Term Limits?

Midterm fallout: the implications for retirement policy

BY TED GODBOUT
Change is coming to the nation’s capital – and the ramifications for retirement policy could be significant.

Clearly, the biggest shift will be the Democrats taking control of the House of Representatives during the 116th Congress, and the resulting divided party control in the House and Senate, will no doubt, create political and policy challenges. But while many Beltway pundits contend that the next two years will be stalled with gridlock, that may not be the case with retirement policy, despite the divided Congress.

For starters, momentum has been building for quite some time on both sides of the political aisle that an update is needed to the Pension Protection Act of 2006 to build on the successes of the legislation — now heading into its second decade — as well as to address some of the perceived shortcomings.

Moreover, it’s becoming something of a mantra among policymakers and academics that there is a retirement savings crisis in America. While that remains a hotly debated topic, there’s little disagreement that there remains a coverage gap, at least in terms of access to an employer-sponsored plan. In view of data that suggests that even modest income workers are 12 times more likely to save when they have such a plan, expanding access remains a key policy objective.

Another area primed for action is addressing retirement adequacy for those who are saving, but may not be saving enough to live a secure retirement, particularly considering increases in life expectancy. As part of this, policymakers are looking to, among other things, build on the success of automatic contribution arrangements, lifting both the floor and ceiling established by the PPA’s automatic enrollment safe harbor, as well as make it easier to offer lifetime income alternatives, and to reduce plan leakage through mechanisms such as auto-portability.

Accordingly, several key lawmakers in both parties have been circulating legislative proposals to address these and other related issues. In just the past year, we have seen legislation that would expand multiple employer plans, or MEPs, address the issues with lifetime income offerings, expand and enhance auto-enrollment and auto-escalation, as well as address employees’ reluctance to save because of student loan debt. More recently, President Trump’s Executive Order calling for measures to expand access to workplace retirement plans for American workers provides added impetus.

Leadership and Policy Impacts
As anticipated, Democrats retook control of the House for the first time since 2010, and if their majority is modest, it is all that is needed in that Chamber to lead the committees and set the legislative agenda.

In the Senate, Republicans managed to expand their majority, but not enough to attain the 60-vote threshold needed to break a filibuster — and thus they will still need cooperation from Senate Democrats.

Committee Turnover
Leadership changes aside, a number of veteran lawmakers on key retirement policy committees lost their bids for reelection, including four Republican members of the powerful House Ways & Means Committee, as well as three members of the Senate Finance Committee.

The Ways & Means Republicans who will not be back next year include Carlos...
Curbelo (FL), Erik Paulsen (MN) and Mike Bishop (MI). Perhaps most notable of this group is Peter Roskam (IL), who served as chairman of the tax policy subcommittee and was a constant player in the retirement security arena.

The Senate Finance Committee members who were defeated include Democratic Sens. Claire McCaskill (MO) and Bill Nelson (FL), along with GOP Sen. Dean Heller (NV). In addition, Senate Finance Committee Chairman Orrin Hatch (R-UT) is retiring, which, as noted below, opens the seat for a new chairman.

**Incoming Ways & Means Committee Chair**

One of the biggest impacts for retirement policy will likely be the elevation of Rep. Richie Neal (D-MA) to chairman of the powerful House Ways & Means Committee. Neal has long been a champion of retirement policy and, as recently as late 2017, introduced two pieces of ambitious legislation that seek to shore up retirement savings across the spectrum of plans.

Neal’s Retirement Plan Simplification and Enhancement Act (RPSEA) included numerous changes that seek to encourage small businesses to offer plans as well as simplify the existing rules for employer-sponsored plans. Among those changes were modification of the current automatic enrollment safe harbor and establishing a new automatic safe harbor, including changes to minimum default contributions, matching contributions and a special tax credit.

The arguably more provocative Automatic Retirement Plan Act (ARPA) would require employers above a certain size to have or establish a 401(k) or 403(b) plan that covers all eligible employees — and, at least in its current form — would expand that definition of eligible employees beyond ERISA’s current standards to all employees who are 21 or older, including new, part-time workers. However, certain employees would not be required to be covered, such as those subject to a collective bargaining agreement, nonresident aliens or seasonal workers employed for less than three months, and small employers, governments, churches and businesses not in existence for three years would be exempted. The bill also allows for expanded access to MEPs and increases the start-up credit for small employers.

Another House committee change that could have an impact on retirement and investment policy is the Education and the Workforce Committee, where Rep. Bobby Scott (D-VA) will likely take over from current chair Rep. Virginia Foxx (R-NC). This committee oversees all matters dealing with workforce-related issues, including labor relations and employment-related health and retirement security matters dealing with ERISA. Rep. Scott has been strongly critical of the 5th Circuit’s ruling vacating the 2016 fiduciary rule — and some think he may focus on regulation of 401(k) and IRA fees and conflicts of interest.

In addition, Rep. Maxine Waters (D-CA) will take over as chair of the Financial Services Committee, which oversees Dodd-Frank issues. Rep. Jeb Hensarling (R-TX),
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the current chairman, is retiring at the end of this term.

**Senate Finance Committee Changes**

Meanwhile, in what will be his third stint as chairman, Republican Senator Charles Grassley of Iowa has decided to return as chairman of the powerful Senate Finance Committee. When the 116th Congress convenes in January, Grassley, 85, will step down from his position as chairman of the Judiciary Committee to take on the Finance role, following the retirement of Sen. Orrin Hatch (R-UT). Grassley chaired the Finance Committee in the early-to-mid 2000s, when the Pension Protection Act of 2006 was signed into law. Many of that law’s provisions originated and advanced through the committee under his leadership.

Grassley was also a key sponsor of the retirement reforms (along with the Portman-Cardin legislation in the House) that formed the basis of the provisions that were enacted in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and later made permanent in the PPA ‘06. Those reforms included higher 401(k) and IRA limits, catch-up contributions for workers age 50 and older, a permanent Savers’ Credit and a wide array of other savings initiatives.

Grassley has been somewhat quiet over the past two years with respect to retirement security initiatives, but he has been supportive of the Retirement Enhancement and Savings Act (RESA) sponsored by Sen. Hatch and he is a strong proponent of the Tax Cuts and Jobs Act. Grassley also previously expressed alarm over the Labor Department’s now-vacated fiduciary regulation. Prior to the rule’s finalization in 2016, Grassley argued that substantial changes were needed, contending that it would limit the ability of his constituents to access investment advice and the same level of retirement planning education.

That said, under the Senate Republican Conference rules, Grassley only has two years remaining to serve as Finance Committee chair and will be able to serve for one full Congress.

**Portman-Cardin Draft**

As to key lawmakers circulating legislative proposals, Sens. Rob Portman (R-OH) and Ben Cardin (D-MD), who both serve on the Finance Committee, are in the process of drafting legislation that could be one of the most sweeping pieces of retirement security legislation since the PPA.

Portman and Cardin, who have worked together on retirement policy issues going back to their days in the House more than 20 years ago, have circulated a draft for feedback with the intent to introduce the legislation before Congress adjourns for the year.

Areas the legislation would address include expanding coverage and increasing retirement savings, preserving income, simplifying and clarifying retirement plan rules, defined benefit plan reforms, reforming plan rules to harmonize with IRA rules, and phased retirement.

**Lame ‘Ducked’?**

As we headed to press, Congress was still engaged in a post-election “lame duck” session. While there had been hope that the House and Senate might complete action on pending retirement security legislation before adjourning, there has been no indication since the elections that Congress intends to do so.
Retiring Sen. Hatch is one of the lead sponsors of the bipartisan Retirement Enhancement and Savings Act (RESA), which was reintroduced in March 2018 after stalling on the Senate floor in 2016 (after passing the Senate Finance Committee on a bipartisan vote of support, 26-0, a margin that these days is reserved to items such as naming post offices), RESA includes several provisions that seek to make it easier for small businesses to adopt and maintain a workplace retirement plan. In general, the legislation provides a more generous tax credit to defray the cost of starting a retirement plan and adds an additional tax credit for plans with an automatic enrollment feature. It also removes the 10% cap on default contributions for auto-enrollment and auto-escalation in DC plans.

What’s more, RESA aims to expand retirement plan coverage by allowing otherwise unrelated employers to join a pooled employer plan, as well as give small business owners until the due date of the employer’s tax return to adopt a qualified retirement plan. RESA also seeks to improve upon the existing 401(k) safe harbor plan design by giving small business owners more flexibility to switch to a safe harbor plan. The Portman-Cardin proposal noted above includes more than 70 provisions and builds on the provisions included in RESA as well as the House-passed Family Savings Act (H.R. 6757).

The Family Savings Act is the retirement component of current Ways & Means Committee Chairman Kevin Brady’s (R-TX) three-part “Tax Reform 2.0” initiative. The bill seeks to ease the commonality rules for MEPs and eliminate the “one bad apple” rule, as well as create a new Universal Savings Account (USA) and ease the non-discrimination rules for frozen DB plans. It also includes a safe harbor for the selection of a lifetime income provider within a DC plan, as well as a slew of other provisions, many of which were drawn from RESA.

Incoming Ways & Means Chairman Richard Neal has vowed to make retirement security a policy priority and he has a history of working across party lines. In addition, as noted above, Sen. Grassley has an extensive record on moving important policy legislation.

And that doesn’t include the potential for new initiatives from the administration, such as President Trump’s recent Executive Order calling for:
- expanded access to multiple employer plans;
- simplification of retirement plan disclosures for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and plan fiduciaries; and
- updating life expectancy and distribution tables for purposes of required minimum distribution rules.

Additionally, the Labor Department and Securities and Exchange Commission recently published target release dates of September 2019 (the end of the federal government’s fiscal year) for their fiduciary and advice rulemaking initiatives.

Moreover, let’s not forget that Congress needs to address must-pass legislation each year — such as annual spending bills — which will force the House, Senate and Trump administration to compromise — or run the risk of a government shutdown. These types of bills oftentimes pick up other unrelated policy provisions to help build support for the legislation.

**Multiemployer ‘Motivation’?**

Looming over both the lame duck session — and perhaps the next Congress — are concerns about the multiemployer (not multiple employer plan) financial crisis. Proposed legislation from the Joint Select Committee on Solvency of Multiemployer Pension Plans (authorized by the Bipartisan Budget Act of 2018 and chaired by Sen. Hatch) is due by Nov. 30, 2018. The Pension Benefit Guaranty Corporation (PBGC), which serves as insurer for the nation’s private pension system, recently reported that the Multiemployer Program protects about 10.6 million workers and retirees in about 1,400 pension plans, but also that, in fiscal 2018, the agency paid $153 million in financial assistance to 81 insolvent multiemployer plans. At year-end there were 78 insolvent plans expected to continue to receive financial assistance covering 62,300 participants currently receiving benefits.

Democrats have, at least once in the past, been prepared to withhold support from retirement legislation over this issue. Indeed, in 2016, Democratic members of the Senate Finance Committee conditioned their approval of RESA on committee approval of relief for the UMW multiemployer health and pension funds (the Miners Protection Act of 2016). Consequently, it is entirely possible that Democrats will, once again, insist on some Republican support on that issue in order to back broader retirement legislation. Will that slow — or perhaps accelerate — that legislation? At this point, it’s anybody’s guess.

Regardless of whether the House and Senate take up RESA, the Family Savings Act or similar or legislation during the lame duck session — or don’t — the prospects seem good that retirement policy legislation will be front and center in the 116th Congress — despite, or perhaps as a result of — divided-party rule and likely gridlock on many other policy matters.  

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*The term today is primarily associated with an officeholder or politician seen as having considerably less authority at the end of tenure or term of office because either he or she is ineligible or is not seeking another term. However, originally, it denoted a member of a stock exchange who was “hammered” and expelled from the membership for being unable to meet financial or contractual obligation. Source: Business Dictionary. Read more: [http://www.businessdictionary.com/definition/lame-duck.html](http://www.businessdictionary.com/definition/lame-duck.html)*