A Step Forward for Retirement Legislation

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On April 2, 2019, the House Ways and Means Committee approved bipartisan retirement legislation titled the "Setting Every Community Up for Retirement Enhancement Act of 2019" ("SECURE Act," H.R. 1994). The bill is similar to the Retirement Enhancement and Savings Act ("RESA," H.R. 1007) but includes several changes and new provisions. The SECURE Act's prospects for enactment in this Congress are good as it is the result of a multi-year, bipartisan process and has the support of many key lawmakers.

Background

There is a significant amount of interest in Congress in retirement security, and lawmakers on both sides of the aisle have been working on a legislative package for a number of years. In 2016, the Chairman and Ranking Member of the Senate Finance Committee introduced legislation that would have, among other things, permitted "open" multiple employer plans and created a fiduciary safe harbor for in-plan lifetime income options. That bill – RESA – was approved by the Finance Committee unanimously but never received a vote in the Senate. However, many of the key provisions of RESA were then included in the Family Savings Act ("FSA," H.R. 6757), which passed the House in 2018 as part of GOP leadership's second round of tax reform bills. The SECURE Act includes most of RESA, with some changes and some new provisions, including a few provisions of the FSA. The Ways and Means Committee approved the SECURE Act unanimously by voice vote, likely setting up consideration by the full House in the near future and possible action in the Senate thereafter.

Summary of Provisions

A. Encouraging Employer-provided Plans

- *Pooled Employer Plans.* The SECURE Act would permit unrelated employers (i.e., those without so-called "commonality") to pool their resources by participating in a new type of MEP, provided certain conditions are met. The new plans – referred to as Pooled Employer

Plans – would be treated as a single plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). The legislation would override Department of Labor ("DOL") guidance, which currently generally prevents unrelated employers from participating in a single plan. The SECURE Act also amends the Internal Revenue Code of 1986 (the "Code") to provide a procedure for ensuring that one employer's qualification problem would not lead to the disqualification of an entire Pooled Employer Plan (and certain association-sponsored plans).

- *Increase to Small Employer Plan Start-Up Credit*. Under current law, an eligible employer with 100 or fewer employees may receive a nonrefundable income tax credit for qualified start-up costs of adopting a new qualified retirement plan. The SECURE Act would increase the amount of the credit and provide for an additional credit for small employers that establish plans that include automatic enrollment or add automatic enrollment as a feature to an existing plan.
- *Plan Adoption Date.* The SECURE Act would allow an employer to adopt a qualified retirement plan after the close of a taxable year so long as it is adopted before the deadline for filing the employer's tax return for the taxable year.

B. Lifetime Income Provisions

- *Lifetime Income Disclosure.* The SECURE Act would require employers to provide defined contribution plan participants with an estimate of the amount of monthly annuity income the participant's balance could produce in retirement (if benefits were received in a qualified joint and survivor annuity and a single life annuity). The new lifetime income disclosure would be included on participant's annual benefit statements, and employers and plan fiduciaries will not have fiduciary responsibility for providing estimates in accordance with DOL assumptions and guidance. The SECURE Act directs DOL to issue model lifetime income disclosures and prescribe assumptions that may be used in converting participant account balances to lifetime income stream equivalents.
- *Fiduciary Safe Harbor for Selection of Lifetime Income Provider.* The SECURE Act would create a new fiduciary safe harbor for employers who opt to include a lifetime income investment option in their defined contribution plan. In 2008, DOL published a safe harbor for annuity selection in defined contribution plans, but many view the rules as too challenging to provide meaningful relief, particularly given the difficulty in evaluating the financial capability of the insurer. The SECURE Act would specify the measures that a plan fiduciary may take with respect to the selection of an insurer to comply with his or her fiduciary duties. Specifically, a fiduciary would be deemed to have satisfied its fiduciary requirements with respect to the financial capability of the insurer if the fiduciary receives certain

representations from the insurer as to its status under and satisfaction of state insurance laws

- *Portability of Lifetime Income Options.* The SECURE Act would permit participants to make direct trustee-to-trustee transfers (or transfer annuity contracts) of "lifetime income investments" that are no longer authorized to be held as investment options under a qualified defined contribution, 403(b) plan, or governmental 457(b) plan, without regard to any plan restrictions on in-service distributions.

C. Changes Affecting Plan Distributions

- *Post-Death Required Minimum Distribution Rules.* The current post-death required minimum distribution ("RMD") rules vary depending on whether an employee or IRA owner dies on or after or before the required beginning date and whether the employee or IRA owner has a designated beneficiary. The SECURE Act would change the post-death RMD rules to generally require that all distributions after death (including to a designated beneficiary) be made by the end of the tenth calendar year following the year of death. The 10-year distribution requirement generally does not apply if the designated beneficiary is an eligible beneficiary, which is defined as any beneficiary who, as of the date of death, is a surviving spouse, disabled, or chronically ill, or is an individual who is not more than 10 years younger than the employee (or IRA owner), or is a child of the employee (or IRA owner) who has not reached the age of majority
- *Increase in Age for Required Beginning Date.* The SECURE Act would increase the age at which required minimum distributions must begin from 70 ½ to 72.
- *Child Birth or Adoption Withdrawals*. The SECURE Act would permit individuals to take penalty-free withdrawals of up to $5,000 from their qualified defined contribution, 403(b), and governmental 457(b) plans and IRAs for expenses related to the birth or adoption of a child for up to 1 year following the birth or legal adoption.
- *Limits on Loans through Credit Cards.* The SECURE Act would prohibit plan loans made through credit cards.

D. Changes Affecting Plan Administration

- *Part-Time Employees*. The SECURE Act would require that 401(k) plans permit participation by long-term, part-time employees who work at least 500 hours in three consecutive 12-month periods. The provision would provide nondiscrimination testing relief with respect to long-term, part-time employees.
- *Increase on Limit on Automatic Enrollment Safe Harbor Default Rate.* The automatic enrollment safe harbor to the 401(k) plan nondiscrimination rules imposes a 10 percent limit on default automatic contribution rates. The SECURE Act would increase this limit to 15 percent.

- *Nonelective 401(k) Safe Harbor Changes.* The SECURE Act would make the following changes to the rules that apply to nonelective contribution 401(k) safe harbor plans: (1) eliminates the safe harbor notice requirement with respect to nonelective 401(k) safe harbor plans; (2) permits a plan to be amended to become a nonelective 401(k) safe harbor plan at any date before the 30th day before the close of the plan year; and (3) permits a plan to be amended to become a nonelective 401(k) safe harbor plan after the 30th day before the close of the plan year if the plan is amended to provide for a nonelective contribution of at least 4 percent of compensation for all eligible employees and the amendment is made by the last day for distributing excess contributions for the plan year (i.e., generally by the close of the following plan year).
- *Consolidation of Reporting.* The bill directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of plans may file a consolidated Form 5500. A group of plans would be eligible for a consolidated form if all the plans in the group (1) are defined contribution plans, (2) have the same trustee, the same named fiduciary and the same administrator, (3) use the same plan year, and (4) provide the same investments or investment options to participants and beneficiaries.
- *Increased Penalties for Failure to File Retirement Plan Returns.* The SECURE Act would increase the tax code penalties for failing to file a Form 5500 to $105 per day (but not to exceed $50,000). It would increase the penalties for failing to provide a required withholding notice to $100 per day (but not to exceed $50,000 maximum penalties per year). It also would increase penalties for failures to file a registration statement for deferred vested benefits or file a required notification of change.

E. Defined Benefit Plan Provisions

- *Community Newspaper Plans.* The SECURE Act would permit certain "community newspaper plans" to elect to apply alternative funding rules to the plan and other plans sponsored by members of the controlled group.
- *PBGC Premiums for CSEC Plans.* SECURE would set Pension Benefit Guaranty Corporation insurance premiums for cooperative and small employer charity ("CSEC") plans at $19 per participant and $9 for each $1,000 of unfunded vested benefits.
- *Nondiscrimination Flexibility for Frozen Plans.* The SECURE Act would provide nondiscrimination relief with respect to benefit accruals and benefits, rights and features for a closed class of participants under a defined benefit plan that has been closed for new hires, provided that the plan satisfies certain requirements. This change is particularly important to "soft" frozen plans, with more mature, highly compensated participant populations.

F. Changes Affecting IRAs

- *Repeal of Maximum Age for Traditional IRA Contributions.* The SECURE Act would repeal the prohibition on contributions to a traditional IRA for individuals who have attained age 70-1/2 by the end of a year.
- *Stipends and Difficulty of Care Payments Treated as Compensation.* Amounts includible in income and paid to aid individuals in their pursuit of graduate or postdoctoral study or research would be treated as compensation taken into account for IRA contribution purposes. Similarly, the SECURE Act would permit income excludable under the Code section 131 "difficulty of care" exemption to be treated as compensation for purposes of making contributions to a defined contribution plan or IRA.

G. Other Provisions Affecting Specific Plan Types

- *529 Plans*. The SECURE Act would allow tax-free distributions from 529 plans for certain apprenticeship program, homeschooling, and elementary or secondary public, private, or religious school expenses, and qualified student loan repayments.
- *Treatment of 403(b) Custodial Accounts Upon Plan Termination*. The SECURE Act provides that the Secretary will issue guidance that will provide that, if an employer terminates a 403(b) plan, the account can be distributed in kind to a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to the 403(b) rules in effect at the time that the individual custodial account is distributed.
- *Clarification of Church Plan Rules.* The SECURE Act would clarify that employees of nonqualified church-controlled organizations may be covered under a Code section 403(b) plan that consists of a retirement income account.
- *Benefits for Volunteer Firefighters and Emergency Medical Responders.* The SECURE Act reinstates, for one year, the exclusions for state or local tax benefits and qualified reimbursement payments provided to members of volunteer emergency response organizations.