

**We believe it is important to keep you informed on the latest proposals and regulations impacting the retirement industry, as well as implications to your business. As such, we are pleased to share the latest edition of the *Retirement Legislation and Regulation Quarterly Bulletin*, prepared by experts at Davis & Harman LLP.**

As the final days of the 115th Congress drew to a close, many were optimistic that Congress would use the lame duck session to pass significant bipartisan tax or retirement legislation. Unfortunately, however, this did not happen. Instead, Congress was unable to avert a partial government shutdown, resulting in a 35-day lapse in appropriations to several government agencies and stalling efforts to pass other legislation. Nonetheless, the members of the newly-convened 116th Congress are pursuing an ambitious retirement agenda. The Retirement Enhancement and Savings Act (RESA) was recently reintroduced, along with several other bills aimed at enhancing and expanding access to retirement savings accounts. These efforts are being spearheaded by longstanding champions of retirement policy like Senators Rob Portman (R-OH) and Ben Cardin (D-MD), who reintroduced the Retirement Security and Savings Act (introduced in the 115th Congress as [S. 3781](#)), as well as by newly-appointed House Ways and Means Committee Chairman Richard Neal (D-MA). Two recent hearings highlight this renewed focus on retirement policy.

**Ways and Means Hearing.** On February 6, 2019, the Ways and Means Committee convened for a [hearing](#) entitled “Improving Retirement Security for America’s Workers.” The hearing focused on a range of retirement topics, including expanding access to and increasing effectiveness of employer-sponsored retirement plans, the solvency of the Social Security program, and the multiemployer pension crisis. By making retirement security the headline issue for the Ways and Means Committee’s second hearing since Democrats regained control of the House, Chairman Neal has signaled that retirement security will be one of the Committee’s top priorities during the current session of Congress.

Throughout the hearing, members of both parties and the witnesses widely supported the suite of retirement proposals collectively known as the Retirement Enhancement and Savings Act (RESA), including its signature provision that would permit unrelated employers to join together to offer retirement benefits to their employees through a multiple employer plan (a so-called open MEP). Chairman Neal and Ranking Member Kevin Brady (R-TX) both expressed support for open MEPs and discussed open MEPs as a solution that would make it easier for employees of small businesses to access a retirement plan through work. This kind of bipartisan support makes RESA a likely centerpiece for any retirement package that may develop over the next two years. On the same day as the Committee’s retirement hearing, Representatives Ron Kind (D-WI) and Mike Kelly (R-PA) reintroduced RESA in the House as [H.R. 1007](#).

Chairman Neal also used the hearing as an opportunity to showcase his Automatic Retirement Plan Act (introduced as [H.R. 4523](#) in the 115th Congress), which would require all but the smallest employers to offer their employees a retirement plan, and the Retirement Plan Simplification and Enhancement Act, which includes various other proposals that would promote automatic enrollment and simplify plan administration. Ranking Member Kevin Brady (R-TX) also discussed his own savings proposals, including the Family Savings Act ([H.R. 6757](#)) that passed the Republican-controlled House last summer but died in the Senate.

**Special Committee on Aging Hearing.** Also on February 6th, the Senate’s Special Committee on Aging convened a [hearing](#) entitled “Financial Security in Retirement: Innovations and Best Practices to Promote Savings.” This hearing, presided over by Chairwoman Susan Collins (R-ME) and Ranking Member Bob Casey (D-PA), focused on the financial challenges facing older Americans as they retire and strategies for improving their overall retirement security. The discussion highlighted measures that Congress could take to make it easier for people to save and for their

employers, particularly small businesses, to establish workplace retirement plans. Chairwoman Collins described two of her retirement bills: the Retirement Security Act of 2019 ([S. 321](#)), which would also enable more businesses to join MEPs, and the SIMPLE Plan Modernization Act ([S. 322](#)), which is aimed at encouraging more small businesses to use SIMPLE plans. Ranking Member Casey advocated for expanding access to workplace plans as well, but also for enhancing the Social Security program and addressing the multiemployer plan solvency crisis.

The two hearings serve as a microcosm of the current retirement policy debate. They both featured several bipartisan proposals to expand access to and enhance employer-sponsored retirement plans, such as proposals on MEPs. However, they also highlighted potential sources of division. For instance, both hearings included robust discussions on the Social Security program and multiemployer pension funding, serving as a reminder that many lawmakers (and their constituents) have other priorities with respect to retirement policy.

**Putting the Puzzle Together.** If it's true that Chairman Neal, a key decision-maker in the House, is interested in passing retirement legislation, and there are strongly supported bipartisan bills in the Senate such as RESA and the Portman/Cardin Retirement Security and Savings Act, how might these pieces ultimately fit together into a single puzzle that could reach the President for signature? It is uncertain what this sort of bill might look like, but a few considerations are likely to inform the legislative process.

First, while RESA could likely pass both chambers in an up or down vote, the longer that RESA lays dormant, the more likely new ideas from Chairman Neal and Senators Portman and Cardin will be attached to the next prominent piece of retirement legislation. Second, it has been historically rare for retirement legislation to gain traction as a standalone bill. Instead, it generally rides along with other must-pass tax or spending legislation. On that front, the opportunities for must-pass legislation are relatively few. Congress will need to pass a spending bill or a continuing resolution by the end of the government's fiscal year (September 30th) to keep the government open. Congress will also need to raise the debt limit; according to the most recent data, the Congressional Budget Office projects this will need to be done early in the next fiscal year. (The temporary suspension of the debt limit ended March 1st, but the government generally collects significant taxes in March and April and can temporarily deploy what have become known as extraordinary measures to avoid default.)

There are, however, headwinds that could make passing even noncontroversial legislation difficult. In the last few years, House and Senate leaders have been reluctant to add provisions to must-pass legislation. In addition, Democrats may be unwilling to agree to retirement legislation unless the funding crisis for multiemployer plans is addressed, which will be hard to accomplish as the parties disagree on the solution. It is also worth keeping in mind that Democrats have recommitted to the "paygo" rules, which require that any new tax cuts be offset by either other tax increases or spending cuts. And retirement legislation tends to *appear* to lose revenue because the federal government budgets in a 10-year window: the more people save, the more the federal government temporarily loses tax revenue through the tax incentives. In other words, and somewhat ironically, the more likely that an improvement like open MEPs would successfully increase coverage, the harder it is to pass. The House and Senate can always waive this 10-year rule, but, as an initial matter, members that put forward retirement provisions that are not revenue neutral are typically required to come up with an "offset" – or a provision that raises an equivalent amount of revenue.

### **Regulatory Update**

The partial government shutdown that ended on January 25th after a record-setting 35 days will likely impact the timing of regulatory guidance from various agencies that govern retirement and benefits policy. The Treasury Department, Internal Revenue Service (IRS), and Securities Exchange Commission (SEC), were all included among the agencies whose appropriations lapsed as a result of the shutdown.

**Regulation Best Interest.** In April 2018, the SEC proposed a new rule called [Regulation Best Interest](#) to establish a standard of conduct for broker-dealers who make recommendations of security transactions or investment strategies involving securities to retail customers. Comments on the proposed rule were due in August 2018, and the SEC is now reviewing the comments it received. On the Fall 2018 unified regulatory agenda, the SEC indicated that it hoped to finalize Regulation Best Interest by September 2019. In the aftermath of the partial shutdown, however, this target will likely have to be pushed back. Nonetheless, SEC Chair Jay Clayton has previously indicated that he intends to bring the final regulation to the Commission for a vote in 2019.

**“One Bad Apple” Rule.** President Trump’s Executive Order on Strengthening Retirement Security in America, issued in August 2018, directed the Secretary of the Treasury to “consider proposed amendments to regulations” addressing the “one bad apple” rule. Under current law, the IRS will disqualify all the employers participating in a MEP if only one of the employers fails to satisfy its qualification requirements under the Internal Revenue Code. This harsh rule often discourages employers from participating in MEPs. The Treasury has indicated in the Fall 2018 unified regulatory agenda that it aimed to release a notice of proposed rulemaking in April 2019. It is unclear how the shutdown has impacted the Treasury’s efforts to draft a proposed rule, but it will likely delay a proposed rule’s release.

**Association Retirement Plans.** One agency that was not directly affected by the partial government shutdown was the Department of Labor (DOL). As we reported last quarter, in October 2018 DOL issued a [proposed rule](#) modifying DOL’s long-standing interpretation of ERISA’s definition of “employer.” The proposed rule represents an effort to provide groups and associations of employers with an additional means of establishing and maintaining a kind of MEP called an “Association Retirement Plan” (ARP). Generally, the comments submitted to DOL support the proposed rule, while some commenters have also suggested that DOL could expand its proposal so that even more organizations could sponsor ARPs and more employers could join. While DOL has not revealed when it will release final rules, this project is a priority for the White House. As such, most expect final regulations will be issued in 2019.

**GAO Retirement Reports.** Policymakers continue to focus on the issue of missing and unresponsive participants, a problem plan sponsors have dealt with for a long time. On February 19th, the Government Accountability Office (GAO) released a [report](#) on the need for the IRS and DOL to clarify the treatment of 401(k) assets that are transferred to state unclaimed property funds. Last year, the IRS released guidance on withholding and reporting with respect to traditional IRA assets that are escheated to state unclaimed property funds, but the guidance does not address assets other than traditional IRAs (e.g., employer-sponsored plans). And while DOL has issued guidance on dealing with missing and unresponsive participants and uncashed checks from terminating plans, DOL has provided little guidance on the same issues with respect to ongoing plans. Along with recommending reporting and withholding guidance from IRS, GAO recommended that DOL specify the circumstances, if any, under which uncashed distribution checks from active plans can be transferred to the states.

Additionally, on February 12th, Senator Patty Murray (D-WA) and Representative Bobby Scott (D-VA) asked GAO to study cybersecurity threats to the private retirement system, citing recent data breaches at financial services providers and the lack of a comprehensive federal framework governing cybersecurity for retirement plan sponsors or service providers.

**Investments and Fiduciary Rules.** One issue DOL may examine in 2019 is the use of alternative investments in plans, including in qualified default investment alternatives (QDIAs). The ERISA Advisory Council’s 2018 reports will include a recommendation for DOL to clarify when lifetime income investments may be included in a QDIA. DOL has a related project on its “long-term” regulatory agenda, but it is uncertain when DOL might address this question. DOL

has also met with investment professionals to discuss the use of non-traditional, non-publicly traded investments in plans. ERISA does not prohibit the use of any particular asset class, but generally all but the largest defined benefit plans have focused on publicly traded investments and registered mutual funds. On the other hand, QDIAs typically, but not universally, concentrate in traditional asset classes.

### **State Outlook**

Outside of Washington, state lawmakers and regulators are considering proposals to establish state-level fiduciary rules and to enact mandatory auto-IRA programs.

**Fiduciary Rules.** The SEC's efforts to enhance the standards of care for financial professionals, discussed above, have been accompanied by legislative and regulatory efforts by the states as well. In Maryland, for instance, the Maryland Financial Consumer Protection Commission recommended that Maryland implement a fiduciary duty standard for various financial professionals. A [bill](#) to do so was introduced in the Maryland General Assembly in February. In 2017, Nevada enacted a law subjecting broker-dealers and investment advisers to a fiduciary standard of care when providing investment advice to their clients. On January 18th, the Nevada Securities Division released [draft regulations](#) to implement the new rule, and a number of the comments submitted expressed concern that the regulations could discourage the provision of education and guidance to retirement savers in the state.

**Auto-IRA Programs.** Generally, state mandatory auto-IRA programs require certain employers in the state that do not already offer a retirement plan to automatically enroll their employees in an IRA account through a program that is established and administered by the state, subject to an employee's decision to opt out. So far, five states (California, Connecticut, Illinois, Maryland and Oregon) and a city (Seattle) have already enacted their own auto-IRA program legislation. In 2019, eight states – and counting – are considering whether to establish their own mandatory auto-IRA programs. Some of these states (i.e., Hawaii, Massachusetts, Minnesota, Missouri, and New Jersey) have already considered the same or similar bills previously, while other states (i.e., New Mexico, Virginia, and Washington) are considering such legislation for the first time. Lawmakers in New Jersey and Hawaii appear poised to establish auto-IRA programs, although prospects are less certain in other states.



# RETIREMENT LEGISLATION & REGULATION

## *Quarterly Bulletin – Q1*

Prepared for Franklin Templeton by Davis & Harman LLP

March 2019

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Franklin Templeton Distributors, Inc.  
One Franklin Parkway  
San Mateo, CA 94403-1906  
(800) DIAL BEN® / 342-5236  
franklintempleton.com

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