RETIREMENT SECURITY OFFERS A RAY OF SUNSHINE FOR BIPARTISANSHIP, THOUGH THE OUTLOOK FOR SOCIAL SECURITY REFORM SEEMS CLOUDIER

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President Donald J. Trump and former Vice President Joe Biden have contemplated reforms to Social Security and other methods of retirement savings. Notably, retirement security is an area where Congress has achieved bipartisan reforms in recent years; however, Congress has been unable to come to a consensus on an approach to tackle Social Security's solvency concerns. In this alert, we contemplate the impact possible shifts in control of the White House or Congress may have on Social Security and retirement reform.

CONTINUED BIPARTISAN EFFORTS ON RETIREMENT REFORM

Regardless of which party wins the presidential election or control of either chamber of Congress, retirement reform is one area where ongoing bipartisan efforts to implement reforms are likely to continue. In early 2019, Senate Finance Committee members Senators Rob Portman (R-OH) and Ben Cardin (D-MD) introduced the Retirement Security and Savings Act (S. 1431), which included a number of retirement reform proposals. Following the successful passage of the Setting Every Community Up for Retirement Enhancement (SECURE) Act in 2019 as part of Pub. L. 116-94, the tax-writing committees turned their focus to the next iteration of retirement reform, seeking to build off of their previous success. In that vein, on October 27, 2020, House Ways and Means Committee Chairman Richard Neal (D-MA) and Ranking Member Kevin Brady (R-TX) introduced the Securing a Strong Retirement Act of 2020 (H.R. 8696). Although this legislation is not likely to pass in the lame duck session, H.R. 8696 will be a marker for retirement reform discussions in the 117th Congress. Since we anticipate the leadership of the tax-writing committees will stay relatively consistent, we expect these efforts to continue throughout the next Congress.[1] Additionally, the Department of the Treasury (Treasury), Internal Revenue Service, and Department of Labor — either under a Trump or Biden presidency — will likely continue working on the implementation of the SECURE Act through regulations and other guidance.

Mr. Biden has suggested several retirement reform proposals, including allowing caregivers to make “catch-up” contributions into retirement accounts for years when they may not have had income and expanding access to retirement plans for workers at small businesses. Additionally, Mr. Biden has proposed “equalizing the tax benefits of defined contribution plans,” presumably 401(k)-type plans or individual retirement accounts (IRAs), by enabling low- and middle-income Americans to receive an increased tax benefit for their retirement contributions.[2] While specific details of his proposal have not been released, it has been widely speculated that this plan could transition tax treatment of contributions to defined contribution plans from the current tax deferral system where individuals receive a deduction in the year of the contribution to a tax credit system where an individual would receive a credit that is capped.

Finally, there are likely to be additional efforts to attempt to resolve the multiemployer pension crisis. In the event of a Democratic sweep, these efforts would likely be swift and include potential passage of the Rehabilitation for Multiemployer Pension Plans Act (H.R. 397, also known as the Butch Lewis Act) or similar legislation. Since Democrats are unlikely to secure a filibuster-proof majority in the Senate, these efforts will require bipartisan negotiations. H.R. 397 would create a Pension Rehabilitation Administration within Treasury to help facilitate loans for failing multiemployer pension plans. Some Republicans have expressed concerns with H.R. 397, noting it is unlikely the plans would be able to repay the loans, resulting in a taxpayer funded bailout. If there is mixed control of Congress, work would likely continue behind the scenes to negotiate a bipartisan solution. Several years ago, Congress established the Joint Select Committee on Solvency of Multiemployer Pension Plans, led by former Senate Finance Committee Chairman Orrin Hatch (R-UT) and Sen. Sherrod Brown (D-OH). While the Select Committee was unable to come to an agreement on a final proposal before its work concluded, significant progress was made. Notably, bipartisan discussions have continued throughout the 116th Congress.

TACKLING SOCIAL SECURITY'S SOLVENCY CONCERNS

While retirement security is an area where bipartisan work has led to needed reforms and reform proposals, Social Security is one where partisan differences on how to address the question of solvency and whether reforms to the system are needed has prevented forward momentum toward a compromise legislative solution. Concerns regarding the solvency of the Social Security Old-Age and Survivors Insurance (OASI) and Disability Insurance (DI) trust funds have been growing in recent years. Notably, the estimated exhaustion of both trust funds has accelerated because of COVID-19 and a resulting reduction in payroll tax revenue due to the increase in unemployment. For example, in 2019, the Congressional Budget Office estimated the exhaustion of the OASI trust fund by 2032[3]; however, in a revised estimate, they are now estimating exhaustion to occur in 2031.[4]

Mr. Biden has indicated that he would work to improve the solvency of Social Security if elected. Under current law, the annual earnings amount subject to the Social Security FICA tax is adjusted each year based on the national average wage index. For example, in 2020, the wages subject to the 12.4 percent combined employer/employee Social Security FICA tax rate were $137,700; for 2021, the threshold will increase to $142,800. In order to increase the amount of revenue being brought into the Social Security trust fund, Mr. Biden has suggested making income over $400,000 subject to the 12.4 percent combined employer/employee Social Security FICA tax rate, creating a “donut hole” between the current earnings cap and $400,000. If the national average wage index calculation continues to increase, the donut hole would likely narrow each year.

In addition to addressing solvency concerns, Mr. Biden has suggested several reforms to Social Security, including:

- Providing increased benefits for Americans that have been receiving Social Security benefits for longer than 20 years;
- Increasing the minimum benefit for those that have worked for more than 30 years to at least 125 percent of poverty level;

- Allowing a surviving spouse to retain a larger share of benefits, which Mr. Biden estimates could increase monthly payments by approximately 20 percent; and,
- Working to resolve issues regarding the Government Pension Offset and Windfall Elimination Provision.[5]

Mr. Biden will likely find a strong ally in House Ways and Means Subcommittee on Social Security Chairman John Larson (D-CT). Chairman Larson is a long-time advocate of reforming Social Security to ensure its solvency for future generations and held several hearings this year on the issue. His legislation, the Social Security 2100 Act (H.R. 860), would similarly apply the Social Security FICA tax rate to earnings above $400,000. Additionally, it would gradually increase the combined employer/employee Social Security FICA tax rate to 14.8 percent from the current rate of 12.4 percent. Finally, the bill proposes several other reforms, including:

- Increasing benefits by approximately two percent on average;
- Shifting the inflation calculation method to a Consumer Price Index for Elderly Consumers (CPI-E) formula;
- Increasing minimum benefits for those who have worked for more than 10 years and tying the minimum benefit to wage levels; and,
- Reducing the amount of Social Security benefits subject to taxation by increasing the threshold of non-Social Security income that can be earned without being taxed to $50,000 for individuals and $100,000 for couples.[6]

In the event Democrats control both chambers of Congress, it is possible that they could turn to Social Security reform early in the 117th Congress, using the Social Security 2100 Act, either as currently written or modified, as a starting point. However, forward momentum on Social Security reform may be difficult. The budget reconciliation process, an expedited procedure for consideration of certain legislation that impacts revenue, cannot be used for changes to Social Security; therefore, unless Democrats end the Senate's filibuster rule, this would need to be a bipartisan effort in order to receive 60 votes in the Senate. Finally, Social Security reform is often viewed as generally unpopular. In addition to negotiating a legislative compromise on reform, there will have to be public and political will to support enactment, which could also delay, or even prevent, such reform from taking place.

President Trump has indicated he plans to work to protect Medicare and Social Security. While he has not released a specific proposal, his FY 2021 budget suggests making some modifications to DI “that would avert approximately $12.6 billion in improper payments in Social Security over 10 years,” such as reducing the number of months of benefits DI claimants can receive prior to their date of application from 12 to six months.[7] It is worth noting that such budget proposals are transmitted by the White House to Congress for their consideration; however, they are generally unlikely to be signed into law given the difficulty in achieving bipartisan consensus on changes to Social Security, especially ones that may reduce certain benefits.

Should President Trump be re-elected, he is likely to pursue forgiveness of his recent employee FICA payroll tax deferral covering the period from September 1 through December 31, 2020. Republicans have suggested that, if the deferred taxes are forgiven, they would transfer the appropriate funds to Social Security to make up for the lost revenue. This would require congressional action. Notably, while Democrats have expressed opposition to the deferral, it is possible they would consider forgiving the deferred taxes as part of negotiations over a potential COVID-19 relief package later this year or early in the next Congress.

CONCLUSION

The outcome of the 2020 election may spur a variety of reforms to the U.S. retirement system over the next two years, as each party strives to ensure all Americans are afforded financial security in retirement. With the election rapidly approaching, it will be important for individuals and businesses to consider the potential impact of such reforms and begin planning now. Our tax and tax policy teams are happy to discuss how these changes could affect your retirement security and tax planning, as well as ways you can engage with the administration and Capitol Hill in 2021 to help shape emerging tax and retirement policies.

FOOTNOTES

[1] Note: The only change currently anticipated in tax-writing committee leadership is current Senate Finance Committee Chairman Chuck Grassley (R-IA) stepping down as chair due to term limits; his likely successor is current Banking Committee Chairman Mike Crapo (R-ID).

[2] See source here.

[3] See source here.

[4] See source here.

[5] See source here.

[6] See source here.

[7] See source here.

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