SECURE Retirement Legislation on Hold in the Senate

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Congress will soon be returning to Washington from its summer recess. The question for those interested in retirement policy is whether pension reform will finally move forward this year. The answer will depend on whether several key senators agree to lift the "holds" they have placed on the legislation.

Background

Over the last 10 years, various retirement reform proposals have been introduced in Congress. In 2016, Orrin Hatch (R-UT) and Ron Wyden (D-OR) jointly introduced the Retirement Enhancement and Savings Act of 2016 (RESA). This bill pulled together a number of ideas for retirement reform that had been under consideration. Noteworthy was the fact that the co-sponsors of the bill were the two highest ranking members of the Senate Finance Committee, the Republican Chairman and the Democratic Ranking Member.

Before it was introduced, the bill's provisions were carefully negotiated so as to be acceptable to both parties. Anything controversial was omitted to ensure bi-partisan support. As a result, the bill passed out of the Senate Finance Committee by a unanimous vote.

The belief at the time was that RESA would be ripe for passage during the lame duck session of Congress after the 2016 elections. Unfortunately, Congress adjourned without taking up the measure. As a result, the bill "died" when the 114th Congress ended.

RESA was reintroduced during the next session of Congress, which began in 2017. The bill stalled as Congress focused on the top Republican priority, passage of the Tax Cuts and Jobs Act. Supporters once again hoped that RESA would be considered during the lame duck session following the 2018 mid-term elections. Many thought Congress would pass RESA to honor its then co-sponsor, Orrin Hatch, who was retiring at the end of that term. Other political matters intervened and once again, Congress adjourned without considering the legislation.

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The SECURE Act of 2019

In 2019, the 116th session of Congress began and pension reform is again front and center. RESA was reintroduced in both the House and the Senate earlier this year. Then, in late March, Richie Neal (D-MA), Chairman of the House Ways and Means Committee, introduced the Setting Every Community Up for Retirement Act of 2019 (SECURE). SECURE is very similar to RESA. Some of the highlights include:

- Pooled Employer Plans (open MEPs) would be permitted;
- Plan fiduciaries would be given a new safe harbor standard to assist in prudently selecting an annuity provider for the plan;
- The "stretch" IRA would be eliminated;
- A new disclosure would be required on defined contribution plan benefit statements which would provide an estimate of the lifetime income stream that a participant could expect at retirement based on his or her current account balance;
- An employer sponsoring a 401(k) plan would have to offer long-term, part-time workers the opportunity to make elective deferral contributions;
- The deadline to formally adopt a new plan would be extended to the due date of the employer's tax return;
- The required beginning date for minimum distributions would be moved back to age 72 (from 70½);
- A single, aggregated Form 5500 would be permitted for groups of plans that share common trustees, fiduciaries, and investments;
- The annual safe harbor notice for plans using the non-elective safe harbor contribution design would be eliminated; and
- Plan loans made though credit cards would be prohibited.

The SECURE Act has strong bi-partisan support. On May 23, 2019, it passed in the House of Representatives by a vote of 417–3. The bill was immediately sent to the Senate for consideration, where it has languished. Senate Majority Leader Mitch McConnell (R-KY) has made approving federal judges a top Republican priority. Consequently, he is unwilling to spend precious floor time in the Senate considering pension reform legislation, at least for the time being.

As an alternative, supporters of SECURE sought to have the bill approved in the Senate by a unanimous consent vote, which could be done expeditiously without the need for debate or floor time. There was hope that the bill could be passed in this fashion ahead of the Memorial Day recess. However, this approach requires unanimity, which means any one senator can place a "hold" on the bill to delay the vote; and that is precisely what happened as several senators have raised concerns with SECURE.

There are several sticking points. Ted Cruz (R-TX), the most vocal objector, has taken issue with a last-minute decision to remove a provision that would have permitted home schooling and charter

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school expenses to be paid from a section 529 plan. (Senator Cruz had previously sponsored standalone legislation with similar provisions.) The SECURE Act, as passed out of the House Ways and Means Committee, permitted this expanded use of section 529 funds. Democratic leadership, however, dropped the provision from the language of the bill before it came to the House floor. Apparently, some members of the Democratic caucus thought the expansion to cover charter schools and home schooling expenses would hurt the public education system and lobbied leadership to have it removed. Senator Cruz has objected to the provision being dropped, and he wants to add it back. He hopes to do so by bringing the bill to the floor of the Senate where it can be amended (which can't be done if passed by unanimous consent). He remains firm in his resolve because it is uncertain whether any other tax legislation will move through Congress before the 2020 elections, and he wants Section 529 expansion to be enacted as soon as possible.

Other Republican senators have complained about the mandate in SECURE that an employer who offers a 401(k) plan must allow long-term, part-time employees to make elective deferral contributions. This provision was not included in any previous iterations of RESA and was likely inserted into SECURE at the behest of Chairman Neal. Many believe it will cause administrative nightmares and act as a disincentive to plan formation, and therefore it needs to be more fully vetted before being considered for a vote.

What's Next?

Congress is in recess and will return to Washington after the Labor Day holiday. Various trade associations, particularly those representing insurers and the financial services industry, are continuing their advocacy efforts in hopes of convincing the objecting senators to release their "holds." It is unclear whether they will be successful. It is equally unclear whether Senate Majority Leader Mitch McConnell (R-KY) will relent and allow for precious floor time in the Senate to be spent on a retirement policy bill.

Another possibility is for SECURE to be added to a "must pass" bill that will require consideration and floor time before year end, Senator McConnell's priorities notwithstanding. For example, to avoid a government shutdown, a budget bill funding the federal government's new fiscal year beginning October 1st will have to be enacted between now and then (or at least a continuing resolution to provide stopgap funding). SECURE could be made part of that bill and passed as a package. Much will depend, however, on the political landscape as we approach next year's elections.

Given the broad bi-partisan support backing SECURE, it is still more likely than not that it will get through Congress and to the President's desk by the end of the year. Then again, the same was said of RESA in 2018, and yet it never came up for a vote. The prospects for the bill's passage next year will become more challenging as the election cycle kicks into high gear. Plan sponsors and retirement plan professionals should keep a watchful eye on Washington as passage of SECURE will significantly affect retirement policy in America.

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