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## View From Groom: Post-Election Outlook for Retirement and Health Policy

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The results of the November 8 elections came as a surprise to many. Pundits had largely expected the election to maintain the *status quo* of a divided government, but instead, the voters handed complete control of the federal government to Republicans by electing Donald Trump as President and maintaining Republican control of both chambers of Congress.

Now, Republicans will have the opportunity to set the policy agenda and to move major pieces of legislation that could significantly impact the health and retirement systems. In particular, Republicans are actively pursuing legislation to roll back and replace key portions of the Affordable Care Act ("ACA"), and they are prioritizing major changes to the tax code and various regulations, which could profoundly impact the retirement system.

Below, we discuss in more detail what to expect from both the Trump Administration and Congress over the coming year.

### Trump Transition

In the weeks since the election, the Trump transition team has formed "landing teams" to go into the various agencies to prepare the hand-off to the new Administration when Mr. Trump takes the oath of office on Friday, January 20, 2017. President Elect Trump also has begun filling the four-thousand executive branch positions he needs to fill and has appointed new cabinet secretaries in the agencies that have jurisdiction over retirement and health policy.

Since his election, Mr. Trump has announced that he will make the following key appointments:

- Steve Mnuchin for Secretary of the Treasury. Mr. Mnuchin is a former partner at Goldman Sachs and the founder of Dune Capital Management. He has spoken at length in recent weeks about the need for tax reform.

- Andrew Puzder for Secretary of Labor. Mr. Puzder is the CEO of CKE Restaurants, Inc. (Carl's Junior, Hardee's). He has been critical of the ACA and Obama Administration labor policies such as the recent regulation expanding who qualifies for overtime pay and the National Labor Relations Board's decisions adopting a new standard for "joint employer" liability.

- Rep. Tom Price (R-GA) for Secretary of Health and Human Services. Dr. Price is an orthopedic surgeon and currently is the Chairman of the House Budget Committee. He has been a leading advocate for repealing and replacing the ACA.

All three of these positions require confirmation by the Senate after public hearings and debate. President Elect Trump will then need to fill a host of other political positions, including many that will have primary responsibility for health and retirement policy (e.g., the Assistant Secretary of the Employee Benefits Security Administration). Historically, it has taken more than six months to fill all of the key positions.

## Regulatory Outlook

President-Elect Trump has signaled his intent to roll back many of the Obama Administration's regulations, and Republican operatives have already compiled a list of several hundred rules they would like to see repealed. Based on recent precedent, it is likely the new Administration will issue a directive to executive agencies immediately after the inauguration imposing a moratorium on new regulations. The directive may also include a requirement that agencies postpone the effective date of certain rules. President Trump likely will further direct the withdrawal of regulations that have not been published in the Federal Register, and he is likely to issue an order repealing many of President Obama's Executive Orders.

The new Administration and the Republican-controlled Congress will likely pull back or amend many of the Obama Administration's regulations that have already been published in the Federal Register. The Administration can delay and reopen regulations that are not yet effective on the day Mr. Trump takes office. Regulations that are currently effective will have to be repealed or amended through the normal rulemaking process under the Administrative Procedure Act, which can take a significant amount of time.

Congress can also act to block the Obama Administration's rules. However, Congressional action is difficult given the fact that Democrats can still filibuster legislation in the Senate. Recently issued rules can be overturned using an expedited procedure under the Congressional Review Act ("CRA"), which allows rules to be overturned by a simple majority vote in both chambers. However, each vote takes valuable legislative time in the House and Senate, so absent a legislative change, Congress may only be able to consider a handful of rules under the CRA.

## Fiduciary Rule

The Trump Transition Team has not yet publicly signaled the new Administration's position on the Department of Labor ("DOL") final regulation to change the definition of a fiduciary. Technically, the fiduciary rule is already effective, although the new provisions are not applicable until April 10, 2017. If the new Administration decides to delay the applicability date of the fiduciary rule, it may need to effectuate the delay by issuing an interim final regulation, which is subject to notice and comment after release. Generally, an agency cannot indefinitely delay a rulemaking through an interim final rule, so a shorter delay is more likely.

If the fiduciary rule is delayed, the new Administration will then have the opportunity to re-evaluate the rule and determine whether it wants to make changes to the rule or any of the exemptions. Any changes will need to go through the official notice and comment rulemaking process. Because the rulemaking process is often time-consuming, we expect there to be a considerable amount of uncertainty for many months.

There also are a number of outstanding lawsuits challenging the fiduciary rule. Two courts have already ruled in favor of DOL, although the decisions are likely to be appealed. A decision in a third challenge in a District Court in Texas is expected soon. Although the new Administration could decide to stop defending the lawsuits, it is possible--if not likely--that an advocacy group could step in to take over the defense in the event the Department of Justice refuses to take the lead.

We also expect Congress to consider legislation to replace the fiduciary rule. There were several bills in the last Congress that sought to replace or delay the rule, and it is likely that similar pieces of legislation will be considered in the next Congress. However, Congressional Democrats will likely attempt to block the legislation (as discussed more below).

## Legislative Outlook

During the campaign and since the election, President-Elect Trump and Vice President Elect Mike Pence have signaled the following as top legislative priorities in the first year of the new Administration:

- Repeal and replacement of the ACA;
- Comprehensive tax reform;
- Curbing illegal immigration;
- Filling the Supreme Court vacancy; and
- Increasing investments in U.S. infrastructure.

Most notable for health and retirement policy are President-Elect Trump's and Congressional Republicans top priorities of "repealing and replacing" the ACA and overhauling the corporate and individual tax systems. The Trump transition team and Republican Congressional leaders have indicated since the election that they intend to repeal portions of the ACA early next year. President Elect Trump and Congressional Republican leaders also have indicated that they intend to consider comprehensive corporate and individual tax reform legislation next year.

It is, however, important to remember that while Republicans control the House and the Senate, Democrats and Independents who vote with Democrats will hold forty-eight Senate seats. Under current Senate rules, that gives them a powerful tool for blocking legislation—the filibuster. While Republicans will hold fifty-two Senate seats, under current rules, any one senator can continue debate and block a vote on final passage unless there are sixty votes to end the debate.

Congressional Republicans can move parts of their agenda without Democratic support through the budget reconciliation process, which would permit the legislation to pass the Senate with a simple majority rather than the 60 votes generally needed to end debate. Under the reconciliation process, the House Budget Committee and Senate Budget Committee approve budget resolutions with a budget framework for the year. The

House and Senate would then pass a concurrent budget resolution containing reconciliation instructions ordering the specific committees of jurisdiction to meet certain budgetary goals. Once the committees create reconciliation legislation that meet the prescribed budget targets, the pieces are combined into one bill that has procedural protections that protect it from filibuster in the Senate. Reconciliation has been used quite a few times in the past; for example, the passage of the ACA and President George W. Bush's tax cuts.

There are important restrictions that apply to budget reconciliation legislation. In general, these restrictions are referred to collectively as the "Byrd Rule," so-named for former Senator Robert Byrd (D-W.Va.). Under the Byrd Rule, a Senator can raise a point of order to strike certain "extraneous" matters, defined as provisions that:

- do not produce a change in outlays or revenues;
- produce an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;
- are outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;
- produce a change in outlays or revenues that is merely incidental to the non-budgetary components of the provision;
- increase the deficit for a fiscal year beyond the "budget window" covered by the reconciliation measure; or
- recommend changes in Social Security.

Republican leaders in the House and Senate have indicated that budget reconciliation legislation could be used for both repealing the ACA and for comprehensive tax reform. Because there was no final budget for the 2017 fiscal year, Republican leaders have suggested that Congress may pass two budget resolutions next year—one for the 2017 fiscal year and one for the 2018 fiscal year—which would pave the way for both an ACA and tax reform budget reconciliation bill to be considered in 2017.

## Health Care Reform

Congressional Republicans have indicated that they intend to begin repealing and replacing the ACA through budget reconciliation legislation early next year, although leaders reportedly have not yet settled upon the length of a transition period between the ACA rules and the new, replacement rules. Some Senate leaders have indicated a preference for a 3-year or longer transition period, while some conservative members of the House Republican caucus have expressed support for a 2-year or shorter transition period. President Elect Trump has indicated that he believes there should not be a gap between the repeal and replacement of ACA provisions.

At this time, it appears likely that the Congressional Republican "repeal and replace" strategy could be considered in phases. First, it appears that the House and Senate could consider legislation resembling the ACA repeal bill (H.R. 3762) that passed the House and Senate through budget reconciliation in late 2015 and early

2016, and then was vetoed by President Obama in January 2016. Because the 2015 bill went through the reconciliation process, it may be reflective of the types of provisions that could survive the Byrd Rule under budget reconciliation next year. Key provisions in the 2015 legislation included the following:

- Repealing the premium tax credits and cost sharing subsidies for years after 2017;
- Requiring individuals to pay back the full amount of advance payments in excess of their premium tax credit;
- Repealing the small business tax credit after 2017;
- Ending the expansion of Medicaid on December 31, 2017;
- Eliminating the penalties for violations of the individual and employer mandate effective in 2015;
- Eliminating the Cadillac excise tax on high cost employer-sponsored health coverage after 2017;
- Permitting health savings accounts ("HSAs"), Archer medical savings accounts ("MSAs"), health flexible spending arrangements ("FSAs"), and health reimbursement arrangements ("HRAs") to be used to pay for over-the-counter medications after 2015;
- Lowering the tax on distributions from HSAs and Archer MSAs that are not used for medical expenses after 2015;
- Repealing the limit on salary reduction contributions to an FSA after 2015;
- Eliminating the taxes and fees on health insurers, medical devices, and manufacturers and importers of brand name prescription drugs;
- Eliminating the additional Medicare tax and net investment income tax after 2015; and
- Eliminating the ACA limitation on the amount of an employee's compensation that a health insurer may deduct after 2015.

Notably, all of these provisions have a relatively direct budgetary impact—i.e., impact on government revenues or spending—and thus apparently were not subject to a point of order under the Byrd rule. Significantly, the 2015 legislation did not modify any of the ACA's insurance market reform provisions.

Republican Congressional leaders have indicated that they could then attempt to pass replacement legislation—in one or multiple bills, either as part of or outside of budget reconciliation—at a later time. It is possible that the House's version of replacement legislation could be modeled upon the House Republicans' proposal to repeal and replace the ACA—"A Better Way: Our Vision for a Confident America – Health Care"—that was released in June 2016. The A Better Way report would generally repeal the ACA while retaining some popular features of the law (e.g., extension of dependent coverage to age 26 and a ban on the exclusion of individuals with pre-existing conditions). It also would, among other things:

- cap the employer-provided health care tax exclusion;
- expand the use of HSAs and HRAs;

- replace the ACA premium credits with a new universal, refundable, advance tax credit;
- allow individuals to purchase insurance across state lines;
- create association health plans;
- repeal the individual and employer mandates;
- repeal the various ACA taxes and fees; and
- reform Medicare and Medicaid.

## Tax Reform

Speaker Paul Ryan (R-Wis.) and Ways and Means Chairman Kevin Brady (R-Texas) have both made clear that tax reform is one of their top priorities for the 115th Congress. The driving force behind tax reform is an effort to reduce corporate and individual income tax rates, and both Speaker Ryan and Chairman Brady have stated that they want tax reform to be revenue neutral. Rep. Brady recently said that tax reform would come with “significant trade-offs” and that “the only way to lower rates for everybody is to eliminate the hundreds of special tax provisions for some.”

In order to accomplish tax reform on a revenue neutral basis, Congress will need to reduce tax expenditures significantly. That puts the retirement system at risk because the tax incentives for retirement are among the largest tax expenditures in the Internal Revenue Code, and virtually every recent tax reform proposal has attempted to limit the tax preference for retirement plans. For example, former Ways & Means Chairman Dave Camp’s (R-Mich.) Tax Reform Act of 2014 would have, among other things, made the following changes:

- Reduce the number of tax brackets to three rates (10%, 25% and 35%) and, for taxpayers in the 35% bracket, apply a 10% surtax to various deductions and exclusions, including employer pre-tax contributions to defined contribution plans, under a new modified AGI definition;
- Freeze indexing of various retirement contribution and benefit limits (e.g., Section 415, elective deferral and catch-ups);
- Require all defined contribution plans to permit Roth contributions and impose a limit under which no more than 50% of contributions can be made on a pre-tax basis;
- Eliminate certain types of plans (e.g., SEPs, SIMPLE 401(k) plans, and traditional IRAs) and move toward consolidation of others (e.g., applying uniform contribution limits to all defined contribution plans by extending 401(k) limits to 403(b) and governmental 457(b) plans);
- Eliminate the special net unrealized appreciation rules on lump sum distributions of employer stock;
- Change the taxation of deferred compensation by requiring taxation to occur at the time there is no substantial risk of forfeiture of the deferred compensation; and
- Eliminate the performance-based compensation exception to the \$1 million annual compensation deduction limit and change the covered employee definition.

To date, neither the House nor Senate leadership has released a detailed plan describing the impact of tax reform on the retirement system. However, House Republican leadership did reference generally (in the A Better Way report) a proposal to consolidate and reform the multiple different retirement savings provisions and consider the creation of Universal Savings Accounts.

## Other Retirement Legislation

Congress has also been considering other legislation that could reform the retirement system. In particular, the Senate Finance Committee approved the following two bills in September:

- a large package of retirement reforms—compiled into a single bill called the “Retirement Enhancement and Savings Act of 2016” (“RESA”)—to improve the retirement system generally; and
- legislation to shore up the Mineworkers of America’s struggling retiree health and pension funds, which are both facing insolvency in the near future (the “Miners Protection Act of 2016”).

On November 17, Finance Committee Chairman Hatch (R-UT) and Ranking Member Wyden (D-OR) introduced both pieces of legislation—S. 3470, the Miners Protection Act of 2016, and S. 3471, the Retirement Enhancement and Savings Act of 2016 (“RESA”)—and the Committee filed its committee reports on the legislation. (Subsequently, a provision to temporarily (until April 2017) fund the health benefits of certain mineworkers was included in end-of-the-year spending legislation.)

RESA was approved by the Senate Finance Committee by a unanimous vote, and its provisions reflect a bipartisan consensus on legal changes that could improve the retirement system. Notable provisions in the RESA include the following:

- Permit unrelated employers (i.e., those without “commonality”) to pool their resources by participating in a new type of multiple-employer plan referred to as a “pooled employer plan;”
- Require employers to provide defined contribution plan participants with an annual benefit statement that includes an estimate of the amount of monthly annuity income the participant’s balance could produce in retirement;
- Create a new fiduciary safe harbor for employers who elect to include a lifetime income investment option in their defined contribution plan;
- Change the post-death required minimum distribution (“RMD”) rules to generally require that all distributions after death (including to a designated beneficiary) be made by the end of the fifth calendar year following the year of death, with exceptions for certain eligible beneficiaries and for aggregated amounts of \$450,000 or less;
- Remove the 10-percent limit on the automatic enrollment safe harbor default rate;
- Make certain changes to the rules that apply to nonelective contribution 401(k) safe harbor plans;
- Modify the hardship withdrawal rules;

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- Extend the period during which a qualified plan loan offset amount may be contributed to an eligible retirement plan;

- Create strict new limits on plan loans made through credit cards; and

- Permit rank-and-file employees at certain private companies to defer income taxation for up to 5 years on amounts attributable to certain stock options or restricted stock units.

Because the RESA has strong, bipartisan support, it is likely that the legislation will be considered, in whole or in part, next year.

## **Dodd-Frank Act Reform**

The Trump transition team has vowed to “dismantle” the Dodd–Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Similarly, Congressional Republican leaders have indicated that they plan to repeal and replace the Dodd-Frank Act next Congress. For example, House Financial Services Committee Chairman Jeb Hensarling (R-TX) has indicated that the House could move legislation similar to the Financial CHOICE Act, a bill to overhaul the Dodd-Frank Act that the Financial Services Committee approved in September 2016.