

The Plan Sponsor's Guide to RESA

In 2016, the Senate Finance Committee unanimously approved a package of retirement reforms called the "Retirement Enhancement and Savings Act of 2016" ("RESA"). RESA has now been re-introduced in the Senate by Senators Orrin Hatch (R-UT) and Ron Wyden (D-OR), the Chairman and Ranking Member of the Senate Finance Committee, respectively, and is largely unchanged from the 2016 version, except for the removal of a handful of changes enacted as part of the tax reform bill and recent budget bill and a few other miscellaneous changes. A House counterpart is likely to be introduced in the House of Representatives by Reps. Kelly (R-PA) and Kind (D-WI) later this week. As of this writing, RESA is under consideration for inclusion in the omnibus appropriations bill that must pass before March 23 for the government to avoid another shutdown.

The key provisions of RESA are summarized briefly below.

A. Creation of Pooled Employer Plans

RESA would permit unrelated employers (i.e., those without so-called "commonality") to pool their resources by participating in a new type of multiple employer plan ("MEP"), provided certain conditions are met.

B. Changes to Encourage Lifetime Income Options

- *Lifetime Income Disclosure.* RESA would require employers to provide defined contribution plan participants with an estimate of the amount of monthly annuity income the participant's balance could produce in retirement (if benefits were received in a qualified joint and survivor annuity and a single life annuity). Potential Impact on Plan Sponsors: Recordkeepers/TPAs would likely provide this information.
- *Fiduciary Safe Harbor for Selection of Lifetime Income Provider.* RESA would create a new fiduciary safe harbor for employers who opt to include a lifetime income investment option in their defined contribution plan. Potential Impact on Plan Sponsors: Lifetime income products might be more appealing to plan sponsors because of increased protections to them as fiduciaries.
- *Portability of Lifetime Income Options.* RESA would permit participants to make direct trustee-to-trustee transfers (or transfer annuity contracts) of "lifetime income investments" that are no longer authorized to be held as investment options under a qualified defined contribution, 403(b) plan, or governmental 457(b) plan, without regard to any plan restrictions on in-service distributions when changing recordkeepers or TPAs. Potential Impact on Plan Sponsors: Lifetime income products might be more appealing to plan sponsors because plan sponsors could transition recordkeepers/TPAs more easily. Currently, some recordkeepers/TPAs cannot handle all lifetime income products on their platforms which impacts plan sponsors' ability to switch vendors.

C. Changes Affecting Plan Distributions

- *Post-Death Required Minimum Distribution Rules ("Stretch IRAs").* RESA would change the post-death RMD rules to generally require that all distributions after death (including to a designated beneficiary) be made by the end of the fifth calendar year following the year of death, with some exceptions. Potential Impact on Plan Sponsors: Plans would be required to distribute accounts more rapidly after a participant's death. Most of this functionality would be addressed by recordkeepers/TPAs.

- *Limits on Loans Through Credit Cards.* RESA would create strict new limits on plan loans made through credit cards. Potential Impact on Plan Sponsors: Those plans who allow for loans through credit card programs would need to reevaluate these programs.

D. Changes Affecting Nondiscrimination Rules and Safe Harbor Plans

- *Nondiscrimination Flexibility for Closed Defined Benefit Plans.* RESA would provide nondiscrimination relief with respect to benefit accruals and benefits, rights and features for a closed class of participants under a defined benefit plan that has been closed for new hires, provided that the plan satisfies certain requirements. Potential Impact on Plan Sponsors: Plan sponsors with defined benefit plans frozen to new entrants could find it easier to pass nondiscrimination testing.
- *Removal of Limit on Automatic Enrollment Safe Harbor Default Rate.* RESA would remove the 10% limit on the deemed election rate under the automatic enrollment safe harbor after the first year that the deemed election applies. Potential Impact on Plan Sponsors: Contributions pursuant to an automatic enrollment/automatic increase plan design could still use the Pension Protection Act of 2006 safe harbor even if they escalate contributions over 10% of compensation.
- *Nonelective 401(k) Safe Harbor Changes.* RESA would make a number of changes to the rules that apply to nonelective contribution 401(k) safe harbor plans. Potential Impact on Plan Sponsors: Plan sponsors may want to evaluate whether to use the new flexibility for nonelective safe harbor plans.

E. Other Provisions

- *Increase to Small Employer Plan Start-Up Credit.* RESA would increase the amount of the credit for start-up costs of adopting a new qualified retirement plan and would create a credit for adding automatic enrollment. Potential Impact on Plan Sponsors: None other than encouraging new start-up employer plans.
- *Treatment of 403(b) Custodial Accounts Upon Plan Termination.* RESA provides that if an employer terminates a 403(b) plan under which amounts are contributed to custodial accounts, and the person holding the assets of the accounts is an IRS-approved nonbank trustee, then, as of the date of the termination, the custodial accounts would be deemed to be IRAs. Potential Impact on Plan Sponsors: It would be easier for 403(b) plan sponsors to terminate their plans containing custodial accounts.
- *Plan Adoption Date.* RESA would allow an employer to adopt a qualified retirement plan after the close of a taxable year so long as it is adopted before the deadline for filing the employer's tax return for the taxable year. Potential Impact on Plan Sponsors: Sponsors of new plans would have more time to get their plan documents in order when creating the plans, thus reducing administrative burdens.
- *Consolidation of Reporting.* The bill directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of plans may file a consolidated Form 5500. Potential Impact on Plan Sponsors: Plan sponsors could, depending on IRS and DOL guidance, have a lower compliance burden for completing their annual reports.
- *Increased Penalties for Failure to File Retirement Plan Returns.* RESA would increase the penalties for failing to file a Form 5500 and failing to provide a required withholding notice to \$100 per day (but not to exceed \$50,000 maximum penalties per year). Potential Impact on Plan Sponsors: Plan sponsors

with late filing issues would want to continue focusing on using the DOL's delinquent voluntary filing correction program to avoid these increased penalties.

F. Next Steps

Passing RESA is seen as a final bit of "housekeeping" as Senate Finance Committee Chairman Orrin Hatch (R-UT) prepares to retire later this year. The provisions have a good likelihood of passing this year, either in the omnibus appropriations bill or another vehicle, given strong industry support and no significant opposition from lawmakers.