



House Committee on Ways and Means

Ranking Member Richard E. Neal

Prepared by Ways and Means, Democratic Staff

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The Retirement Plan Simplification and Enhancement Act of 2017

Expanding Coverage and Increasing Retirement Savings

Modify the Current Automatic Enrollment Safe Harbor – The bill would revise the automatic enrollment safe harbor to remove the cap that required automatic escalation of employee deferrals go no higher than 10 percent of employee pay, provided that the cap would remain in effect for a participant’s first year subject to automatic enrollment.

Establish a New Automatic Enrollment Safe Harbor – Under the current law automatic enrollment safe harbor, the automatic deferral must be at least three percent of salary during the first year. Some have argued that this provision has resulted in employers setting the deferral amount at three percent in the first year (even though they could set it higher), when most Americans should be saving more to ensure a financially secure retirement. Therefore, the legislation would establish a new automatic enrollment safe harbor - in addition to the existing the existing automatic enrollment safe harbor. Some of the features of the new safe harbor include:

- **Minimum levels of default contributions.** The minimum default level of contributions would be 6% in the first year, 7% in the second year, then 8% in the next year, 9% the following year, and 10% in all subsequent years. There would be a 10% cap on the default level of contributions in the first year but no cap would apply thereafter.
- **Matching contributions.** The employer would be required to make matching contributions on behalf of all eligible nonhighly compensated employees (“NHCEs”) equal to (a) 100¢ on the dollar on employee or elective contributions up to 1% of pay, (b) 50¢ on the dollar on the next 5% of pay; and (c) 25¢ on the next 4% of pay, so that some level of matching contributions must be provided on employee or elective contributions up to 10% of pay. This structure ensures that the required matching contribution for all NHCEs under the new safe harbor will be at least equal to the required matching contribution for NHCEs under the existing safe harbor. Matching contributions with respect to employee or elective contributions above 10% of pay would not be permitted. For this new safe harbor, the nonelective contribution option available with respect to the existing automatic contribution safe harbor would not apply. The rationale is that employees should have an incentive to contribute up to 10%; if the employer could use the nonelective contribution option, that incentive would not exist.
- **Special tax credit.** A special tax credit would apply to small employers (i.e., employers with 100 or fewer employees) that adopt the new safe harbor. The purpose of the credit is that compared to the existing safe harbor, the new safe harbor will be expensive. To

address these additional costs, the tax credit would equal the matching contributions made on behalf of NHCEs, subject to two limits: (a) the credit with respect to any NHCE would be limited to 2% of pay, and (b) the credit with respect to any NHCE would only apply for the NHCE's first five years of participation in the plan.

- Similar to the existing safe harbors, this new safe harbor arrangement would be exempt from nondiscrimination and top-heavy testing.

Amend DC Elective Deferral Coverage Rules for Long-term Part-time Workers - Under current law, employers generally may exclude part-time employees (employees who work less than 1,000 hours per year) when providing a defined contribution plan to their employees. As women are more likely than men to work part-time, these rules can be quite harmful for women in preparing for retirement. Except in the case of collectively bargained plans, the bill will require employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (with the 1,000-hour rule) or three consecutive years of service where the employee completes at least 500 hours of service. In the case of employees who are eligible solely by reason of the latter new rule, the employer may elect to exclude such employees from testing under the nondiscrimination and coverage rules, and from the application of the top-heavy rules.

Amendment to Top Heavy Rules to Expand Coverage - In a top heavy plan, any participant that has completed an hour of service must receive a top heavy contribution – even if the employer allows employees to enter the plan before the law would require they be eligible to participate. As a result, small employers are discouraged from allowing early entry into 401(k) plans. The bill would allow employers to test participants that have not met the minimum statutory age and service requirements separately for determining required top heavy contribution requirements.

Saver's Credit/1040-EZ – The Saver's Credit provides millions of low and middle-income individuals with an incentive to save for retirement each year. Unfortunately, usage of the Saver's Credit is not nearly as high as it should be. One source of the problem is the fact that the Form 1040-EZ, the simplest tax return form and the one used by many intended users of the Saver's Credit, does not permit the Saver's Credit to be claimed. Under the bill, the Secretary would be directed to make the Saver's Credit available on the Form 1040-EZ.

Additional Time to Adopt a Qualified Plan - Under current law, Revenue Ruling 81-114 provides that a deduction for qualified plan contributions is not allowed for a prior taxable year if the plan is not established by the end of that taxable year. Accordingly, in order to be able to make deductible contributions for a taxable year, an employer must formally adopt a new qualified retirement plan by the end of such year. However, an employer can establish a Simplified Employee Pension (SEP) plan as late as the due date of the employer's tax filings, including extensions. The bill would permit an employer to adopt a qualified plan up to the due date (including extensions) for filing its tax return for the employer's taxable year in which the first plan year ends.

Frequently, the employer's profitability for a year will be a major factor in his or her decision to establish a plan, and reliable information on such profitability is often not available until after the

close of the employer's taxable year. The proposed change will allow employers to consider the adoption of a qualified plan, or addition of non-elective contributions to an existing plan, when final results for a year are available, thereby expanding coverage and employer-funded retirement benefits. The extension of time to adopt a qualified plan will coordinate with the maximum time that an employer can make a deductible contribution with respect to a plan year. This rule also would place the timing for adopting qualified plans on par with the adoption of SEPs, enabling an employer to opt for an ERISA-covered program to cover its employees in lieu of adopting a non-ERISA covered SEP program.

Repeal of maximum age for traditional IRA contribution – Under current law, taxpayers can make contributions to a traditional IRA up until the year they turn age 70 ½. This age limit on contributions does not apply to Roth IRAs. The bill would repeal the maximum age for traditional IRA contributions, which would allow taxpayers to continue making traditional and Roth IRA contributions after age 70 ½.

60-day rollover to inherited IRA of nonspouse beneficiary – To eliminate a trap for the unwary and create parity between rollover methods available to spouse and non-spouse beneficiaries, the bill would expand the options that are available to non-spouse beneficiaries under a qualified retirement plan or IRA to allow such beneficiaries to move assets via a 60-day rollover.

Increase in age for required beginning date – Under current law, participants are generally required to begin taking distributions from their retirement plan at age 70 ½. The policy behind this rule is to ensure that individuals spend their retirement savings during their lifetime and not use their retirement plans for estate planning purposes to transfer wealth to beneficiaries. However, the age 70 ½ was first applied in the retirement plan context in the early 1960s and has never been adjusted to take into account increases in life expectancy. Therefore, the bill would increase the RMD age from 70 ½ to 71 in 2019. The age would be increased further to 72 in 2024, 73 in 2029 and, thereafter, would be adjusted in a manner proportional to increases in life expectancy.

Enhancement of the Start-Up Credit – Current law offers a small business that adopts a new qualified plan a tax credit, which can apply for up to three years, equal to the lesser of (1) 50 percent of the employer's start-up costs, or (2) \$500. The bill would modify the cap to be equal to the greater of (1) \$500, or (2) the lesser of (a) \$250 for each nonhighly compensated employee eligible to participate in the plan, or (b) \$5,000. In addition, 50 percent would be increased to 100 percent in the case of employers with 25 or fewer employees.

Encourage Small Businesses to Adopt Auto-Enrollment – Many employers – particularly small employers – are hesitant to adopt a retirement plan with automatic enrollment and automatic escalation features because they could be subject to significant penalties if even honest mistakes are made. The bill would ease these concerns by allowing for a grace period to correct, without penalty, reasonable errors in administering these automatic enrollment and automatic escalation features if they are corrected prior to the date that is 9 ½ months after the end of the plan year in which the mistakes were made.

Economically targeted investments (“ETIs”) – The issue of ETIs has been addressed in three DOL Interpretive Bulletins, one each by Presidents Clinton, George W. Bush, and Obama. The Clinton IB stated that there are no issues with ETIs as long as the plan is not sacrificing rate of return or incurring greater risk. In other words, if two investments are similar, the ETI can be chosen. The Bush IB adopted a more restrictive approach:

In light of the rigorous requirements established by ERISA, the Department believes that fiduciaries who rely on factors outside the economic interests of the plan in making investment choices and subsequently find their decision challenged will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.

The Obama IB then reinstated the Clinton IB. In explaining the reinstatement, DOL stated that:

Environmental, social, and governance issues may have a direct relationship to the economic value of the plan’s investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary’s primary analysis of the economic merits of competing investment choices. Similarly, if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote. Fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors.

The bill would codify the Clinton/Obama IB by clarifying that a fiduciary can take into account economic, social, and governance factors to the extent that the fiduciary prudently determines that the investment is appropriate based solely on economic considerations, including those derived from such factors.

Small immediate financial incentives for contributing to a plan – Commentators have noted that individuals can be especially motivated by immediate financial incentives. So in addition to providing matching contributions as a long-term incentive for employees to contribute to a 401(k) plan, it might be helpful for employers to be able to offer small immediate incentives, like \$25 gift cards. However, such immediate incentives are prohibited by the rule in Code section 401(k)(4)(A) generally prohibiting any incentives other than matching contributions. Under the bill, de minimis financial incentives would be exempted from section 401(k)(4)(A).

Preservation of Income

Clarify the law with respect to the availability of distribution options – Under the bill, Treasury is directed to clarify its regulations with respect to the treatment of investment options that provide employees with rights to distribution options, such as annuity contract investments or guaranteed minimum withdrawal benefits. Under the clarified regulations, such options could be limited to employees who have attained specific age and/or service conditions, in the same

manner as it is clearly permissible to apply such conditions with respect to the distribution options themselves.

In-Plan Lifetime Income Options Portability - One of the concerns plan sponsors have regarding offering a lifetime income option, such as guaranteed minimum withdrawal benefits, in their defined contribution retirement plans relates to portability. To address this issue, the bill would treat a defined contribution plan's discontinuance of a lifetime income option as a distributable event, allowing affected participants to roll over the entire amount invested in the lifetime income-related investment to an IRA that provides the same lifetime income protection. By allowing participants to roll over their accounts if a lifetime income option is discontinued (for example, by change of plan provider or otherwise), the participants are generally able to preserve their guarantee feature. Otherwise, the participants will have paid the guarantee fee and potentially will receive no protection. The bill provides similar treatment to managed account investments that cease to be offered by a plan.

Qualifying Longevity Annuity Contract Reforms

In 2014, the Treasury Department and IRS published final regulations on qualifying longevity annuity contracts ("QLACs"). QLACs are generally deferred annuities that begin payment at the end of an individual's life expectancy. Because payments start so late, QLACs are a very inexpensive way for retirees to hedge the risk of outliving their savings in defined contribution (DC) plans and IRAs.

The minimum distribution rules were an impediment to the growth of QLACs in DC plans and IRAs because those rules generally require payments to commence at age 70 ½, before QLACs begin payments. The 2014 regulations generally exempted QLACs from the minimum distribution rules until payments commence. However, due to a lack of statutory authority to provide a full exemption, the regulations imposed certain limits on the exemption that have prevented QLACs from achieving their intended purpose in providing longevity protection.

The QLAC regulations limit the premiums an individual can pay for a QLAC to the lesser of (1) \$125,000 and (2) 25% of the individual's account balance under the plan or IRA. The \$125,000 limit applies across all types of arrangements, whereas the 25% limit applies separately to each DC plan and collectively to all IRAs that an individual owns. For purposes of the 25% limit, the account balance of an IRA is determined as of December 31st of the previous calendar year. According to the regulatory preamble, the 25% limit was included because Treasury lacked the authority to exempt more than 25% of any account.

It is rare for a DC plan to offer a QLAC option directly. As a result, generally the only way for a DC plan participant to obtain a QLAC is by rolling money out of the plan to an IRA. QLACs are readily available in the IRA market.

Here is the problem: Assume that an individual has a \$250,000 account balance in her former employer's DC plan. She wants to use 20% of that balance, or \$50,000, to purchase a QLAC, but her plan does not offer one. She decides to roll the money from the plan to an IRA to purchase a QLAC. However, because the 25% limit on QLAC premiums applies based on her

IRA account balance (which is zero), she will need to roll \$200,000 from her plan just to facilitate the \$50,000 QLAC purchase. Moreover, because the regulations measure her IRA account balance as of the prior year-end (which, again, was zero), she will need to roll the \$200,000 from the plan to an IRA, wait until the next year, then transfer \$50,000 from the IRA to a QLAC that qualifies as an IRA annuity. After the transaction, the individual would own a QLAC that clearly complies with the intent of the premium limits, but would have unnecessarily moved \$150,000 from her plan to an IRA.

- **Proposal to repeal the 25% limit.** In practice, this cumbersome process is severely slowing the growth of QLACs, and for no policy reason. The only reason for the 25% limit was Treasury's lack of statutory authority. Moreover, the adverse effects of the 25% limit are limited to low and middle-income individuals because for higher income individuals with bigger accounts, the applicable limit is the \$125,000 limit, not the 25% limit. Because there is no policy rationale for the 25% limit, and because it is having a very adverse effect on the growth of this helpful hedge against longevity, this bill would provide that the 25% limit is void and would direct Treasury to amend its regulations accordingly.

Deleting the 25% test would solve the current problems blocking the use of QLACs. For instance, in the above example, the individual would be able to roll over \$50,000 (not \$200,000) and immediately purchase the QLAC (rather than wait a year). In other words, what the bill would do is effectively enable individuals to do is make QLAC purchases under the dollar limit without the need to roll over excess amounts or artificially wait a year to make a purchase that they are ready to make. In practice, this small change could make a very large difference in facilitating the purchase of QLACs that protect participants against the risk of outliving their retirement savings.

- **Proposal to raise the \$125,000 limit to \$200,000.** At age 65, \$125,000 would purchase a QLAC (with a 2% COLA and a return of premium death benefit) paying approximately \$18,049 annually starting at age 80. This is not sufficient to protect a middle-income individual from the longevity risk. Under the bill, the limit would be increased to \$200,000, which would increase the annual payment to \$29,047. As under the current QLAC regulations, the \$200,000 limit would be indexed.
- **Proposal to facilitate the sales of QLACs with spousal survivor rights.** The QLAC regulations prescribe very different rules depending upon whether the owner's beneficiary is his or her spouse, with much more restrictive rules on death benefits if the beneficiary is not the spouse.

The regulations do not address how the QLAC death benefit rules apply if the beneficiary is the owner's spouse on the date the contract is issued but because of a subsequent divorce is no longer the owner's spouse when the annuity payments commence or when the owner dies. If a beneficiary's status as a spouse or non-spouse is determined after a QLAC is issued, *e.g.*, on the date annuity payments commence, a contract that was issued with permissible benefits might be viewed as providing impermissible benefits merely because of the divorce.

To avoid this issue, some insurers have decided to just offer single life QLACs, which deprives spouses of important benefits.

The bill's solution to this problem is to clarify that a divorce occurring after a QLAC is purchased but before payments commence will not affect the permissibility of the joint and survivor benefits previously purchased under the contract if a qualified domestic relations order ("QDRO") (in the case of a retirement plan) or a divorce or separation instrument (in the case of an IRA) either (1) provides that the former spouse is entitled to the promised spousal benefits under the QLAC, (2) does not modify the treatment of the former spouse as the beneficiary under the QLAC, or (3) does not modify the treatment of the former spouse as the measuring life for the survivor benefits under the QLAC. This is consistent with the minimum distribution and QDRO rules, but the lack of clarity is adversely affecting the QLAC market.

Remove Required Minimum Distribution ("RMD") Barriers for Life Annuities – The bill would eliminate certain barriers to the availability of life annuities in qualified plans and IRAs that arise under current law due to an actuarial test in the required minimum distribution regulations (Q&A-14(c) of Treas. Reg. § 1.401(a)(9)-6). The test is intended to limit tax deferral by precluding commercial annuities from providing payments that start out small and increase excessively over time. In operation, however, the test commonly prohibits many important guarantees that provide only modest benefit increases under life annuities. For example, guaranteed annual increases of only 1 or 2%, return of premium death benefits, and period certain guarantees for participating annuities are commonly prohibited by this test. Without these types of guarantees, many individuals are unwilling to elect a life annuity under a DC plan or IRA.

The bill would eliminate these barriers to annuity forms of payout by amending section 401(a)(9) of the Code to provide that certain types of annuity benefits that do not implicate concerns over excessive tax deferral are always permitted. This will exempt those types of benefits from the actuarial test in the regulations. The exempted benefits are (1) annuity payments that increase by less than 5% per year, (2) commutations or accelerations of future annuity payments determined in an actuarially reasonable manner, (3) participating annuities that provide dividends or similar payments determined in an actuarially reasonable manner, and (4) lump sum return of premium death benefits.

The bill also directs the Treasury Department to make three important changes to the regulations under Code section 401(a)(9). First, Treasury would be directed to conform the regulations to the foregoing statutory amendments and thereby exempt the listed annuity benefits from the actuarial test in the regulations. Second, Treasury would be directed to amend the regulations to provide that any commercial annuity under which the initial payment is at least equal to the initial payment that would be required from an individual account will be deemed to satisfy the actuarial test in the regulations. Third, Treasury would be directed to amend the actuarial test in the regulations to provide that the calculations under the test are to be made using the reasonable tables or other actuarial assumptions that the issuing life insurance company

actually uses in pricing the premiums and benefits under the contract, rather than the test being applied based on life expectancy tables in the regulations.

Simplification and Clarification of Qualified Retirement Plan Rules

Exception from RMD Rules when Retirement Savings Does Not Exceed \$250,000 – Under current law, participants are generally required to begin taking distributions from their retirement plan at age 70 1/2. The policy behind this rule is to ensure that individuals use their retirement savings during their lifetime - and not use their retirement plans for estate planning purposes to transfer wealth to beneficiaries. However, for most Americans, unfortunately, they do not have large retirement account balances and will need their retirement savings during their lifetimes. Furthermore, the age 70 1/2 was never indexed (prior to this bill) and so with Americans living longer, it doesn't seem to make good policy sense to require most people to begin spending down their retirement savings at age 70 1/2 when they could live another 20 years or more. The bill would provide that participants are not required to comply with the RMD rules if they have a balance in their retirement plans and IRAs of not more than \$250,000 (indexed and subject to a \$10,000 phase-out range) on December 31 of the year before they attain 70 ½ (or such later age applicable for required minimum distribution purposes under this bill).

Expand EPCRS - Because of the ever growing complexity of plan administration due to continued Internal Revenue Code changes, the bill would expand the correction system (1) to allow more types of errors to be corrected internally through self-correction, (2) to apply to inadvertent IRA errors, and (3) to exempt certain failures to make required minimum distributions from the otherwise applicable excise tax. For example, the bill would allow for correction of many plan loan errors through self correction. These are a frequent area for error and it can be burdensome to go to the IRS to correct a single loan error. Typically, correcting a loan error for a loan amount would be less than the cost of the VCP fee.

Review by Treasury and Labor of Reporting and Disclosure Requirements - The bill would direct Treasury, DOL and PBGC to review the current ERISA and Code reporting and disclosure requirements and make recommendations to Congress to consolidate, simplify, standardize and improve such requirements.

Consolidation of Employee Notices – Over the years, Congress has created a number of notices that must be provided to participants in 401(k) and similar defined contribution plans. These notices must be provided upon enrollment and annually thereafter, with the precise timing requirements varying slightly in the implementing regulations. These notices include:

- Qualified default investment alternative notice. (*ERISA §§ 404(c)(5)(B), 514(e)(3)*): Explains how a participant's account will be invested in the absence of an affirmative election.
- Participant fee and investment disclosure. (*DOL Reg. § 2550.404a-5*): Informs participants who have the right to direct investment of their account about the plan's fees and the investments on the plan menu.

- Safe harbor notice. (*Code § 401(k)(12)(D)*): Informs participants that the employer will make matching or nonelective contributions to satisfy the Code’s nondiscrimination testing safe harbor.
- Auto enrollment safe harbor notice. (*Code § 401(k)(13)(E)*): Informs participants that the employer will utilize auto enrollment, auto escalation and matching or nonelective contributions to satisfy the nondiscrimination testing safe harbor and about the employer contributions and the auto enrollment features.
- Permissive withdrawal notice. (*Code § 414(w)(4)*): Informs participants in auto enrollment plans about their right to stop automatic contributions and withdraw them within 90 days.

The bill would:

- Direct the Secretaries of Labor and the Treasury to adopt final regulations within 18 months of enactment providing that a plan may, but is not required to, consolidate two or more of the notices required under ERISA §§ 404(c)(5)(B) and 514(e)(3), Internal Revenue Code §§ 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4), and 29 C.F.R. § 2550.404a-5 into a single notice and/or consolidate such notices with the summary plan description or summary of material modifications described in ERISA § 104(b), so long as the combined notice, SPD, or SMM includes the required content, clearly identifies the issues addressed therein, and is provided within the time required by law.
- Amend ERISA §§ 404(c)(5)(B) and 514(e)(3) and Internal Revenue Code §§ 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4) to provide that the annual notices must be furnished at least annually within any 12-month period without regard to the plan year

Making Target Date Disclosure More Effective – The Department of Labor’s participant disclosure regulation requires that each designated investment alternative’s historical performance be compared to an appropriate broad-based securities market index. Thus, for example, if the plan offers an equity fund on its menu, the plan will show participants the 1-, 5-, and 10-year returns of the equity fund and the returns of an appropriate index like the S&P 500, because the S&P 500 represents an index of the same asset class. Unfortunately, the rule does not adequately address increasingly popular investments like target date funds that include a *mix* of asset classes.

Target date funds offer a long-term investment strategy based on holding a mix of stocks, bonds and other investments that automatically changes over time. Comparing a target date fund to an index consisting solely of equities or bonds is *inherently* misleading because neither of these accurately reflects the risk/return profile of a target date fund. In fact, DOL has acknowledged that benchmarks that do not reflect the proportional holdings of the investment will mislead 401(k) savers. Further, the rule as written would allow a comparison solely against an index like a bond index that will make the target date fund appear to significantly beat its benchmark over time. DOL’s benchmarking rule is based on a longstanding similar requirement under the securities laws for mutual fund prospectuses, which generally works well—but not in this circumstance.

In the preamble to the final regulation and a related Field Assistance Bulletin, DOL has indicated that a plan could provide the required benchmark and *additional* benchmarks in the disclosure, but this simply serves to further confuse participants and unnecessarily lengthen the disclosure.

Under the bill, DOL is directed to modify its regulations so that an investment that uses a mix of asset classes can be benchmarked against a blend of broad-based securities market indices, provided (a) the index blend reasonably matches the fund's asset allocation over time, (b) the index blend is reset at least once a year, and (c) the underlying indices are appropriate for the investment's component asset classes and otherwise meet the rule's conditions for index benchmarks. (These conditions are important to prevent the blended benchmark from being manipulated.) This change in the disclosure rule will allow better comparisons and aid participant decision-making. This change, including the conditions, would also apply to balanced funds and other asset allocation investments.

The bill also requires the Secretary of Labor to deliver a study to Congress by December 31, 2018 regarding the effectiveness of the regulatory benchmarking requirements.

Permit Non-Spousal Beneficiaries to Roll Assets to 457, 401(k) and 403(b) Plans – The Pension Protection Act of 2006 (PPA) permitted non-spousal beneficiaries to roll assets they obtain as a beneficiary to an IRA but not to their 457(b), 401(k) or 403(b) accounts. EGTRRA acknowledged that the consolidation of retirement assets is valuable to those with multiple retirement savings accounts. It would be very beneficial to permit non-spousal beneficiaries to consolidate their beneficiary assets in their 457(b), 401(k) or 403(b) accounts rather than forcing them to open an IRA and maintain multiple retirement savings accounts.

Eliminate the “first day of the month” requirement - Participants in a 457(b) plan must request changes in their deferral rate prior to the beginning of the month in which the deferral will be made. This rule does not exist for other defined contribution plans. This rule has a negative impact on participants and is no longer necessary to carry out the purposes of a 457(b) plan. The bill allows such elections to be made at any time prior to the date that the compensation being deferred is currently available, thus conforming the 457(b) rule to the 401(k) and 403(b) rule.

Creation of IRS Office of Participant and Plan Sponsor Advocate - The bill would create an Office of Participant and Plan Sponsor Advocate at the IRS, similar to the current PBGC Advocate.

Make 402(f) Notices on Rollover Options More Understandable to Retirement Savers – There is widespread concern that the current model 402(f) notices, which provide information on rollover options and applicable tax consequences, are too long and confusing. As with any participant notice, if participants cannot readily understand a notice, they will disregard it. Under the bill, by December 31, 2018, Treasury, in consultation with DOL and PBGC, is directed to simplify the model 402(f) notices so that participants can better understand each of their distribution options and tax consequences. The notice must explain clearly the effect of different elections on spousal rights.

Provide Guidelines that Curb Unreasonable Overpayment Recoupment Practices – The Treasury Department and IRS should be commended for releasing Rev. Proc. 2015-27, which clarifies proper recoupment procedures of overpayments of benefits to retirees by sponsors of retirement plans. However, the guidance does not go far enough to curb unreasonable recoupment practices by plan sponsors. We have heard of situations where retirees found their retirement income zeroed-out because their employers reduced their benefits to zero to compensate for past overpayments. Ultimately, these retirees were placed in a precarious financial situation by no fault of their own but instead because of clerical errors by their employers.

Under the bill, by December 31, 2018, the Secretary would be directed to amend its correction programs to cease requiring employers to demand repayments from participants, thus permitting employers to elect to simply make the payment itself to make the plan whole. In addition, the bill would:

- Direct the DOL to issue rules under which an employer that makes a make-whole contribution and does not seek recoupment from an employee does not have any fiduciary liability for failing to seek recoupment.
- Where PBGC has made an overpayment, prohibit PBGC from reducing any future payment to an individual by more than 10%.
- Direct the Secretary of Treasury to amend EPCRS (the IRS’ plan correction program referenced above) to provide that, except as provided by the Secretary, if the employer makes a “make-whole contribution” with respect to an inadvertent overpayment, and the employee had rolled over the excess to an IRA or plan, the IRS will not:
 - Treat the excess rollover as an excess contribution to an IRA subject to the 6% per year excise tax under §4973;
 - Treat the excess rollover to a plan as an impermissible contribution to the plan; or
 - Treat the excess rollover as taxable to the individual until distributed from the IRA or plan.

Encourage and Simplify Non-elective 401(k) Safe Harbor Plans – The bill eliminates the notice requirement for non-elective contributions and gives small business owners the flexibility to switch to plans with non-elective contributions. The bill would allow employers with existing plans to be amended mid-year to switch to a plan with non-elective contributions at 3% of pay. The bill would allow employers with existing plans to be amended after the plan year to switch to a plan with non-elective contributions at 4% of pay. Encouraging the adoption of a non-elective 401(k) safe harbor plan enhances the retirement benefits of the non-highly compensated employees by increasing employer contributions to this group.

Allow Forfeitures to be used for Safe Harbor Employer Contributions – When an employee terminates before becoming fully vested, the non-vested employer contributions are forfeited. Under IRS regulatory interpretations, employers can currently use forfeitures to help pay for plan administrative expenses. However, they are not permitted to be used to make matching contributions or profit-sharing contributions for employees under a 401(k) safe harbor plan. The bill would clarify that forfeitures can be used to fund employer contributions under these safe

harbor arrangements. This would encourage the use of these safe harbor arrangements with generous employer contributions that - once made - will become nonforfeitable to the employees.

Treatment of Custodial Accounts on Termination of 403(b) Plans – Unlike most qualified defined contribution plans, under which assets are held in a trust, assets associated with section 403(b)(7) plans consist of mutual funds held in a custodial account in the participant’s name. In many cases, this prevents an employer from distributing these assets in order to effectuate a plan termination. The bill provides a mechanism under which the plan termination may proceed without forcing assets out of the custodial account.

Under the provision, not later than six months after the date of enactment, Treasury shall issue guidance under which if an employer terminates a 403(b) custodial account, the distribution needed to effectuate the plan termination may be the distribution of an individual custodial account in kind to a participant or beneficiary. The individual custodial account shall be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to the 403(b) rules in effect at the time that the individual custodial account is distributed. The Treasury guidance shall be retroactively effective for taxable years beginning after December 31, 2008.

Defined benefit plan reforms

Cash balance Clarification – This provision clarifies the application of Code rules, such as backloading and section 415, as they relate to hybrid plans that credit variable interest. Specifically, the provision would clarify that, for purposes of all of the applicable Code rules, the interest crediting rate that is treated as in effect and as the projected interest crediting rate is a reasonable projection of such variable interest rate, subject to a maximum of 6 percent. This clarification will allow plan sponsors to provide larger pay credits for older longer service workers.

Parity for employers that provide more generous lump sum benefits – Code section 417(e) provides a ceiling on the interest rates that can be used to value distributions, such as lump sum distributions. The ceiling is generally based on the interest rates required for funding purposes. In determining these interest rates, employers are permitted to use a “lookback month” that is up to five months before the beginning of the year. So for 2018, the lookback month can be any month during the August to December of 2017 period. Generally, the anti-cutback rules prohibit changing the lookback month, but a special rule permits a change in the lookback month if for the next year the plan compares the new and old lookback month and uses the more generous interest rate.

Although section 417(e) provides a ceiling on interest rates, employers are permitted to establish lower interest rates by, for example, providing that distributions will be valued using the lesser of the “applicable interest rate” (as defined in Code section 417(e)(3)(C)) or a specified other rate. Some employers have used this ability to use a lower interest rate to, for example, grandfather benefits from changes in the applicable interest rate under Code section 417(e). For example, the Pension Protection Act of 2006 changed the section 417(e) rate from the 30-year Treasury rate to the first, second, and third segment rates. To avoid reducing benefits, some employers grandfathered existing benefits from this change. Other companies have simply picked a

different set of assumptions and provide a value equal to the greater of the value using the plan's assumptions or the value under the assumptions under section 417(e)(3).

Employers in these situations may want to change the lookback month for determining their non-417(e)(3) interest rates, such as the 30-year Treasury rate to, for example, an earlier date so as to facilitate communications to participants well before the beginning of the plan year. Although this is permitted for 417(e) interest rates, as discussed above, it is not permitted for the more generous non-417(e) interest rates, which does not make policy sense.

Under the bill, the option to change the lookback month would be permitted for not just the 417(e) rates, but also the 30-year Treasury rate, PBGC-based rates, or any other rates used by the plan, as long as the amendment has a delayed effective date of at least one year, so as to protect participants from sudden changes. After any such change in the lookback month, the lookback month may not be changed again for five years without IRS consent.

Align Employer Pension Contribution Due Date with Corporate Return Due Date – The bill would conform the due date for employer pension contributions for a given year with the corporate return due date, which is now 9 ½ months after the end of the year. Currently, in order to claim a deduction for a pension contribution that is made after the end of the employer's tax year, section 404(a)(6) requires that the contribution be on account of the preceding taxable year and be made within 9 ½ months after the end of the plan year. But under the funding rules, a contribution must be made within 8 ½ months after the end of the year in order to be treated as on account of such year. The bill would conform the due date for funding contributions to the due date of corporate returns.

Clarification of Role of PBGC Participant and Plan Sponsor Advocate – The bill clarifies the role of the PBGC Participant and Plan Sponsor Advocate by making it clear that (1) the Advocate is independent of the PBGC, (2) the Advocate is an advocate for participants and plan sponsors, and (3) the Advocate has the right to needed information from the PBGC.