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A Dream Deferred

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Executive Summary: The American retirement dream is at risk. Millions of Americans likely will not be able to afford to retire, let alone live the idealized retirement of their dreams. While previous retirees were able to rely on a combination of social security, personal savings, and employer-sponsored plans to secure their future, these systems have serious funding challenges. These systems are no longer a reliable means to build a secure financial foundation for retirement. This paper briefly discusses the history of the retirement system in the United States, focuses on the most significant failures of the current retirement landscape, and suggests solutions for how to make retirement fiscally sound for the generations of Americans who will come to rely on the system.

This paper concludes that we cannot start afresh, but rather we will need to work within the systems we currently have to (1) encourage additional savings by increasing pre-tax contribution limits for employer-sponsored retirement plans and individual retirement accounts; (2) improve Social Security sustainability by eliminating the Social Security Wage Base, increasing the payroll tax, increasing normal retirement age, and tying normal retirement age to an actuarial life expectancy tables; (3) reduce plan leakage by reducing penalty-free withdrawal reasons and increasing the age to receive penalty-free withdrawals; and (4) create more comprehensive financial educational programs that are widely accessible so that people understand the importance of concepts like saving, 401(k), inflation, diversification and compounding interest.

INTRODUCTION

Everyone dreams at one point, or another about what their retirement would be and the lifestyle they would be able to live in retirement. [1] For many, they imagine that they will stop working at age sixty-five so they can spend their time traveling, be with loved ones, or pursuing their hobbies and other personal interests. [2] While everyone's particular dream may be different, at their core they rely on financial freedom to achieve their goals. However, for many the middle-class retirement dream is no longer within reach.

The United States is in a retirement crisis. [3] According to the 2017 U.S. Census Bureau's Survey of Income and Program Protection (SIPP), forty-nine percent of adults ages fifty-five to sixty-six have no personal savings for retirement. [4] More broadly, twenty-five percent of non-retired adults do not have any retirement savings and forty-five percent of non-retired adults do not believe their retirement savings are on track. [5] This means that millions of Americans will lack the resources to maintain their lifestyle in retirement and are potentially at risk of running out of money during their retirement. [6] These risks are compounded due to longer lifespans afforded by medical advances and lifestyle changes. [7]

The Transamerica Center for Retirement Studies reports that sixty-nine percent of retirees believe that social security will be their primary source of income during their retirement. [8] Social Security alone is not sufficient to be a retiree's primary source of income and it was never the intention for this program to do so. [9] Social Security will likely only replace about forty percent of a retiree's pre-retirement income and it is estimated that a retiree will need at least twice that amount for a comfortable retirement. [10] The heavy reliance on social security "paints a rather ominous picture" about retirement prospects in the United States. [11]

To fully understand this problem, we must first look at the historical background that developed our modern retirement scheme and the landscape that has evolved over the years.

HISTORICAL BACKGROUND

Before the Great Depression, the United States did not have any federal safety net programs. [12] The role of the government was relatively limited and federal government spending was less than three percent of gross domestic product. [13] Wealthy individuals and private charities provided social insurance against the "hardships of life." [14] During the Great Depression, this system became overwhelmed with requests for assistance and it could not handle the volume of need. [15] This ultimately led to the collapse of the private welfare system and the rise of federal welfare programs. [16]

In August 1935, the private welfare system was replaced by the first federal welfare program when President Franklin D. Roosevelt signed the Social Security Act into law. [17] Social Security provides partial income protection to workers by replacing some of their earnings when they retire, develop a qualifying disability, or expire. [18]

The retirement landscape changed again after World War II when millions of people returned from the front and entered the workforce. [19] Wage and price controls effective during this time and lasting through the Korean War shifted compensation from wage based to nonwage benefits like defined benefit (DB) plans. [20] DB plans became a key recruitment tool for employers to attract and retain the best talent. [21] DB continued to grow in popularity through the 1970s with thirty-eight percent of employers providing DB plans. [22] In 1974, the Employee Retirement Income Security Act (ERISA) was passed. [23] ERISA requires private companies who offered DB plans to pay an annual premiums for pension insurance, mandated that companies fully fund their DB plans, set minimum standards for participant, vesting and benefits accruals, provides employees legal rights to sue if employers breach their fiduciary duties, and guarantees payment of a certain benefit if the DB plan is terminated. [24]

The Revenue Act of 1978 again changed the retirement landscape by promulgating Internal Revenue Code Section 401(k), frequently referred to only as 401(k). [25] A 401(k) is a type of defined contribution (DC) plan that allows employees to contribute a portion of their pre-tax wages into an individual retirement account and allows employers to deduct any contributions they make into the account from their taxable income. [26] By 1981, nearly half of all large companies either offered a 401(k) plan or were considering adding one. [27] Since the late-1980s, "401(k) plans have become the fastest-growing type of retirement plan in the United States" and DB plans have been decreasing in popularity in the private section. [28] In 2020, there were more than sixty million people, or twenty-three percent of the adult population in the United States, were active participants in 401(k) plans. [29]

Americans accumulate the vast majority of their retirement savings through employer-sponsored retirement plans. [30] Employer-sponsored retirement plans are not compulsory though, so over one-third of all workers do not have access to either a DB or DC plan. [31]

Individual Retirement Arrangements (IRAs) attempt to fill this gap by allowing individuals to make tax-deferred investments for retirement. [32] IRAs are not employer-sponsored plans and the tax advantaged amount is much less than employer-sponsored plans. [33] IRAs are increasingly playing a more important role in retirement savings with IRA assets representing eleven percent of all household financial assets. [34] However, IRAs disproportionately benefit those who already have access to employer-sponsored retirement accounts so there are still approximately thirty-six million United States households without a tax-advantaged retirement account. [35]

SOCIOECONOMIC FACTORS EFFECTING PERSONAL SAVINGS RATE

Saving for retirement can be psychologically challenging for three main reasons: loss aversion, inertia, and myopia. [36] Inertia is the "preference for the status quo" and can be very difficult to overcome. [37] Inertia is one of the main reasons that "one-third of the eligible workers end up not enrolling and hence not saving for their retirement." [38] These people become "overwhelmed and as a result, end up doing nothing." [39] Myopia is the "detrimental focus on the short-term. [40] People struggle to save for retirement because they must plan for their future selves and it is hard give up money now for uncertain future plans. [41] Even after people overcome myopia and inertia, they must overcome loss aversion, the "strong negative response to loss." [42] It "creates a desire to minimize future regret" by investing money in safe investments like bonds, which are unlikely to keep up with inflation over the long-term. [43] This is particularly a problem now with the current inflationary pressures. [44]

A recent survey conducted by the Global Atlantic Financial Group found that forty-six percent of retirement aged investors "believe low interest rates and rising inflation will make it harder to create an income stream" which will sustain them through retirement. [45] Rising inflation can quickly eat through retirement savings by reducing purchasing power for goods. [46] To cope with this it is recommended that people invest beyond their savings accounts and remain flexible when inflation does occur. [47]

Another massive barrier to saving for retirement is a person's income. Saving for retirement is a luxury many Americans cannot afford. [48] Over "one-third of those who do not contribute to retirement plans say it is because they cannot afford to do so "and approximately fifty percent of people with an "annual income of less than $50,000 said they've have never had a retirement account." [49]

Debt is another determining factor in budgeting for retirement. Nearly half of workers say debt has negatively impacted their ability to save for retirement. [50] This is a particular problem for the younger generations like Millennials and Gen Z because in addition to lower incomes they are also oftentimes balancing paying off high student loan debts, increasing costs of purchasing a home, and exorbitant healthcare costs. [51]

Despite high debt-to-income ratios and comparatively lower salaries, younger generations, Millennials and Gen Z, recognize that the retirement landscape is changing and understand that employers are shifting from DB to DC plans that require them to actively plan for their retirement. [52] Millennials will be the first generation "to rely on defined contribution plans [like 401(k)s] as their main means of saving for retirement." [53] According to a Pew Trust study, younger workers who have access to an employer-sponsored plan, "have higher overall plan balances in defined contribution accounts than previous generations." [54] However, this has led to Millennials being "significantly more pessimistic about achieving financial security in retirement compared…to Boomers." [55] Millennials' concern is not entirely misplaced either. While Millennials make up the majority of the US workforce, they only represent about six percent of all household wealth. [56] Wealth tends to accumulate over time, but Millennials are concerned that their wealth accumulation is not on track with where Boomers were at approximately the same. [57] Millennials will be required to primarily rely on their wealth to sustain themselves through retirement, but it is unclear if they will have accumulated enough to obtain the same financial security that Boomers enjoy. [58]

Lastly, there have been a series of repeated economic downturns in the past twenty-two years. [59] There have been three recessions in the twenty-first century and "each was worse than the one before it…" [60] The losses by these economic contractions have affected every generation, however, it has exacerbated all of the other socioeconomic factors discussed. The repeated recessions have reinforced loss aversion fueling people to invest in less risky investments that tend not to have significant loss, but the gains typically do not keep pace with inflation. Those who were living paycheck-to-paycheck prior to an economic contraction typically become more conservative and are concerned with potentially losing their jobs. The younger generations are often the first group to be laid off and the last group to get hired since they have the least tenure and experience. [61] While it is uncertain what impact the three recessions will have on Millennials' ability to retire, it is clear that the recessions have had an impact on their perception of the economy. [62]

The socioeconomic factors outlined above affect how people approach their personal and retirement savings, however, fixing these issues require many societal changes which are beyond the scope of this research paper. Rather, we will specifically focus on changes which can be made to the United States retirement system bearing in mind these socioeconomic factors which impact human behavior surrounding savings.

UNITED STATES RETIREMENT SYSTEM

Most Americans have planned their retirements based on some combination of three income sources: Social Security, employer-sponsored retirement plans, and personal savings. [63] The combination of the income sources is often times referred to as the 'three-legged stool' of retirement planning. [64] Each 'leg' of this stool is crucial to the United States retirement system working effectively, however, none of the legs are structurally sound anymore.

Social Security

Over seventy million Americans receive benefits from programs administered by the Social Security Administration. [65] While retirement benefits for the elderly are the primary benefit Social Security provides, it is by no means the only benefit program. [66] Social Security also provides "important life insurance and disability insurance protection" for Americans. [67]

The average Social Security retirement benefit in 2022 was approximately $1,614 per month and the benefit cap for Social Security is $34,180 annually. [68] Approximately ninety-seven percent of all superannuated individuals are either current recipients of Social Security or they will receive it. [69] Without Social Security, approximately forty percent of our most vulnerable citizens (*i.e.*, elderly) would live below the poverty line. [70] In 1939, the poverty rate in the United States was as high as seventy-eight percent among the elderly. [71] After Social Security began paying benefits to superannuated individuals, the poverty rate for the elderly Americans decreased to approximately fourteen percent in 1979. [72] This was one the main reasons that Social Security was created and one of its largest successes has been lifting so many seniors from poverty. [73]

Social Security is funded directly through a payroll tax. [74] Both employers and employees each pay 6.2% of wages up to the taxable maximum. [75] Individuals who are self-employed must pay 12.4% of wages up to the taxable maximum. [76] The taxable maximum amount is called the Social Security Wage Base and adjusts annually based on cost-of-living adjustments based on the Consumer Price Index. [77] In 2022, the wage base was $147,000. [78] This means that any money that your earn over $147,000 is not subjected to Social Security payroll taxes.

Social Security pays benefits based on normal retirement age (NRA), also called full retirement age. [79] NRA is the age when a person may elect to receive Social Security benefits that are not prorated. [80] Upon its inception, the NRA was sixty-five years old. [81] This age was selected based on "prevailing retirement ages in the few private pension systems in existence at the time" and actuarial studies which "showed that using sixty-five years old provided a management system that could easily be made self-sustaining with only modest levels of payroll taxation." [82]

The Social Security Amendments of 1956 permitted women to elect to receive their Social Security benefit before NRA at age sixty-two and in 1961 the Social Security Act was amended again to allow men the same option to elect to receive their Social Security benefit before NRA at age sixty-two. [83] However, if the retiree elects to receive benefits prior to NRA, they will forever receive reduced benefits. [84] The Social Security Act was again amended in 1983 to gradually increase the NRA from sixty-five to sixty-seven years of age. [85] It also added that if a retiree delayed their retirement to seventy years old, they would receive a higher monthly benefit since they have delayed their benefits for several years. [86] Despite the negative consequences of electing to receive Social Security benefits before NRA, a "majority of people opt to start claiming [benefits] at sixty-two years old." [87]

Social Security provides the foundation for the retirement system in the United States and is a critical national welfare program. [88] However, the "concepts of solvency, sustainability, and budget impact are common in discussions of Social Security…" [89] Currently, the Social Security Board of Trustees projects that program costs will exceed payroll taxes collected in 2035. [90] Additionally, the life expectancy of Americans has increased from about seventy years old to nearly eighty years old in 2021. [91] This means that the Social Security must pay higher total payouts. Lastly, the worker-to-beneficiary ratio for Social Security is decreasing. Currently, "there are about 2.7 covered workers for each [Social Security] beneficiary." [92] In 2035, this is projected to decrease to as low as 2.1 covered workers for each Social Security beneficiary. [93] The United States public retirement system is rapidly approaching the point where we will exhaust current assets and will therefore no longer be able to provide the benefits promised to vulnerable individuals who primarily rely on this income to remain above the poverty line.

Employer-Sponsored Plans

There are two primary categories of employer-sponsored retirement plans in the United States: defined benefit (DB) plans and defined contribution (DC) plans. [94] DB plans promise employees a "specified monthly benefit at retirement." [95] DB plans usually express their promised benefit as a benefits formula that considered a variety of different factors like salary, years of service, and age. [96] The benefits provided by a DB plan "are protected within certain limitations, by federal insurance provided through the Pension Benefit Guaranty Corporation (PBGC)." [97] By contrast, DC plans "[do] not promise a specific amount of benefits at retirement." Instead, these plans require contributions from the employee and/or the employer into the "employee's individual account under the plan…" [98] Typically these contributions are invested either on the employee's behalf or in a participant directed account. [99] Upon retirement, employee's will receive the balance in their individual account plus or minus any investment gains or losses. [100] As a result, the amount of money in DC accounts will fluctuate based on the investments. [101] The most common type of DC plans "are 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans." [102] These plans allow pre-tax contributions and potentially (varies from employer to employer) post-tax participant contributions. [103]

Currently, approximately "sixty-seven percent of private industry workers [have] access to employer-sponsored retirement plans…" [104] About "thirty percent of union workers had access to only a defined benefit plan and thirty-four percent of union workers" had access to both a defined benefit and defined contribution plan. [105] "Fifty-four percent of nonunion workers had access only to a defined contribution plan, compared with twenty-seven percent of union workers." [106] Over the past three decades, private employers have been switching from offering DB plans to DC plans, with some employers terminating their DB plans so they only offer DC plans. [107] Private employers are seeking to shift the retirement risk from the employer, where they are required to pay promised benefits to retirees regardless of how their investments perform. [108] This means that private employers may need to cover a funding gap or they could fund benefits from their investments performing better than anticipated. [109] When private employers offer DC plans, they do not need to be concerned about this because the employer has not promised a retirement benefit to the employee. [110] Given the decreased risks to employers, many companies are only offering DC plans to new employees. [111] This means that DC plans will be many Millennial and Gen Zers' primary retirement vehicle; so ensuring adequate funding is crucial to younger generations having access to financial security in retirement.

Since DC plans are the retirement of the future, we must look at the deficiencies of this type of retirement plan. One of the primary concerns in DC plans is leakage. [112] Leakage occurs when participants prematurely withdraw money from retirement accounts for non-retirement purposes without paying their retirement accounts back with interest. [113] There are three primary ways for retirement plans to distribute benefits prior to retirement: hardship distributions, early withdrawals, and loans. [114] A hardship distributions is "a withdrawal from a participant's elective deferral account made because of an immediate and heavy financial need, and limited to the amount necessary to satisfy that financial need." [115] Loans are not typically considered taxable to the participant. [116] Loans are only become taxable to the participant if they do not pay back their retirement account. [117] Early withdrawals are "plan distributions before you turn sixty-five (or the plan's NRA, if earlier). An early withdrawal may result in an additional income tax of ten percent of the total amount of the withdrawal to disincentivize participants from making these types of withdrawals. [118] Loans from a participant's retirement account "must be paid back to the borrower's retirement account under the plan." [119] If the loan meets the rules and the repayment schedule is followed by the participant, the money is not taxed. [120] If it is not a qualified loan or the participant is not repaying the loan based on the amortization schedule, then it is treated the same as an early withdrawal and becomes taxable. [121] Once the participant is 59.5, withdrawals are no longer considered early so all withdrawals (loans and hardship distributions) from their retirement account are penalty-free regardless of whether they repay the withdrawal. [122]

A 2016 study conducted by Transamerica found that "twenty-five percent of workers in small companies and twenty-eight percent of employees in large companies have taken some form of loan, early withdrawal or hardship withdrawal from a 401(k) plan…" [123] Participants have a myriad of reasons or taking money from their retirement accounts. [124] Often times, the money is needed to pay for medical expenses, bills, or mortgages for primary homes. [125] However, the resulting leakage could mean that participants will not be adequately prepared for retirement. [126]

Personal Savings

When creating a retirement plan, a person also typically needs to incorporate at least one type of personal saving account or passive income stream to ensure financial stability in retirement. Often times retirees incorporate IRAs after evaluating their retirement plan options. An IRA is an individual retirement account that enables people "to save money for retirement in a tax-advantaged way." [127] Similar to 401(k) plans, IRA accounts come in a variety of types. [128] They can be tax-advantaged or after-tax contributions. [129] Contributions you make to your IRA "may be fully or partially deductible, depending on the person's filing status and income, and…earnings and gains are not taxed until [the individual] take[s] a distribution from [their] IRA." [130]

There are several important differences between 401(k) plans and IRAs. First, 401(k) plans are employer-sponsored plans so employee contribution amounts are deductible directly from their paychecks. [131] Next, the annual limit between the two retirement accounts is very different. The annual 401(k) contribution limit is $20,500 in 2022 and if a person is over the age of fifty, the person is permitted to make additional "catch-up" contributions of $6,500. [132] Additionally, an employer may make contributions to the employee's 401(k) account. Annual contributions consisting of employee elective deferrals, employer matching, employer nonelective contributions, and allocation of forfeitures "may not exceed the less of: one hundred percent of the participant's compensation," or $61,000 ($67,500 including catch-up contributions). [133] In contrast, the annual IRA contribution limit in 2022 is $6,000 and the catch-up contribution is $1,000. While employee elective deferrals into their 401(k) accounts have increased from $19,000 in 2019 to $20,500 in 2022, IRA contribution limits have remained stagnant in that same period. [134] This means that Americans who do not have access to employer-sponsored retirement plans are at a disadvantage and likely will not be able to save as much money for retirement because they have a lower contribution limit and the contribution limits have not increased in three years.

Financial Literacy

To be successful in investing and saving for retirement, people must be financially literate. According to the Financial Industry Regulatory Authority, "approximately sixty-six percent of the American population is considered financially illiterate." [135] Financial literacy at its base means "to know how to manage your money," however, encompassed in this broad definition is "learning how to pay your bills, how to borrow money and save money responsibly, and how and why to invest and plan for retirement." [136] Financial literacy provides people with the tools and skills to be able to manage their money effectively. [137] This is an ever important skill because Millennials' and Gen Z's largest asset will likely be their investment accounts when they retire. This means that they must be able to effectively manage an investment portfolio and make informed financial decisions regarding their finances if they are to have a financially secure retirement.

RECOMMENDATIONS

The United States retirement system is facing a crisis the likes of which it has never faced. The three-legged stool is in disrepair and thus the retirement of the nation hangs along with it. The recommendations below are aggressive suggestions for how to quickly repair retirement so we can ensure that generations to come are able to enjoy the benefits that have been promised to them, are able to make informed retirement decisions, and allow individuals to have self-determination over their retirement.

Encourage Additional Savings

One of biggest financial hurdles most people will likely face is saving enough money for retirement. There are many barriers to savings, but saving for retirement is necessary. Retirement planning is especially important when we consider the longevity of the human life. Since Social Security was enacted people are living approximately twenty years longer and the babies born today will likely live to be over one hundred years old. [138] While some people plan to work until they die, others plan to cease working at a certain age and live off their retirement funds. However, it is becoming increasingly less likely that they will have saved or invested enough money to retire. Given the rate at which medicine is changing and extending the life expectancy for Americans, we must consider what this means for a potentially longer retirement. People will need to save more money for retirement and other expenses that come along with aging, like increased medical expenditures.

Most people must supplement their Social Security earnings with personal retirement savings to be able to afford the expenses of daily living. The most common mechanism for retirement saving is contributing through an employer-sponsored retirement plan like a 401(k) or a 403(b). However, there are millions of Americans without access to an employer-sponsored retirement plan. These individuals rely on IRAs. [139] IRAs are similar to emp loyer-sponsored retirement plans; however, they vary in arguably the most important way – the contribution limit.

The contribution limit for IRAs is intentionally set lower than the contribution limits for private retirement system. [140] In fact, "policymakers believe it is necessary to maintain this unfairness [between IRA and 401(k) plans] because extra tax incentives induce employers to offer a retirement plan when they otherwise might not." [141] While this may have been the case forty years ago when section 401(k) was promulgated, employers have had ample opportunity to add these types of plans. The idea that increasing IRA limits would disincentivize employers ignores the substantial tax incentives employers receive for offering these plans and the increased value proposition employer-sponsored retirement plans create in attracting and retaining talent. The potential to alter the behavior of a very small number of employers does not justify continuing an unfair practice that does not promote the use of IRAs as part of a retirement strategy for millions of Americans who do not have access to employer-sponsored retirement plans.

The 2022 contribution limit for IRAs is $14,500 less than the limit for employer-sponsored retirement plans and the catch-up contribution is $5,000 less than the catch-up limit for employer-sponsored retirement plans. [142] This means that someone who is fifty or older and thereby eligible for catch-up contributions is losing out of almost $20,000 in additional retirement savings per year plus compounding interest. Assuming a five percent rate of return over the fifteen years before NRA, a fifty-year-old participant is missing the opportunity to earn approximately $430,000. This would be particularly helpful to Gen Xers and older Millennials who are in their 40s and 50s, the prime saving years for retirement. This could transform the trajectory of retirement savings for the millions of American relying on IRAs as their primary retirement savings vehicle.

The retirement contribution limits for IRAs are in 26 U.S.C. §§ 219(b)(5)(A) and (B). To ensure equal access to savings for retirement, 26 U.S.C. §§ 219(b)(5)(A) and (B) and I.R.C. § 402(g)(1) and § 414(v)(2)(B)(i) must have the same contribution limits and the contribution limit for both should be tied to the same inflationary metric to ensure that they both increase equally at the same time. Currently, the formulas used to determine the contribution limits are different between employer-sponsored plans and IRAs; however, this unfairly punishes an employee for the happenstance of finding a job where the employer chooses not to provide an employer-sponsored retirement plan. Coupling these provisions would ensure there is equal access to retirement plans. [143]

Additionally, the contribution limits in 26 U.S.C. §§ 219(b)(5)(A) and (B) and I.R.C. § 402(g)(1) and § 414(v)(2)(B)(i) should have an immediate step-up increase to allow participants to set the contribute rate at $30,000 per year and $10,000 catch-up into either a pre-tax or Roth retirement account. Next, we should change the inflationary measure used to increase these contributions annually. The amounts should increase annually at a rate using the greater of either: current inflationary measures for COLA (I.R.C. § 415) or 2 percent.

The increases in the annual contribution amount for both employer-sponsored retirement plans and IRAs are tied to inflation measures, however, this is not the only cost pressure facing retirees using these types of savings accounts. Individuals who will be retiring primarily on these accounts need to be able to save more to account for the increasing responsibility. When they were initially conceived IRAs and 401(k)s were never intended to replace pension plans and thus their design is flawed for their current purpose. Increasing the contribution limit will allow people an opportunity to be able to best position themselves for a comfortable retirement.

Critics will argue that this will lead wealthy individuals to shelter more of their income. Wealthy individuals will be able to afford to put additional money into their retirement accounts and will shield the additional money temporarily from taxation. The key to this is that it is a temporary shield from taxation and in the end the money will need to be taken from the retirement account and taxed. Wealthy individuals will always find ways to make the tax code most advantageous for themselves and their families, so one must look to the remainder of the population to see how much this would help them. This will allow people who delayed saving for the retirement the ability to still build a retirement, with a basic standard of living and this is what we should focus on when discussing increasing retirement savings. Americans of all income levels deserve the ability to try to save for retirement and we must make their savings our priority.

Social Security Sustainability

Since its inception in 1935, the main purpose of Social Security has not changed. Social Security is the bedrock of the United States retirement system and is used as the primary source of retirement for many Americans. Social Security is facing a test, the likes of which is has never faced before and one in which it is unprepared to handle. The massive influx of Baby Boomers retiring and collecting Social Security benefits is a large change for the system. Social Security was based on population pyramids. This means that there were a much larger amount of younger people to support the older population by infusing additional money into the Social Security fund through payroll taxes. However, when Boomers retire there will not be enough workers paying payroll tax to support the amount of benefits Boomers are anticipated to receive based on the current distribution formulas. This means that we have two options as a society: we can either choose to decrease the benefit payments that elderly Americans overwhelming rely on in retirement to support themselves or we can change how we fund Social Security to ensure we can all enjoy these benefits for years to come.

In *Flemming v. Nestor*, the Supreme Court held that benefits under Social Security are not an accrued property. [144] As such, Congress has the ability to change the rules regarding eligibility at any time to make them more generous, more restrictive, or even eliminate the benefit entirely if they so choose. [145] While it is not politically feasible that Congress would eliminate Social Security in its entirety, it does mean that the benefit amounts retirees relied on and, in fact, planned their retirement around could be reduced. However, despite Social Security not being considered a constitutional right, as a society we should seek to protect our elderly from the potentially life- threatening prospect of reducing their benefits. The vast “majority of Americans oppose cuts to Social Security and support strengthening the program by contributing more in taxes. ” [146]

One of the ways that Congress could ensure the continuity of Social Security is to increase the Federal Insurance Contributions Act (FICA) tax, which funds Social Security. FICA is a payroll tax that is used to fund Social Security and Medicare programs. [147] The current FICA Social Security tax is a 12.4 percent payroll tax on wages shared evenly between employers and employees. [148] The last time FICA taxes were increased was in 1983 when the Social Security payroll tax was increased over seven years from 10.8 percent to the current 12.4 percent. [149] Congress decided to increase the Social Security payroll tax at this time to improve the solvency Social Security and it is time for it to be increased again. [150]

The current FICA tax is not sustainable and needs to be increased because of the number of people who the program will need to provide benefits for and the limited tax base for collecting wages to support these changes. 26 U.S.C. § 3101(a) should be amended to increase the tax rate from 12.4% to 15.9% split evenly between employers and employees. This one and a half percent increase in funding is similar to the Social Security payroll tax increase in 1983 and could also be spread out over seven years. Spreading the increased tax rate over a period of seven years would help to alleviate the additional income pressures on workers and businesses because the rate will increase slowly. The marginal effect of the taxes will be as limited as possible to ensure that worker’s paychecks are impacted as minimally as possible. However, this alone is not sufficient to stabilize Social Security and the taxable maximum or Social Security wage base must be eliminated.

The Old-Age, Survivors, and Disability Insurance (OASDI) taxable wage base provides benefits to retirees and people with disabilities. [151] The provision, 26 U.S.C. § 3101, applies to all income to the maximum taxable income limit. This creates an upper limit on the amount people are required to pay into Social Security and is frequently considered a regressive tax that benefits wealthier Americans. [152] A regressive tax is “a tax that is applied uniformly, taking a larger percent from low-income earners than from high-income earners.” [153] This means that lower-income individuals are required to pay OASDI taxes on every dollar of their income, while higher-income earners are only required to pay OASDI taxes on a portion of their income. [154]

The OASDI maximum on taxable income changes each year based on the National Average Wage Index. The National Average Wage Index is computed by the Social Security Administration each year. In 2022, the taxable wage base is $147,000. [155] Once an employee earns more than $147,000, they are no longer subject to the 12.4 percent OASDI tax. There is no cap on taxable wages for Medicare, so high-income individuals are still required to pay the 2.9 percent tax shared evenly between employers and employees. [156]

The majority of the funding increases for Social Security will come from eliminating the cap on taxable wages found in 26 U.S.C. § 3101. [157] These changes to Social Security would only affect high-income individuals, however it currently remains politically infeasible for several reasons. The primary reason is that the amount you pay into Social Security is directly tied to the rate of benefit you can receive, similar to an annuity. If we eliminate the OASDI maximum on taxable income, it raises substantial questions about whether high-income individuals should receive an increased benefit. The political sustainability of the system is based on the fact that it is not a wealth distribution system, however, this is the direction that we should be moving in as the wealth gap in the country in increasing and people are finding it harder to make a living let alone save for their retirement. [158] Additionally, this would bring the OASDI tax in line with the Medicare tax. In the past, Medicare also had a similar tax break, but it was removed effective January 1, 1994, and the same should be done for OASDI. [159] These are both similar taxes and should be treated in a similar way to create consistency within the tax code. [160]

Finally, to avoid the similar mistakes that were made when the Medicare tax break was removed, policy makers should work to limit payroll tax avoidance. The purpose of FICA taxes is to ensure that we pay money based on our income to support the most vulnerable individuals in society, however, there is a large loophole that remains in the tax code for self-employed people. Self-employed individuals create “S corporations” and do business under these entities. These entities can avoid paying taxes into OASDI and Medicare by legally underreporting their income by stating their services were not worth as much as a client paid for them. The last time the United States Government Accountability Office (GAO) studied this issue using data from 2203 and 2004, they determined that S Corporations “annually misreported about fifteen percent (an average of fifty-five billion dollars for 2003 and 2004) of their income.” [161] Using more recent IRS data, the “GAO derived a rough-order-of-magnitude estimate…” S Corporations are now misreporting about ninety-one billion dollars per year from 2006 through 2009. This amount would likely be hundreds of billions of dollars now in misreported income and if Congress closed the loophole, these funds would substantially help in ensuring that Social Security is available for many generations to come.

Reducing Leakage

The Congressional Joint Committee on Taxation estimates that about twenty-two percent of net contributions to 401(k)s and other workplace retirement savings plans made by workers aged fifty or younger is withdrawn early via loans, hardship withdrawals, or cash-outs by people switching jobs. [162] While the most common reason for leakage in a retirement account is leaving a job, there are several other common reasons for leakage like becoming unemployed, large medical expenses, divorce or separation, or a decrease in income. [163] While twenty-two percent may not seem like a lot of money, it can really add up with compounding interest. For example, say a forty-year-old participant contributes $3,500 per year into their 401(k) and every year they have a hardship withdrawal of $770, which accounts for twenty-two percent of their annual 401(k) contribution. Over the remaining twenty-five years of their career, they will have lost about $37,000 assuming a five percent annual rate of return. This is almost twice as much as what the participant initially withdrew from their account. Some plan leakage is certainly inevitable; however, there are steps that can be taken to reduce this problem. [164]

I.R.C. § 72(t)(2) allows for early withdrawals from IRA accounts and other tax advantaged accounts like 401(k) and 403(b) plans. [165] This section details eight reasons for withdrawals: (1) unreimbursed medical bills; (2) disability; (3) death; (4) health insurance premiums if you have been unemployed for at least twelve weeks; (5) unpaid IRS taxes; (6) down payment for first-time homebuyers; (7) higher education expenses; and (8) income purposes. [166] I.R.C. § 72(t)(1) states the general rule that any early distributions from a qualified retirement plan are subject to a ten percent penalty. [167] This can be avoided if the distribution meets one of the provisions in I.R.C. § 72(t)(2)(A). [168] I.R.C. § 72 also allows participants to take loans from qualified retirement plans. [169] To reduce plan leakage, I.R.C. § 72(t) and (p)(4) should be amended.

First, I.R.C. § 72(p) should apply not only to qualified employer plans, but also to IRAs. Since an IRA is the primary saving vehicle for people who do not have access to an employer-sponsored retirement plan, they should not be penalized for something which is not in their control. While these plans should not have the same penalty that I.R.C. § 72(t)(1) has, there should be a greater deterrent than is found in the I.R.C.

Currently, most plans allow participants to take loans at an additional one percent interest rate over the prime rate. Frequently, this is vastly superior to other loan interest rates. While the employee believes they are saving money, they are losing in the long run because they are not earning what they would have if they had left their money in their retirement account. As a result, the interest rate calculation should be added to I.R.C. § 72(p) and should be calculated using the same formula banks use for personal loans. This would make these loans seem much less attractive and would help the participant earn a steady return of their loan to themselves.

I.R.C. § 72(p) should also be amended to specifically enumerate reasons that a participant can elect a loan. Right now, this process is determined by plan and the reasons can vary widely. This function would look similar to how the reasons are currently listed in I.R.C. § 72(t). In fact, many of the reasons from I.R.C. § 72(t) should be re-categorized as loans. Penalty-free withdrawals for I.R.C. § 72(t)(2)(A) subsections (v) and (vi) should be removed from the list and subject to I.R.C. § 72(t)(1). Early Withdrawals from a retirement account should be made only when absolutely needed to avoid dire consequences like homelessness or when mandated by the courts like a qualified domestic order in a divorce proceeding. The purpose of retirement accounts is to ensure that participants have money to support themselves when they stop working and should not be used to make major purchases or as income supplement.

Next, the age that participants receive a penalty-free withdrawal should be increased to match Social Security NRA. I.R.C. § 72(t)(2)(A)(i) should state that the age to receive penalty-free withdrawal is aged sixty-two. Currently, participants are encouraged to begin withdrawing from their retirement accounts prior to when many of them are able to retire. The money may be used for any purpose or no purpose at all. This means that when the participant retires, the amount of money that they will be able to use each month will be decreased. To reduce the likelihood of this occurring, the penalty-free withdrawal period should match when participants are able to receive Social Security. This would still allow retirees to cover additional household expenses not covered by Social Security or allow them to spend the money in whatever way they please at that age.

Lastly, this amount should be tied to 26 C.F.R. 1.411(a)-7 for normal retirement age and I.R.C. § 401(a)(9) for required minimum distributions. These three provisions are interconnected and should be thought of cohesively. Ensuring that 26 C.F.R. 1.411(a)-7 and I.R.C. § 72(t)(2)(A)(i) are tied together with help to create consistency within the tax policy. Since the ages for these two provisions continue to increase, I.R.C. § 401(a)(9) will need to increase by a commensurate amount to ensure that NRA is not the same as the date for RMDs.

Additional protective measures are required to attempt to maximize the amount participants have in their accounts when they retire. These paternalistic measures mimic protections in place for DB plans to protect retirement savings from employers and should be in place in DC plans to continue to protect employees' retirement savings.

Financial Education

The United States retirement system is going through a transformative period from relying primarily on DB plans to support retirees to DC plans where the retiree must prudently manage their investments to ensure they will have enough money to sustain them through retirement. The retirement system is not designed to adequately support participant and later retirees in this task. Our retirement model currently requires participants to be knowledgeable about a wide range of financial terms, investment offerings, and strategies; however, it does not provide participants with the resources to make informed decisions.

Including financial education in a retirement plan is something that has been contemplated for decades and in 2007 the ERISA Advisory Council formed a Working Group on Financial Literacy of Plan Participants. The Working Group recognized in 2007 that we did not have the infrastructure in place to adequately facilitate the transition from DB to DC plans. The Working Group sought to identify items which "would enhance the ability of plan participants to manage assets throughout their financial life cycle." [170] The recommendations of the Working Group were never adopted, but pieces of their advance are just as relevant now as they were 15 years ago. We must work to educate students in K-12 about finances because financial habits start early and we must provide financial education to those who are participating in employer-sponsored plans and IRAs so they are aware of the risks and the responsibilities inherent in DC plans.

K-12 Education

The current generation of students of K-12 students will be among the first to retire primarily on employer-sponsored DC plans and IRAs. This means that they will need a good working knowledge of financial principles and ideas to be able to understand their investment statement, manage their account, and make informed investment decisions. Currently, a majority of our country is financially illiterate and cannot manage the day-to-day responsibilities of paying bills on time, having emergency savings, and debt reduction. Managing a requirement requires all of these skills and more. This means that we need to include a financial education or a personal finance class as a requirement to graduation from high school or obtain a GED.

Empowering children to have an "open, respectful, and comfortable relationship with money" will provide them the tools to have the knowledge to manage their personal finances later in life. [171] Teaching these habits through a personal finance course with teachers who are "confident and trained to deliver it adequately" should be added as a graduation requirements and is something that is widely popular in the United States and twenty-six states currently have proposed legislation to do just that. [172] According to the National Endowment for Financial Education, when students are required to take a financial education course they are "more likely to display positive financial behaviors." [173] Developing good financial habits and teaching students about financial terms help them to better understand their options when they are planning for retirement and enable them to make more informed investment and contribution decisions.

Plan Participant and Beneficiary Education

The second prong of education is ensuring that current participants understand their retirement plans and investment offerings to ensure they develop a strategy for retirement. As employers have switched from offering DB plans to offering DC plans, they have been able to lower their potential exposure. DB plans require that employers pay retirees the benefits they promised. DC plans shift that risk to employees. The employee must ensure that they are saving enough money and investing it wisely to have enough money to sustain them through potentially four decades of retirement. This is an overwhelming to conceptualize and it can be challenging to know where to start let alone how much money will be needed. As employers have shifted the retirement risk, it is only fair to increase their fiduciary obligations to ensure they are giving their employees access to the right tools to manage this process.

There are two ways where policies can be altered to better support participants. First, EBSA should "update, expand, and amend [IB] 96-1. In this updated interpretive bulletin, DOL should provide examples of safe harbor financial education programs that would not be considered fiduciary investment advice as defined in ERISA § 3(21)(A)(ii) and 29 C.F.R. § 2519.3-21. Second, ERISA § 404(c) should be amended to require employer-sponsored retirement plans to offer financial education that provides employees access to resources that explain financial concepts.

The first step would be to amend ERISA § 404(c) which currently does not require employers to provide participants and beneficiaries with investment advice or investment education. [174] Employers should be required to provide investment education and encouraged to provide employees access to investment advice. Money in a DC plan has investment risks, longevity risks, and inflation risks that require an understanding of many financial concepts to manage. Since employers have divested themselves from the inherent risks involved in planning for retirement, they should bear the smaller cost of educating their population on the transferred risk. Employers would have the ability to provide financial education in a variety of formats and select the topics these resources would cover. This will allow employers to tailor their financial education based on the demographics of their workforce or frequently asked questions. A likely concern that would be raised is whether employers will have increased fiduciary obligations and now be considered to provide investment advice.

ERISA § 3(21)(A)(ii) and 29 C.F.R. § 2519.3-21 state when investment decisions of plan participants and beneficiaries constitute "investment advice" and thereby raise the potential for liability under ERISA. [175] Requiring that plans provide financial education to participants will raise concerns among plan sponsors about being considered investment advice fiduciaries. ERISA § 404(c) states when a participant or beneficiary has excised independent judgment over the assets in their account and the consequences of such control. [176] The DOL Interpretive Bulletin (IB) 96-1 states that investment-related information and materials to participants and beneficiaries would not ordinarily adversely affect ERISA § 404(c). [177] Providing employers with safe harbor financial education plans that provide a comprehensive financial education to participants would ameliorate the concerns surrounding potential employer liability while still providing employees access to the information that they need.

In *Hughes v. Northwestern University*, the United States Supreme Court acknowledged some of the overt perils in our current retirement system and clarified that employers' fiduciary duties mean that they may only include prudent investments. [178] This means that an employer can no longer avoid liability by having an excessively long number of investments nor a mix of high costs and lost cost investments. [179] Employers must now ensure that they monitor the investment choices and determine which investments may be prudently included in the plan. [180] This shifts some of the burden for deciding on investments to the employer to ensure they are offering participants prudent options. The United States Supreme Court provided some additional protections for participants in *Hughes v. Northwestern University*, however, the investment changes in Hughes are an ineffective assistance without understanding the context of the investments. [181]

The ruling in *Hughes*, while helpful, is not sufficient alone to prepare participants for the retirement landscape and they require more protections. Ensuring that investments are financially prudent is the first step, but ERISA § 404(c) must be updated to require employers to provide financial education. Participants must understand the importance of the investments that they are choosing to ensure that it helps them achieve their financial and retirement goals.

NEXT STEPS

The American retirement dream is at risk, but we are starting to see progress. Congress and the United States Supreme Court have both recently taken actions to help increase access to retirement plans and simple account management. Additionally, Congress is considering additional legislation that would further assist participants saving for retirement.

In 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act. [182] The SECURE Act could allay some concerns by making it easier and less expensive for small business owners to implement retirement plans; make more part-time workers eligible to participant in an employer-sponsored retirement plan; allow individuals to use 529 plan money to repay student loans; and increase the age for participants to take required minimum distributions. [183] While it is too early to quantify the impact that the SECURE Act has had on access to retirement plans, the provisions in the SECURE Act should allow for wider access to employer-sponsored retirement plans. Additionally, the Act will allow Millennials and Gen Z to use a tax advantaged 529 plan to pay off student loan debt. These changes are all steps in the right direction; however, these are not the most critical changes that are needed to substantially ensure retirement goals for all Americans.

In March 2022, the House of Representatives passed a bill called the Securing a Strong Retirement Act (aka SECURE Act 2.0). [184] If passed by the Senate, this bill would expand automatic enrollment, increase catch-up contribution limits, further delay required minimum distributions, and increase the tax credits for small businesses. [185] The change to automatic enrollment would allow employers to automatically enroll participants at three percent and increase their deduction by one percent annually until it reaches ten percent. [186] This would help to alleviate the problems with inertia because participants would have to opt-out rather than opting into the plan. The change could also incentivize small businesses to offer retirement plans.

While both the SECURE Act and SECURE Act 2.0 would likely have a positive impact on retirement readiness, they do not contain any provisions which would alter Social Security. Social Security is the foundation of the retirement system in the United States and changes to this institution are critical for financial stability in retirement. To ensure the United States has a fiscally sound retirement system, we must (1) continue to encourage additional savings by changing the IRA contribution and catch-up limits to match that of employer-sponsored retirement plans and increasing the contribution and catch-up limits for both employer-sponsored retirement plans and IRAs; (2) improve Social Security sustainability by eliminating the Social Security Wage Base, increasing the payroll tax, increasing normal retirement age, and tying normal retirement age to an actuarial life expectancy tables; (3) reduce plan leakage by reducing penalty-free withdrawal reasons and increasing the age to receive penalty-free withdrawals; and (4) create more comprehensive financial educational programs that are widely accessible so that people understand the importance of concepts like saving, 401(k), inflation, diversification and compounding interest.

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