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Senate Finance Committee Approves Bipartisan Pension Bills

Over the past year, there has been an increasing sense of urgency from many Republicans and Democrats in Congress to consider legislation to shore up the Mineworkers of America's struggling retiree health and pension funds, which are both facing insolvency in the near future. On September 21, the Senate Finance Committee marked up and approved (18-8) legislation – the Miners Protection Act of 2016 – to address the problem.

The Finance Committee also took the opportunity to consider and unanimously approve a package of other retirement reforms – compiled into a single bill called the “Retirement Enhancement and Savings Act of 2016” (“RESA”) – to improve the retirement system generally.

Both pieces of legislation are potentially important, but RESA has the potential to significantly alter the retirement landscape in several ways. The key provisions of RESA are summarized briefly below.

A. Creation of Pooled Employer Plans

RESA would permit unrelated employers (*i.e.*, those without so-called “commonality”) to pool their resources by participating in a new type of multiple employer plan, 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. RESA 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).

B. Changes to Encourage Lifetime Income Options

- **Lifetime Income Disclosure.** RESA 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 will not have fiduciary responsibility for providing estimates in accordance with DOL assumptions and guidance. RESA directs DOL to issue model lifetime income disclosures and prescribe assumptions that plans must use in converting participant account balances to lifetime income stream equivalents.

- ***Fiduciary Safe Harbor for Selection of Lifetime Income Provider.*** RESA 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. RESA 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.*** RESA 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 (“Stretch IRAs”).*** Current post-death required minimum distribution (“RMD”) rules generally provide that if an employee or IRA owner dies before the required beginning date and has a designated beneficiary, RMD distributions are permitted to be paid over the designated beneficiary’s life expectancy. RESA 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 fifth calendar year following the year of death – a significant revenue raiser. The requirement 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. In addition, RESA would provide that the new 5-year distribution requirement only applies to the extent that the amount of an individual’s aggregate account balances under all IRAs and defined contributions plans, determined as of the date of death, exceeds \$450,000 (indexed for inflation).
- ***Rollovers of Plan Loan Offset Amounts.*** RESA would extend the period during which a qualified plan loan offset amount may be contributed to an eligible retirement plan as a rollover contribution from 60 days after the date of the offset to the due date (including extensions) for filing the Federal income tax return for the year in which the offset occurred.
- ***Substantial Modifications of Hardship Withdrawal Rules.*** RESA would allow earnings on elective deferrals, qualified non-elective contributions and qualified matching contributions under a 401(k) plan to be distributed on account of hardship. It also provides that a distribution would not be treated as failing to be on account of hardship solely because the employee does not take any available plan loan, and directs Treasury to revise the hardship regulations to eliminate the requirement that an employee be prohibited from making elective deferrals and employee contributions for six months after receipt of a hardship distribution in order for the distribution to be deemed necessary to satisfy an immediate and heavy financial need.
- ***Limits on Loans Through Credit Cards.*** RESA would create strict new limits on plan loans made through credit cards.

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D. Changes Affecting Nondiscrimination Rules and Safe Harbor Plans

- ***Nondiscrimination Flexibility for Closed Defined Benefit Plans.*** RESA 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.
- ***Removal of 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 automatic escalation. RESA would remove this limit on the deemed election rate under the automatic enrollment safe harbor after the first year that the deemed election applies.
- ***Nonelective 401(k) Safe Harbor Changes.*** RESA 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., by the close of the following plan year).

E. Changes Affecting IRAs

- ***Repeal of Maximum Age for Traditional IRA Contributions.*** RESA 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.
- ***Stipend Payments Treated as Compensation for IRA Purposes.*** 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.
- ***IRA Ownership of S Corporation Banks.*** RESA would permit any IRA (including a Roth IRA) to be a shareholder of any S corporation that is a bank.

F. Other Provisions

- ***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. RESA would increase the amount of the credit and provides 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.

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- **Treatment of 403(b) Custodial Accounts Upon Plan Termination.** RESA provides that if an employer terminates a 403(b) plan under which amounts are contributed to custodial accounts, and the person holding the assets of the accounts is an IRS-approved nonbank trustee, then, as of the date of the termination, the custodial accounts would be deemed to be IRAs.
- **Plan Adoption Date.** RESA 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.
- **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.** RESA would increase the penalties for failing to file a Form 5500 and failing to provide a required withholding notice to \$100 per day (but not to exceed \$50,000 maximum penalties per year). It also increases penalties for failures to file a registration statement for deferred vested benefits or file a required notification of change.
- **Clarification of Church Plan Rules.** RESA 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.** RESA reinstates, for one year, the exclusions for state or local tax benefits and qualified reimbursement payments provided to members of volunteer emergency response organizations.
- **Stock Option Income Deferral.** RESA would permit rank-and-file employees at small private companies (*i.e.*, no stock readily tradable on an established securities market) to defer income tax inclusion for up to 5 years on amounts attributable to certain stock options or restricted stock units. The company would be required to have a written plan under which at least 80 percent of all employees providing services to the company in the U.S. are granted stock options that may be deferred. The House recently passed similar legislation.
- **PBGC Premiums for CSEC Plans.** RESA 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.
- **Accelerate Payment of Variable Rate Premiums.** RESA would require plan sponsors to pay their variable rate premium one month early in the federal government's 2026 fiscal year. This provision was included in RESA because it brings additional premiums inside Congress's 10-year scoring window and helps offset the cost of other provisions of the bill.

G. Next Steps

Given the fact that RESA has strong, bipartisan support, plan sponsors and service providers should keep their eye on the bill. Although the 114th Congress is winding down, it is possible that Congress could consider some or all of RESA in the lame duck session. However, it is more likely that the bill will be considered, in whole or in part, in the next

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