U.S. Chamber of Commerce

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SECURING A STRONG RETIREMENT ACT OF 2020

U.S. Chamber of Commerce Comments 6.2.21

Additions

- Long-Term Part-Time Employees

SECURE Act Section 112 requires that 401(k) plans allow long-term, part-time employees to make elective deferrals once they have reached age 21 and have at least 500 hours of service in three consecutive 12-month periods. The eligibility effective date should be delayed by one year to 2024.

- Emergency Savings Accounts
    - Emergency savings account provisions should be included with any retirement package. As we work with stakeholders, we believe that any legislation should:
        - Define emergency savings accounts as funds to cover unexpected, one-time expenses, but not more than $2,000;
        - Allow for automatic enrollment through payroll withholding;
        - Eliminate barriers to access to funds, including allowing access electronically or through credit or debit type cards, and funds must be accessible at least within 24 hours of request;
        - Allow employees to self-certify that the withdrawal was on account of an emergency;
        - Require investments to be in cash or cash equivalents;
        - Allow, but not require, employers to incentivize savings, and allow incentives to be provided to lower wage earners but not higher wage earners.
        - Allow accounts to be linked to retirement accounts so that excess emergency savings contributions automatically are rolled into retirement accounts;
        - Allow, but not require, employers to match such contributions in the 401(k) plan, but such match would not be part of the emergency savings account and such employees may be segregated for purposes of the ADP test.

    - Require that emergency savings funds must be used before a loan or hardship withdrawal may be taken.

- SIMPLE IRA/SIMPLE 401(k)

Allow for a Roth option for SIMPLE IRAs (Section 308 Roth SIMPLE IRAs in Portman-Cardin).

Allow transitions between a SIMPLE plan and a safe harbor 401(k) at any point during the year (Collins-Warner *SIMPLE Plan Modernization Act*).

Allow for employers to make up to a 10% nonelective contribution on behalf of all eligible employees in a SIMPLE Plan. (Section 113 Allow Additional Nonelective Contributions to Simple Plans in Portman-Cardin's Retirement Security and Savings Act (Portman-Cardin)).

Waive the current excise fee on rollovers from a SIMPLE plan into a 401(k) or annuity after the two-year withdrawal period (Collins-Warner).

- Financial Planning

Allow employees to pay for financial planning with pre-tax dollars through employer-sponsored "cafeteria" plans (Section 112 Treatment of Qualified Retirement Planning Service in Portman-Cardin).

<u>Deletions</u>

- Section 101: Expanding Automatic Enrollment in Retirement Plans

Although the Chamber supports automatic enrollment, we do not support plan design mandates. Specifically, this provision mandates that all new plans with more than 10 employees include an autoenrollment feature of not less than 3 and not more than 10 percent with the auto escalation of at least one percent.

First, if an employer does not include autoenrollment, there is a reason, such as high turnover or cost. Second, we are concerned that this would create an odd dichotomy with existing plans not being required to include autoenrollment and discourage the formation of new plans. Third, for plans subject to the mandate, it would likely reduce overall employer contributions.

Finally, as drafted, it would appear that this would mandate that most new multiple employer plans or pooled employer plans would be required to have autoenrollment because only PEPS or MEPs where all employers in the plan have 10 or fewer employers are excluded. This requirement could inhibit the establishment of and participation in such plans.

Alternatively, the following should be considered:

- A credit such as that under Section 103 of Portman-Cardin, which adds a new section 45U that is a credit for small employers with modified safe harbor requirements, and/or Section

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110 which adds a new section 45V that is a credit for re-enrollment in plans provided by small employers.

- Exclusion of PEP/MEP with a credit if allowed
- Non-discrimination relief

Section: 306 Retirement Savings Lost and Found

A new paragraph (d) add a new clause (F) to Section 6057(a) which would require every plan sponsor to list the name and address of the designated trustee or issuer for cash outs over $1,000 and the account number (or contract or certificate number for an annuity) of the individual retirement account. This section should be deleted as adding administrative burdens that could expose sensitive participant data without adding any significant participant protections.

- Section 315: Requirement to Provide Paper Statement in Certain Cases

This section should be deleted. This section overly complicates the current regulatory structure, and adds confusion not only to how participants receive retirement statements (namely some under one rule and some under others), but further complicates plan administration by adding a third requirement for retirement statements, and a different standard remains for all other ERISA notices and disclosures. On a substantive level, this section does not provide any additional information to participants, and most of it is information that already is required to be provided in the summary plan description.

- Section 603: Elective Deferrals Generally Limited to Regular Contribution Limit

This section would require that all catch-up contributions be made on a Roth basis. This should be at the plan sponsor's election because not all plans contain Roth options.

<u>Modifications</u>

- Section 107: Higher Catch-Up Limit to Apply at Age 62, 63 and 64

This section provides for catch-up contributions of $10,000 (with a cost-of-living adjustment) at ages 62-65. This section should be modified to reflect section 120 of Portman-Cardin that would apply a $10,000 (adjusted) catch-up limit at age 60.

- Section 110: Treatment of Student Loan Payments as Elective Deferrals for Purposes of Matching Contributions

The legislation should clarify that matching student loan payments are not mandatory if an employer matches employee contributions. Clause (g)(3) provides that the Secretary may promulgate regulations to permit employers to establish reasonable procedures to claim matching

contributions for qualified student loan payments under the plan including an annual deadline (but no earlier than three months after the close of the plan year) to make the claim. This time should be allowed to be at the discretion of the plan sponsor.

- Section 113: Small Immediate Financial Incentives for Contributing to a Plan

As currently drafted, this would only apply to 401(k) and 403(b) plans. This should be clarified to apply to SIMPLEs.

- Section 301: Recovery of Retirement Plan Overpayment

The eight conditions imposed on plans that seek recoupment are so onerous that they effectively would preclude plans from seeking recoupments. Furthermore, even if a plan were to do so, because of the amorphous nature of some of the requirements, a plan is opening itself up to litigation that the requirements were not met. We suggest deleting the new ERISA paragraph 204(h)(4). Alternatively, we suggest the following modifications.

- A plan should be allowed to charge reasonable interest.
- Recovery through future benefit reductions is capped at 10% of the benefit amount. We propose this amount should be higher (at least 20%).
- A plan should be able to use a collection agency or other third party. The language regarding "threats of litigation" in (h)(4)(D) should be deleted and instead replaced by the following: "In its efforts to seek recoupment, a plan may inform a participant or beneficiary that the plan may seek to enforce its rights in court. The Secretary shall issue model language that a plan may use." Similar language should replace the last sentence in (h)(5) with respect to Rule 11.
- This section limits recovery of any errors not found within three years. This restriction should be eliminated, or, at the least, set the same as the six-year statute of limitations for breach of fiduciary duty, where there was no actual knowledge.
- Section 206(4)(F) appears to prohibit ANY recoupment if the first overpayment was made more than three years before the notice was provided. As written, it would appear that if the plan did not catch an overpayment within three years, the plan could not seek any recoupment, even payments within three years of the notice. This section should be rewritten to allow for recoupment of, at the least, payments within three (alternatively six) years of notice of overpayments.

Paragraph (5) provides that the protections in subparagraphs (A) through (F) of paragraph (4) do not apply to a participant or beneficiary who is culpable, which is if the individual "bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment), or if the individual knew, or had good reason to know under the circumstances, that the benefit payment or payments were material in excess of the correct amount. If paragraph (4) is deleted, this should be as well. Alternatively, given how difficult it would be to prove culpability it is

likely that no plan would invoke this because doing so would lead to additional litigation over whether the definition were met.

- Section 304: Review and Report to the Congress Relating to Reporting and Disclosure Requirements

The due date for the report should be at least 24 months after the date of enactment.

- Section 305: Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants

The amendments to the Code section appear to reverse the current Code provisions that allow for default electronic delivery. However, the ERISA provisions do not include a provision related to how the document can be delivered. Plan administrators should be allowed to provide the annual notice by any means currently allowed under ERISA, the Code or the applicable regulations.

To be eligible, an unenrolled participant initially only needs to receive a summary plan description.

The ERISA section (c)(2) should be changed to require the notice of the right to participate should include the following: whether the plan has any matching or other employer contributions and any applicable vesting provisions, rather than the current language that requires the notice to include "the key benefit under the plan and the key rights and features."

Subparagraph (c)(3) should be deleted because ERISA currently contains a standard for how information must be presented.

The notice of the right to participant should be allowed to be provided under 29 C.F.R. Section 2520.104b–31 (Alternative method for disclosure through electronic media— notice-and-access).

- Section 306: Retirement Savings Lost and Found

Amounts less than $1,000 would be required to be transferred to the Office of Lost and Found. This should be may rather than must for administrative purposes.

A participant should be able to search for the plan sponsor, not the plan administrator. The plan administrator often is a committee or other entity, but the plan sponsor for a single employer plan is the employer. This is more useful.

- Section 321: Limiting Cessation of IRA Treatment to Portion of Account Involved in Prohibited Transaction

This section amends IRC Section 408(e)(2) to limit the tax penalty for only the portion of the account involved in the prohibited transaction. Alternatively, this provision should be replaced with Section 318(d) (IRA Preservation) of Portman-Cardin which eliminates the unfavorable tax treatment (408(e)(2) for prohibited transactions for IRAs.