

Politics and Plans: *What the Congress and DOL Have Been up to Post Election*

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Post Election: Changing the Tone at the Top of DOL

New Sheriff in Town – Secretary of Labor



Out: Thomas Edward Perez

- Perez was the United States Secretary of Labor from 2013 to 2017.
- Prior to that he worked as a consumer advocate and civil rights attorney before serving as the Assistant Attorney General for Civil Rights.
- American Democratic Party politician and attorney who was elected chairman of the Democratic National Committee in February 2017.

In: Alex Acosta (April 2017, last cabinet confirmation)

- Attorney, academic
- Appointed by G.W. Bush to the National Labor Relations Board and later served as Assistant Attorney General for Civil Rights and federal prosecutor for the Southern District of Florida.
- He is the former dean of Florida International University College of Law.

Post Election: Changing the Tone at the Top at EBSA

Employee Benefits Security Administration



Who are the people
in your
neighborhood?



Selection for Asst. Sec. of Labor - EBSA



“The assistant secretary of the Department of Labor’s Employee Benefits Security Administration not only oversees issues related to pensions and retirement plans, but also helps enforce part of the health care reform law as it pertains to businesses.”

(sort of the ERISA and ACA police)

Out: Phillis Borzi (left office November 2016)

- **Of counsel with the D.C. law firm of O'Donoghue & O'Donoghue LLP, specializing in ERISA and other legal issues affecting employee benefit plans** From 1979 to 1995, served as pension and employee benefit counsel for the House Subcommittee on Labor-Management Relations (part of the Committee on Education and Labor).
- **In 1993, she served on working groups dealing with insurance reform, workers' compensation and employer coverage** Hillary Clinton's Presidential Task Force on Health Care Reform.
- **From 1995 to 2009, a research professor in the Department of Health Policy at George Washington University Medical Center's School of Public Health and Health Services. There she was involved in research and policy analysis involving employee benefit plans, the uninsured, managed care, and legal barriers to the development of health information technology.**

IN: Preston Rutledge (confirmed 1/3/18)

- Rutledge was the Republican majority's senior tax and benefits counsel on the Senate Finance Committee and a top aide to Hatch, the committee's chairman, since 2011
- He worked with the Internal Revenue Service's tax exempt and government entities division in Washington.
- He served as a senior technical reviewer in the Qualified Pension Plans Branch of the IRS Office of Chief Counsel
- Rutledge also served as a law clerk on the United States Court of Appeals for the Fifth Circuit, and worked in private law practice as an employee benefits counselor and ERISA litigator.

No Change – Tim Hauser

- **His responsibilities include overseeing EBSA's regulatory, enforcement and reporting activities.**
- **Mr. Hauser joined the Department of Labor in 1991 as a trial attorney for the Plan Benefits Security Division (PBSD), where he represented the Department in federal district court and appellate litigation.**
- **From 2000 until 2013, Mr. Hauser was the Associate Solicitor of the Division. As the head of PBSD, he was responsible for all of the Department's legal work under ERISA.**
- **Before joining the Department of Labor, Mr. Hauser worked as a trial attorney for six years at Legal Aid of Western Missouri.**

The Deputy Assistant Secretary for Policy directs the policy, legislative, and research functions of EBSA.

They also serve as liaison to other government agencies and the private sector on a variety of issues relating to ERISA.

OUT- Judy Mares (left office November 2016)

- She joined EBSA after retiring from an extensive corporate career. Most recently, she was the Chief Investment Officer of Alliant Techsystems, Inc., where she managed the investments of the pension, savings, and VEBA plans. She also served as the CIO of Ameritech Corporation for five years, and the Director of Benefit Finance at General Mills for twelve years.
- Prior to joining EBSA, Mares was the Defined Contribution Committee Chair of the Committee on the Investment of Employee Benefit Assets (CEIBA), and a member of the Plan Sponsor Advisory Committee of the Defined Contribution Institutional Investment Association (DCIIA).
- Mares was previously the Chair of the ERISA Advisory Council.

In- Jeanne Wilson (November 2017)

- Most recently an attorney at the DC office of Groom Law Group, one of the nation's foremost benefits, retirement, and health care law firms.
- From 2001 to 2016 Jeanne practiced as in-house counsel for Waste Management, University of Houston and Continental Airlines where she was responsible for a full suite of employee benefits legal advice.
- This included government affairs, public and community affairs, employee relations, collective bargaining, and fiduciary matters.

Not Out, but Retired: Ian Dingwall

- Mr. Dingwall **assumed the position of EBSA first chief accountant on July 1, 1988**. He served as EBSA's primary adviser on accounting and auditing issues stemming from EBSA's responsibilities under ERISA and the Federal Employee Retirement Security Act.
- Prior to 1988, he was a supervisory auditor in the Special Litigation Division of the Office of the Solicitor, where he provided expert advice on accounting and auditing matters involving litigation of employee benefit plan cases.
- Mr. Dingwall performed the functions of chief accountant to the Enforcement Division of the Federal Energy Regulatory Commission from 1980 to 1982.
- From 1974 to 1980, he was a senior accountant in the Division of Enforcement at the Securities and Exchange Commission, where he developed numerous cases involving accounting principles and auditing standards.
- From 1969 to 1974 he was with the accounting firm of Ernst & Young

In – Michael E. Auerbach

- As the Chief, Division of Accounting Services, Employee Benefits Security Administration, Mr. Auerbach's responsibilities include providing ERISA related accounting and auditing technical expertise within the Employee Benefits Security Administration.
- He is also the liaison with the American Institute of Certified Public Accountants (AICPA), the Financial Accounting Standards Board (FASB) and other professional organizations.
- Mr. Auerbach is a certified public accountant and earned his B.S. in accounting from the University of Maryland.

Focus of Trump's New DOL/EBSA Team



- **Modernization of the Form 5500 Project** – Will this resurface?
- **The Conflict of Interest Rule** – What will the final new “Fiduciary Rule” look like?
- **Future Policy** – What influences will the new team have?

Modernization of the Form 5500 Project – Will this resurface?

- Major changes to the 5500 for all types of plans was approved by EBSA and OMB in December 2016
- The new EBSA administration has not continued down this path
- It appears any 5500 reporting changes, if any, will be consistent with revisions we have seen in recent years.
- EFAST2 contract expires in 2019, may be re-bid a is.

Focus of Trump's New DOL/EBSA Team



The Conflict of Interest Rule – What will the final new “Fiduciary Rule” look like?

February 2017, President Trump slams on the brakes by issuing a memorandum requesting a study to examine:

- Whether the anticipated applicability of the Fiduciary Duty Rule has **resulted in dislocations or disruptions within the retirement services industry** that may adversely affect investors or retirees
- Whether the Fiduciary Duty Rule is likely to cause an **increase in litigation**, and an **increase in the prices** that investors and retirees must pay to gain access to retirement services.
- Whether the anticipated applicability of the Fiduciary Duty Rule has **harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings**, retirement product structures, retirement savings information, or related financial advice

The Conflict of Interest Rule – What will the final new “Fiduciary Rule” look like?

- May 2018, the U.S. Court of Appeals for the Fifth Circuit **vacated the entire final Fiduciary Rule** that was issued by the DOL in April 2016.
- The Fifth Circuit held that the definition of “fiduciary” in the final Fiduciary Rule conflicts with the plain text of ERISA and the common law definition of fiduciary.
- **The Fifth Circuit further held that the DOL overstepped its authority** in applying ERISA’s fiduciary standards to individual retirement accounts.
- In response to the Fifth Circuit’s decision, the **DOL announced that it will not be enforcing the rule** at this time.

Future Policy – What influences will the new team have?

They have been a bit busy since the team came together the first quarter of 2018

But first, lets look at recent retirement plan reform to see what is cooking in the EBSA stove

Focus of Trump's New DOL/EBSA Team



In 2014, The Bipartisan Policy Center launched:

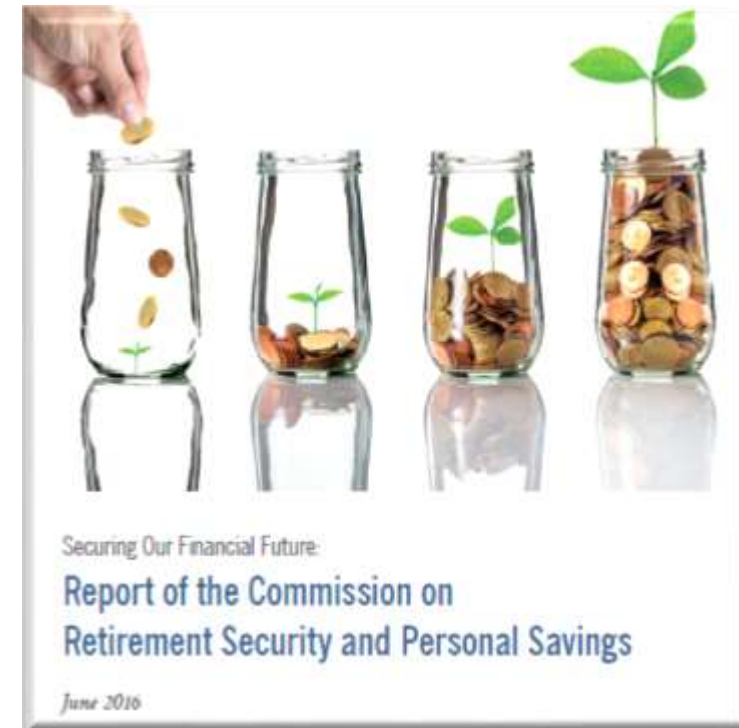
“The Commission on Retirement Security and Personal Savings”

Their mission was to examine the U.S. retirement system and offer public policy recommendations that could facilitate increased savings and improve the financial security of Americans in retirement.

Focus of Trump's New DOL/EBSA Team

In June 2016, they release the “Securing Our Financial Future: Report of the Commission on Retirement Security and Personal Savings”

This report represented the first real bipartisan attempt in retirement plan reforms in more than 10 years



Retirement Enhancement and Savings Act of 2016



- Later that year (September) the Senate Finance Committee created and unanimously passed the “Retirement Enhancement and Savings Act (RESA) of 2016”
- This bill contained around 30 of the suggestions made in the bipartisan committee’s report
- Both parties overwhelmingly supported the bill
- Components of the bill were mentioned in President Obama’s 2016 State of the Union speech

Here are some of the highlights of the bill:

- Expand access to Multiple-Employer Plans (MEPs)
- Exempt small balances from Required Minimum Distribution (RMD) rules, thereby simplifying requirements for many individuals.
- Repeal of the maximum age limit for making Traditional IRA contributions (currently 70½)
- Enhance funding flexibility for Safe Harbor 401(k) plans
- Introduce a new tax credit designed to encourage use of automatic enrollment

Retirement Enhancement and Savings Act of 2016



Here are some of the highlights of the bill:

- Introduce a new fiduciary safe-harbor option to provide fiduciary protection for employers when selecting a guaranteed retirement income contract provider (i.e., insurer)
- Authorize trustee-to-trustee transfers between plans for lifetime income options
- Require that benefit statements for defined contribution plans incorporate a lifetime income disclosure

Here are some of the highlights of the bill:

- Provide a new consolidated 5500 filing option for certain groups of defined contribution plans using the same trustee, same named fiduciary, and same administrator
- Eliminate the 10% deferral cap on automatic enrollment safe harbor plans
- Increase the tax credit for small business start-up plans
- Enhance funding flexibility for Safe Harbor 401(k) plans
- Enable businesses to establish qualified retirement plans up until business tax return due date (including extensions)

So what happened to the bill in 2016?

- The Senate approved to refer the bill to committee(s) with the intent of going through debate, then onto the whole chamber for a vote.
- And that's as far as it got
- And then there was an election
- And then there was politics....

So what has the “new” gang in DC been up to?

Now lets fast forward to March 2018...the Senate Finance Committee revived, repackaged and created the -

“Retirement Enhancement and Savings Act of 2018”



It included several provisions that were in the prior bill, and some with a slightly different approach.

So what has the “new” gang in DC been up to?

The Retirement Enhancement and Savings Act Round 2:

- So what happened?
- The bill was then passed promptly by the Senate and House in early March
- It was then supposed to be attached to the must pass omnibus spending bill on March 26th
- But it wasn't. The House pulled it at the last minute and that was that

So what has the “new” gang in DC been up to?

So where are we now?

- Senator Orin Hatch, Chair of the Senate Finance Committee, still wants the RESA bill to pass in its entirety (somewhat of swansong) before he retires in December
- The odds of that are pretty slim for this year, but not all the way out for next year

So what has the “new” gang in DC been up to?



So let me see if I have this right....the House passed the RESA bill in March, then decided not support the bill getting to the presidents desk for signature? Yep.

They had a change of heart and decided to create smaller less all inclusive HR bills to discuss in “hearings”.

So what has the “new” gang in DC been up to?

Lets take a look at the HR bills the House Subcommittee on Health, Employment, Labor, and Pensions discussed at their May 16th hearing:

- H.R. 854, the Retirement Security for American Workers Act, eliminates two burdensome requirements affecting multiple employer plans: the “common nexus” requirement that prevents **adoption of open multiple-employer plans (MEPS)**, in which unrelated employers may collectively satisfy plan administration requirements
- H.R. 4604, the Increasing Access to a Secure Retirement Act of 2017, reduces the compliance uncertainty that companies face by amending ERISA to clarify existing rules that provide a **fiduciary safe harbor when selecting an annuity provider**

So what has the “new” gang in DC been up to?



Lets take a look at the HR bills the House Subcommittee on Health, Employment, Labor, and Pensions discussed at their May 16th hearing:

- H.R. 4610, the Receiving Electronic Statements to Improve Retiree Earnings Act, authorizes the **electronic disclosure** of retirement plan information so that plan participants may access their plan information online.
- H.R. 4158, the Retirement Plan Modernization Act, increases the automatic **cash-out limit for retirement plans from \$5,000 to \$7,600**, and defrays some of the costs of retirement plan administration for small employers.

So what has the “new” gang in DC been up to?

- The bills were all received well and overall there was little opposition
- Usually the lifetime income discussion causes sparks, smoke and fires. However, this round there was a big wet blanket over it all
- Post hearing status: these HR bills are still parked at the House Subcommittee on Health, Employment, Labor, and Pensions. Its up to them to move it to the floor for a full vote. And that’s the same people that already voted “yes” for the RESA bill. Making sense yet?

So what has the “new” gang in DC been up to?

- To summarize a bit, the Senate got the retirement plan overhaul legislation kicked off with the RESA 2018 bill kicked off in **March**.
- In **May**, the House drafted and discussed components of the RESA bill via separate HR Bills.
- In all accounts, there was overwhelming bipartisan support.
- So is there anyone left to toss their retirement plan improvement visions into the hat?

So what has the “new” gang in DC been up to?

Of course - The President decides to jump right in!

On August 31st , Pres Trump signed an executive order directing the Departments of Labor and Treasury to consider changes:

- Make it easier for businesses to join together to offer **MEPs**, which the order refers to as Association Retirement Plans (ARPs)
- Review the rules on **required minimum distributions** from retirement plans (to see if retirees could keep more money in 401(k)s and IRAs longer)
- Consider ways to improve notice requirements (electronic) to reduce paperwork and administrative burdens.

So what has the “new” gang in DC been up to?



....But it sure sounds familiar?

President Obama (2015).. *“We are proposing legislation to allow multiple unrelated employers to come together and form pooled 401(k)s (MEPs), resulting in lower costs and less burden for each employer.....more small businesses should be able to offer cost-effective plans to their employees, while certain nonprofits and other intermediaries could create pooled plans for contractors and other self-employed workers.”*

President Trump (2018).. “Our goal is to lower the cost of retirement plans so that they can become an affordable option for businesses of all sizes. Small businesses will no longer be at a competitive disadvantage. *Reducing regulatory barriers allowing small businesses to band together to create low cost association retirement plans (MEPs) is such a big thing.* They will have such strength to negotiate incredible deals, because they will have bigger numbers. We may even see small businesses make bigger plans than the large companies.”

So what has the “new” gang in DC been up to?



So who is left to propose similar (i.e. exactly the same) retirement plan reform?

Not to be outdone by the Senate, President and other House committees, the **House Ways and Means Committee** also decided to jump in the retirement plan enhancement game

On September 10th, the House Ways and Means Chair Kevin Brady unveiled HR 6757 - The Family Savings Act of 2018, as part of the Tax Reform 2.0 legislation

So what has the “new” gang in DC been up to?

This HR 6757 incorporates a number of the themes included in the RESA bill including:

- Allow more employers to band together and offer a common retirement plan to employees (MEPs), thereby reducing cost and administrative duties.
- Portability of lifetime income investments
- Provides an exemption from required minimum distribution rules Improvement of rules relating to election of safe harbor 401(k) status
- Allows employers to adopt a qualified plan up to due date of tax return
- Modification of nondiscrimination rules to protect older, longer service participants

So what has the “new” gang in DC been up to?

This HR 6757 incorporates a few new proposals that were not mentioned the RESA bill including:

- Allows families to access their retirement accounts penalty-free for new child expenses capped at \$7,500, with the ability to replenish those accounts in the future.
- Expands Section 529 education accounts to also be available to pay for apprenticeship fees, cover the cost of home schooling and help pay off student debt.

So in Summary?

The good news:

- There is solid long lasting bipartisan support for retirement plan reform
- The menu for retirement plan enhancements all look pretty darn good
- There is way more momentum to pass improvement legislature than ever before

The less than good news

- Politics
- It looks like we may have to wait until after the midterm elections a bit to see who will get the “naming rights” to the first significant retirement plan reform legislation passed in 12 years

Thank you for listening!

We are all in this together!

Questions?

