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Are We on the Verge of the Next Big Pension Bill? A Review of the House-Passed Family Savings Act

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While the eyes of the nation were focused on the Senate confirmation hearings for Brett Kavanaugh, the House of Representatives quietly passed the Family Savings Act of 2018 (H.R. 6757) on September 27th. The Family Savings Act, which is one of three tax bills clearing the House as part of the Republicans' push for ''Tax Reform 2.0,'' contains a series of proposals designed to enhance Americans' retirement security and increase other savings. Some of the proposals contained in the Family Savings Act are new, but many have been taken from previously introduced legislation — most substantially, from the Retirement Enhancement and Savings Act (S. 2526, hereinafter RESA).

Gaining passage through the House, of course, does not mean that we will see the Family Savings Act signed into law any time soon. The bill must first overcome what is typically the most challenging hurdle for any law — the Senate's de facto 60-vote threshold. The Family Savings Act, however, is different from many House-approved bills because a significant portion of the package — i.e., the portion taken directly from RESA — already enjoys bipartisan support in the Senate.

Nevertheless, the Family Savings Act's prospects in the Senate remain very uncertain. It is unclear how the Senate will respond to the Family Savings Act proposals that were not included in RESA and whether the Senate will agree with the House's omission of certain provisions that were part of the original RESA package. Moreover, it is even more uncertain how the results of the upcoming elections will impact both chambers' ability to pass legislation in the few days remaining in the 115th Congress.

In this article, we will briefly discuss how RESA came about in the Senate and summarize the provisions that made it into the Family Savings Act. Next, we will discuss the Family Savings Act and dive into the provisions that do not overlap with RESA. Finally, we will conclude by discussing the factors that will be most relevant in determining whether a retirement and savings package can get signed into law by the end of this year.

RESA's STAGGERED JOURNEY

In the run-up to the 2016 elections, which were largely predicted to result in at least two more years of divided government, Senate Finance Committee Chairman Orin Hatch (R-UT) called upon his Finance Committee colleagues to do something unique – cobble together a bipartisan and commonsense legislative package aimed at addressing longstanding retirement issues. The ground rules were simple – the package should only include non-controversial retirement proposals and it should be revenue neutral. If neither party would have exclusive control over the policymaking levers in Washington in the coming years, why not work on a commonsense retirement package with support from both sides?

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Those efforts ultimately resulted in the Senate Finance Committee unanimously approving a suite of retirement provisions collectively known as RESA. The package included roughly two dozen proposals that would refresh the tax code and the Employee Retirement Income Security Act (ERISA) to address many longstanding issues that have been widely viewed as impediments to more Americans achieving a financially secure retirement. While some members of the Finance Committee may not have been thrilled with every provision contained in RESA, there was broad-based support for the package as a whole.

Despite overwhelming approval by the Senate Finance Committee at the end of 2016, RESA has only made modest progress through Congress, until recently. When the 2016 elections handed Republicans the White House, in addition to the House and Senate, the focus of congressional tax-writers pivoted from issues-based tax legislation, like RESA, to pursuing a comprehensive overhaul of the tax code. Those efforts eventually resulted in the legislation referred to as the Tax Cuts and Jobs Act of 2017 (Pub. L. No. 115-97, hereinafter the 2017 tax act). Now, with that broader and more pressing priority out of the way in 2018, Congress has recently been able to return its attention to more routine matters, including the issues that were initially highlighted by RESA and incorporated into the Family Savings Act.

The RESA provisions incorporated into the Family Savings Act would make the following changes:

- **Open MEPs/Pooled Employer Plans.** Unrelated employers would be allowed to participate in a multiple employer plan (MEP), called a ''pooled employer plan,'' that would be treated as a single plan for ERISA purposes. The bill would also generally eliminate the tax code's ''one bad apple'' rule for MEPs. (Notably, this legislative proposal is much broader than a similar regulatory proposal issued by the Department of Labor on October 22, 2018, that would facilitate ''association retirement plans.'' The DOL explained in its proposal that, without legislative action, ERISA constrains DOL's ability to approve open MEPs.)
- **Post-70½ IRA Contributions.** Individuals who have attained age 70½ would be permitted to make non-rollover contributions to traditional IRAs.
- **Portability of Lifetime Income Investments.** Participants would be allowed to take a distribution of a lifetime income investment without regard to any of the tax code's withdrawal restrictions if the lifetime income investment is no longer authorized to be held under the plan.
- **Annuity Provider Selection Safe Harbor.** Plan sponsors would be eligible to use a new fiduciary safe harbor when selecting an annuity provider for their defined contribution plans. This safe harbor builds on existing regulations.
- **Closed Defined Benefit Plans.** Nondiscrimination relief would be provided to closed defined benefit plans.
- **Safe Harbor Nonelective Plans.** The bill would eliminate the safe harbor notice requirement for plans seeking to satisfy the nondiscrimination safe harbors by using nonelective contributions and ease the amendment timing rules for plans seeking to become nonelective safe harbor plans.
- **Plan Adoption Deadline.** An employer would be allowed to adopt a new plan for a taxable year as long as the plan is adopted by the due date for the employer's tax return for that year (including extensions).
- **Termination of §403(b) Custodial Accounts.** If an employer terminates a §403(b) plan under which amounts are contributed to custodial accounts and the person holding the assets of the account is Internal Revenue Service-approved to serve as an IRA trustee or custodian, then the custodial account would be deemed to be an IRA as of the date of the termination.
- **§403(b)(9) Church Retirement Income Accounts.** The Family Savings Act would clarify the participation rules for church retirement income accounts under §403(b)(9).
- **IRA Contributions Based on Non-Tuition Fellowship and Stipend Payments.** The definition of ''compensation'' on which IRA contributions may be based would be amended to include amounts included in gross income and paid to an individual to aid the individual in the pursuit of graduate or postdoctoral study.
- **Prohibition on Credit Card Loans.** Plan loans made through the use of a credit card or any other similar arrangement would be treated as a distribution.

THE FAMILY SAVINGS ACT

Although the Family Savings Act and RESA significantly overlap, the suite of retirement proposals in the Family Savings Act materially differ from the retirement package that unanimously cleared the Finance Committee two years ago.

The Family Savings Act contains four retirement proposals that were not contained in RESA. Those proposals would: (1) exempt taxpayers with modest retirement savings from having to take minimum distributions during their lifetime; (2) create new tax

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preferences for individuals tapping into their retirement accounts when welcoming a new child to the family; (3) modify the ''pick-up'' contribution rules for state and local governmental plans to allow those plans to offer employees a choice between two benefit formulas; and (4) permit certain individuals serving in a reserve component of the military to contribute more money than is permitted under present law to their retirement plans.

In addition to those retirement-related changes, the Family Savings Act also includes a few provisions that are geared towards increasing Americans' savings more generally. Most prominently, the bill contains a proposal that would create a new kind of savings vehicle called a Universal Savings Account. If enacted, after-tax contributions to a Universal Savings Account could grow and be distributed tax-free regardless of when or why distributions are being made. Additionally, the Family Savings Act would expand the permitted uses for 529 accounts, which are Roth-like savings vehicles intended to promote education savings.

The Family Savings Act provisions not contained in RESA are more fully summarized below:

- **Universal Savings Accounts.** This provision would create a tax-preferred savings vehicle — the Universal Savings Account — that would be taxed like a Roth IRA, but for which there would be no penalty for distributions before retirement. The annual contribution limit would be the lesser of $2,500 or the amount of compensation earned during the year.
- **RMD Relief for Small Balances.** This provision would provide an exemption from the required minimum distribution rules for individuals whose aggregate balance under all IRAs, qualified defined contribution plans, §403(b) plans, §403(a) plans, and governmental §457(b) plans does not exceed $50,000 (indexed), as of the last day of the year. This exemption would not apply to defined benefit plans.
- **Qualified Birth or Adoption Distributions.** This provision would allow a plan or IRA distribution of up to $7,500 without imposition of the 10% penalty for early distributions, if made within one year of a birth or adoption. The bill would allow these amounts to be repaid and treated as if they were rollover contributions. Conceptually, this new type of distribution would share many similarities with the special tax treatment extended to retirement plan distributions in the wake of recent natural disasters, like Hurricane Harvey.
- **Governmental Plan ''Pick-Up'' Contributions.** This provision would provide that an employee contribution to a governmental plan does not fail to receive favorable ''pick-up'' treatment as an employer contribution solely because an employee may make an irrevocable election between the application of two alternative benefit formulas involving the same or different levels of employee contributions.
- **Elective Deferrals by Ready Reserve Members.** For members of the Ready Reserve of a reserve component of the Armed Forces, the annual limitation on elective deferrals, including the additional limitation for catch-up contributions, would apply separately with respect to: (1) elective deferrals of compensation received for service as a member of the Ready Reserve; and (2) all other elective deferrals of such qualified ready reservist.
- **Expanded 529 Rules.** The Family Savings Act would permit 529 accounts to make tax-free distributions to pay for all elementary and secondary school expenses and certain homeschooling expenses, up to an annual limit of $10,000. It would also permit 529 accounts to make tax-free distributions to repay student loans, up to a lifetime limit of $10,000. Finally, the Family Savings Act would newly permit unborn children to be named as an account beneficiary, and permit tax-free distributions to pay for certain apprenticeship programs.

PROSPECTS FOR YEAR-END RETIREMENT LEGISLATION

At this stage, it is highly uncertain whether the Family Savings Act, or similar legislation, will be able to successfully navigate its way into law by the end of the year. Although the Family Savings Act provisions that overlap with RESA achieved substantial bipartisan support in the Finance Committee two years ago, to state the obvious, the Family Savings Act is not RESA, 2018 is not 2016, and Congress is far from predictable. Nevertheless, all of the following considerations will play a crucial role in determining the fate of the Family Savings Act and RESA in the final days of the 115th Congress.

As discussed above, the Family Savings Act contains significant provisions that were not part of RESA, like the proposal to establish Universal Savings Accounts. According to estimates produced by the Joint Committee on Taxation (JCT), those provisions alone would reduce federal revenues by roughly $17 billion over the next 10 years. By comparison, JCT estimated that the 2016 RESA package would increase federal revenues over a 10-year period, albeit by a very modest amount. Although we know that privately there is some concern among Senators about some of these new proposals, Senate leaders have not

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publicly expressed a judgment as to which of these provisions could achieve 60 votes.

The Family Savings Act also omits certain provisions that were part of the 2016 version of RESA. For example, Congress already passed RESA's provisions affecting hardship and loan distributions as part of the 2017 tax act and the Bipartisan Budget Act of 2018. Beyond those already enacted provisions, the Family Savings Act also omits a series of RESA provisions that would, if enacted: (1) require new participant disclosures illustrating how §401(k) account balances would convert to a stream of lifetime income; (2) accelerate the after-death distribution rules for certain non-spouse beneficiaries; (3) remove the 10% cap on automatic enrollment safe harbor plans; (4) increase tax incentives for small employers newly offering a retirement plan or adopting automatic enrollment; (5) consolidate Form 5500 reporting for employers adopting nearly identical plans; (6) provide Pension Benefit Guaranty Corp. premium relief for certain types of defined benefit plans; and (7) broaden permitted IRA investments. It is unclear whether any of those provisions, or a collection of those provisions, will be critical to securing support from the Senate.

Notwithstanding these differences, there is still significant bipartisan support for many of the provisions that overlap between the Family Savings Act and RESA, including the signature open-MEP proposal that would permit the employees of unrelated employers to participate in a single retirement plan. That concept, which is intended to unleash new economies of scale for small employers, was not only promoted as the subject of a recent executive order from President Trump, it was also floated as a proposal in former President Obama's FY 2017 budget. Ideas sharing such broad support are rare in Washington and have a serious chance of eventually becoming law, despite the constraints of heightened partisanship.

Policy considerations aside, it is important to conclude by recognizing how important political and practical considerations will be in determining whether Congress will approve year-end retirement legislation. The upcoming mid-term elections could bring dramatic shifts to the balance of power in Washington and it is uncertain how congressional leaders will operate in the lame duck session to follow. Moreover, regardless of the mid-term results, there is not much time remaining on the congressional calendar for the 115th Congress. Thus, even if the policy and politics of year-end retirement legislation line up, lawmakers may simply run out of time in this congress. If that happens, we fully expect the proposals in RESA and the Family Savings Act to be reconsidered in the 116th Congress.

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