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Closed Plan Relief and More Savings Plan Options

A re-proposed Retirement Enhancement and Savings Act (RESA) may be included in the omnibus spending bill due for action by March 23. In addition to relief for closed pension plans struggling to meet coverage and nondiscrimination requirements, RESA would lift the automatic escalation 401(k) cap and revive the multiple employer pension concept for unrelated small employer plans.

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RESA Catapulting Toward Spending Bill?

Chairman Orrin Hatch, R-Utah, and ranking member Ron Wyden, D-Ore., the two leaders of the Senate Finance Committee, reintroduced the Retirement Enhancement and Savings Act (RESA) in S. 2526. The 2016 version of the bill was reported favorably out of the Senate Finance Committee in September 2016 but failed to gain approval on the full Senate floor. Hatch is apparently eager to have the bill enacted before he retires at the end of this year.

In the House, Reps. Mike Kelly, R-Pa., and Ron Kind, D-Wis., along with 18 other Democratic and Republican cosponsors, introduced companion legislation in H.R. 5282 on March 14. With bills live in both chambers, speculation is high that RESA might well be folded into the omnibus spending bill working its way through Congress this week on a fast track to avoid another government shutdown. However, with time growing short, negotiators are apparently resisting the addition of policy items that might trip up final passage.

For employer-sponsored defined contribution (DC) and defined benefit (DB) plans, key provisions in the bipartisan proposal, include:

Closed DB plans. For plans closed by September 21, 2016, or that have five years of history prior to closing without substantial increase in benefits during that period, RESA would suspend benefits, rights, and features testing and the minimum participation rule. In addition, RESA would allow DB cross-testing with DC plans without the need to meet current IRS regulatory conditions and would allow tests to include matching contributions, elective deferrals — including 403(b) contributions — and ESOP allocations. Defined benefit plans using this relief would need to show favorable benefits, rights and features, and general accrual tests without this relief for the year of closure and the two succeeding years and would need to avoid discriminatory amendments.

"Make-whole" contributions to a DC plan to a closed class of participants whose accruals under a DB plan have been reduced or eliminated could similarly be cross-tested and include matching contributions, elective deferrals — including 403(b) contributions — and ESOP allocations and would need to avoid discriminatory amendments. RESA would also offer helpful transition rules for mergers and spinoff situations. (For background on current IRS relief for closed DB plans, please see our *FYI Alert* from September 19, 2016.)

Required minimum distributions. The rules would be modified for individuals who die with aggregate DC plan and IRA assets in excess of $450,000 (subject to indexing for inflation). The general requirement to distribute by the fifth year after the participant's death would apply to the excess unless the designated beneficiary is the decedent's surviving spouse or child under the age of majority, or an individual who is disabled, chronically ill or not more than 10 years younger than the decedent.

> **Comment.** Importantly, the change would not apply to DB plans, thus avoiding disruption for typical 10 and 15 year certain and continuous options typically offered by such plans.

Automatic enrollment/escalation safe harbor default rate. The current 10% cap on automatic elective deferrals would be modified so that after the first year — unless an employee elects otherwise — he or she could be treated as having made an election to defer compensation more than 10%.

401(k) nonelective safe harbor plans. The requirement for a written notice of safe harbor status would be eliminated for plans that intend to satisfy the safe harbor with nonelective contributions (as opposed to matching contributions) and plan sponsors would have an extended period to amend a plan to become a nonelective safe harbor plan — including a post year-end period if a 4% nonelective contribution is provided. (For background on mid-year safe harbor plan changes, please see our February 3, 2016 *For Your Information*.)

Plan loans. Plans would be prohibited from making most loans through credit cards or similar arrangements.

Discontinued lifetime income investments. If a lifetime income investment is no longer available under a plan, the plan may allow a participant to take a distribution of an annuity contract or make a direct transfer of the investment into an IRA or other qualified retirement plan (even if the participant does not have a distributable event — death, disability, attainment of age 59½, or termination of employment).

Lifetime income disclosures. Benefit statements for DC plans would be required to include an annual lifetime income stream disclosure based on the current account balance paid as a single life annuity and a qualified joint and survivor annuity. Statements provided in accordance with yet-to-be-published DOL assumptions, guidance and models would not create any risk of liability under ERISA for the plan fiduciary.

Lifetime income provider selection. DC plan fiduciaries could meet the "prudent man" requirement when selecting an insurer for a guaranteed retirement income contract under a new safe harbor that, among other things, would require the fiduciary to engage in an objective, thorough and analytical search that considers (1) the insurer's financial capability to satisfy the contract obligations, and (2) the contract cost (including fees and commissions) relative to the contract features and insurer's administrative services.

Section 403(b) plan terminations. Certain 403(b) custodial accounts held by IRS-approved nonbank trustees would be deemed IRAs upon termination of the 403(b) plan. This allows preservation of the tax status of assets that cannot otherwise be distributed.

Coverage by church 403(b) retirement accounts. RESA would clarify that individuals who may be covered by 403(b) retirement accounts maintained by church-controlled organizations include "employees" as defined for general church plan rules, that is, duly ordained, commissioned, or licensed ministers, regardless of the source of compensation; employees of a tax-exempt organization controlled by or associated with a church or a convention or association of churches; and employees who have separated from service from a church or a convention or association of churches or a tax-exempt organization described above.

Open multiple-employer plans (Open MEPs). The current DOL nexus requirement would not be a showstopper for a defined contribution MEP so long as the plan for unrelated companies has a "pooled employer provider" (e.g., a person designated as the named fiduciary, the plan administrator and one who would perform all administrative functions to satisfy applicable Code and ERISA requirements) who registers as such and acknowledges fiduciary status; the "one bad apple" rule would be modified so that a tax-qualification failure by one of the employers would not disqualify the plan for all the employers; participating employers would have fiduciary responsibility for selecting and monitoring the pooled plan provider; finally, the DOL would be able to call for simplified reporting for MEPs that cover fewer than 1,000 participants as long as no single employer covers more than 100 employees in the plan. The proposal does not cover DB plans. Nor does it eliminate the need for an audit if the MEP covers more than 100 participants, although presumably the DOL might waive this requirement if each employer has fewer than 100 employees in the plan.

Small employer start-up credit. The annual nonrefundable income tax credit for start-up costs (permitted for up to three years) for most employers with 100 or fewer employees for adoption of a new plan would increase to the greater of (1) $500, or (2) the lesser of $250 times the number of non-highly compensated employees eligible to participate in the new plan or $5,000 (currently the credit is equal to the lesser of $500 or 50% of the start-up costs). Small employers would also be eligible for an additional annual $500 credit (permitted for up to three years) for adding an automatic enrollment feature to an existing 401(k) plan.

Increases in failure to file penalties. The failure to file penalties for retirement plan returns would be increased. The Form 5500 penalty would be modified to $100 per day, not to exceed $50,000. Failure to file a registration statement (SSA) would incur a penalty of $2 per participant per day, not to exceed $10,000. Failure to file a required notification of change (e.g., merger) would result in a penalty of $2 per day, not to exceed $5,000 for any failure. Failure to provide a required withholding notice attracts a penalty of $100 for each failure, not to exceed $50,000 for all failures during any calendar year.

Week Ahead

All eyes are on the anticipated spending bill, what it will contain, and whether it will cross the finish line before another shutdown. Will it be derailed by a snowstorm? Or a lone Senator?

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