

4Q18

Legislative and Regulatory Brief

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Policy topics

- Legislative Activity page 4
- Department of Labor Guidance and Projects page 9
- IRS/Treasury Guidance and Projects page 14

Legislative Activity

- Tax reform 2.0 - Family Savings Act
- Portman/Cardin discussion draft
- Health Savings Proposals
- State Run Retirement

Family Savings Act of 2018

STATUS: *Passed in the House*

Would need the Senate to pass the Family Savings Act or a comparable piece of legislation for this to advance.



Status in Washington

- The Family Savings Act would make various changes to retirement savings plans including:
 - Creating Open Multiple Employer Plans (open MEPs) where small employers who are otherwise unrelated, could join together in a pooled retirement plan to realize economies of scale.
 - Exempt from Required Minimum Distribution requirements individuals whose aggregate retirement balances do not exceed \$50,000 as of the last day of the year.
 - Establish an annuity selection safe harbor for plan sponsors.
 - Eliminate the safe harbor notice requirement for plans using nonelective contributions and ease the amendment timing rules for plans wishing to be nonelective safe harbor plans.
- The bill would also create Universal Savings Accounts which would be taxed like a Roth IRA but for which there would be no restriction on distribution reasons nor would there be any penalty for distribution prior to retirement.
- Would expand 529 accounts permitting tax-free distributions for certain K-12 expenses, homeschooling expenses, student loan repayments and would permit the establishment of an account for an unborn child.



Bank of America Merrill Lynch's point of view

- Retirement and 529 elements are the elements with bi-partisan support.
- We could see these elements added to another bill during the lame duck session depending on the midterm election outcome.
- The USA account proposal is very expensive and very partisan so its outlook is uncertain at this time.

Portman/Cardin Bill to Enhance Retirement Security Discussion Draft

STATUS: Draft discussion document released mid-October 2018



Status in Washington

The proposal would include in part:

- Establish a new auto enrollment safe harbor with a minimum default at 6% and maximum at 10% - matching employer contribution of dollar for dollar up to the first 1% of pay, 0.50/\$ on the next 5% of pay and 0.25/\$ on the remaining 4% of pay, providing a match all the way to the 10% maximum.
- A special tax credit for employers with 100 or fewer employees who adopt the new safe harbor.
- Amend top heavy rules to expand coverage.
- Amend DC elective deferral coverage for long-term part-time workers.
- Increase the age for Required Beginning Date.
- Expand IRS Employee Plans Compliance Resolutions System (EPCRS) for all inadvertent plan violations.
- Increased in-plan lifetime income portability.
- Remove Required Minimum Distribution barriers for life annuities.
- Consolidation of employee notices and disclosures.
- Expand Roth to SIMPLE IRAs.
- Various defined benefit rule reforms including cash balance clarification, parity for employers that provide more generous lump sum distributions, correct errors in mortality regulations.



Bank of America Merrill Lynch's point of view

- Senators Portman (R-OH) and Cardin (D-MD) have both been supporters of improved retirement savings for years back to the Pension Protection Act in 2006.
- The Senators released a discussion draft of legislation to enhance retirement security in October 2018 and circulated to various industry and policy groups for feedback.
- They have indicated their intent to introduce a formal bill in the Senate in November.
- There are several elements of the Portman/Cardin draft that are similar to provisions in the Family Savings Act from the House and the existing Retirement Enhancement Security Act in the Senate.
- We could see elements of the Portman/Cardin proposal pulled into an existing piece of legislation already in play in the Senate during the lame duck session following the mid term elections.

Health Savings Proposals

STATUS: *Passed in the House in July 2018*



Status in Washington

Two pieces of health savings legislation were passed by the House before they recessed this summer.

H.R. 6199: *Restoring Access to Medication and Modernizing Health Savings Accounts (HSAs) Act*

- Allow greater HSA first dollar insurance coverage prior to the satisfaction of the plan's minimum deductible.
- Permit HSA use for direct primary care arrangements.
- Make services at on-site or retail clinics not HSA disqualifying.
- Make spouse's health Flexible Spending Accounts (FSAs) not HSA-disqualifying.
- Allow transfer of unused FSA and Health Reimbursement Arrangements (HRAs) funds to an HSA.
- Reinstate provisions to permit HSA use for over-the-counter medicines
- Allow HSA use for sports and fitness expenses.

H.R. 6311: *Increasing Access to Lower Premium Plans and Expanding Health Savings Accounts Act*

- Increase annual permitted HSA contributions.
- Allow spousal HSA catch-up contributions to be made into the other spouse's HSA.
- Allow more generous FSA carry-forwards.
- Allow HSAs for working Medicare eligible individuals.



Bank of America Merrill Lynch's point of view

- The House approved and reported on 11 separate health savings bills in late July, eventually combing them down into two bills, H.R. 6199 and H.R. 6311.
- The two bills show that House Republicans are very supportive of Health Savings Accounts (HSAs) and are working to make them more accessible and flexible.
- Both bills were passed on party lines before the August recess with only 12 Democrats voting in favor of H.R. 6311.
- Neither of these bills has been taken up by the Senate which would be the next required stop and the Senate Leader, Senator McConnell (R-KY) has made no indication he intends to take up health savings legislation this year.
- If there is a change in control of the House or the Senate during the mid term elections, it is not likely Democrats will work to advance these proposals in 2019.
- There continues to be policy focus on health savings and the cost of health care so these proposals and other like them will likely continue to be around for some time.

State Run Retirement Programs

STATUS: Ongoing in various states with a national mandate unlikely in the near future



Status in Washington

- There has been no further action in Washington on state run automatic IRA programs since Congress repealed the former Department of Labor favorable guidance on state run programs under the Congressional Review Act in 2017.
- Rep. Richard Neal (D-MA) has proposed Automatic Retirement Plan Act which would create a nationally mandated automatic 401(k) program (deferrals only would be required) for all employers without a work based retirement savings offering who have 10 or more employees and have been in business 3 or more years.



Bank of America Merrill Lynch's point of view

- A national mandate has a very steep hill to climb to gain support from both Republicans and some Democrats.
- The mandate idea has some backing because it would get large amounts of workers into work based retirement savings programs with the hope that more people will be better saved for retirement.
- There are costs to small and mid sized employers that continue to be a concern.
- Congressional legislation with a national mandate would likely freeze existing state run programs and prevent future programs from developing.
- If open Multiple Employer Plans (MEPs) are legislated and provide a more cost effective means for coverage in small to mid size employers we could see an expanded proposal to require employers to offer an open MEP or default into a national mandate.

Department of Labor Guidance and Projects

- DOL Guidance Plan 2018-2019
- Hurricane relief
- Proposed Association Retirement Plan Guidance
- Proposed HRA regulatory guidance

DOL Guidance Plan for 2018 - 2019

STATUS: Released October 2018



Status in Washington

- **Form 5500:** DOL previously listed its next step as analyzing comments, but this project is now just listed as “next action undetermined.”
- **Fiduciary Relief for Investments in Qualified Default Investment Alternatives:** No targeted date is given. ERISA Advisory Council has indicated they will address this year.
- **Notices and Electronic Disclosure:** There is no targeted date for this project but the Executive Order issued by the President in August 2018 directs the DOL to explore ways to improve and make notices more useful and provide for broader use of electronic delivery within one year.
- **Other “Long Term” Projects:** DOL lists its projects regarding pension benefit statements (including a lifetime income disclosure), the annuity safe harbor, and fee disclosure for welfare plans all as next action “to be determined.”
- **Health Reimbursement Accounts (HRAs):** proposed rule released (see page 13).
- **Association Retirement Plans:** proposed rule released (see page 12).



Bank of America Merrill Lynch’s point of view

- There are relatively few changes to the agenda of the Employee Benefit Security Administration.
- The agenda contains longstanding projects for the abandoned plan program, electronic filing of top hat plan statements, and a restated voluntary fiduciary correction program, but few of them are active.
- The current Administration has been focused on regulatory reform to reduce unnecessary regulations and to regulate where they cannot legislate.
- We will continue to see regulatory projects at the direction of the Administration.
- Two of the listed projects have already been released as proposed regulations (HRAs and Retirement Association Plans).

Hurricane Relief

STATUS: *Published*

U.S. Department of Labor Announces Guidance and Relief For Employee Benefit Plans Impacted by Recent Hurricanes



Status in Washington

- **Verification Procedures for Plan Loans and Distributions:** plan will not be considered as failing to follow procedural requirements for plan loans or distributions solely because the failure is attributable to Hurricane Florence or Hurricane Michael.
- **Participant Contributions and Loan Repayments:** The Department will not take enforcement action with respect to a temporary delay in forwarding such loan payments or contributions to the plan.
- **Blackout Notices:** The regulations provide an exception to the advance notice requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing.
- **ERISA Claims Compliance Guidance:** Fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits and take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.
- **Filing Relief:** Form 5500 Annual Return/Report filing relief is provided in accordance with Hurricane Florence and Hurricane Michael Internal Revenue Service (IRS) news releases.



Bank of America Merrill Lynch's point of view

- The DOL worked quickly to provide guidance to those affected by natural disasters this year
- We have not seen any legislative relief related to the recent hurricanes at this time

Proposed Association Retirement Plans Regulation

STATUS: Proposed regulation open for public comment through December 24, 2018



Status in Washington

- The president issued an Executive Order in late August directing the DOL to issue guidance on Association Retirement Plans, also referred to as Multiple Employer Plans (MEPs).
- The guidance was issued as a proposed rule in October and is open for comments from the public.
- The proposed rule would enable employers to join together in a pooled retirement plan with a broader definition of the DOL “commonality” requirement if the employers have a principal place of business in the same regions or metropolitan area.
- The proposal does not create “open MEPs” which have been proposed legislatively that would in part, enable employers to join into a pooled plan without regard to a common business purpose or geographical location among other broader requirements.



Bank of America Merrill Lynch’s point of view

- The guidance is proposed and open for comments through December 24, 2018.
- The DOL will receive comments, review them and determine if changes are necessary to the proposed rule and then publish a final rule.
- The DOL cannot address an outstanding Treasury rule referred to as the “one bad apple” rule that needs to be addressed to make these plans attractive to small employers. The Treasury was directed by the Executive Order to issue guidance on the “one bad apple” rule, but they have not yet issued a proposed rule.
- There are two legislative proposals that have bi-partisan support that would address both the DOL commonality rule and the Treasury “one bad apple” rule and create a truly open MEP.
- We could see legislation in the lame duck session after the mid-term.
- If the legislative proposals are successful, the DOL guidance may not see a final rule as the various concerns with making MEPs more accessible would be addressed by the legislation.
- We continue to watch for developments.

Proposed Health Reimbursement Account Regulation

STATUS: Proposed rules open for public comment through December 28, 2018



Status in Washington

- Under a 2017 Executive Order, the president directed regulators to expand the use of Health Reimbursement Accounts (HRAs) to be used to pay for individual market coverage.
- The executive order indicated that the regulators should, “...consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers’ ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with non-group coverage.”
- On October 29, 2018 proposed regulations were published in the Federal Register jointly from the Departments of Labor, Treasury, and Health and Human Services on health reimbursement arrangements (HRAs).
- The regulations may not be relied upon until they are finalized and currently provide for a January 1, 2020 applicability date.



Bank of America Merrill Lynch’s point of view

- The proposed regulations would allow the use of Health Reimbursement Accounts (HRAs) to pay for individual market coverage reversing effectively Obama-era guidance on HRAs while allowing an employer to remain compliant with the ACA mandate and without violating the requirements of the Affordable Care Act (ACA).
- The administration continues to look for ways to work around elements of the ACA from a regulatory approach where Congress has not been successful in legislative changes to the ACA.
- It is too soon to tell, but this expansion of HRA use could result in more individuals having access to health care or it could result in employers getting rid of their health coverage in favor of individual coverage through the ACA or short-term limited duration plans.
- We will continue to monitor and see if the rule is finalized what the impact is to employers and employees.

IRS/Treasury Guidance and Projects

- IRS / Treasury priority guidance plan for 2018 - 2019
- Private Letter Ruling on Student Loan Benefit
- Guidance Permits QNECs and QMACs Funded by Forfeitures

IRS / Treasury priority guidance plan for 2018-2019

STATUS: Guidance and project plan released October 2018 – the regulatory guidance plan is a guideline not a schedule. Items can be changed or removed, timeframes are illustrative and not to be relied upon



Status in Washington

- **Hardship Distributions:** The Bipartisan Budget Act of 2018 made changes to hardship distribution rules including: removal of the requirement that a participant first take any available loan under the plan prior to being eligible for a hardship distribution and elimination of the requirement that participants must suspend contributions for 6 months following a hardship distribution. The Act also permits hardship distributions of earnings on elective deferrals, qualified matching contributions (QMACs), and qualified nonelective contributions (QNECs). Proposed regulatory guidance was published in the Federal Register on 11/14/2018 followed by a 60 day comment period.
- **One Bad Apple Rule for MEPs:** Proposed rule addressing the “one bad apple” rule for MEPs, which the President’s Executive Order directs them to address - targeted April 2019.
- **Governmental Plans:** Project to define governmental plan status. Targeted for April 2019.
- **Cadillac Tax:** Guidance on the excise tax on high cost employer-sponsored health coverage, which has been delayed until 2020 – no targeted release at this time.
- **162(m) Changes:** Amend the regulations that limit deductibility of compensation above \$1 million to certain executives, to reflect the changes made by the Tax Cuts and Jobs Act – targeted for July 2019.
- **Nonprofit Excise Tax:** New excise tax for compensation paid to executives of non-profits above \$1 million - targeted for May 2019.



Bank of America Merrill Lynch’s point of view

- **Hardship Distributions:** Changes are effective for plan years beginning in 2019 and later and plan sponsors had been concerned that they would not have guidance in time to comply. The recently issued proposed regulation would delay the requirements to apply to distributions made on or after January 1, 2020, giving plan sponsors time to amend their plans. It is good this is on the Treasury/IRS plan as it shows it is a priority for them.
- **One Bad Apple Rule:** In the event the open MEP legislation is passed prior to the release of IRS guidance, this project could fall off of their plan
- **Governmental Plans:** This project has been on the project plan with no action has been taken for a number of years
- **Cadillac Tax:** Congress keeps delaying the implantation of this excise tax and we will not likely see a working guidance project until we are closer to its 2020 effective date
- **162(m) Changes:** The IRS issued limited interim guidance in August 2018 and the have heard from industry groups that the remainder of the guidance is eagerly awaited
- **Nonprofit Excise Tax:** Comments on the interim guidance are due to the IRS November 9th. The IRS anticipates issuing further guidance on other aspects of section 162(m), including the Act’s amendments to section 162(m).

Private Letter Ruling on Student Loan Benefit

STATUS: *Ruling issued*



Status in Washington

- Private Letter Ruling (PLR) 201833012 is a ruling to a particular employer on matching contributions to the 401(k) based on student loan repayments.
- An employer offered to make “matching” contributions to the 401(k) plan based student loan repayments made by some participants who might not be able to afford loan repayment as well as a deferral into the plan.
- The plan provides for a 5% matching contribution on elective deferrals.
- An employee who made a student loan repayment that was equivalent to at least 2% of their compensation would receive a 5% contribution from the employer even if they had not made an elective deferrals into the plan.
- The employer asked the IRS to rule if the student loan benefit program violated the prohibition on contingent benefit rules
- The IRS found that the program did not violate the prohibition on contingent benefit rules.



Bank of America Merrill Lynch's point of view

- Private letter rulings may only be relied upon by the taxpayer who requested them. They cannot be used as precedent by other individuals or plans
- This ruling was limited to the question of the prohibition of contingent benefits but did not address other concerns such a program might create under ERISA
- This is interesting as there is a developing interest in tying student loan debt counseling and repayment to employee benefits but it is a one-off issue not a new benefit
- There was a legislative proposal in a bill by Senator Wyden (D-OR) that would provide for this kind of “matching” contribution and would simplify the nondiscrimination testing requirements, but it has not advanced since it was introduced
- With student debt a concern for young employees as well as for their parents and grandparents who may have taken on debt to help pay for their schooling, this issue will likely remain a focus in benefits policy going forward.

Guidance Permits QNECs and QMACs Funded by Forfeitures

STATUS: *Final regulation*



Status in Washington

- IRS issued final regulations permitting employers to pay for qualified nonelective contributions (QNECs) and qualified matching contributions (QMACs) out of a plan forfeiture account.
- These regulations were issued as proposed in January 2017, but no changes were made from the proposed to the final rule.



Bank of America Merrill Lynch's point of view

- Previously, QNECs and QMACs had to be nonforfeitable when they were contributed to the plan. As such employers were unable to fund QNECs and QMACs with these otherwise forfeitable funds.
- The revised regulations clarify that the QNECs and QMACs only become nonforfeitable when they are allocated to participants accounts.
- These changes help to simplify plan administration and provide plan sponsors with more flexibility.