WINTER 2017

SECURING AMERICA'S RETIREMENT

A LEGISLATIVE ROADMAP

THE SPIRIT OF ENTERPRISE
U.S. CHAMBER OF COMMERCE ®

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INTRODUCTION

The U.S. Chamber of Commerce is developing private sector driven policy solutions focused on achieving retirement security for workers. As 2017 welcomes a new presidential administration and Congress, the Chamber is pleased to present this legislative roadmap of retirement proposals for policymakers to consider and enact.

The roadmap is the product of thoughtful deliberation by business leaders and industry experts in the retirement benefits area. It focuses on strengthening the voluntary employment-based retirement benefits system and enhancing retirement security for workers, while proposing solutions to address our country's evolving workforce as demographics continue to change—an important and pressing issue that policymakers will need to tackle in 2017.

The roadmap reflects recommendations that have been thoroughly vetted through the Chamber's Employee Benefits Committee. As new issues emerge and new legislation and regulations are introduced, these recommendations will evolve as circumstances dictate and more proposals are vetted by Chamber members.

The proposals outlined in the roadmap are divided into three sections:

1. Previously Introduced Legislation
2. Legislative Recommendations
3. Policy Ideas for Congressional Action

The Chamber looks forward to working with the incoming administration, Congress, and stakeholder groups to develop legislative solutions addressing retirement security. The Chamber also welcomes the opportunity to partner with policymakers on public-private initiatives focused on educating Americans about financial literacy and retirement savings.

PREVIOUSLY INTRODUCED LEGISLATION

This section describes legislation previously introduced in Congress that the Chamber has fully endorsed. This legislation has been considered and legislative language has been developed, facilitating its consideration by policymakers in 2017.

Pension Benefit Guaranty Corporation Premiums

RECOMMENDATION:

- The Pension and Budget Integrity Act of 2016—H.R. 4955 and S. 3240

Increases to Pension Benefit Guaranty Corporation (PBGC) premiums have become more frequent—three times in the past four years—as they can raise significant revenue.[1] These increases are done without regard to policy or considering whether the increases are needed. Premium increases foster economic uncertainty, hamper investment, endanger jobs, and constrain economic growth. PBGC premiums should be affordable, administrable, fair, consistent, and predictable. Moreover, they should not be increased except as part a long-term plan to address the future of private-sector defined benefit plans and the PBGC. To address the issue, the Pension and Budget Integrity Act of 2016 prevents PBGC premium increases from being used to fill budget holes and, thus, allow for a policy discussion regarding PBGC premiums.[2]

Nondiscrimination Testing for Frozen Plans

RECOMMENDATION:

- Retirement Enhancement and Savings Act of 2016—S. 3471

[1] Before the most recent increases to PBGC premiums in the Bipartisan Act of 2015, premiums were also increased in the Bipartisan Budget Act of 2013 (P.L. 113-67) and in the Moving Ahead for Progress (MAP-21) highway law (P.L. 112-141).

[2] There is a slight difference between the bills. H.R. 4955 prohibits Congress from increasing PBGC premiums to offset general government (i.e., non-pension) program spending. S. 3240 prohibits provisions that increase or extend an increase of PBGC premiums from being counted as an offset to determine budget points of order for legislation in the House or the Senate. However, both pieces of legislation achieve the same goal and the Chamber supports passage of either version.

Many companies designed their transition from a defined benefit structure to a defined contribution structure in a way that allowed older, long-service employees who were close to retirement to maintain their then-current defined benefit pension plan. However, as these grandfathered employees continue to work, they are becoming highly compensated employees. Since no additional employees are entering the plan, the number of non-highly compensated employees is decreasing. This phenomenon makes it difficult for companies to pass discrimination testing. The Chamber recommends that companies that passed nondiscrimination testing at the time of the plan freeze should be deemed as continuing to pass so long as no significant amendments are made to the plan. The Retirement Enhancement and Savings Act of 2016 provides a permanent solution for all plans facing this issue.

Facilitate the Preservation of Retirement Assets

RECOMMENDATION:

- Shrinking Emergency Account Losses (SEAL) Act—S. 324

An important component of retirement security is ensuring that retirees have sufficient assets to fund their retirement. In particular, the Chamber urges Congress to allow 401(k) plan participants to continue to make elective contributions following a hardship withdrawal. In addition, the Chamber supports an extended rollover period for plan loan amounts after a termination of employment**.** The SEAL Act addresses both of these issues.

Employee Stock Ownership Plans

RECOMMENDATION:

- Promotion and Expansion of Private Employee Ownership Act of 2015 H.R. 2096 and S. 1212

Employee Stock Ownership Plans (ESOPs) are an important part of the retirement landscape which Congress should encourage and support. There are several significant advantages to ESOPs. They provide employees with a stake in the company, which can motivate employees to work harder and more efficiently, and—similar to other retirement plans—provide employees with meaningful incentives aimed at increasing retirement savings.

LEGISLATIVE RECOMMENDATIONS

This section outlines legislative ideas that enhance the private employer-provided retirement system. Proposals in these areas have been discussed and some may have been part of past legislation. Further, this section includes specific legislative recommendations that the Chamber encourages policymakers to implement in 2017.

State-sponsored Retirement Plan Legislation

RECOMMENDATIONS:

- Maintain Employee Retirement Income Security Act (ERISA) protections for private employees subject to state-sponsored retirement programs.
- Avoid the creation of an uneven playing field between public and private employers.

Creating a safe harbor for states or other political subdivisions to offer retirement programs to private employees runs counter to ERISA's intent and specifically undermines the objective of ERISA preemption. There are several ways to ensure that all private employees receive the same ERISA protections. For example, Congress can require that state retirement programs that mandate automatic enrollment for private employees are covered under ERISA or, alternatively, can explicitly preempt state-mandated retirement programs.

The Chamber is also concerned about a level playing field. Private employers should have access to the same plan design options as states that sponsor plans for private employees. To the extent that the current safe harbor is amended to allow states to implement automatic-enrollment payroll deduction programs, private employers should also be allowed to voluntarily implement the same programs.

Open Multiple Employer Plans (MEPs)

RECOMMENDATIONS:

- Eliminate the "one bad apple rule" that creates joint liability among MEP sponsors.
- Simplify MEP reporting and disclosure obligations under ERISA.
- Eliminate the "employer commonality" requirement.

A number of legislative proposals have been introduced that address open MEPs—albeit in different ways. The Chamber supports all efforts to expand retirement coverage through open MEPs as they offer an attractive and cost-efficient alternative for small businesses, for which a stand-alone 401(k) plan is not feasible.

Implementing these changes can expand retirement coverage and savings by making MEPS more attractive to small businesses. MEPs can promote positive retirement savings behavior by providing employees with a menu of investment options, ensuring that plan participants will be able to tailor their portfolios to their needs and retirement goals. MEPs can also provide small businesses with enhanced opportunities for cost-effective retirement planning education programs for employees through the pooling of resources with other small businesses. This creates economies of scale and cost efficiencies compared with stand-alone plans for these businesses. To the extent there are employers currently participating in MEPs, transition rules must also be enacted to allow these employers to benefit from the changed rules.

Minimum Required Distribution Rules

RECOMMENDATIONS:

- Eliminate the required minimum distribution (RMD) rules—Repeal Internal Revenue Code (IRC) section 401(a)(9).
- As an alternative:
  - Move the starting age to 75 to match longevity increases—Remove "70 ½" and replace with "75" in IRC section 401(a)(9)(C)(i)(I).
  - Allow 5% owners to continue working and not begin required distributions—Repeal IRC section 401(a)(9)(C)(ii)(I).
  - Limit distributions to a certain amount beyond the aggregate account balance (e.g., the law would require a RMD only for amounts more than $500,000 of aggregate account balances); eliminate the plan qualification requirement; and require self-certification of account amounts by owners to prevent additional administrative burdens on plan sponsors.
  - Reduce the amount of the excise tax.

Distributions must now begin at age 70½ unless the participant is still working. The Chamber recommends eliminating the RMD rules because they are complicated and provide limited value. The RMD rules and age requirement have not kept pace with today's labor market—the 70½ age requirement established in 1962 has never been updated. Because

Americans are living and working longer, it is imperative to reconsider the original purpose of the RMD rules in order to ensure the retirement security of workers. Americans should not be forced to receive annual distributions from their 401(k) and Individual Retirement Accounts (IRAs) beginning at age 70½. Instead, policymakers should encourage workers to continue saving in order to ensure their economic security during their retirement years. The current RMD rules run counter to that public policy goal and have the potential to be detrimental to middle class families. For these reasons, the Chamber has also opposed proposals that would expand the RMD rules to Roth accounts and Roth IRAs.

Involuntary Cash-out Limit

RECOMMENDATIONS:

- Increase the mandatory cash-out limit to $10,000 plus indexing—Amend IRC sections 401(a)(31)(B)(ii) and 411(a)(11)(A) to state that the cash limit will be increased to $10,000 for the 2017 plan year and indexed to wages thereafter.
- Increase the automatic rollover threshold—Amend IRC section 401(a)(31)(B)(i)(I).

Increasing the cash-out limit is long overdue. The current cash-out limit has not been increased in 19 years.[3] Moreover, this limit is not subject to indexing, as are many other limits in the retirement system. Absent congressional action, employers will have to assume rising financial costs and fiduciary liabilities for former employees' assets, which is particularly burdensome for small businesses. The Chamber recommends that Congress increase the involuntary cash-out limit and include automatic indexing so that the cash-out does not become outdated. Based on the employment cost index of wages for private sector workers published by the Bureau of Labor Statistics,[4] the current equivalent relative to wages of $3,500 in 1984 would be $9,219 in 2016.

Similarly, the automatic rollover threshold should be substantially increased to reflect inflation. By setting the original $1,000 threshold, Congress recognized that small amounts are not suitable for rollover because the fees can be prohibitive. As such, we call on Congress to recognize that this limit must be increased to reflect reality.

Increasing these limits would also require an amendment to IRC section 411(d)(6) to allow the increase to apply to amounts currently accrued.

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[3] The cash-out limit was increased from $3,500 to $5,000 in the Taxpayer Relief Act of 1997 (P.L. 105-34). Before 1997, the limit was increased from $1,750 to $3,500 in the Retirement Equity Act of 1984 (P.L. 98-397).

[4] http://www.bls.gov/web/eci/ecicois.pdf Table 9.

Small Business Tax Credit

RECOMMENDATION:

- Increase the small business tax credit and make it refundable—Amend IRC section 45E to allow for a refundable credit of up to $5,000 a year for five years.

The prevailing business tax credit allows for $500 in credit for the first three years of startup costs for a new small business retirement plan. Raising the small businesses tax credit for 401(k) startup costs would encourage greater plan formation. The current credit is too small and short-lived to act as a meaningful incentive. The Chamber recommends expanding the credit and making it refundable to increase the incentive for small businesses to set up 401(k) plans.

Top-heavy Rules

RECOMMENDATIONS:

- Eliminate the top-heavy rules—Repeal IRC section 416.
- As an alternative:
  - Eliminate the requirement that deferrals made by family members be attributed to the key employee—Repeal IRC section 416(i)(1)(B)(iii).
  - Modify the rules so that if a plan is top heavy, only participants who meet certain age and service requirements would receive the benefit—Amend the definition of a "non-key employee" under IRC section 416(i)(2) to employees that meet the age and service requirements under IRC sections 401(a)(4) and 410(b).
  - Allow small and midsize companies to sponsor employee pay all 401(k) plans without triggering the top-heavy rules.

The Chamber considers top-heavy rules unnecessary since the contributions are already subject to Actual Deferral Percentage testing to ensure equanimity between highly paid and non-highly paid employees. Therefore, the top-heavy rules should be eliminated. If they are not eliminated, the rule should be modified to promote greater implementation and maintenance of retirement plans.

Small and midsize companies—at the very least—should be allowed to offer employee pay-all plans, just as larger companies are able to do. Under an employee pay-all plan, the regular anti-discrimination tests would still apply to offer protection for non-key employees. However, under current Internal Revenue Service (IRS) regulations, when a key employee makes a 401(k) contribution, that employee contribution is deemed to have been made by the company which is then required to make top-heavy contributions for non-key employees. As a result, small to midsize companies that would like to offer 401(k) plans must either commit to make company contributions to non-key employees or exclude key employees from participation in the 401(k) plan. Larger companies, which because of the mathematical tests are never top-heavy, can sponsor employee pay-all 401(k) plans. Therefore, this rule unfairly discriminates against small businesses and their employees.

Increase the Small Business Voice

RECOMMENDATIONS:

- Add a small business representative to the Department of Labor (DOL), IRS, and PBGC advisory councils—Amend the following:
    - ERISA section 512(a)(3) to preserve a spot for a small business representative on the ERISA Advisory Council.
    - ERISA section 4002(h)(2) to preserve a spot for a small business representative on the Advisory Committee to the PBGC.
    - Federal Advisory Committee Act, Public Law 92-463, to preserve a spot for a small business representative on the Advisory Committee on Tax Exempt and Government Entities.

Small businesses play an important role in the conversation regarding the effectiveness of the voluntary employer-provided system. The Chamber supports efforts to increase small business participation in the formal dialogue. The advisory councils to the DOL, IRS, and PBGC are important sources of input for those agencies. Nevertheless, none of the councils have a seat devoted to small business. Adding small business representatives to the advisory committees and councils at regulatory agencies with jurisdiction over retirement plans is an important way to increase small businesses' voice in the discussion of the employer-provided system. As policymakers and regulators seek to close the retirement coverage gap, it is imperative to give small businesses a dedicated voice on government advisory councils. This would allow them to directly express to government officials the challenges small businesses face in retirement planning.

Automatic Enrollment Safe Harbor

RECOMMENDATION:

- Remove the upper deferral limit and relax the matching formula—Amend IRC section 401(k)(13)(D)(i)(I) to allow for an increased upper deferral limit and provide flexibility in the matching formula.

The safe harbor requires either (1) a minimum employer matching contribution of 100% of the first 1% deferred and 50% of the next 5% deferred, for a total contribution of 3.5% for participants who defer at least 6%; or (2) a nonelective employer contribution of 3% of compensation.[5] Increasing the upper limit to increase the level of employee contributions and relaxing the matching formula will make the safe harbor more attractive to plan sponsors. Moreover, research shows that starting with 6% starting deferral and auto-increasing up to 18%, which can include a combination of employer and employee contributions, allows participants to achieve 45% income replacement rates. Accordingly, the safe harbor should be amended to promote higher initial deferral rates and ongoing deferral amounts.

Electronic Delivery

RECOMMENDATIONS:

- Create a single, uniform electronic disclosure standard between the Department of Treasury, DOL, and PBGC.
- Allow employers to choose electronic delivery as the default delivery option.

Modernizing the restrictive rules on electronic delivery in this manner is critical to the larger task of reforming employee benefit plan notice and disclosure requirements. These changes enable the provision of important information without it being buried in an avalanche of rarely used information.

Annuity Selection Safe Harbor for Defined Contribution Plans

RECOMMENDATIONS:

- Clarify the limits on employer liability for selecting an annuity provider.

[5] I.R.C. Section 401(k)(13)(d).

One way to strengthen the provision of lifetime income is to remove deterrents. Even with DOL guidance issued with respect to annuity selection from a defined contribution plan, the provider selection requirements are a barrier, particularly for small businesses.

Phased Retirement

RECOMMENDATIONS:

- Continue to treat phased retirement programs and practices as discretionary arrangements.
- Clarify that phased retirement benefits are not protected under IRC Section 411(d)(6).
- Eliminate restrictions against rehiring people who have recently retired.
- Allow in-service distributions at early retirement age as defined in the plan.
- Exclude plan beneficiaries who participate in a company's phased retirement program from the plan's general discrimination testing.
- Permit, but do not require, employers to continue to offer health benefits to phased retirees.
- Clarify that phased retirees are not held to a different standard under labor laws.

Although there is not an official definition of phased retirement, it generally refers to any arrangement whereby a worker at or near retirement age continues to work, but at a reduced schedule, salary, or responsibility—or a combination of all three. Sometimes the phased retiree will continue receiving health benefits or will begin receiving a pension.

Many phased retirement arrangements are informal, but some employers—particularly universities—have formal phased retirement programs. However, several barriers exist to phased retirement. Legal barriers restrict when benefits can be paid. Fiscal barriers include the costs associated with employing older workers, such as increased pension payments and higher health care coverage costs. Policy and practical barriers exist with respect to how accruals should be calculated during phased retirement or how to apportion the payout. These barriers have prevented many employers from implementing phased retirement programs.

Notice Requirements

RECOMMENDATIONS:

- Eliminate the notice for the 3% nonelective safe harbor.
- Include the 401(k) safe harbor match information in the Summary Plan Description rather than keeping it as a stand-alone notice.
- Replace quarterly investment statements with annual notices for participants who have internet access to their investment account information.

Plan sponsors and participants are overwhelmed by the disclosure requirements. This burden is particularly acute for small businesses that may not have a human resources department to focus on notice requirements. In addition to the recommendations above, the Chamber urges a thorough congressional review to identify further notices that could be eliminated or streamlined to relieve unnecessary administrative burdens while ensuring that participants receive information that is meaningful and relevant.

POLICY IDEAS FOR CONGRESSIONAL ACTION

This section highlights key issues that require further vetting and discussion. Whereas the two prior sections outlined proposals that Congress can enact immediately, here the Chamber identifies areas that Congress should consider during 2017 as it debates ways to strengthen our entire retirement structure and the employer-based retirement benefits system. The Chamber stands ready to be an active and constructive participant as policymakers consider our employer-provided private retirement system comprehensively.

Tax Reform

Preserving current tax incentives for retirement saving is critical. Today, about 123 million households have a combined $24.8 trillion earmarked for retirement in defined benefit plans, defined contribution plans, IRAs, and annuities.[6] As Congress considers comprehensive tax reform, the Chamber urges careful consideration of the impact of changes to tax incentives for retirement plans. In addition to tax incentives, the Chamber urges Congress to consider the importance of different plan designs and recognize that employers must be able to choose from different retirement plan designs to best meet the needs of their workforces.

It is also critical for Congress to understand that the tax incentives for retirement plans are not a complete revenue loss; rather, they are a deferral of taxable income. Tax incentives for retirement plans are treated as tax expenditures for the purposes of budget scoring. However, at the time of retirement, deferred amounts are withdrawn and taxed at normal income tax rates. Retirement incentives, therefore, are not truly tax expenditures and are often recouped outside of the congressional 10-year budget window. The Chamber urges Congress to keep this inconsistency in mind during tax reform.

Fiduciary Rule

The Chamber remains very concerned about the detrimental effect of the DOL fiduciary rule. The Chamber has always argued that the rule is unnecessarily complex and challenging to implement, while disadvantaging small businesses, limiting access to and choice of investment advice, and making saving for retirement more expensive. The Chamber has consistently argued for an extension of the applicability date to allow adequate time for

[6] Figure 1 in Sarah Holden and Daniel Schrass, "The Role of IRAs in U.S. Households' Saving for Retirement, 2014," *ICI Research Perspective* 21, no. 1 (January 2015); available at www.ici.org/pdf/per21-01.pdf;
Investment Company Institute, Quarterly Retirement Market Data, Second Quarter 2015 (September 24, 2015) available at www.ici.org/research/stats/retirement. .

compliance and sort out the many questions arising from the rule—including the outcome of litigation. Delaying the applicability date of the rule is a first step towards creating a workable best interest standard. The Chamber continues to consider all alternatives—litigation, regulation, and legislation—to oppose the detrimental effects of the fiduciary rule.

Longevity Insurance

There are a number of voluntary products, such as longevity insurance, that participants may find useful in managing retirement assets. However, not every product will be appropriate or necessary for every participant. The Chamber recommends that employers be able to make these products available to their workers in the most efficient and flexible way possible, such as through a cafeteria plan or with 401(k) plan savings. Similarly, it is important to discuss options for medical treatment and long-term care as part of the longevity landscape to preserve retirement security.

Decumulation Options

To promote continued innovation and the growth of financial products to meet the needs of retirees, lawmakers should approach decumulation issues in a product-neutral manner. Public policy in this arena should encourage education regarding various distribution options and encourage product innovation to meet the varied objectives of savers and retirees, particularly as people live longer.

Retirement Education and Literacy

Education is critical to employees' understanding of their retirement savings options and the need to plan for retirement. The workforce is the primary source of retirement savings options and education for most workers. As such, the Chamber recommends that policymakers and regulators encourage and expand retirement education and literacy, whether provided by employers or others, with appropriate protections that do not expand liability under ERISA.

Multiemployer Pension Plan Reform

The Multiemployer Pension Reform Act was passed at the end of 2014 and was a significant first step towards comprehensive reform. Nonetheless, further attention to the problem is necessary. Specifically, Congress needs to address the withdrawal liability issue and consider new plan options for multiemployer pension plans.

Disability Insurance

Having access to disability insurance can be the difference between having economic stability or not, often ensuring basic necessities such as food and shelter. One way to expand private disability insurance coverage would be to clarify that it is permissible for employees to be offered this benefit on an opt-out basis.

CONCLUSION

This roadmap has one overarching theme—the voluntary nature of the private employer system. The system's voluntary nature is critical because it allows an employer to choose whether or not to offer a retirement plan, as well as the type of plan that is best for its workforces. As policymakers move to strengthen the retirement system, they must protect those parts of the system that are essential to its success. To that end, the Chamber stands ready to work with Congress, the administration, and all other interested parties to strengthen the voluntary, employer-provided retirement system.

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