act
 - S. 1817 — the Public Good IRA Rollover Act of 2017
 - H.R. 4189 — the IRA Preservation Act of 2017
 - S. 1861 — the Automatic IRA Act of 2017 (a companion to H.R. 3499 which was introduced at an earlier date)

Outlook

- Legislation to create a Universal Savings Account:
 - H.R. 5118, **USA Accounts: Investing in America’s Future Act of 2018**
 - H.R. 937/S. 323—the Universal Savings Account Act
- Legislation to address financial problems facing the multiemployer pension system:
 - S. 2147/H.R. 444—Legislation to create a Pension Rehabilitation Trust Fund to make loans to multiemployer defined benefit plans
 - S. 489—The Pension Accountability Act
 - S. 1105/H.R. 2713—The Miners Pension Protection Act
- Legislation to address the Department of Labor Fiduciary Rule:
 - H.R. 10—the CHOICE Act
 - H.R. 2823, the Affordable Retirement Advice for Savers Act

With Tax Reform 2.0 potentially on the table for consideration this fall, an opportunity exists to consider retirement-focused legislation as well, either as a part of that tax reform effort, separately as its own legislative proposal, or as part of another moving piece of legislation. As mentioned herein, we do not anticipate Tax Reform 2.0 will be enacted into law this year, thus retirement legislation likely will have to move via another legislative avenue. For RESA, it either moves as stand-alone legislation or, more likely, attached to legislation that may be considered to address the funding issues surrounding multiemployer pension plans, or alternatively, attached to legislation to extend expired or expiring tax code provisions (e.g., renewable and other energy tax credit provisions that expired at the end of 2017). Whether any legislation affecting retirement plans and retirement savings is addressed this year, likely will be dependent in large measure on the outcome of the mid-term elections.



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Regulatory

Department of Labor — Fiduciary Rule

On March 15, 2018, the U.S. Court of Appeals for the Fifth Circuit held, in *Chamber of Commerce v. U.S. Department of Labor*, that the Department of Labor exceeded its authority when it promulgated the Fiduciary rule and vacated that rule.ⁱⁱⁱ Thereafter, on June 21, the Fifth Circuit issued its judgment, reversing the judgment of the U.S. Federal District Court for the Northern District of Texas, thus vacating the Fiduciary Rule in its entirety. Subsequent to the issuance of the 5th Circuit Court's mandate, the District Court in the proceedings (Northern District of Texas) issued an order requiring any party seeking further relief to notify that court by July 12, 2018, further stating that, if no notice is received by that date, that the case would be dismissed "with prejudice and without further notice." Thereafter, on July 13, and in the absence of any party having sought further relief in the matter, the District Court ordered the case to be closed administratively. No further DOL Fiduciary Rule litigation matters are anticipated to be initiated at this particular time.^{iv}

Department of Labor — Field Assistance Bulletin No. 2018-01

On April 23, 2018, the Employee Benefit Security Administration ("EBSA") of the Department of Labor released the above referenced Bulletin to provide guidance to its regional enforcement offices regarding interpreting prior EBSA

guidance that related to the exercise of shareholder rights by ERISA plans as well as, separately, the environmental, social, or governance ("ESG") factors that plan fiduciaries can consider when investing plan assets. A copy of the Field Assistance Bulletin can be accessed via the link below:

<https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01>

Securities and Exchange Commission

On April 18, 2018, the Securities and Exchange Commission approved, by a 4-1 vote to move forward with a proposal relating to the standards of conduct for brokers and advisors. The proposals by the SEC are broken into the following:

- **Regulation Best Interest**—a proposed rule to establish a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer. Comments on the proposed rule were due to the SEC by August 7, 2018;
- **Relationship Summary**—propose new rules and amend other existing rules to, among other things, require registered investment advisers and registered broker-dealers to provide a brief relationship summary to retail investors; provide amendments to Form ADV; and provide for

certain required disclosures in retail communications as well as restrictions on the use of certain names or titles in communications with retail investors in certain circumstances. Comments on the proposed rules/rule changes were due to the SEC by August 7, 2018; and

- **Standard of Conduct for Investment Advisors**—a proposed interpretation of the standard of conduct for investment advisors under the Investment Advisor's Act. The Notice also requested comments on: licensing/continuing education requirements for personnel of SEC-registered investment advisors; delivery of account statements to clients with investment advisory accounts; and financial responsibility requirements for SEC-registered investment advisors. Comments were due to the SEC by August 7, 2018.

The above proposed rules/interpretations can be accessed via the following links:

<https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08582.pdf>

<https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08583.pdf>

<https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08679.pdf>

With the SEC now having issued proposed and amended rules pertaining to standards of conduct for brokers and advisors, and the DOL's fiduciary rule having been vacated by the 5th Circuit Court of Appeals, the regulatory calendar

has shifted to the SEC and its effort to establish a standard of conduct for brokers and advisors when providing investment advice to retail customers. Going forward, one question will be the extent to which both the SEC and the DOL seek to coordinate on such standard(s) as applicable to retail customers within retirement plans.

Department of Treasury

On May 9, 2018, the Treasury Department released its third-quarter update to the 2017–2018 Priority Guidance, containing guidance projects the Department hopes to complete during the 12-month period from July 1, 2017 through June 30, 2018. The Plan alerts taxpayers regarding those priorities for which the Treasury/IRS will seek to issue regulatory guidance in the coming months.

With regard to retirement-focused issues, the Treasury has identified 26 items upon which the Treasury/IRS intend to work during the current year (several of which have already been completed or put into process). In addition, the Treasury further identified 19 items pertaining to “executive compensation, health care and other benefits,” (several of which have also been completed or put into process). The following is a sampling of the items that

are the focus of the Treasury/IRS Plan, along with a link where you can find all of the proposed work items for the coming year:

- Regulations updating the rules applicable to ESOPs
- Guidance under 401(a)(9) on the use of lump sum payments to replace lifetime income being received by retirees under defined benefit plans
- Final regulations (proposed 1/18/2017) regarding qualified nonelective contributions (QNEC) and qualified matching contributions (QMAC)
 - **Final regulations were published in the Federal Register on July 20, 2018**
- Additional guidance on issues relating to lifetime income from retirement plans and IRAs
- Guidance on rules applicable to IRAs under sections 219, 408, 408A, and 4793
- Guidance updating regulations for service credit and vesting under 411; and separately—restrictions on certain mandatory distributions under 411(a)(11)
- Guidance on missing participants
- Guidance related to church plans
- Final regulations under 409A (first proposed on 12/8/2008)
- Revenue Procedure modifying the Employee Plans Compliance Resolution System (EPCRS)

The following link provides access to the May 9, 2018 third quarter update to the 2017-2018 Priority Guidance Plan, and includes the above items as well as others not enumerated above:

https://www.irs.gov/pub/irs-utl/2017-2018_pgp_3rd_quarter_update.pdf

Miscellaneous

Retirement Plan Limits

For quick reference, the 2018 retirement plan cost of living adjustments are listed below:

- Elective deferral (contribution limit) for 401(k), 403(b), 457 plans—**\$18,500**
- Catch-up contribution limit for 401(k), 403(b), 457 plans—**\$6,000**
- Annual contribution to an IRA—**\$5,500**
- Catch-up contribution limit for IRAs—**\$1,000**
- SIMPLE employee deferrals—**\$12,500**
- SIMPLE catch-up deferral—**\$3,000**
- Annual Defined Contribution limit—**\$55,000**
- Annual Compensation limit—**\$275,000**
- Limit on annual benefit under a defined benefit plan—**\$220,000**

Estate and Gift Tax Exclusion Amounts

For 2018, the basic exclusion amount for an estate tax return for a 2018 date of death is **\$11.18 million** (inflation adjusted).^v

For 2018, the *first \$15,000* of gifts to any person is not included in the total amount of taxable gifts made during the year.

Health and Savings Accounts

For 2018, the Health Savings Account (“HSA”) contribution limit for individuals with family coverage under a high deductible health plan is **\$6,900**. The 2018 HSA contribution limit for individuals with self-only high deductible health plan is **\$3,450**.^{vi}

Social Security Trustees Report for 2018

Each year, the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds issues an annual report detailing the financial condition of the Old Age and Survivors (“OASI”) and Disability Income (“DI”) programs. Using intermediate long-range assumptions, the Social Security Trustees project that the combined trust funds for the programs will be depleted in 2034 (the programs are combined only hypothetically—as current law does not allow for one program to borrow from the other program). Considered separately, the Trustees project that the DI program will see its trust fund reserves depleted in 2032; while the OASI program will see its trust fund reserves depleted in 2034.

A copy of the 2018 Social Security Trustees Report may be accessed via the link below:

<https://www.ssa.gov/OACT/TR/2018/tr2018.pdf>

ⁱ S. 2526 (Hatch, R-UT) and Wyden (D-OR); and H.R. 5282 (Kelly (R-PA) and Kind (D-WI) were both introduced in March 2018.

ⁱⁱ There remains a possibility that this particular proposal will be removed from the RESA legislation prior to its consideration by the full House or Senate.

ⁱⁱⁱ <http://www.ca5.uscourts.gov/opinions/pub/17/17-10238-CVO.pdf>

^{iv} An additional DOL fiduciary case, *Thrivent Financial for Lutherans v. R. Alexander Costa, Secretary of Labor, and United States Department of Labor*, Civil Action No. 16-cv-03289-SRN-DTS, is stayed until September 4, 2018.

^v https://www.irs.gov/irb/2018-10_IRB#RP-2018-18

^{vi} The HSA contribution limit for 2018 was originally set at \$6,900, but enactment of the Tax Cuts and Jobs Act that included a change in how certain limits are adjusted for inflation, caused the IRS to update the HSA limits to reflect the lower inflation-adjusted amount referenced above. <https://www.irs.gov/pub/irs-drop/rp-18-27.pdf>

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