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House Tax Writers Unanimously Approve the SECURE Act: Retirement Changes Inch Toward Finish Line

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INTRODUCTION

On April 2, 2019, the House Committee on Ways and Means unanimously approved a package of retirement enhancements called the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). That suite of proposals, although approved for the first time under this name, is primarily composed of ideas that have been working their way through Congress as part of the Retirement Enhancement and Savings Act (RESA) over the past two years. In many ways, this latest push for wide-ranging retirement updates reminds us of the incremental development that is typical of technology products from generation to generation.

Think of your newest smartphone. It probably looks and feels a lot like your previous phone, but with a few modest improvements to the apps you already use, a few completely new features, and hopefully the same charging cable. When taking it out of the box, it feels familiar and you know there is not much of a learning curve. If you are familiar with RESA and the other ideas that have been packaged with it in recent years, the SECURE Act should feel as familiar to you as that next generation smartphone. In fact, we have reviewed prior versions of this package before, so please consult our October 2018 article[1] for additional background on RESA and the Family Savings Act, and our June 2018 article[2] for background on the policy underpinnings of open multiple employer plans (MEPs).

Despite all its similarities, however, the SECURE Act does include a few noteworthy changes that differ from RESA and other recent packages designed around its core provisions, like the Family Savings Act that cleared the Republican-controlled House in Fall 2018. Some of these recent alterations reflect the shift in House control following the 2018 elections and the fingerprints of new Ways and Means Committee Chairman Richard Neal (D-MA).

In this article, we will briefly review the SECURE Act provisions that have been taken from RESA. The discussion of those proposals is truncated and assumes familiarity with RESA, so please consult our prior articles for more details. Next, we will discuss the SECURE Act provisions that were not included in the traditional RESA package. Finally, we will offer our thoughts on the SECURE Act's prospects for enactment.

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[1] Michael Hadley & Adam McMahon, *Are We on the Verge of the Next Big Pension Bill? A Review of the House-Passed Family Savings Act*, 46 Tax Mgmt. Comp. Plan. J. No. 11 (Nov. 2, 2018).

[2] Michael Hadley & Adam McMahon, *Narrowing the Coverage Gap by Expanding Access to MEPs,* 46 Tax Mgmt. Comp. Plan. J. No. 6 (June 1, 2018).

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CORE RESA PROVISIONS LARGELY REMAIN UNCHANGED

With very few exceptions, the SECURE Act includes nearly all of the retirement enhancements that were included in the original RESA package approved unanimously by the Senate Finance Committee at the end of 2016. In fact, the only provisions in the original RESA package that do not appear in the SECURE Act are those proposals that have already been signed into law or are unrelated to retirement savings and a modest change that would broaden the types of investments that can be held in an IRA.

Increased Access and Savings. Like RESA, the SECURE Act includes a series of changes that are designed to increase access to employer-sponsored retirement plans and increase savings across all retirement accounts. This includes RESA's open MEP proposal that would allow multiple unrelated employers participating in a "pooled employer plan" to be treated as a single plan for purposes of the Employee Retirement Income Security Act (ERISA). Unlike prior versions of this open MEP proposal, the SECURE Act includes new language that is designed to ensure that small employers participating in an open MEP can receive the Startup Credit when joining a MEP.

Beyond open MEPs, the SECURE Act also incorporates RESA's administrative simplifications for employers who offer their employees a §401(k) plan under one of the Internal Revenue Code's (Code's) nondiscrimination safe harbors and a provision that would increase the maximum Startup Credit available to small employers to as much as $5,000. The SECURE Act also includes a change that would streamline Form 5500 reporting by allowing nearly identical defined contribution plans to file a single Form 5500 if they share key attributes, like the same named fiduciary and investment lineup. Although this Form 5500 proposal was included in the original RESA package, it was not included in the Family Savings Act that passed the House last fall.

Also like RESA, the SECURE Act includes multiple proposals that are designed to increase savings across all types of retirement accounts. This includes a new tax credit for small employers that adopt automatic enrollment, a change that would allow safe harbor plans to automatically escalate participants to defer up to 15% of their pay (rather than capping it at 10% as under current law), and a proposal that would allow individuals who have reached age 70½ to contribute to a traditional IRA.

Lifetime Income. In nearly identical fashion, the SECURE Act also borrows RESA's proposals that focus on the importance of lifetime income solutions. This includes, for example, a change that would promote lifetime income by prescribing an improved fiduciary safe harbor for plan sponsors selecting annuity providers and a provision that would make lifetime income investments portable when they are no longer authorized under an employer-sponsored plan. Additionally, the SECURE Act would require defined contribution plans to annually include a lifetime income disclosure on benefit statements that are sent to participants. This new disclosure would estimate the monthly payments that participants could expect to receive if their current account balance were annuitized.

Defined Benefit Plans. Like RESA, the SECURE Act would offer significant relief for certain defined benefit plans. Most notably, the SECURE Act would provide nondiscrimination relief to certain "closed" defined benefit plans and reduce the Pension Benefit Guaranty Corporation (PBGC) premiums owed by defined benefit plans made available by cooperatives and small employer charities.

SECURE ACT PROVISIONS NOT FOUND IN RESA

Although most of the SECURE Act overlaps with RESA, the SECURE Act is not simply a rebranded version of RESA. Importantly, the SECURE Act includes new proposals that were not included in the original RESA package. Some of these provisions were developed as part of the Family Savings Act under the leadership of former Ways and Means Committee Chairman Kevin Brady (R-TX). Others reflect the preferences of current Ways and Means Committee Chairman Richard Neal and his desire to see broad retirement changes signed into law.

The SECURE Act provisions that were not included in the original RESA package are summarized below:

- **Required Beginning Date Raised to Age 72**. Under the SECURE Act, distributions from retirement plans and IRAs would not be required until after an individual reaches age 72. This change is intended to update the Code's minimum distribution rules to account for longer life expectancies. Under current law, distributions generally must begin shortly after age 70½.

- **Long-Term Part-Time Employees**. The SECURE Act would generally require employers to allow employees that have worked at least 500 hours in three consecutive years to participate in their §401(k) plan. Under current law, employers can exclude employees who do not work at least 1,000 hours during a 12-month period. The SECURE Act's exception to this 1,000 hour rule is sometimes described as a change that is intended to help more women save for retirement because

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women are more likely to work part-time than their male counterparts, and in fact, this provision has appeared in a bill called the ''Women's Pension Protection Act.'' Under the SECURE Act, employers would not be required to make nonelective or matching contributions on behalf of employees who become eligible to participate in a plan pursuant to this new rule for long-term part-time employees. Also, these long-term part-time employees could be excluded from nondiscrimination and top-heavy testing.

- **Penalty-Free Withdrawals for Births and Adoptions**. The SECURE Act would permit retirement savers to make penalty-free withdrawals of up to $5,000 in connection with the birth or adoption of a child and would allow a plan sponsor to offer such a distribution even if in-service distributions were otherwise unavailable. This provision, which originally appeared as part of the House-passed Family Savings Act, would also permit retirement savers to recontribute birth and adoption withdrawals to a workplace retirement plan or IRA, in which case the recontribution would be treated similar to a rollover.
- **529 Improvements**. The SECURE Act also borrows from the Family Savings Act by including a series of changes that would expand the permitted uses for 529 education savings accounts. As approved by the Ways and Means Committee, tax-free distributions could be taken from 529 accounts to repay student loans, up to a lifetime limit of $10,000. Tax-free distributions could also be taken to pay for all elementary and secondary school expenses and certain homeschooling expenses, up to an annual limit of $10,000. Finally, tax-free distributions could be taken to pay for certain apprenticeship programs. Unlike the Family Savings Act, however, the SECURE Act would not permit unborn children to be named as an account beneficiary.
- **Community Newspaper Minimum Funding**. The SECURE Act would provide minimum funding relief to certain community newspapers that offer their employees a traditional defined benefit pension plan. To be eligible for this relief, participant benefits must have been frozen no later than December 31, 2017.
- **Foster Care Difficulty of Care Payments**. ''Difficulty of care payments'' are payments made to foster care providers as compensation for providing additional care to foster children with physical, mental, or emotional handicaps. Under current law, workers that only receive difficulty of care payments cannot contribute them to qualified retirement plans or IRAs because such payments are not considered compensation for purposes of the Code's contribution limits. The SECURE Act would amend those contribution limits to permit difficulty of care payments to be contributed to qualified retirement plans and IRAs.

REVENUE RAISERS INCLUDE IMPORTANT 'STRETCH' CHANGES

The SECURE Act's retirement enhancements are expected to reduce federal revenues, or at least delay them, because more Americans will be able to save more money through tax-deferred savings vehicles. Accordingly, in an effort to offset these costs, the SECURE Act includes a block of provisions that would offset its estimated costs over the next ten years. These so-called revenue raisers, which are largely taken from the original RESA package, would: (1) increase the minimum penalty for failing to file tax returns; (2) increase the penalties for failing to file and furnish certain retirement-related documents, including a failure to file Form 5500; (3) make it easier for the government to enforce an excise tax unrelated to retirement savings; and (4) accelerate the required distribution period for certain designated beneficiaries of retirement plans and IRAs.

The most relevant of these proposals for retirement plan sponsors and participants is, of course, the proposal that would accelerate the required distribution period for certain designated beneficiaries. This proposal, which has appeared in RESA since it was first conceived in 2016, is commonly referred to as the ''stretch'' provision because it would prevent certain designated beneficiaries from stretching out tax liabilities that arise from inherited retirement accounts. The SECURE Act, as further explained below, significantly alters the stretch provision that was included in the original RESA package and the version of RESA most recently introduced in the Senate.

Under the SECURE Act, individual designated beneficiaries for defined contribution retirement plan accounts and IRAs (including IRA annuities) would generally be required to draw down their entire inherited interest by the end of the tenth calendar year following the year of the employee's or IRA owner's death. There would, however, be an exception to this ten-year rule for ''eligible designated beneficiaries,'' which are defined to include surviving spouses, children under the age of majority, disabled or chronically ill individuals, or any person who is not more than ten years younger than the retirement plan participant or IRA owner. Eligible designated beneficiaries, unlike other beneficiaries, could opt to receive their inherited interest over their life or over a period not exceeding their life expectancy. Notwithstanding this special dis-

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tribution period for eligible designated beneficiaries, the ten-year rule would apply after the death of an eligible designated beneficiary and after a minor child reaches the age of majority.

By comparison, under the stretch proposal found in RESA, designated beneficiaries (other than eligible designated beneficiaries) would be required to draw down a portion of their inherited interest within **five** years of a decedent's death, instead of **ten**. Also unlike the SECURE Act's stretch provision, RESA would only apply this fixed distribution period to larger inheritances. For example, under the original RESA package, the five-year rule would only apply to the extent that a decedent's aggregate account balances under all IRAs and defined contribution plans exceed $450,000. In contrast, under the most recent version of RESA introduced in the Senate earlier this year, the five-year distribution period would only apply to the extent that any designated beneficiary's interest exceeds $400,000. Although the Senate's latest version includes a slightly lower exemption threshold, it should be much easier to administer than prior versions when a decedent has multiple beneficiaries. This is because the latest version of RESA would implement the $400,000 exemption at the beneficiary level, as opposed to the decedent level.

PROSPECTS FOR ENACTMENT

With the Ways and Means Committee approving the SECURE Act so early in this 116th Congress, we have never been so close to seeing the retirement reforms originally assembled as RESA signed into law. However, like prior efforts to enact many of these retirement enhancements, the SECURE Act's future will depend on policy, political considerations, and procedural opportunities.

From a policy perspective, the SECURE Act faces few hurdles. The bill would increase access to employer-sponsored retirement plans, promote greater savings, and make other commonsense updates to the private retirement system that are supported by the retirement industry and participant groups alike. While a few of the SECURE Act's provisions have faced some criticism from quarters within the retirement policy community, the vast majority are viewed favorably. Moreover, as currently drafted, the Joint Committee on Taxation estimates that the SECURE Act will actually increase federal revenues over the next ten years.

From a political standpoint, the RESA provisions at the center of the SECURE Act have long received support from Democrats and Republicans alike. This kind of bipartisanship is increasingly rare, and unlike previous attempts to package RESA with other savings proposals, the SECURE Act does not include any proposals that are likely to raise ideological concerns from any particular strand of the political spectrum. Also, in the mired political landscape of 2019, there are few opportunities for members of Congress to show their constituents that they have actually produced legislation that improves the everyday lives of Americans. The SECURE Act, however, presents such a political opportunity.

Procedurally, the SECURE Act's path to enactment still remains uncertain. On April 25, 2019, House Majority Leader Steny Hoyer (D-MD) announced that House leadership intends to bring the SECURE Act to the House floor for a vote during the May work period and we would expect it to pass. Next steps in the Senate, however, are not clear. At this stage, a standalone package of retirement reforms seems unlikely, although a "pre-conference" in which the House passes a compromise bill that can be immediately passed by Senate is under active consideration. If this does not occur, then the SECURE Act could be combined alongside a larger bill, like the spending bill that Congress must pass in order to avoid another government shutdown this fall or a bill to address the debt ceiling.

Although its path to enactment is very uncertain, the SECURE Act has made significant strides early in this legislative session. This is an important difference from the previous attempt to get RESA's core provisions signed into law in the waning days of the 115th Congress. Accordingly, we are optimistic that retirement reforms are coming soon, as there is plenty of time for Congress to find the right opportunity to push a retirement package over the finish line.

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