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Would the Securing a Strong Retirement Act Secure More Retirement Equity?

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VIII. CONCLUSIONS

On March 29, 2022, the House approved H.R. 2954 that is titled the Securing a Strong Retirement Act (the Bill)[1] by a vote of 414-5.[2] The Bill's tax incentives are focused principally on those with more than adequate retirement savings. The Bill would make it more difficult to curb violations of the retirement tax rules, although some Bill provisions would slightly increase the savings of the many American families and workers with inadequate or modest retirement savings. It would intensify rather than diminish retirement benefit disparities, while leaving tens of millions of American families and workers with either inadequate or modest retirement savings. Thus, the Bill's tax incentives of more than $70 billion[3] fails to secure a strong retirement for tens of millions of Americans. Incorporating in the Bill the provisions in the discussion draft of the RISE & SHINE Act of 2022 released by the Senate Health, Education, Labor, and Pensions (HELP) Committee Chair Senator Patty Murray (D-WA), and Ranking Member Senator Richard Burr (R-NC) on May 26, 2022 (RISE & SHINE Bill), without any revenue or cost estimates[4] would not significantly change this outcome.

The retirement equity of the Bill could be significantly enhanced by:

- improving the Bill's equitable provisions, such as the Bill's annual $1,000 retirement savings credits for the low-income and middle-income.[5] Doubling the credit, making it refundable, first available in 2023 rather than in 2028, and payable directly to the worker's individual retirement plan or tax-advantaged employee benefit plan would significantly increase the benefits for the American workers and families without adequate retirement savings;
- removing the Bill's inequitable provisions, such as the delay in the date retirement plan benefits

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[1] The proposed legislation (the Bill) as passed is available at https://www.congress.gov/117/bills/hr2954/BILLS-117hr2954rfs.pdf (March 30, 2022). *See generally H.R. 2954 Securing a Strong Retirement Act/Section-by-Section Summary*, Committee on Ways & Means Summary, Committee on Ways & Means democrats (Mar. 29, 2022) (W & M Summary of Bill), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/SECURE2.0_SxS_032822.pdf (explaining the Bill's provisions) and Elizabeth Dold, Michael Kreps, Louis Mazawey, Diana McDonald, and Brigen Winters, *Summary of House-Passed SECURE 2.0 Legislation,* Groom Law Group (Apr. 27, 2022) (describing the difference between each of the Bill's provisions and the current law).

[2] Roll Call 86 | Bill Number: H. R. 2954, https://clerk.house.gov/Votes/202286 (showing the vote of each Congressperson).

[3] *Estimated Revenue Effects of H.R. 2954, as Amended, The "Securing A Strong Retirement Act Of 2022," Scheduled for Consideration by The House of Representatives on March 29, 2022* (Fiscal Years 2022 – 2031), Joint Committee, at 1 (Rept. JCX-3-22, March 28, 2022) (JCT Cost Summary), https://www.jct.gov/publications/2022/jcx-3-22/ (describing more than $35 billion in tax expenditures, balanced by more than $35 billion in tax revenues, although as explained herein the reported revenues from making Roth IRAs more readily available do not reflect the long-term net costs of such changes).

[4] The draft legislation is available at https://www.help.senate.gov/imo/media/doc/052622%20-%20HELP%20Retirement%20Discussion%20Draft.pdf (RISE & SHINE Bill). A Senate HELP Committee document entitled, RETIREMENT IMPROVEMENT AND SAVINGS ENHANCEMENT TO SUPPLEMENT HEALTHY INVESTMENTS FOR THE NEST EGG (RISE & SHINE) ACT OF 2022 Discussion Draft Section-By-Section Summary, is available at https://www.help.senate.gov/imo/media/doc/052622%20Retirement%20Bill_Section-by-Section%20Summary.pdf. *See also* Press Release, *Senators Murray, Burr Release Draft of Legislation to Strengthen Families' Finances, Bolster Emergency Savings, Improve Retirement Security*, Senate HELP Committee (May 26, 2022), https://www.help.senate.gov/chair/newsroom/press/senators-murray-burr-release-draft-of-legislation-to-strengthen-families-finances-bolster-emergency-savings-improve-retirement-security *-Cf.* Austin R. Ramsey, *Senators Float Retirement Bill Lacking Auto-Enrollment Plan (1)*, Daily Tax Rep. (May 26, 2022) (emphasizing differences between the Bill and the RISE & SHINE Bill. The latter lacks an automatic contribution mandate, but provides for "emergency savings accounts").

[5] The Bill, Note 1, above, §104, at 14-16.

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must begin to be distributed to a plan participant;[6] This delay that would be effective in 2023 would only help those whose retirement would not depend upon their plan benefits, not those with adequate or modest retirement savings. It is the costliest Bill provision that is described as ''increase[ing] retirement savings:'' [7]

- adding equitable provisions, such as curbs on Mega-IRAs and Mega-Plan Accounts, those individual and employer retirement plan accounts with balances far in excess of the participant's expected retirement needs;[8]

I. EXISTING WIDESPREAD RETIREMENT BENEFIT SHORTFALLS AND INEQUITIES

The Bill purportedly assists the many American families and households with inadequate retirement savings.[9] There are a huge number of such American families or households, whether one uses, as described below from the analysis of assets and retirement expenses, the conservative estimate of almost 40%, or the more alarming estimate of 75%. Surveys of Americans similarly show that 30 to 75% are not confident they will have sufficient funds to retire. [10] Yet, these Americans, as discussed below, receive a disproportionately small portion of the current retirement tax incentives.[11]

At the end of 2019, almost half of the American families, headed by someone between 32 and 61, had no assets in an individual retirement plan (IRA), such as an individual retirement account or individual retirement annuity, or in a tax-advantaged employer defined contribution plan, such as a §401(k) plan or a §403(b) plan.[12] Among the little more than half of those families with some retirement savings, half had less than $65,000 in those retirement plans as of De-

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[6] The Bill, Note 1, above, §106, at 17-18.

[7] The Joint Committee on Taxation estimated the cost to be approximately one-third of the more than $30 billion cost of expanding coverage and increasing retirement savings. JCT Cost Summary, Note 3, above, at 1, Item I.6.

[8] *See generally* Albert Feuer, *Mega-IRAs, Boon or a Bane?*, 49 Tax. Mgmt. Comp. Plan. J. No. 8, 179 (Aug. 6, 2021) (describing Mega-IRAs and proposing measures to curtail tax incentives for such vehicles) (Mega-IRAs).

[9] *See* Press Release, *Neal Applauds House Passage of Retirement Legislation*, Committee on Ways & Means democrats (Mar. 29, 2022),https://waysandmeans.house.gov/media-center/press-releases/neal-applauds-house-passage-retirement-legislation (explaining the Bill's provisions).

[10] *See, e.g.*, Amanda Umpierrez, U.S. Falls in Natixis Global Retirement Ranking Plan Sponsor (Sept. 16, 2021), https://www.plansponsor.com/u-s-falls-natixis-global-retirement-ranking/ (describing finding that almost half of Americans believe it would take a miracle for them to retire securely); and David Goodsell, *2021 Global Retirement Index: It Will take a Miracle-The search for retirement security in an insecure world,Nataxis Investment Managers,* https://www.im.natixis.com/us/resources/2021-global-retirement-index-full-report (comparing retirement readiness among investors with more than $100,000 in such assets throughout the world and finding the U.S. workers rank 17th in the world); *2022 Retirement Confidence*, Employee Benefit Research Institute and Greenwald Research (April 2022) (reporting that an online survey of an unclear group in January 2022 showed that more than 70% of workers are confident that they will have enough money to live comfortably throughout their retirement years (Figure 1), and in Figure 2 almost 80% of retirees share the same confidence (Figure 2)). On the other hand, Figure 17 in the same source shows that 40% of the workers and almost 20% of the retirees reported they don't know who to go to for financial and retirement planning advice, which suggests that their respective perceptions of retirement readiness may not be realistic; *New York Life Wealth Watch Supplemental Datasheet*, New York Life (May 2022), at 1 https://www.newyorklife.com/assets/newsroom/docs/pdfs/Wealth-watch-supplemental-data-sheet-May-2022.pdf (reporting that 66% of the respondents in an unclear group were confident that their retirement savings would last their whole lives). On the other hand, at 4 in the same source, 34% of the non-retirees reported that they had not started thinking about their retirement, which suggests that their respective perceptions of retirement readiness may not be realistic; and *Working Americans Say It Will Take $1,100,000 Saved to Retire Comfortably but Less Than One-Quarter Will Get There*, Schroder's (May 24, 2022), https://www.yahoo.com/now/working-americans-1-100-000-130200907.html (reporting that 24% expect to have sufficient assets to ''retire comfortably,'' and only 22% nearing retirement age reported ''having enough to retire'').

[11] *Cf.* Tyler Bond and Dan Doonan, *The Missing Middle How Tax Incentives For Retirement Savings Leave Middle-Class Families Behind*, National Institute on Retirement Security (May 2022) (''The Missing Middle''), https://www.nirsonline.org/wp-content/uploads/2022/05/NIRS-The-Missing-Middle-1.pdf (presenting the case that ''the U.S. retirement savings system too often leaves out the middle class.'' and that the tax current retirement incentives are most beneficial to high-income earners) and Samantha J. Prince, *Megacompany Employee Churn Meets 401(k) Vesting Schedules: A Sabotage on Workers' Retirement Wealth*, at 27-38 (Mar. 10, 2022) (MegaCompany Churn), https://ssrn.com/abstract=4054884 (discussing the extent and causes of a variety of retirement wealth inequalities).

[12] Neil Bhutta *et al.*, *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin (Sept. 2020) at 16, https://www.federalreserve.gov/publications/files/scf20.pdf (describing the changes in finances of American families between 2016 and 2019, including retirement assets, as described in the 2020 Federal Reserve Survey of Consumer Finances Data, which do include interests in defined benefit plans). The results were similar for the 2016 survey by the Board of Governors of the Federal Reserve. *See* Monique Morrissey, *The State of American Retirement Savings*, Economic Policy Institute (Dec. 10, 2019), https://www.epi.org/publication/the-state-of-american-retirement-savings/. *But see U.S. Retirement Assets: Amount in Pensions and IRAs*, Cong. Res. Service (IF12117: May 23, 2022), at 2, https://sgp.fas.org/crs/misc/IF12117.pdf (reporting that the 2019 study found that 63.3% of those households had DC assets, participated in DB plans, or had IRA assets).

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cember 2019.[13] Thus, three quarters of American families have less than $65,000 in retirement savings. At the end of 2019, the median retirement savings for families, whose head of household was in the range of 65-74 is $164,000.[14] According to the U.S. Department of Labor Lifetime Income Calculator, an individual 65 years old could convert the sum into a single life monthly annuity of $894.[15] This is far too little to pay for most individuals' retirement expenses, and why more than half of those over age 60 did not believe their retirement savings were on track.[16] Such retirement shortfalls, like below-average wealth and income, are far more pronounced among Hispanics and Black families.[17] Such shortfalls are particularly prevalent among those working for small businesses. In 2019, seventy-five percent of the 42 million American workers at businesses with less than 100 employees were found to have no access to an employer retirement plan.[18]

Retirement readiness, however, must be determined taking into account non-retirement plan income and assets that may be used to pay normal retirement expenses, such as social security, savings in non-tax-advantaged vehicles, and home equity.[19] Jack VanDerhei, a researcher for the Employee Benefit Retirement Institute using this retirement readiness

[13] *Id. See also* Jack Caporal, *Average Retirement Savings in the U.S.: $65,000*, Motley Fool (June 16, 2021), https://www.fool.com/research/average-retirement-savings/ (breaking down the retirement asset data for those who have such plan assets by age, education level, and race).

[14] Jack Caporal, *Average Retirement Savings in the U.S.: $65,000*, Motley Fool (June 16, 2021), https://www.fool.com/research/average-retirement-savings/ (breaking down the retirement asset data for those who have such plan assets by age, education level, and race).

[15] Employee Benefits Security Administration, *Lifetime Income Calculator*, U.S. Dept of Labor (calculation made on May 31, 2022) https://www.askebsa.dol.gov/lia/. No attempt was made to update the 2019 account balance because such attempt would have to make assumptions about growth, which would depend on how the funds were invested. However, a S&P investment would have fallen by almost 18% between January 1, 2022 and May 20, 2022. *SP YTD Return*, YTD Return.com, https://www.ytdreturn.com/on-s-p-500/ (last visited May 23, 2022).

[16] *Report on the Economic Well-Being of U.S. Households in 2020-Retirement*, Board of Governors of the Federal Reserve System (May 2021), at Table 23. Retirement saving and self-assessed preparedness (by age and race/ethnicity), https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-retirement.htm (reporting that concern rose with the individual's age and significantly more Blacks and Hispanics were concerned).

[17] Neil Bhutta, *et al.*, *Disparities in Wealth by Race and Ethnicity*, Board of Governors of the Federal Reserve System FEDS Notes (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm (finding that racial/ethnic wealth inequality results from (1) White families being more likely to receive an inheritance or gift, and in larger amounts, than Black or Hispanic families. (2) non-White families are less likely to own their home, often due to not having help with a down payment or being able to obtain a mortgage; and (3) non-White families are less likely to have a retirement account and/or an emergency savings account. Also finding that for working-age families that have balances in retirement accounts, the typical White family has about $50,000 saved, which is two and a half times the amount saved as the typical Black or Hispanic family, who have about $20,000 saved in retirement accounts.) *See also* Ana H. Kent, Nikki Lanier, David F. Perkis, and Claire James, *Examining Racial Wealth Inequality*, Federal Reserve Bank of St. Louis Page One Economics (March 2022), https://files.stlouisfed.org/files/htdocs/publications/page1-econ/2022/03/01/examining-racial-wealth-inequality_SE.pdf (finding that Black and Hispanic Americans have experienced ongoing income inequality and even more substantial wealth inequality compared with White Americans. This inequality persists across time, generations, and education levels.) and *Advisory Council on Employee Welfare and Pension Benefit Plans*, Report to the Honorable Martin Walsh, United States Secretary of Labor, *Gaps in Retirement Savings Based on Race, Ethnicity and Gender*, U.S. Dept. Labor (Dec. 2021), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-gaps-in-retirement-savings-based-on-race-ethnicity-and-gender.pdf (presenting non-statutory recommendations to reduce gaps between retirement savings of people of color, minorities, and women compared to other workers in same occupation, such as measures to encourage the employers of half of the American workforce who do not sponsor an employee retirement plan to do so).

[18] Kevin Busque, *Exposing the small business 401(k) access gap*, Guideline (Mar. 29, 2019), https://www.guideline.com/blog/defining-the-small-business-401-k-access-gap/ (describing the results of reviewing all the annual employee benefit plan reports, Form 5500s, filed with the IRS).

[19] *See also Report on the Economic Well-Being of U.S. Households in 2020-Retirement*, Board of Governors of the Federal Reserve System (May 2021), at Figure 39. Forms of retirement savings among non-retirees, https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-retirement.htm (reporting that only 26% of non-retirees had no retirement savings of any kind), *But cf.*, *Present Law and Background Relating to Retirement Plans Scheduled for A Public Hearing before The Senate Committee on Finance on July 28, 2021*, Joint Committee of Taxation, JCX 32-21 (July 26, 2021), 49-64, https://www.jct.gov/publications/2021/jcx-32-21/ (observing that retirement readiness needs to be determined on a household basis and taking into account social security and savings in non-tax-advantaged vehicles, but recognizing in Table 1 that of those at least 65 years old, in the lowest income quartile, only 5% had any pension income and less than 4% had any earned income, and in the next quartile, only 21% had any pension income, and 9% had any earned income and Irena Dushi and Brad Trenkamp, *Improving the Measurement of Retirement Income of the Aged Population*, Office of Retirement and Disability Policy, Social Security Administration (ORES Working Paper No. 116 (released January 2021), https://www.ssa.gov/policy/docs/workingpapers/wp116.html (finding that for the population aged 65 or older, supplementing the Census Department 2016 population survey with IRS and Social Security administrative data results in a higher estimate of pension income's share of aggregate income, less estimated reliance on Social Security, and a lower estimated rate of poverty and finding that 31% had no pension or IRA income in Table 4).

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approach, projected that almost 40% of households, regardless of the current age of the head of the household would eventually be unable to meet ''normal retirement expenditures.''[20] The average shortfall in 2019 dollars for such households was computed to range from $117,739 for households headed by someone aged 35–39 to $105,093 for those headed by someone aged 60–64.[21] This approach may understate retirement readiness because it focuses on retirees' average expenditures,[22] rather than the desire of retirees to maintain their pre-retirement consumption.[23]

Current retirement tax incentives are focused on those with the highest income, who receive tax benefits that are a larger percentage of their income than do those with low and middle incomes.[24] This focus exacerbates retirement benefit disparities that favor high-income workers. More of the 2019 retirement tax incentives were granted to households with market incomes in the top 10% than were granted to the households with market incomes in the bottom 80%.[25]

IRAs display some of the starkest retirement inequities. In 2020, 63% of the reported 128.5 American households, i.e., 80 million, had no IRA accounts and 36%, i.e., more than 45 million, had no IRA accounts or interests in employer retirement plans.[26] At the end of 2019 there were almost 63 million Americans with IRAs,[27] with an average IRA account balance less than $200,000.[28] At the end of 2019, there were 3,625 taxpayers with traditional and Roth IRA balances in excess of $10 million and 497 with balances in excess of $25 million.[29] These individuals constituted less than one tenth of a percent of all IRA owners and each had balances far in excess of their expected reasonable retirement needs.[30]

II. TAX PRINCIPLES GOVERNING TAX-FAVORED RETIREMENT EXPENDITURES

The Internal Revenue Code of 1986, as amended (the ''Code'') provides income tax incentives to employee benefit plans that satisfy §401(a), §401(k), §403(a), §403(b) or §457(b). These plans are not subject to tax on their earnings.[31] The Code also provides direct income tax incentives to their participants and beneficiaries. They are not subject to tax on plan benefits until the benefits are distributed.[32] These retirement tax incentives are expected to cost American taxpayers between 2022 and 2031 almost $2.6 trillion dollars.[33] The similar tax incentives associated with IRAs that satisfy §408(a), §408(b), or §408(c) are ex-

[20] Jack VanDerhei, *Retirement Savings Shortfalls: Evidence from EBRI's 2019 Retirement Security Projection Model,* EBRI Issue Brief, No. 475 (Mar. 7, 2019), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_475_rspm-7mar19.pdf

[21] *Id*., at Table 3, at 6.

[22] *Id.*, at 5.

[23] *See* Anqi Chen and Alicia H. Munnell, *Do Retirees Want Constant, Increasing, or Decreasing Consumption?*, Center for Retirement Research at Boston College Working Paper 2021-21 (Dec. 2021), https://crr.bc.edu/wp-content/uploads/2021/12/wp_2021-21.pdf (finding that wealth and health constraints help explain the observed pattern of declining post-retirement consumption, which implies the decline reflects inadequate retirement savings).

[24] *See, e.g.*, Eric Toder, Surachai Khitatrakun, and Aravind Boddupalli, *Tax Incentives for Retirement Savings*, Tax Policy Center, Table 2 at 13 (May 11, 2020), https://www.taxpolicycenter.org/publications/tax-incentives-retirement-savings/full (using three different methods that those in the top quintile of pre-tax income for 2020, other than the top 1% who often don't take advantage of tax-advantage retirement plans, often usually don't rely on retirement tax incentives, receive tax incentives that are greater percentage of their pre-tax income than others).

[25] *The Distribution of Major Tax Expenditures in 2019*, Cong. Budget Office (Oct. 2021), Table 2, at 14, https://www.cbo.gov/publication/57585#_idTextAnchor026.

[26] *The Role of IRAs in US Households' Saving for Retirement*, 2020, Investment Company Institute (Jan. 2021), at 3, https://www.ici.org/system/files/attachments/pdf/per27-01.pdf (presenting statistics regarding the prevalence of IRAs among different groups of working and retired households). *See also U.S. Retirement Assets: Amount in Pensions and IRAs*, Note 12, above, at 2 (reporting that, in 2019, 74.6% of American working and retired households had no IRA assets).

[27] *SOI Tax Stats - Accumulation and Distribution of Individual Retirement Arrangements (IRA)*, IRS, Table 1. Taxpayers with Individual Retirement Arrangement (IRA) Plans, by Type of Plan, Tax Year 2019, https://www.irs.gov/statistics/soi-tax-stats-accumulation-and-distribution-of-individual-retirement-arrangements (Press 2019 button under IRA Plans: Classified by Tax years). This number is higher than the number of households with IRAs because multiple members of households may have IRAs.

[28] *Id.* There was no indication of the median account value, i.e., the amount which half of the account owners had balances less than or equal to such amount, which is not increased by a few large accounts.

[29] *See* Memorandum to: Kara Getz, Tiffany Smith, and Drew Crouch, Joint Committee on Taxation (July 27, 2021), https://www.documentcloud.org/documents/21018466-72821-jct-megaira (showing dollar threshold breakouts and counts of both traditional and Roth IRAs with large balances, based on the most recent data then available).

[30] *See generally* Albert Feuer, Note 8, above.

[31] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated. Such a plan is tax exempt except to the extent it engages in an activity or activities that generate ''business income'' and thereby becomes subject to the unrelated business income tax of §511-§514.

[32] *See, e.g.*, §401(a) and §402(a). An employee benefit which, however, engages in activity that generates ''business income'' is subject to the unrelated business income tax of §511-§514.

[33] *Tax Expenditures*, U.S. Dept of Treasury, Office of Tax Analysis, Table 3 INCOME TAX EXPENDITURES RANKED

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pected to cost American taxpayers almost $300 billion for the same period.[34] These costs are only exceeded by the tax incentives for health care and health care insurance premiums.[35] Yet less than $14 billion is allocated for the same period for tax credits to low- and middle-income workers cash who make retirement plan contributions.[36]

There is general agreement that retirement tax incentives are intended to encourage adequate retirement savings by working Americans, but the Government Accounting Office reported in 2017 that ''there has been little progress in expanding [retirement plan] coverage by either DB or DC employer-sponsored plans.''[37] The incentives are not intended to encourage savings in general. Otherwise, the Code would simply defer tax on the income on all savings and not be limited to savings arising from a worker's compensation. Nor are the savings intended to encourage unlimited savings in either individual or employer retirement plans. Otherwise, the Code would not limit the contributions to either kind of plan.[38] It is thus reasonable to ask whether the Bill would reduce or increase the current income, wealth, race, and ethnic disparities in retirement savings or in the distribution of retirement tax incentives.[39]

III. DIFFERENT RETIREMENT SAVINGS TAX INCENTIVES

Several examples will illustrate how the retirement tax incentives may and may not encourage additional savings. For simplicity, a worker will be assumed to be in the 20% income tax bracket for all relevant periods.[40]

Some workers lack the financial ability, rather than the financial willingness, to save for retirement. For example, a worker living from paycheck to paycheck will not be able to set aside retirement funds, regardless of tax incentives other than those that directly increase the worker's income sufficiently so that the worker can afford to allocate to retirement savings, such as refundable tax credits to the worker, or those to the taxpayer's employer, which indirectly encourage the employer to increase the worker's income that the worker can afford to defer. In both cases, if the additional income is initially allocated to retirement savings it is not likely to stay so allocated, if the worker, at such time, is barely keeping his or her head and that of his or her family above water, despite prudent spending habits.

Some workers have the financial resources, but not the financial willingness, to save for retirement. For example, consider a worker who is able to set aside $8,000 of the worker's after-tax compensation for re-

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BY TOTAL FISCAL YEAR 2022-2031 PROJECTED REVENUE EFFECT, at 32 (June 3, 2021), https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures [go to tab FY 2022 Released December 9, 2021)] (ranking the 2022-2031 tax expenditures), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2023.pdf.

[34] *Id*.

[35] *Id*.

[36] *Id*., at 33 (referring to the §25B).

[37] GAO-18-111SP, *Report to Congress, The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security*, U.S. GOVT. ACCOUNTABILITY OFFICE (Oct. 18, 2017), at 91-92, https://www.gao.gov/assets/690/688063.pdf.

[38] *See, e.g.,* §219(b) (limiting IRA contributions) and §401(a)(17) (limiting the compensation that may be considered by tax-exempt trusteed employer retirement benefit plans).

[39] *Cf.* Daniel Hemel, *The American retirement system is built for the rich*, Wash. Post (Apr. 20, 2022), https://www.washingtonpost.com/outlook/2022/04/20/retirement-ira-inequality-budget/ (claiming that the Bill is ''part of a decades-long pattern: While loudly and proudly proclaiming that their goal is to nurture nest eggs for the working class, lawmakers have constructed a complex of tax shelters for the well-to-do''); David Mitchell, *Retirement tax incentives supercharge the fortunes of wealthy Americans*, Washington Center for Equitable Growth (Mar. 17, 2022), https://equitablegrowth.org/retirement-tax-incentives-supercharge-the-fortunes-of-wealthy-americans/ (claiming that ''tax-advantaged retirement accounts have been hijacked by the rich and their armies of lawyers and accountants. Today, wealthy Americans use tax-advantaged retirement accounts to invest huge sums tax free for themselves and their heirs;'' and presents a chart illustrating the continuing racial and ethnic disparities in retirement savings); Nevin Adams, *'Broken' Premises*, American Soc'y. Pension, Professionals & Actuaries (May 1, 2022), https://www.asppa.org/news/%E2%80%98broken%E2%80%99-premises (claiming that the current private pension works ''amazingly well — for those who have access to it — including, most especially, those at the lower end of the income scale'' and observing that tax deferrals are not tax avoidance, but not mentioning that Roth accounts result in tax avoidance), Michael Doran, *The Great American Retirement Fraud* (Dec. 31, 2021), available at https://ssrn.com/abstract=3997927 ''[d]espite the benign but misleading rhetoric about enhancing retirement security for everyone, the real beneficiaries of the retirement-reform legislation [in the last twenty-five years] have been higher-income earners, who would save for retirement even without tax subsidies, and the financial-services industry, whose lobbyists have driven the retirement-reform legislative agenda''), and Teresa Ghilarducci, *In SECURE 2.0 Congress Identified America's Retirement Crisis: But More Needs Doing To Cover 50% Of Americans With No Real Pension*, Forbes, https://www.forbes.com/sites/teresaghilarducci/2022/04/20/in-secure-20-congress-identified-americas-retirement-crisis-but-more-needs-doing-to-cover-50-of-americans-with-no-real-pension/?sh=462fb7f78243 (praising the automatic contribution provisions of the Bill, but criticizing the postponement of the required beginning date for plan distributions and suggesting ''that anyone without a plan would be automatically enrolled into a life-cycle fund at a specified percentage of income'').

[40] *But see IRS provides tax inflation adjustments for tax year 2022, IRS* (Dec. 15, 2021), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2022 (showing actual bracket for 2022 income not subject to special rates, such as for capital gains).

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tirement, and will stay in the 20% tax bracket may, and, if taxes were disregarded, could generate a 200% return, i.e., triple the savings, until his retirement when the worker could withdraw the entire sum. Tax incentives may encourage these workers to set aside more retirement savings.

The worker could place the $8,000 in a brokerage account and have immediate access to the funds without any adverse tax consequences, but would probably be unable to triple his money because of the need to pay taxes on the pre-retirement realized gains. This would reduce the amounts that could be invested until his retirement.

If the worker had access to a tax-advantaged plan that permitted the worker to make an after-tax non-Roth contribution of $8,000 and could avoid making any withdrawals, the funds would triple to $24,000, and the 20% tax on the $16,000 gain, $3,200 would reduce the balance to $20,800, which would be greater than the balance in the nonretirement plan. Thus, a prudent worker would do that if the worker did not expect to need immediate and penalty-free access to the funds prior to reaching retirement.

If the worker had access to a §401(k) plan that permitted the worker to make pre-tax contributions, the worker would be in the same position after making the contribution as before if the worker makes a $10,000 contribution, which is equivalent to $8,000 in after-tax funds. If the worker could avoid making any withdrawals, the funds would triple to $30,000, and the 20% tax on the full $30,000, no portion of which was taxed would be $6,000 and the worker would have $24,000 rather than $20,800. Thus, investing an equivalent amount of pre-tax dollars in an employee benefits plan is more prudent than investing directly in a vehicle without such tax incentives.

The worker could achieve the exact same result if he had been able to deposit the after-tax amount of $8,000 in a Roth vehicle in which case the amount would have tripled to $24,000 and be subject to no further income tax on distribution on the same retirement date.

This analysis disregards two important Roth IRA characteristics. First, contributions to Roth IRAs, which must be made on an after-tax basis,[41] are given a bonus tax advantage that is not available to after-tax contributions made to traditional IRAs or any other tax-advantaged vehicle. The bonus is that the participant has to pay no tax if at the time of the distribution the participant is at least 59 ½, and has maintained a Roth IRA for a five-year period.[42] Moreover, unlike those other after-tax distributions, no required minimum distributions need made from a Roth IRA during the participant's life.[43] Thus, if the Roth IRA participant does not need the Roth IRA funds, tax deferrals need not cease during the participant's lifetime.

Roth vehicles provide more significant tax benefits than similar nonRoth vehicles, even if the law were changed to make them subject to the same withdrawal rules as nonRoth vehicles, because it appears that almost no Roth contributors reduce their contributions to reflect the tax associated with such contributions. Let's first look at a plan permitting the worker to make an after-tax nonRoth contribution of $10,000 who can avoid making any withdrawals. The funds would triple to $30,000, and the 20% tax on the $20,000 gain, $4,000, would reduce the balance to $26,000, which would be greater than the balance in the nonretirement plan. Similarly, a contribution of $10,000 to a Roth vehicle rather than an ordinary §401(k) plan account would result in a tripling of the balance to $30,000 which would be subject to no further tax. The reason for this is that the worker is in fact setting aside not only the $10,000 contribution, but the $2,000 income associated with the $10,000 income. If the $2,000 source of the tax credit payment were not so used and also tripled in the same period, there would be no difference between using pre-tax dollars in a §401(k) plan and post-tax dollar in the Roth vehicle. Interim taxes, however, on such gains make this unlikely. Thus, Roth retirement tax incentives are highly valued by those who use them, but highly costly to American taxpayers.[44]

Roth contributions have been attractive to tax-writers because as shown above they front-load the tax-payment, but back-load the tax costs. Thus, it is not surprising that the Roth provisions were initially adopted not to facilitate more retirement savings, but to facilitate the extension of capital gains and dividends rate cuts.[45] The Joint Committee on Taxation estimated that the short-term revenue gains in the 10-year measuring period in that case would be more

[41] §408A(c)(1), §408A(c)(6).

[42] §408A(d). In contrast, recipients of distributions otherwise allocable to after-tax contribution such as distributions from traditional IRAs, are taxable on the earnings attributable to such contributions.

[43] §408A(d)(5).

[44] *But see* Eric Toder and Surachai Khitatrakun, *Accounting for the Benefit of Retirement Saving Incentives in Distribution Tables*, Tax Policy Center (Aug. 17, 2020) (presenting a more sophisticated analysis of the value of retirement tax incentives, including how changes in tax rates may change the comparative value of different incentives), https://www.taxpolicycenter.org/publications/accounting-benefit-retirement-saving-incentives-distribution-tables/full.

[45] See Amanda Parsons, *Slam the Door: Why Congress Should End the Backdoor*, 35 Yale L. and Policy Rev. 41, at 45 (2017), http://ylpr.yale.edu/sites/default/files/IA/parsons.produced.pdf, at 45.

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than offset by the long-term revenue losses.[46] Similarly, Congress may be reluctant to curtail Roth advantages because of how the revenue costs of such a curtailment are computed.[47]

The same front-loading costs and back-loading benefits make Roth vehicles, which include designated Roth accounts for §401(k) plans, §403(b) plans, and §457(b) plans,[48] very appealing to individuals with high incomes and considerable wealth.[49] It is often prudent for such individuals to convert their traditional IRAs in whole or in part into Roth IRAs.[50]

IV. THE FOCUS ON IMPROVING THE BILL'S SECURING RETIREMENT PROVISIONS

This article will focus on those Bill provisions that have obvious retirement security consequences, particularly the extent to which they will assist the many American workers and families with adequate or modest retirement savings. Neither the Ways and Means Committee nor the Joint Committee on Taxation sought to quantify these effects. Bill provisions will be disregarded that have no obvious retirement security or distributional consequences even if they seem quite sensible, such as §320 of the Bill providing that all employers, not just those who have just established a new plan, may postpone adopting discretionary amendments that increase plan participants' benefits until the due date of the employer's tax return,[51] or the similar §321 of the Bill providing that sole proprietors and single-member LLCs for which that individual is the only employee may treat elective deferrals made before the filing date of the employee's tax return filing date for the initial year of a §401(k) plan as having been made in such initial year.[52] A similar approach will be taken with respect to the RISE & SHINE Bill, which like the Bill,[53] would sensibly improve the notice and disclosure requirement pertaining to employer retirement plans,[54] but, unlike, the Bill has no cost or revenue estimates of its various provisions.

V. THE GOOD EQUITABLE PROVISIONS IN THE BILL AND THE RISE & SHINE BILL AND HOW THEY MAY BE IMPROVED

The Bill has good equitable provisions that are likely to help many working Americans with inadequate retirement savings improve those savings. Some of those provisions could be improved as described below.

A. Making Participation and Contribution Requirements Easier to Satisfy

Making it easier to participate and contribute to tax-advantaged employer retirement plans will tend to help those with inadequate retirement savings. It is difficult to acquire and maintain adequate retirement savings without ready access to tax-advantaged employer retirement plans.

Section 101 of the Bill:

> requires 401(k) and 403(b) plans to automatically enroll participants in the plans upon becoming eligible (and the employees may opt out of coverage). The initial automatic enrollment amount

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[46] Joel Friedman & Robert Greenstein, *Joint Tax Committee Estimate Shows that Tax Gimmick Being Designed to Evade Senate Budget Rules Would Increase Long-Term Deficits*, Ctr. On Budget & Policy Priorities, 4-5 (2006), https://www.cbpp.org/sites/default/files/atoms/files/4-25-06tax.pdf (the estimates show a short gain of $4 billion in the measuring period and a $9 billion loss after the measuring period).

[47] *See, e.g.*, Laura Weiss, *Delayed 'mega IRA' provisions boost budget bill's revenue take*, Roll Call (Nov. 12, 2021), https://rollcall.com/2021/11/12/delayed-mega-ira-provisions-boost-budget-bills-revenue-take/ (explaining how delaying the effective date of excise taxes on Mega-IRAs would result in more favorable revenue estimates for the proposal).

[48] *See generally* Albert Feuer, Note 8, above at 182.

[49] *See, e.g.*, Louis A. Mezzullo, *Roth IRAs: Time for a New Look*, 36 ACTEC L.J. 317 (2010) (describing the conditions under which it is prudent for wealthier individuals to use Roth IRAs).

[50] *See, e.g.*, Neal Templin, *Roth IRA Conversions: What You Need to Know*, Wall St. J. (Nov. 19, 2020), https://www.wsj.com/articles/roth-ira-conversions-what-you-need-to-know-11605798001 (describing when IRA conversions are prudent and when they are not prudent) ; and Natalie Choate, Indirect Roth IRA Contributions: Backdoor or Trapdoor?, Morningstar (Jan. 11, 2021), https://www.morningstar.com/articles/1017202/indirect-roth-ira-contributions-backdoor-or-trapdoor (presenting numerical examples of the advantages and disadvantages of IRA conversions of traditional IRAs to Roth IRAs by high-income individuals).

[51] The Bill, Note 1, above, §320, at 121-122. This provision seems to recognize that many employers, particularly those with low-income, don't know the extent to which they business can afford to take on plan liabilities for a plan year until the following year when the employer's owners may determine the employer's income for the plan year.

[52] The Bill, Note 1, above, §321, at 122. This proposal raises the question of whether it is advisable to permit such recharacterization for all plan years because many such an individual, particularly one with low income, often don't know the extent to which the individual can afford to make employee deferrals for a plan year until the following year when the individual determines the trade or business's income for the plan year.

[53] The Bill, Note 1, above, §305, at 78-83 (focusing on notices to unenrolled participants).

[54] RISE & SHINE Bill, Note 4, above, §301-§304, at 57-70.

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> is at least 3 percent but no more than 10%. And then each year that amount is increased by 1 percent until it reaches 10 percent. All current 401(k) and 403(b) plans are grandfathered. There is an exception for small businesses with 10 or fewer employees, new businesses (i.e., have been in business for less than 3 years), church plans, and governmental plans. Section 101 is effective for plan years beginning after December 31, 2023.[55]

The automatic enrollment provision will encourage those with the financial resources but without the willpower to make or to increase their contributions, but will not affect those lacking the financial resources. This is one of the more costly items of the Bill, more than $5 billion over the 10-year measuring period, [56] which is about one sixth of the cost of the Bill's self-described provisions for Expanding Coverage and Increasing Retirement Savings.[57] The RISE & SHINE Bill may enhance this by requiring those who opt out of an automatic enrollment retirement savings plan to reconsider their choice at least every three years.[58]

The effectiveness of this provision at helping American workers without adequate retirement savings would be significantly enhanced if the provision were effective a year earlier, i.e., for plan years beginning after December 31, 2022, and the small plan cutoff were set at five rather than 10 employees. The 2012 Ariel Aon-Hewitt Study cited in support of the Bill[59] observed that ''While automatic enrollment is effective at increasing participation rates, it may actually negatively affect contribution rates among all races and ethnicities.'' This was ascribed to low initial rates in more than three-quarters of the cases being below 6%, as is the case with the Bill which begins at 3%, and the lack of automatic escalation, which is not the case with the Bill.

A 2022 analysis by the Employee Benefits Research Institute (EBRI Study) found that using a 6% initial automatic contribution rate for all employers with at least five employees would significantly assist those with inadequate retirement savings.[60] In particular, the EBRI Study concluded if such an enhanced automatic contribution program in concert with an enhanced savings credit program described below were enacted:

> that families with White, nonHispanic heads ages 35–39 would have an average reduction in savings shortfalls of 25.6 percent if these two legislative proposals were enacted. In contrast, families with Black heads of the same ages would have an average reduction of 19.1 percent. Families with Hispanic heads ages 35–39 would have an average reduction that falls between these two groups, at 22.1 percent. Families with ''other'' heads start with the smallest average reduction in savings shortfalls as a result of these two legislative proposals —16.7 percent.[61]

Section 116 of the Bill provides that except in the case of collectively bargained plans, employers maintaining a §401(k) plan or a §403(b) plan must have a dual eligibility requirement under which an employee must complete either a one year of service requirement (with the 1,000-hour rule) or two, rather than the existing three, consecutive years of service in which the employee completes at least 500 hours of service. [62] The vesting requirements for a §401(k) or a §403(b) plan must have a similar dual requirement. [63] This is effective for plan years beginning after December 31, 2022. The cost of this item is a relatively small $213 million over the 10-year measuring period.[64]

Requiring tax-advantaged plans to permit part-time workers to participate earlier would appear to be directed at workers without adequate retirement savings. Part-time workers often do not have adequate retirement savings because they are not only poorly

[55] W&M Summary of Bill, Note 1, above, at 1.

[56] JCT Cost Summary, Note 7, above, at 1 Item I.1

[57] JCT Cost Summary, Note 7, above, at 1, Item named Total for Expanding Coverage item and Increasing Retirement Savings.

[58] RISE & SHINE Bill, Note 4, above, §401, at 70-74.

[59] W & M Summary of Bill, Note 1, above, at 1 referencing without a citation, MacKenzie Lucas and Merrillyn J. Kosier, *Aon News Release: New Study Reveals Retirement Plans of African-Americans and Hispanics Hit Especially Hard During Tough Economy*, Ariel/Aon Hewitt (Apr. 3, 2012), https://ir.aon.com/about-aon/investor-relations/investor-news/news-release-details/2012/New-Study-Reveals-Retirement-Plans-of-African-Americans-and-Hispanics-Hit-Especially-Hard-During-Tough-Economy/default.aspx.

[60] Jack VanDerhei, *Impact of Various Legislative Proposals on Retirement Income Adequacy*, EBRI ISSUE BRIEF (Jan. 1, 2022) (''EBRI Study''), abstract and link to full article available at https://ssrn.com/abstract=4035612 (discussing the impact on retirement income adequacy with breakdowns by age and ethnicity of (1) an automatic contribution arrangement; (2) enhanced savings credit; (3) student loan payment matching contributions; (4) a simplified 401(k) plan; and (5) auto-portability of defined contribution plan benefits).

[61] *Id.,* at 4-5 (presenting more comprehensive findings in Figure 2).

[62] The Bill, Note 1, §116(a), (c), and (d), at 44-48. Similar provisions are in the RISE & SHINE Bill, Note 4, above, §109(a), §109(c), and §109(d), at 31-35, although the effective date is contingent on the issue of regulations rather than a specific plan year.

[63] The Bill, Note 1, above, §116(b), §116(c), and §116(d), at 46-48. Similar provisions are in the RISE & SHINE Bill, Note 4, above,§109(b), §109(c), and §109(d), at 33-35, although the effective date is contingent on the issue of regulations rather than a specific plan year.

[64] JCT Cost Summary, Note 7, above, at 1 Item I.16,

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paid, but they have difficulty qualifying for any employee benefits.[65]

B. Make Employer and Government Plan Contributions More Readily Available to Those with Limited Financial Resources

Making nonemployee contributions to employer retirement plans more readily available to those with limited financial resources tends to help those with inadequate retirement savings increases such savings. Workers with limited financial resources find it difficult to acquire and maintain adequate retirement savings so third-party matching plan contributions would help such workers achieve this goal.

Section 111 of the Bill permits for plan years beginning after December 31, 2022:

> an employer to make matching contributions under a 401(k) plan, 403(b) plan, or SIMPLE IRA with respect to "qualified student loan payments". Qualified student loan payment is broadly defined under the Act as any indebtedness incurred by the employee solely to pay qualified higher education expenses of the employee. Governmental employers will also be permitted to make matching contributions in a section 457(b) plan or another plan with respect to such repayments.[66]

Permitting matching contributions to be based on student loan payments, as well as employee contributions would appear to be directed at workers without adequate retirement savings. This would address a significant impediment to accumulating retirement savings, the need to pay significant student loans rather than set aside retirement savings. At the end of 2021 there were more than 40 million student loan borrowers with an average outstanding debt of almost $40,000, and almost 3 million have balances in excess of $100,000. loan at the end of 2021.[67] The EBRI Study found this provision would have a significant impact on retirement readiness, but far smaller than that of the automatic contributions analyzed.[68] The cost of this item is significant, almost $2 billion over the 10-year measuring period.[69]

Section 104 of the Bill enhances the current savings credit of up to $1,000, for those with contributions to IRAs, §401(k) plans, §403(b) plans, or any other plan permitting voluntary employee contributions for tax years beginning after December 31, 2026. The credit is not refundable,[70] and is limited to low-income and middle-income taxpayers.[71] The cost of this item is very significant, approximately $7.5 billion over the -year measuring period.[72]

Simplifying the availability of credits to low-income and middle-income workers making contributions to IRAs or employee benefit plans would appear to be directed at workers without adequate retirement savings.[73] However, the effectiveness of these credits would be significantly enhanced if the provision were effective four years earlier, i.e., for plan years beginning after December 31, 2022, rather than after December 31, 2026. By not providing a refundable credit, the credit would not be available to those with the most need, i.e., those with the lowest income who may have *de minimis* tax liabilities. The EBRI Study found that if the eligible incomes were increased and the credit were a refundable government match, i.e., a nonRoth after-tax contribution, the enhanced credit would significantly improve retirement readiness of American workers without adequate retirement savings.[74]

Section 102 of the Bill provides:

> an additional [employer] credit except in the case of defined benefit plans. The amount of the additional credit generally is a percentage of the amount contributed by the employer on behalf of employees, up to a per-employee cap of $1,000. This full additional credit is limited to employers with 50 or fewer employees and phased out for employers with between 51 and 100 employees.

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[65] *Cf.* Maryalene LaPonsie, Can You Retire Comfortably if You Only Work a Part-Time Job?, U.S. News and World Rep. (Sept. 14, 2020), https://money.usnews.com/money/retirement/articles/can-you-retire-comfortably-if-you-only-work-a-part-time-job (suggesting that part-time workers establish individual retirement plans). However, individual retirement plans have smaller contribution limits than employer benefit plans and may not receive direct employer contributions.

[66] *Id.*, at 3.

[67] Emily Guy Birken, *U.S. Student Loan Debt Statistics*, Credible (Apr. 13, 2022), https://www.credible.com/blog/statistics/average-student-loan-debt-statistics/ (presenting a wide variety of loan statistics, including professional school loans).

[68] EBRI Study, Note 60, above, at Figure 5, 8 (describing the impact for those heads of households between 35 and 39).

[69] JCT Cost Summary, Note 7, above, at 1 Item I.11.

[70] The Bill, Note 1, above, §104, at 14-16, references the credit at §25B(a) which is described as a "credit against the tax imposed by this subtitle." This means the tax credit is not refundable.

[71] The Bill, note 1, above, §104, at 14-16, adds those limits to §25B(a).

[72] JCT Cost Summary, Note 7, above, at 1, Item I.4.

[73] *Cf.* The Missing Middle, Note 11, above, at 16-17 (arguing for improvements to the current program, including refundable credits. simplifying the credit claiming process and higher income limits, to make the program more effective, particularly for American workers with middle incomes).

[74] EBRI Study, Note 60, above, at 3-6 (describing the impact of the automatic contribution arrangement in concert with the savings credit).

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The applicable percentage is 100% in the first and second years, 75% in the third year, 50% in the fourth year, 25% in the fifth year – and no credit for tax years thereafter. Section 102 is effective for taxable years beginning after December 31, 2022.[75]

Even though less than one quarter of employers with less than 100 employees offer a tax-qualified plan,[76] it seems ill-advised to introduce credits of up to $1,000 per employee for small employers making contributions to tax-advantaged contributions. The credits, however, like the existing $1,000 savings credits would be quite complex, available for brief periods of time, and also would not be paid directly to the employee plan accounts. The cost of this item is significant, almost $3 billion over the 10-year measuring period.[77] Allocating the same resources to help fund enhanced savings credits, discussed above would better assist workers without adequate retirement savings.

C. Reduce Differences Between §403(b) and §401(a) Plans

Diminishing differences between different tax-advantaged vehicles makes them more easily understood and more likely to be fully used by individuals who become eligible for different vehicles in the course of their working career. This is particularly the case for those workers without adequate retirement savings, in part, because they often threw up their hands at the complexity of tax-advantaged plans.

Section 105 of the Bill provides that §403(b) plans, generally operated through insurance contracts, may include investments in collective investment funds, which are available to §401(a) plans, which are generally operated through trusts. The provisions apply to amounts invested after December 31, 2022. The cost of this change is negligible. [78]

Section 602 of the Bill conforms the hardship withdrawal rules for §403(b) plans to the more liberal rules for §401(k) plans. The provision is effective for plan years beginning after December 31, 2022. This change is expected to generate revenues[79] because hardship withdrawals are subject to income tax.

D. Limit Plan Recoupment of Inadvertent Benefit Overpayments

Section 301 of the Bill provides that retirement plan fiduciaries may decide not to recoup inadvertent benefit overpayments. If plan fiduciaries choose to recoup inadvertent overpayments, no interest or other charges may be added, and reductions of annuity payments must be limited to 10%.[80] Moreover, overpayments to participants may not be sought from any of the participant's beneficiaries, [81] This is not consistent with the provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), discharging plans from liability for making correct payments to a beneficiary, such as nondecreasing periodic payments or lump sum payments, if wrongful payments were made by a prudent fiduciary pursuant to the provisions governing spousal survivor protections[82] or QDROs.[83] The Bill provisions become effective after the date of enactment of this Act.[84] The cost of this change is a relatively small $100 million over the 10-year measuring period. The RISE & SHINE Bill has similar provisions.[85]

The limitations on the ability of a tax-advantaged plan to recoup a plan's overpayments to plan participants are likely to be particularly helpful to workers with inadequate retirement savings. Those individuals and their beneficiaries would seem to be at particular risk from any unexpected benefit payment reductions, and there is no indication that inadvertent benefit payments are made disproportionately to employees who have high incomes or belong to any ethnic group.

E. Give Employees Access to Low-Cost Savings Vehicles

Sections 201 and 202 of the RISE & SHINE Bill give employees to low-cost savings vehicles called emergency savings accounts.[86] Those two sections, which are titled the Emergency Savings Act,[87] were introduced with that name by Senators Corey Booker and Todd Young a day before the RISE & SHINE Bill was introduced.[88] The bill was designed to "help Americans save for unexpected expenses without hav-

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[75] W&M Summary of Bill, Note 1, above, at 1.

[76] Kevin Busque, Note 18, above.

[77] JCT Cost Summary, Note 7, above, Item I.2 at 1 (this refers to the new credit and enhancements to credits for employer plan start-up costs, but does not break down the costs).

[78] Estimated Revenue Effects, Note 7, above, at 1.

[79] *Id.*, at 3.

[80] The Bill, Note 1, above, §301, at 61-73. The IRS applies the same 10% limit to plans that seek to maintain their tax-qualification after making inadvertent benefit overpayments. *See* Rev. Proc. 2021-30, I.R.B. 2021-31, 172, at 255 Appendix B. Section 2.05(b)(1) (Aug. 2, 2021) (the IRS, unlike the Bill, permits interest accruals, albeit subject to limits).

[81] *Id.*, New ERISA §206(h)(4)(E), 29 U.S.C. §1056(h)(4)(E), at 66.

[82] ERISA §205(c)(6), 29 U.S.C. §1055(c)(6).

[83] ERISA §206(d)(3)(I), 29 U.S.C. §1056(d)(3)(I).

[84] The Bill, Note 1, above, at 72.

[85] RISE & SHINE Bill, Note 4, above, §108, at 20-31.

[86] RISE & SHINE Bill, Note 4, above, §201-§202, at 36-57.

[87] *Id.*, Title II, at 35.

[88] See Press Release, *Young, Booker Introduce Bipartisan Bill to Help Americans Build Savings for the Future*, Office of Senator Ted Young (May 25, 2022), https://www.young.senate.gov/

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ing to tap into their retirement accounts.''[89] It is not clear why tapping into retirement accounts is a problem, although the Senators use the term retirement leakage,[90] which seems unlikely if plan loans are available.[91] Plan loan default rates are generally very low.[92] The more serious issue is that workers lacking savings for current expenses tend to lack the income to save for future retirement savings, and thus addressing their current savings deficiency will allow them to add retirement savings. If, as discussed in Section II, the difficulty is a willpower deficiency rather than a cash contribution, nudges such as permitting wage withholding will permit the worker to accumulate savings to address the unexpected cash needs described in the Federal Reserve Study describing how many Americans would have difficulty paying an unexpected $400 expense,[93] and how almost 20% of American adults were underbanked.[94] If the difficulty is a lack of income, nudges will not change the behavior of the worker on a sustained basis.

The proposed provisions would give workers the option to contribute through withholdings from their wage and salary payments to a low-cost interest-bearing savings vehicle found by their employer. If this were all to the proposal it would help those workers with willpower deficiencies establish an account to deal with unexpected expenses and be more comfortable setting aside retirement savings in addition to savings for short-term needs.[95] The proposed provisions would give a worker the option to contribute through withholdings from the worker's wage and salary payments to a low-cost interest-bearing stable value savings vehicle selected by the worker's employer from which the worker could withdraw any portion of the balance at least once a month. This would help those workers with willpower deficiencies establish and maintain an account to deal with unexpected expenses and be more likely to do the same with the worker's retirement savings accounts. First, the accounts are mislabeled as emergency savings accounts,[96] when there is no such limit on the permissible expenditures. Moreover, the balance is far too small to be able to address many emergencies.[97] Second, if the balance of the account exceeds $2,500, any additional withholdings would have to go into the employer's §401(k) or §403(b) plan,[98] for which the funds would be less readily available and absent an election will not go into an interest-bearing account. Would it not be more attractive to provide that after $2,500, or some other amount, were contributed to the account in a year, the worker would have the option of making plan contributions by withholding, and perhaps, more savings account contributions? Third, unlike any other short-term savings deposits these deposits would be considered employee deferrals,[99] but the employee is not permitted to transfer the funds into the employer benefit plan until the termination of employment, when the employee may transfer the funds into the Roth designated account of the employer retirement plan.[100] Considering that plan sponsors may make mandatory distributions of liquidate accounts with balances of $5,000 this may not be much of a privilege. Fourth, the earnings on an interest-bearing account with a balance limited to $2,500 is so minimal, that there is little reason to treat

newsroom/press-releases/young-booker-introduce-bipartisan-bill-to-help-americans-build-savings-for-the-future_-#:~:text=introduced%20theEmergency%20Savings%20Act%20of, and%20reducing%20retirement%20savings%20leakage.

[89] *Id.*

[90] *Id.*

[91] *Cf.*, Jack M. Towarnicky, *Qualified Plan Loans—Evil or Essential?*, Benefit Q. (Second Quarter 2017) (arguing that curtailing plan loans may result in more decreases in wealth because the participants or beneficiaries will otherwise default more readily or borrow at worse terms), https://www.ifebp.org/inforequest/ifebp/0200570.pdf; and Lee Barney, *Updating Loan Policies to Discourage Participants from Taking Plan Loans*, PLAN SPONSOR (Jan. 22, 2019) (describing how such loans can substantially diminish retirement savings, so that while most sponsors of defined contribution plans allow loans, they also try to discourage such borrowings), https://www.plansponsor.com/in-depth/updating-loan-policies-discourage-participants-taking-plan-loans/.

[92] *See generally* Albert Feuer, *What Savings and Retirement Plans May and Must Do to Facilitate Covid-19 Loan Relief*, 61 Tax Mgmt. Memo. No. 13, 171 (June 22, 2020).

[93] *Dealing with Unexpected Expenses, Economic Well-Being of U.S. Households in 2020 - May 2021*, Board of Governors of the Federal Reserve System (May 2022), 35-42, https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf.

[94] *Id.*, at 43-45.

[95] *Cf.* Alicia H. Munnell, Anek Belbase, and Geoffrey T. Sanzenbacher, *An Analysis of Retirement Models to Improve Portability and Coverage*, Center for Retirement Research at Boston College (Mar. 2018), at 26, https://ssrn.com/abstract=3155529 (expressing a concern for retirement leakage that is addressed with what are called ''precautionary savings accounts that may be related to the plan as proposed, but need not be related).

[96] RISE & SHINE Bill, Note 4, above, §202(a) and §202(b), at 36-51.

[97] *See, e.g.*, Margarette Burnette, *Emergency Fund: What It Is and Why It Matters*, NerdWallet (Dec. 21, 2021), https://www.nerdwallet.com/article/banking/savings/emergency-fund-why-it-matters (referring to unforeseen medical expenses, home-appliance repair or replacement, major car fixes, and unemployment and recommending beginning with $500 but aiming at 6 months of expenses) and An essential guide to building an emergency fund, Consumer Financial Protection Bureau, https://www.consumerfinance.gov/an-essential-guide-to-building-an-emergency-fund/ (referring to a fender bender, an unexpected medical bill, a broken appliance, a loss of income, or even a damaged cell phone, but not giving a recommended amount).

[98] *Id.*, at §202(c)(3), at 41-43.

[99] *Id.*, at §202(e) setting forth new §409B(e), at 55.

[100] *Id.*, at §202(b) setting forth new ERISA §801(d) at 47-48.

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the account as tax-exempt. Would it not be better to treat the account as an ordinary taxable account that the bank can continue to so treat on the employee's termination of employment so that the worker need not have any concern about the special treatment of Roth IRA distribution rules. Finally, if an employer wishes to make employer matches based on the low-cost savings account contributions, as with student loan payments on which the employer would be able to do the same under the Bill,[101] there is no more need to have the savings account part of the employer retirement plan than there was a need to make student loan payments on which there would be employer matches under the Bill.

F. Give Victims of Domestic Abuse Better Access to their Benefits

Section 318 of the Bill provides for penalty-free withdrawals from retirement plans by a participant that self-certifies domestic abuse in case of domestic abuse of the smaller of ($10,000, half the value of the individual's account).[102] Moreover, such distributions would be are permissible distributions from §401(k) plans, §403(b) plans, and §457(b) plans.[103] If such amounts are repaid to the retirement plan over 3 years, the income taxes that were paid on money that is repaid will be refunded.[104] The provisions become effective for distributions after the date of enactment of the Bill.[105] The cost of this change is a relatively small $69 million over the 10-year measuring period.[106]

Permitting victims of domestic abuse to withdraw small amounts without being subject to the early distribution penalty[107] would seem to be particularly helpful to workers with inadequate retirement savings. Such individuals and their dependents would seem to be most reliant on access to funds from any source in case of domestic abuse.

This provision raises the question whether the spousal survivor protections of the Code.[108] and ERISA,[109] should be amended to permit a participant to elect a benefit form other than a spousal joint and survivor benefit if the spouse has abused the participant. [110]

VI. THE BAD INEQUITABLE PROVISIONS IN THE BILL AND THE RISE & SHINE BILL THAT SHOULD BE REMOVED

The Bill and the RISE & SHINE Bill have bad inequitable features that will divert tax benefits that would otherwise be available to help working Americans with inadequate retirement savings improve those savings. Thus, the bad inequitable features should be removed.

A. Do Not Treat More Contributions as Roth Contributions

As discussed above in Section III. Roth IRAs and designated Roth contributions significantly diminish federal revenues despite their characterization as revenue-raising changes because they generate revenues in the measuring period. Moreover, because their tax advantage over pre-tax contributions depends on the ability to pay the taxes attributable such contributions for other funds, they favor workers who have such additional funds. In particular, the tax benefits tend to be focused on those with adequate retirement savings, who could obtain significant tax incentives from making after-tax nonRoth contributions. Thus, their use should be diminished rather than expanded.

Section 601 of the Bill would give a SIMPLE or a SEP Plan participant, for taxable years beginning after December 31, 2022, the option of making after-tax contributions to Roth IRAs, as well as the current option of making only pre-tax contributions to traditional IRAs.[111] The same contribution limits would apply to the two options.[112] This change, however, contributes a substantial $712 million amount of revenues over the 10-year measuring period.[113]

Section 604 of the Bill would give a participant in a §401(k) plan, §403(b) plan, or in §457(b) plan, the option to receive matching contributions on a Roth

[101] The Bill, Note 1, above, §111, at 27-36.

[102] *Id*., at 110-117. There is no need to have a similar provision for beneficiaries who are victims of domestic abuse because the 10% early distribution penalty that is being mooted applies to participant distributions, but not to beneficiary distributions.

[103] *Id*., at 117 (such plans only permit in-service distribution under limited and specified circumstances).

[104] *Id*., at 113-116.

[105] *Id*., at 117.

[106] Estimated Revenue Effects, Note 7, above, at 2, III.18.

[107] §72(t).

[108] §401(a)(11).

[109] ERISA §205, 29 U.S.C. §1055.

[110] *See also* Macie Alcoser, *Spousal Abuse Disqualification Statute: It's Time to Protect Other Victims*, 13 Est. Plan. and Comm. Prop. L. J. 269 (2020) (suggesting that an abusing spouse not be permitted to exercise rights to a portion of a decedent's spouse elective estate and describing how to determine whether such abuse has occurred).

[111] The Bill, Note 1, above, §601, at 131-135.

[112] *Id.*

[113] Estimated Revenue Effects, Note 7, above, at 3, VI.1.

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after-tax basis, as well as the current option to receive only pre-tax contributions, after the date of the Bill's enactment. [114] This change, however, reportedly contributes more than $12 billion of revenues over the 10-year measuring period,[115] which is more than one-third of the Bill's estimated revenue-generating provisions.

Section 603 of the Bill would require catch-up contributions to §401(k) plans, §403(b) plans, or to §457(b) plans to be designated Roth contributions, rather than pre-tax contributions, for taxable years beginning after December 31, 2022.[116] This change reportedly contributes more than $22 billion of revenues over the 10-year measuring period,[117] which is almost two-thirds of the Bill's reported revenues.

B. Do Not Weaken the Required Minimum Distribution Rules

Benefit distributions to three kinds of participants in tax-advantaged plans must begin on or before the April 1 following the year in which a participant reaches the age of 72: (a) an employer benefit plan participant who in no longer employed by the plan sponsor;[118] (b) an employer benefit plan participant who is employed by the plan sponsor and owns at least 5% of the plan sponsor;[119] and (c) a traditional IRA participant.[120] Benefit distributions to participants who work for the plan sponsor past age 72 need not begin until April 1 following the year of their retirement[121] unless they are deemed to control the plan sponsor. These required beginning date (RBD) requirements in concert with the annual required minimum distributions (RMDs) for all following years[122] are apparently designed to assure that participants use the benefits for their retirement by requiring that benefits are paid out over such individual's expected retirement years so that the tax incentives encourage savings for one's retirement expenses rather than for estate planning purposes.

It is odd to base the RBD on the current age of 72, which prior to the SECURE Act was age 70½.[123] Age 72 is two years after the age when an individual may obtain the individual's maximum federal universal retirement benefits, Social Security benefits.[124] It is more than seven years greater than the average retirement age for men, and nine years greater than the average retirement age for women.[125] Thus, individuals who fail to make timely RMDs under the current rules are doing so in almost all cases because they are not using the plan benefits for retirement purposes, but are instead relying on other sources to pay their retirement expenses. Thus, they are not the American workers without adequate retirement saving. Nor are they the American workers with modest retirement savings intended to pay the participant's normal retirement expenses.[126] Thus, they are not the intended beneficiaries of the retirement tax incentives.[127] Deferring the required beginning date for distributions by increasing the 72-year-old age would give more tax deferral benefits to individuals who are not using these plan benefits for retirement expenses and would thereby increase retirement savings disparities. Moreover, because of the shorter life expectancies of American Blacks than other Americans,[128] the racial disparities in retirement savings, particularly with respect to tax-advantaged retirement plans, would also be further increased by any increase in the age 72.

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[114] The Bill Note 1, above, §604, at 137-139.

[115] Estimated Revenue Effects, Note 7, above, at 3, VI.1.

[116] The Bill, Note 1, §603, at 137.

[117] Estimated Revenue Effects, Note 7, above, at 3, VI.1.

[118] §401(a)(9)(C)(i).

[119] §401(a)(9)(C)(ii).

[120] §408(a)(6), §408(b)(3), and §408(c)(1).

[121] §401(a)(9)(C)(i).

[122] The distributions are required to be made by December 31 of the year in question except for the first year when the distribution may be delayed until April 1 of the following year. Reg. §1.401(a)(9)-5, A-1.

[123] Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division O-Setting Every Community Up for Retirement Enhancement (SECURE Act), §114, 133 Stat. 2534, 3156 (2020). See generally Veena K. Murthy, T*he SECURE Act: A Tax Policy and Technical Perspective*, 48 Tax Mgmt. Comp. Plan. J. No. 3, 1 (Mar. 3, 2020) (discussing the general themes of the SECURE Act).

[124] https://www.ssa.gov/benefits/retirement/learn.html#h3 (describing the different social security benefits that are available at different ages).

[125] *See* Matthew S. Rutledge, *What Explains the Widening Gap in Retirement Ages by Education*, Center for Retirement Research at Boston College No. 10-18 (May 2018), https://crr.bc.edu/wp-content/uploads/2018/05/IB_18-10.pdf (observing that the average retirement age for men is less than 65 and less than 63 for women, and describing how average the gap in retirement ages between those with college degrees and those with high school degrees has been widening in recent decades).

[126] Presumably other funds, such as nontax-advantage ordinary savings and health savings accounts are designed to pay retirement expenses that are unexpected or not normal. This is consistent with the traditional concept that there are three pillars of retirement savings, social security, tax-advantaged retirement savings, and other savings. GAO-18-111SP, Note 37, above, at 2-3.

[127] *See also* The Missing Middle, Note 11, above, at 23.

[128] *See e.g.*, Steven H Woolf, Ryan K Masters, Laudan Y Aron, *Effect of the covid-19 pandemic in 2020 on life expectancy across populations in the USA and other high-income countries: simulations of provisional mortality data*, British Med. J. at 2(June 23, 2021), https://www.bmj.com/content/373/bmj.n1343 (describing the 2020 American life expectancies for Blacks as below 71, while the American average was almost 77).

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Section 106 of the Bill would provide that the required beginning date for individual and employer retirement plans would be extended in steps starting on January 1, 2023, from the April 1 immediately following the attainment of age 72 until the April 1 immediately following the attainment of age 75.[129] The cost of this change is almost $10 billion over the 10-year measuring period.[130] This is almost one-third of the cost of all the provisions to ''increase retirement savings.''[131]

This $10 billion dollar in tax incentives could be better used to help American workers without adequate retirement savings, such as by enhancing the retirement savings credit, and American workers with modest retirement savings, such as by broadening the coverage of the automatic contributions, rather than to help those who have no need to use their tax-advantaged retirement savings for their retirement expenses.

Section 302 of the Bill would provide that for taxable years beginning after December 31, 2022, the penalty for an RMD violation would decrease from 50% to 25%, and if an RMD distribution is made by the end of the second calendar year following the year of the RMD violation the penalty would be reduced from to 15%. The cost of this change is $75 million over the 10-year measuring period.[132]

There is no evidence that contradicts the commonsense conclusion that this penalty reduction would help American workers without adequate retirement savings far less than provisions that simply granted such workers more retirement savings, such as enhancing the retirement savings credit. Nor is there any evidence that American workers without inadequate retirement savings would get more than a *de minimis* portion of the tax benefits associated with this reduction.

Decreasing the penalties for the failure to take required minimum distributions would not help American workers without adequate retirement savings, but like increases in the RMD ages would widen the disparities between such individuals and those who savings are so large that a penalty is needed to encourage them to withdraw benefits from these tax-favored retirement savings. Offering a discount in the excise tax for those who obtain the distributions within two years of the deadline suffers from the same equity deficiencies as reducing the tax rate from 50 to 25%, Moreover, it is not consistent with the Employee Plans Compliance Resolution System (EPCRS) of the Internal Revenue Service (IRS).[133] The EPCRS provides for the waiver of the RMD excise taxes only if the earnings resulting from the failure to timely withdraw the required minimum distribution are distributed to the individual[134] and therefore is prevented from obtaining any benefit from the distribution delay. Otherwise, there would be a violation of the fundamental EPCRS principle that '[t]e correction method should restore the plan to the position it would have been in had the failure not occurred, including restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred.''[135]

C. Do Not Incentivize Retirement Benefit Distributions to Third Parties

Section 310 of the Bill would index for inflation the current annual $100,000 limit for qualified charitable deductions (QCDs)[136] for taxable years after the date of enactment of the Bill.[137] Moreover, the permissible set of QCDs would be expanded to include gifts in which the charity does not obtain the full distribution, such as a distribution to a charitable remainder trust.[138] The cost of this change is in excess of $2 billion over the 10-year measuring period.[139]

This $2 billion dollar in tax incentives could be better used to help American workers without adequate retirement savings, such as by enhancing the retirement savings credit, and American workers with modest retirement savings, such as by broadening the coverage of the automatic contributions, rather than to help those who have no need to use their tax-advantaged retirement savings for their retirement expenses.

D. Do Not Weaken NonDiscrimination Rules

The tax-qualification rules prohibit an employer benefit plan from discriminating in favor of the spon-

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[129] The Bill, Note 1, above, §106, at 17-18.

[130] Estimated Revenue Effects, Note 7, above, at 1, I.6.

[131] *Id.*, at 1 final line.

[132] Estimated Revenue Effects, Note 7, above, at 1, I.6.

[133] Rev. Proc. 2021-30 (''EPCRS''). See generally Kathryn J. Kennedy, *A Current Update of EPCRS Through Rev. Proc. 2021-30*, 49 Tax Mgmt. Comp. Plan. J. No. 8, 134 (Aug. 6, 2021) (discussing the antecedents and the features of the program in extensive detail).

[134] *Id.*, Appendix A. 06, at 233.

[135] *Id.*, §6.02(1), at 190.

[136] See generally Albert Feuer, *How Savings and Retirement Benefit Distributions May Prudently Be Used to Make Charitable Gifts*, 53 No. 1 NYSBA Tr. & Est. L. Sec. J. 7 (Spring/Summer 2019), https://ssrn.com/abstract=3449534 (describing qualified charitable distributions and alternatives to such distributions).

[137] The Bill, Note 1, above, §310(b), at 97-98.

[138] The Bill, Note 1, above, §310(a), at 93-97.

[139] Estimated Revenue Effects, note 7, at 2, III.10.

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sor's highly compensated employees[140] from failing to cover a sufficient portion of the sponsor's non-highly compensated employees,[141] and from failing to have a sufficient portion of the employees participating in the plan.[142] In order to determine compliance with the nondiscrimination and coverage rules, it is necessary to determine the controlled group of trades or businesses,[143] and the any affiliated service group[144] which constitute the plan sponsor. Controlled groups and affiliated service groups are, in turn, determined by family attribution rules.[145]

Section 319 of the Bill would, for plan years on or after the date of the enactment of the Bill, disregard community property ownership and generally stock owned by an individual's minor child for purposes of the family attribution rules. [146] The cost of this change is in excess of $1 billion over the 10-year measuring period.[147]

It is unclear why such a change is advisable only when the family attribution rules are used for nondiscrimination purposes but not for corporate consolidation return purposes[148] nor corporate transactions.[149] This $1 billion dollar in tax incentives could be better used to help American workers without adequate retirement savings, such as by enhancing the retirement savings credit, and American workers with modest retirement savings, such as by broadening the coverage of the automatic contributions, rather than to make it easier for sponsors to allocate smaller benefits to such people who tend not to be highly compensated.

E. Do Not Increase the Catch-Up Limits Only for Deferrals to Employer Benefit Plans by Workers in Their Early Sixties

Under current law, employees who have attained age 50 may make catch-up contributions under a retirement plan in excess of the otherwise applicable limits, which are currently $20,500 except for SIMPLE plans for which the limit in $14,000.[150]The limit on catch-up contributions for 2022 is $6,500, except in the case of SIMPLE plans for which the limit is $3,000.[151]

Section 308 of the Bill would, for plan years beginning on or after December 31, 2023, increases the catch-up limits to $10,000, except in the case of SIMPLE plans for which the limit would be $5,000 (both indexed) for individuals who have attained ages 62, 63 and 64. The cost of this change is more than half a billion dollars over the 10-year measuring period.[152]

One would suspect the only individuals who could annually defer $30,500 for all plans, except in the case of SIMPLE Plans for which the limit would be $20,000,[153] in the years before reaching age 65 have very substantial savings and are thus obtaining a tax windfall for contributing those amounts to the employer retirement plans. The data supports this suspicion, as well as the suspicion that those with inadequate or modest retirement savings usually contributing far less than the employer retirement plan contribution limits without regard to the catch-up amounts.[154] This more than half a billion dollars from this provision could be better used to help American workers with inadequate or modest retirement savings by increasing the current $1,000 catch-up limit for IRAs, which are available to all workers regardless of age, for plan years beginning on or after December 31, 2023, when the Bill would begin to index such limit. This change could be particularly helpful for the tens of millions of American workers discussed above without access to any employer benefit retirement plans.

F. Do Not Permit Taxpayers to Give the IRS No Notice of Violations of the Retirement Plan Rules

The EPCRS is a comprehensive system of correction programs for sponsors of employer retirement

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[140] §401(a)(4).

[141] §401(a)(3), and §410(b).

[142] §401(a)(26).

[143] §414(b) and §414(c).

[144] §414(m).

[145] §§318(a)(1), §1563(e)(5) and §1563(e)(6).

[146] The Bill, Note 1, above, §319, at 117-120.

[147] Estimated Revenue Effects, Note 7, above, at 2, III.19.

[148] Section 1563 is used for corporate consolidated tax purposes.

[149] Section 319 is used for corporate transaction purposes, such as stock redemptions.

[150] *Retirement Topics - 401(k) and Profit-Sharing Plan Contribution Limits*, IRS (Nov. 5, 2021), https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-401k-and-profit-sharing-plan-contribution-limits#:~:text=The%20limit%20on%20employee%20elective,to%20cost%2Dof%2Dliving%20adjustments.

[151] *Id.*

[152] Estimated Revenue Effects, Note 7, above, at 1, I.8.

[153] For simplicity we are not estimating the deferral limits in 2024 or taking the current value of the new catch-up limits, but simply adding the current 2022 amounts and adding the proposed catch-up contributions to determine these estimates.

[154] Lorie Konish, *Secure 2.0 legislation would make retirement catch-up limits more generous for some. Here's who would really benefit*, CNBC (May 4, 2022), https://www.cnbc.com/2022/05/04/secure-2point0-who-would-benefit-from-more-generous-catch-up-contributions.html (concluding that the benefits of the enhanced catch-up contributions would likely be concentrated among high-income retirement plan participants, and may not help those with inadequate of modest retirement savings).

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plans who wish to return to compliance with the tax-exemption requirements of §401(a), §403(a),§403(b), §408(k), or §408(p) after failing to satisfy these requirements.[155] The EPCRS gives those sponsors a way to correct these failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis.[156] There are three components of EPCRS: the Self-Correction Program (''SCP''), the Voluntary Correction Program (''VCP''), and the Audit Closing Agreement Program (''Audit CAP'').[157] One of the fundamental EPCRS correction principles is that ''Generally, a failure is not corrected unless full correction is made with respect to all participants and beneficiaries, and for all taxable years (whether or not the taxable year is closed).''[158] Thus, statutes of limitations are irrelevant in determining whether a correction is required to maintain the tax-qualification of an employer retirement plan.

The SCP that requires no notice to the IRS may be used for insignificant operational failures, for significant errors failures made within the last three plans years, and for certain documentary failures.[159] Operational failures are the failure to satisfy plan provisions.[160] Significant operational failures include those that involve significant numbers of participants and/or significant sums.[161] The SCP may not be used by; (1) employers adopting §401(k) plans that are not eligible to do so;[162] (2) employers violating the nondiscrimination or coverage rules other than by failing to fall plan provisions; [163] (3) corrections of specified operational failures with plan amendments if the employer has not obtained an IRS determination letter determining that the document meets the tax qualification rules;[164] or (4) corrections of operational failures by a plan amendment to conform the terms of the plan to its prior operations.[165] Moreover, the SCP requires that the violation have occurred despite the existence of ''practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements.''[166]

Significant failures made by an employer retirement plan beyond the last three plan years or failures not eligible for the SCP may be corrected only with notice to the IRS under either the VCP if no audit has begun,[167] or the Audit CAP if an audit has begun.[168] In exchange for giving notice to the IRS, the plan will receive a statement from the IRS that the tax-qualification of the plan is not threatened by any of the errors that were identified and corrected pursuant to the VCP or the Audit CAP.[169]

Section 308 of the Bill would largely eliminate the VCP by make all compliance failures not subject to the Audit CAP subject to the SCP if the failure occurred despite the existence of ''practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements.'' [170] The cost of this change is probably less than $50 million over the 10-year measuring period.[171]

This expansion would compound the current fundamental flaw of the EPCRS Self-Correction Program with respect to plan corrections which seem to pose a particularly significant risk that participants and beneficiaries may be deprived of plan benefits, and are thus now excluded from the SCP.[172] The IRS is never given any notice that the SCP has been used by the plan. Thus, neither the American people nor the IRS has any idea how well the VCP is working either for taxpayers in general, for employer retirement plans, or for plan participants and retirement plans. For example, did the plan's practices meet the EPCRS standards, was the error deliberate or inadvertent as required under the Bill and the current EPCRS SCP standards, and was the plan and its participants and beneficiaries put in the same position as if there had been no error. It would be prudent for any statutory amendment to the EPCRS broadening the SCP to include a requirement that any employer retirement plan using the SCP must disclose such usage on its annual filing even if no annual filing would otherwise be required because the plan assets are too small.[173] If this Bill provision is removed, the IRS should modify its annual plan return filings to require such disclosure.

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[155] EPCRS, Note 133, above.

[156] *Id.*, §1.01, at 175.

[157] *Id.*

[158] *Id.*, §6.02, at 190.

[159] *Id.*, §4.01(1), at 179.

[160] *Id.*, §5.01(2)(b), at 185.

[161] *Id.*, §8.04, at 205-206.

[162] *Id.*, §4.01(d) and 5.01(2)(d), at 180 and 185, respectively.

[163] *Id.*, §4.01(d), and 5.01(2)(c), at 180 and 185, respectively.

[164] *Id.*, §4.05(2)(c), at 182.

[165] *Id.*, §4.05(1), at 181.

[166] *Id.*, §4.04, at 180-181.

[167] *Id.*, §§2.01(4) and 10, at 176, 208-219,

[168] *Id.*, §2.01(4) and 13, at 176, 220-222.

[169] *Id.*, §10.08, at 212 (VCP Compliance Statement). §13.05, at 220 (Audit CAP closing agreement).

[170] The Bill, Note 1, above.§308, at 88-90.

[171] Estimated Revenue Effects, Note 7, above, III.19, at 2 (the cost also covers the cost of making the EPCRS available to IRA owners). It is unclear why a broadening of the SCP eligibility should reduce revenues.

[172] *See, e.g.,* Kennedy, Note 133, above, at 149-152.

[173] *See, e.g.*, 2022 *Instructions for Form 5500-EZ, Annual Return of a One-Participant (Owners/Partners and Their Spouses) Retirement Plan or a Foreign Plan*, IRS, at 2, https://www.irs.gov/pub/irs-pdf/i5500ez.pdf (no returns required for owner-employee plans with total balance less than $250,000).

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G. Do Not Permit IRA owners to Use the EPCRS, the IRS Compliance Program Designed to Address Violations by Employer Benefit Plans

The EPCRS does not apply to individual retirement plans. Nor does it permit a plan participant or beneficiary to seek plan relief from the IRS if the plan violates a tax-qualification rule, such as the RMD requirement,[174] and the individual would as a result be subject to an individual excise tax.[175] The EPCRS permits the plan to seek relief on behalf of the individual, as part of a VCP or Audit CAP filing.[176] However, to obtain such relief and the tax qualification relief, the plan must place the individual in the same position as if a timely distribution were made, i.e., the distribution to the individual must include any earnings that accrued on the delayed RMD.[177]

Individuals, whether they be owners of individual retirement plans or participants in employer retirement plans may seek a waiver of the §4974 penalty for RMD failures by filing IRS Form 5329.[178] In fact, an individual who fails to receive an annual RMD from an individual or employer retirement plan is required to file a Form 5329 for such year describing the violation, but need not pay the associated §4974 excise tax if the taxpayer requests a reasonable cause penalty waiver at the time of the filing.[179] In both cases, the additional tax liability, if any, would be reported on line 8 of Schedule 2 of Form 1040. Unlike the EPCRS, the instructions for the Form 5329 say nothing about the individual being paid the earnings generated by the delayed distribution, so that the individual will be in the same position as if there was no violation of the RMD rules.

Section 308(c) of the Bill would permit IRA owners to use the SCP to waive the §4974 penalty for a RMD failure if the failure occurred despite existence of "practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements."[180] The cost of this change is probably less than $50 million over the 10-year measuring period.[181] However, by requiring that the same correction principles apply to this SCP inclusion as the existing ECPRS principles,[182] the Bill would appear to require the IRA owners to withdraw the earnings on the delayed RMDS. The Bill, like the Form 5329 filing, does not address the IRA disqualification resulting from the RMD failure.[183] Section 308(c) of the Bill would also permit IRA owners to use the SCP also to address inadvertent breaches of the 60-day rollover period and inadvertent rollover distributions to inherited IRA owners.[184]

It is advisable to restrict the EPCRS to employer retirement plans consistent with the fact that the full title of the EPCRS refers to relief for employee plans rather than participants and owners.

The RMD penalties can and are being addressed with Form 5329 filings, although the procedure should be changed to require participants to withdraw the earnings associated with any late RMDs, regardless of whether any excise tax waivers are sought. It would also be prudent for the IRS to require that individual and employer retirement plans annually report the ages of all plan participants, which the plans must maintain to remain tax-qualified, so that the IRS would be able more readily enforce the RMD rules, particularly against those participants whose retirement savings are so large that they need not make annual RMDs. in name not to make individual retirement plans subject to the EPCRS, which is concerned principally with preserving the plan's tax qualification.

If Congress wishes to have a reasonable cause exception to the 60-day rollover requirement, Congress should so amend the statute, and the IRS should prepare a new tax form which can be filed with plan administrators, who can be required to file annual reports with the IRS of any such filings. Such a statute could be built upon the current IRS procedures, which include an automatic waiver to use with financial institutions, but also requires costly private letter rulings in other cases.[185] This would seem to be more likely to result in compliance with the reasonable cause requirements and plan administrators accepting rollover deposits than relying simply on EPCRS self-certifications by IRA owners that are filed with neither the IRS nor with plan administrators. This is particularly important for American workers with inadequate or modest retirement savings, who are more likely to be aware of and comply with rollover certificates

[174] §401(a)(9).

[175] §4974(a).

[176] EPCRS, Note 133, above, §6.09(2), at 201.

[177] *Id.*, Appendix A.06, at 233

[178] *2021 Instructions for Form 5329*, IRS (Sept. 1, 2021), at 8, https://www.irs.gov/pub/irs-pdf/i5329.pdf .

[179] *Id.*, at 8.

[180] The Bill, Note 1, above, §308(c), at 90-91.

[181] Estimated Revenue Effects, Note 7, above, III.19 at 2 (the cost also covers the cost of making the EPCRS SCP more broadly available to employer retirement plans).

[182] The Bill, Note 1, above, §308(f), at 92.

[183] *See, e.g.*, §408(a)(6).

[184] The Bill, Note 1, above, §308(c), at 90-91.

[185] *Retirement Plans FAQs relating to Waivers of the 60-Day Rollover Requirement*, IRS (Apr. 29, 2022), https://www.irs.gov/retirement-plans/retirement-plans-faqs-relating-to-waivers-of-the-60-day-rollover-requirement

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available from plan administrators than with the EPCRS.

If Congress wishes to permit owners of inherited IRAs to be able to recontribute mistaken benefit distributions, Congress should delete §408(d)(3)(C), so all owners of inherited IRAs could do 60-day rollovers. There seems little justification for permitted surviving spouses to make direct rollovers, from one plan administrator to another plan administrator, and indirect rollovers, from one plan administrator to an account owner who has 60 days to transfer the funds to another plan administrator, but only permitting other beneficiaries to make indirect trustees. Adding to the traditional IRA §408(a) definition of a counterpart to §401(a)(31) requiring trusteed employee benefit plans to permit direct rollovers would assure that IRA beneficiaries could, like an employer retirement benefit plan beneficiary dispense with the need to do indirect rollovers. This would seem to be more likely to result in compliance than relying simply on EPCRS self-certifications of an inadvertent service provider error by IRA owners that are filed with neither the IRS nor with plan administrators, particularly for American workers with inadequate or modest retirement savings, who are more likely to be aware of and comply with rollover procedures available from plan administrators than with the EPCRS.

Finally, if IRA owners are given access to the EPCRS, it is advisable for the annual plan filing requirement mentioned above for employer retirement plans about the use of the SCP to be imposed on the IRA owners, as is now the case when such an individual seeks a waiver of the §4974 penalty for RMD failures by filing a Form 5329 as discussed below. Because individual retirement plan custodians, trustees, and insurers play a far less active role than their employer retirement plan counterparts, one would expect far less compliance by IRA owners with the EPCRS requirements, particularly if there were no reporting of the use of the SCP or if insufficient IRS resources were devoted to reviewing some of those ''corrections.''

H. Do Not Reduce the Statute of Limitation Periods for Violations of the Retirement Plan Contribution or the Distribution Rules

Tax statute of limitations against a taxpayer are generally not triggered until the appropriate tax return is filed by the taxpayer.[186] An individual who makes an excess contribution to an IRA that is not withdrawn in a timely fashion is required to file a Form 5329 describing the violation, and pay the associated §4973 excise tax.[187] An individual who fails to receive an annual RMD from an individual or employer retirement plan is required to file a Form 5329 describing the violation, and pay the associated §4974 excise tax, but no tax payment is required if the taxpayer requests a reasonable cause penalty waiver at the time of the filing.[188] In both cases, the additional tax liability, if any, would be reported on line 8 of Schedule 2 of Form 1040. If no Form 5329 were filed, line 8 would be left blank.

If the taxpayer violates §4973 or §4974, but files no Form 5329, the IRS would probably be unaware of the violation, which is why the statute of limitations would never be triggered. This is the case whether the taxpayer's nonfiling was due to ignorance or deliberate disregard of the filing rules. Form 5498[189] filings by custodians, trustees, or insurers that report that report participant reporting the amount of IRA contributions may not be of much assistance to the IRS in discovering excess contributions. It is difficult to know whether the reported amount constitutes an excess contribution. Moreover, the only penalty for failing to file such a return is a $50 fine,[190] and the contribution amount may be understated as often appears to occur when Mega-IRA participants are given very favorable access to very attractive investments.[191]

Section 313 of the Bill would, after the date of the enactment of the Bill, provide that for §4973 or §4974 taxes with respect to an IRA, the statute of limitations would begin at the time the Form 1040 is filed, regardless of whether a Form 5329 is filed. [192] The cost of this change is slightly more than $20 million over the 10-year measuring period.[193]

The current law which places the burden of disclosure on the party benefitting from the excess funds on deposit with the individual retirement plan appears to be a fair and equitable risk allocation. Moreover, this change is unlikely to help American workers without adequate retirement savings. Such individuals lack the resources needed to violate the RMD rules or to make excess contributions to an IRA. Finally, this change is particularly inequitable because it would permit participants in individual retirement plans to deliberately

[186] §6501.

[187] *2021 Instructions for Form 5329*, IRS (Sept. 1, 2021), at 5, https://www.irs.gov/pub/irs-pdf/i5329.pdf.

[188] *2021 Instructions for Form 5329*, IRS (Sept. 1, 2021), at 8, https://www.irs.gov/pub/irs-pdf/i5329.pdf.

[189] *2022 Form 5498 IRA Contribution Information*, IRS, https://www.irs.gov/pub/irs-pdf/f5498.pdf (last visited May 31, 2022).

[190] §6693.

[191] *See* Mega-IRAs, Note 8, above, at 184-187.

[192] The Bill, Note 1, above, §313, at 101-102.

[193] Estimated Revenue Effects, Note 7, above, III.19 at 2.

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disregard the Code contribution or distribution rules without fear of any adverse consequences.[194]

I. Do Not Reduce Sanctions for Self-Dealing by IRA Owners

The Code prohibits potentially self-dealing transactions in which the individual could transfer assets/income to the individual's IRA. IRAs were introduced in 1974 with this limit to "prohibit the abuses in the use of funds under qualified retirement plans."[195] This was apparently designed to prevent the shifting of income/assets from IRAs to IRA participants, such as the participant buying plan assets at too low a price and thereby reducing the participant's income tax on the IRA's distributions. The self-dealing prohibitions, however, also prevent shifts to the IRAs, such as a sale at too low a price to a Roth IRA, which may make distributions to the participant that are not subject to any income tax, as discussed above in Section III. This in fact seems to have occurred with many mega-IRAs, in which participants in effect sell property to an IRA at a large discount.[196]

The Code provides that an IRA loses its tax exemption in the first day of any year in which the IRA participant engages in a transaction that may benefit the IRA participant in his individual capacity rather than in his IRA participant capacity.[197] The IRA is treated as distributing all its assets as of the date of the loss of the exemption.[198] This disqualification only applies to the account which was engaged in the prohibited transaction.[199]

These self-dealing rules prohibit an IRA from directly or indirectly buying/selling property to/from, lending/borrowing to/from, or furnishing/receiving goods, services, or facilities to/from a party who is a Disqualified Person.[200] A Disqualified Person may not directly or indirectly use IRA assets for the person's own personal benefit, and a disqualified person who is a fiduciary may not deal with the income or assets of an IRA for the person's own account, or (in general) receive any consideration from the IRA.[201] The IRA participant is always a fiduciary and disqualified person.[202] Other Disqualified Persons, with respect to an individual's IRA (who may or may not be fiduciaries), are the individual's spouse, ancestors, lineal descendants, and any spouse of a lineal descendant. If an IRA participant, along with any other of those related Disqualified Persons owns 50% or more of a business, then the business, itself, is also a Disqualified Person, along with its officers, directors (and persons with similar responsibilities), 10% or greater owners, and employees who earn 10% or more of its total wages.[203]

Section 322 of the Bill would, for taxable years after the date of the enactment of the Bill, provide that a violation of the prohibitions on self-dealing rules by an IRA account owner no longer disqualifies the account and the account balance will no longer be treated as distributed, but only the portion of the account involved in the violation would be treated as distributed. [204] The cost of this change is slightly more than $30 million over the 10-year measuring period.[205]

It is hard to conceive of a circumstance in which an individual lacking adequate retirement savings or with modest retirement savings would contemplate engaging in any self-dealing with the individual's retirement savings account. On the other hand, it is easy to conceive how such self-dealing may be used to generate very large tax-advantage retirement savings by shifting income to such savings accounts, particularly individual retirement accounts. For example, if a Roth IRA participant, who owns a business, has his Roth IRA acquire substantially all the shares of a corporation, which engages in transactions with the business in which the business pays too much or the corporation pays too little, so that the difference is shifted to

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[194] Participants in employer retirement plans, in contrast, risk of having their plans lose their tax qualification rather than of being assessed an excise tax for making excess contributions. *See, e.g.*, §401(a)(16).

[195] H.R. Rep. No. 93-807, *Private Pension Reform, Report of the Committee on Ways and Means Together with Supplemental Views on H.R. 12855*, Committee Report at 14 and 136 (1974) (describing the prohibited transaction rules for qualified plans and why they were extended to IRAs).

[196] *See* Mega-IRAs, Note 8, above, at 192-93 (discussing how Mega-IRAs for individuals, such as Peter Thiel and George Romney may result from the ability of an IRA to obtain founder's shares at a very large discount).

[197] §408(e)(2)(A).

[198] §408(e)(2)(B)

[199] §408(e)(1).

[200] §4975(c)(1)(A)-§4975(c)(1)(C). *See generally* Warren L. Baker, *Self-directed-IRAs-Top-Five-Complexities-for-Estate-Planning-Attorneys*, Washington State Bar Assn Real Property Trusts & Estates, (April 2014) at 3-4, http://fairviewlawgroup.com/wp-content/uploads/2014/10/Self-directed-IRAs-Top-Five-Complexities-for-Estate-Planning-Attorneys-by-Warren-L-Baker-WSBA-RPPT-Sec-April-2014.pdf and Jeffrey Levine, *Investing A Roth IRA In Early Stage Growth Companies Without Violating Prohibited Transaction Rules*, Kitces.Com (July 7, 2021), https://www.financial-planning.com/news/investing-a-roth-ira-in-early-stage-growth-companies-without-violating-prohibited-transaction-rules (summarizing the prohibited transaction rules applicable to IRAs).

[201] §4975(c)(1)(D)-§4975(c)(1)(F).

[202] §4975(e)(2)(A).

[203] §4975(e)(2)(E)-§4975(e)(2)(I).

[204] The Bill, Note 1, above, §322, at 123-124.

[205] Estimated Revenue Effects, Note 7, above, III.22 at 3.

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the corporation.[206] The IRS has announced it will re-characterize such transactions as a transfer of the difference to the participant from the business followed by a contribution of the same amount to the Roth IRA which contributes the same to the corporation.[207] Thus, the participant would be taxable on the difference, and may be subject to an excise tax on the deemed plan contribution. Moreover, under §408(e)(2)(A), the IRS may take the position in appropriate cases that the transaction gives rise to one or more prohibited transactions between a Roth IRA and a disqualified person.[208]

Pro Publica paraphrased the reaction of one expert to the Bill's proposed substantial reduction in self-dealing sanctions as encouraging substantially more self-dealing because ''someone who violates the rules suddenly would have a 'massive long-term upside benefit' of tax-free growth, Baker said, while 'your downside risk is a penalty that is smaller than the capital gains rates,' the federal tax on the income that's generated when stocks or other assets are sold.''[209]

J. Do Not Weaken the Exclusive Purpose Requirement that Is an Essential Component of the ERISA Fiduciary Duty and Anti-Inurement Clauses

ERISA plan fiduciaries must discharge their plan duties ''solely in the interests of the participants and beneficiaries and (A) for the exclusive purpose of : (i) providing plan benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; . . .'' [210] Moreover, the assets of an ERISA plan may '' never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.''[211] A fiduciary breaching these duties could be subject to significant excise taxes,[212] and the plan could lose its tax-qualification.[213]

These two provisions determine which expenses may be charged to an ERISA plan, and which expenses, called settlor expenses, may not be so charged.[214] In particular, a distinction is made between plan design, establishment, and termination expenses, which unlike plan implementation decisions, may not be charged to ERISA plans.[215] This distinction has been set forth by the U. S. Department of Labor starting in 1986.[216] Thus, the benefits of plan beneficiaries and participants may not be reduced by plan design expenses. should only be compelled to pay for expenses (and thereby reduce their benefits) that solely benefit them.

The RISE & SHINE Bill would change the traditional fiduciary exclusive purpose rules because ''[s] mall employers need additional resources to improve their retirement plan design, such as automatic contribution or contribution escalation provisions. . .''[217] The RISE & SHINE Bill would address this by permitting all plan fiduciaries to spend plan assets for the first time for ''**incidental expenses** solely for the benefit of the participants and their beneficiaries.''(emphasis added)[218] It, however, seems likely that the design obstacle is the cost of implementing the preferred designs, such as making employer contributions, rather than the design costs. If

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[206] IRS Notice 2004-8.

[207] *Id.*

[208] *Cf.* Daniel Gibson, *Self-Directed IRA (''SDIRA'') vs. Rollover as Business Start-Ups (''ROBS'')*, Eisner Amper (May 18, 2022), https://www.eisneramper.com/self-directed-ira-vs-rollover-business-start-up-pb-blog-0522/ (emphasizing if an IRA owner is actively engaged in the business, the owner may be engaged the prohibited self-dealing). *Cf.* Letter from Michael D. Julianelle, Director of Employee Plans at the IRS, *Guideline regarding rollovers s business startups, IRS* (Oct. 1, 2008), (rollovers may result in prohibited self-dealing), https://www.irs.gov/pub/irs-tege/robs_guidelines.pdf .

[209] James Bandler, Patricia Callahan and Justin Elliott, *Campaign to Rein in Mega IRA Tax Shelters Gains Steam in Congress Following ProPublica Report*, Pro Publica (July 7, 2021), https://www.propublica.org/article/campaign-to-rein-in-mega-ira-tax-shelters-gains-steam-in-congress-following-propublica-report (describing how the Ways and Means Chair, Richard Neal, is directing staff to ''stop IRAs from being exploited'').

[210] ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A).

[211] ERISA §403(c)(1) 29 U.S.C. §1103(c)(1)

[212] §4975(a); ERISA §502(i), 29 U.S.C. §1132(i)

[213] §401(a)(2).

[214] *See, e.g.,* Jennifer E. Eller and Andrée M. St. Martin, *Paying Employee Benefit Plan Expenses, Practical Law Company*, *Practical Law Company* (2013), https://www.groom.com/wp-content/uploads/2017/09/1260_Paying_Employee_Benefit_Plan_Expenses.pdf and Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy Of The ERISA Settlor/Fiduciary Distinction , N.C. Law Rev. (2015)* (discussing the history and significance of the distinction between acting as a fiduciary and as a settlor).

[215] *Guidance on Settlor v. Plan Expenses*, U.S. Dept. of Labor Employee Benefits Security Administration, Fact Number Patterns One Through Four, https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/guidance-on-settlor-v-plan-expenses.

[216] Letter of Dennis M. Kass, Assistant Secretary of U. S. Dept of Labor to John N. Erlenborn, Chairman of the Advisory Council on Employee Welfare and Pension Benefit Plans (March 13, 1986), https://www.dol.gov/agencies/ebsa/about-ebsa/our-C/resource-center/information-letters/03-13-1986 (describing the extent to which ERISA fiduciary duties apply to the termination of an ERISA pension plan).

[217] RISE & SHINE Bill, Note 4, above, §402 at 75.

[218] RISE & SHINE Bill, Note 4, above, §402 at 74-76.

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so, it would seem more prudent to target subsidies at small employers or at plans with certain features, such as the one in the Bill criticized above as in Section V. B. This change to long-standing traditional ERISA principles seems akin to using an elephant gun to shoot a rabbit. On the other hand, the change would certainly diminish the assets available for worker retirement benefits on a broad basis as plan advisors and their counsel would have every incentive to explore and test the breadth and significance of the ''incidental expenses'' exception.

VII. THE GOOD EQUITABLE PROVISIONS THAT ARE ADVISABLE TO ADD TO THE BILL

A. Permit Hardship Distributions to Be Rolled Over to Individual or Employer Retirement Plans

There is considerable disagreement about whether hardship withdrawal encourage more retirement savings by individuals with inadequate retirement savings.[219] On the one hand, the availability of such withdrawals encourages more contributions to tax-advantaged employer retirement plans, because workers know such funds would be available to a worker who is undergoing a pre-retirement hardship.[220] On the other hand, permitting withdrawals to pay for hardships would diminish retirement savings because such funds will not be available for retirement savings. One simple way to address this adverse effect is to remove the current prohibition on participants from rolling over hardship withdrawals.[221] There is no similar prohibition on the rollover of withdrawals made on the basis that the individual attained a certain age or the contributions being withdrawn have accumulated for a specified period.[222] A tax-qualified profit-sharing plans may permit such in-service withdrawals of employer contributions other than participant deferrals after the participant attains a specified age or the contribution has accumulated for a fixed number of years.[223] Two years is a fixed number of years.[224]

It is advisable to study the experience of permitting hardship distributions to be recontributed during a longer period, such as the three-year period applicable to for Covid-19 withdrawals,[225] and consider whether to permit a longer period for all hardship distributions, since the hardship often requires more than 60 days to resolve and the participant to be in a position to afford to recontribute the distribution. Thus, it would turn into a short-term no-interest loan.

B. Conform the RMD Rules for Roth IRA Participants to the RMD Rules Governing Traditional IRA Participants and All Employer Retirement Plans

As discussed above in Section V.C, the RMD rules are apparently designed to assure that participants use the benefits for their retirement by requiring that benefits are paid out over such individual's expected retirement years so that the retirement tax incentives encourage savings for one's retirement expenses rather than for estate planning purposes. Roth IRAs are IRAs for which a Roth designation has been made.[226] Thus, there is no good reason why going forward Roth individual retirement plans should not be subject to the same RMD rules that govern traditional IRAs and employer benefit plans, including Roth designated accounts in the latter.[227] There is a complete discussion of how the RMD rules for IRAs may be harmonized in one of my earlier articles.[228] This change would not adversely affect American workers with inadequate or modest retirement savings because both need to take RMDs to pay their retirement expenses. In fact, the IRS reported that in 2021 almost 80% of individuals subject to the RMD rules would take distributions in excess of the RMD amounts.[229] Such change would result in more federal tax revenues be-

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[219] *See, e.g.,* GAO-19-179, Report to the Special Committee on Aging, U.S. Senate, *RETIREMENT SAVINGS-Additional Data and Analysis Could Provide Insight into Early Withdrawals,* U.S. GOVT. ACCOUNTABILITY OFFICE (Mar. 28, 2019), https://www.gao.gov/assets/gao-19-179.pdf (describing the need for additional research).

[220] *Id.*, at 1.

[221] §402(c)(4)(C).

[222] §402(c)(4). Employee deferral distributions are permitted on the attainment of an age that is at least 59 ½. §401(k)(2)(B)(iii), and §403(b)(11).

[223] Reg. §1.4011(b)(1)(ii).

[224] Rev. Rul. 71-295 (finding that 18-months was insufficient, but two years was sufficient).

[225] *See generally* Albert Feuer, *How the CARES Act Takes Care of an Individual's Savings and Retirement Benefits*, 48 Tax Mgmt. Comp. Plan. J. No. 5, 110 (May 1, 2020), at 120-123 (discussing the CARES Act savings and retirement plan relief provisions).

[226] §408A(b).

[227] §402A(a)(1).

[228] Albert Feuer, *The Next Step for Tax Policy Equity*, 62 Tax Mgmt. Memo. No. 3, 259 (Sept. 27, 2021).

[229] *Updated Life Expectancy and Distribution Period Tables Used for Purposes of Determining Minimum Required Distributions*, Internal Revenue Service Notice of Proposed Rule-Making, REG-132210-18, RIN 1545–BP11, 84 Fed. Reg. 60,812, Explanation Special Analyses, I.4, at 84 Fed. Reg. 60,817 (Nov. 8, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-08/pdf/2019-

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cause there would be no more deferrals of realized gains on funds that have been distributed from the Roth plan.[230] Thus, Roth IRAs should be subject to the same RMD rules as all other individual and employer retirement plans.

C. Extend the Due Date for RMD payments for the Beneficiaries of a Participant who Dies in a Year for which an RMD is Required

Individuals often do not withdraw all their RMDs until the latter portion of the year. This may be because the individual prefers to make regular withdrawals throughout the year, as is often the case with individuals dependent on retirement savings for retirement expenses, or toward the end of the year, as is often the case with individuals who do not need such frequent payments. Thus, an individual who passes away may not have withdrawn all the individual's RMDs at the time of the individual's death. This may create an RMD issue because the passing does not change the RMD amount that must be withdrawn for the year of death.[231] If the year of the decedent's death does not contain the individual's required beginning date (RBD), the RMD is due on December 31 of such year, but in such year, the RBD is April 1 of the following year.[232]

It often takes some time after the individual's passing before the plan beneficiary, if other than the beneficiary's estate is authorized to request and obtain the RMDs, or another individual gets appointed the decedent's personal representative, locates all the individual's retirement savings plan, determines who is entitled to the decedent's benefit, and is able to convince the person administering the plan that the representatives. This frequently does not occur until the year following the passing of the decedent, but is almost always before the personal representative or the beneficiary has to prepare the income tax return for the year of the decedent's death. The 2022 proposed 4974 regulations recognize this and provides that ''Unless the Commissioner determines otherwise,'' the due date for such RMDs is the tax filing deadline (including extensions thereof) for the taxable year of that beneficiary beginning with or within the decedent's year of death.[233]

Adding such a statutory provision, without the Commissioner caveat may be expected to be of particular assistance to beneficiaries of participants with inadequate or modest retirement savings. Such participants often take regular distributions and thus may leave their beneficiaries with the difficult task of getting authorization to obtain their plan benefits before the end of the year the participant dies. It would be helpful to relieve them of the need to make any special filing to avoid any excise taxes on those RMDs, or any questions about those taxes. Thus, this provision should be added to the Bill.

D. Adjust the RMD Rules to Require Explicitly the Quick Distribution of the Earnings, if any, Accruing on Any Delayed RMDs, and if Such Earnings Fail to be Quickly Distributed, Apply the §4974 Excise Tax to Those Undistributed Earnings

As discussed above with respect to the EPCRS in Section V.(g), if a person's RMDs are not timely, distributions must be made to the person of the untimely RMDs and the earnings, if any, that accrued as a result of the delayed RMD distributions. Those earnings could be computed in the same manner as described in the EPCRS so that an employer retirement plan may preserve its tax-qualification despite violating the qualification rules by accepting excess employee contributions.[234] This accrued earning distribution requirement would place both the retirement plan and

24065.pdf (presenting the proposed regulations that would update the RMD tables). The regulations were finalized by 85 Fed. Reg. 72,472 (Nov. 12, 2020), https://www.govinfo.gov/content/pkg/FR-2020-11-12/pdf/2020-24723.pdf. *Cf.*, Jeffrey R. Brown, James Poterba, and David P. Richardson. *"Do Required Minimum Distribution Rules Matter? The Effect of the 2009 Holiday on Retirement Plan Distributions."* J. Public Economics 151, 96-109, NBER Working Paper 20464, at abstract and 18 (July 2017), https://dspace.mit.edu/handle/1721.1/129480 (finding that one-third that TIAA account holders suspended RMD distributions during 2009 RMD holiday and no difference in behavior between those who had taken RMD amount, and those who had taken larger amounts, but observing that the median balance for the sample was in the 80th to the 85th percentile of the 2010 Federal Reserve Survey of Consumer Finances, which suggested that the one-third overestimates the proportion of American retirees who may afford to take no RMDs).

[230] In many cases the realized gains would be taxed at the lower capital gains rates.

[231] Reg. §1.401(a)(9)-5, A-4(a).

[232] Reg. §1.401(a)(9)-5, A-1.

[233] *Required Minimum Distributions*, Internal Revenue Service Notice of Proposed Rule-Making (RIN 1545–BP82), 87 Fed. Reg. 10,504, PART 54—PENSION EXCISE TAXES §54.4974–1(g)(3), at 10,567 (Fed. 24, 2022), https://www.govinfo.gov/content/pkg/FR-2022-02-24/pdf/2022-02522.pdf (presenting the proposed RMD and associated regulations).

[234] EPCRS, Note 133, above, §6.02(1) and §6.02(2)(a), at 190 (suggesting that earnings on excess contributions should be computed as prescribed in Reg. §1.402(g)-1(e)(5), and §1.402(g)-1(e)(10) for excess deferrals to a 401(k) plan that must be distributed to preserve the tax qualification of such an employer retirement plan).

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the person in the same position as if the person had timely complied with the RMD rules. Such an explicit addition to the qualification rules for individual and employer retirement plans, such as §401(a)(9), would leave no doubt about its existence. It is also advisable to adjust the §4974 50% excise tax for delayed RMDs to apply to the accrued earnings, if any, on the delayed RMDs not distributed on or before the end of the year of the accrual of such earnings. For example, if in a year, $10,000 of earnings accrued on a delayed RMD, and the earnings were not distributed in such year, an excise tax of $5,000 would be generated. This excise tax could be subject to the same reasonable cause exception as now governs the RMD excise taxes.[235] Thus, this provision should be added to the Bill.

E. Adjust the IRA Excess Contribution Rules to Require Explicitly the Quick Distribution of the Earnings, if Any, Accruing on Any Excess Contributions, and if Such Earnings Fail to Be Quickly Distributed, Apply the §4973 Excise Tax to Those Undistributed Earnings

As discussed above in V.C with respect to the delayed RMDs, if earnings on excess contributions are disregarded in determining the required correction distributions, and for determining the excise tax, the individual making the excess contributions will not be in the same position as if the person had complied with the excess contribution.[236] This approach is set forth in the Instructions for Form 5329 for determining how to remedy an excess contributions in the year for which the filing is prepared.[237] Thus, this provision should be added to the Bill.

F. Apply Two-Year Cliff-Year Vesting to All Employer Contributions to §401(k) Plans or §403(b) Plans for Which Immediate Vesting Is Not Required

There are a variety of vesting rules applicable to §401(k) or §403(b) plans. Employee contributions must be immediately vested.[238] Employer contributions, however, may generally be subject to cliff vesting with at least three years of services, or graded vesting beginning with 20% after two years of service, 40% after three years, 60% of the participant's accrued benefit after four years of service; 80% of the participant's accrued benefit after five years of service; and 100% of the participant's accrued benefit after six years of service.[239] There are exceptions. Employer contributions must be immediately vesting for the two safe harbor §401(k) plans that require employer contributions.[240] Employer contributions must be vested within two years for qualified automatic contribution arrangements.[241] As discussed above in Section V.(a), such feature need not added to a preexisting §401(k) plans. Employers may generally limit employer participation to those who have completed one year of service, which generally means the completion of 1,000 hours of service[242] although some, such as Amazon may provide for immediate participation.[243] Employer may require two years of service, but then the participant is fully vested after two years of service.[244]

Under both the proposed Securing a Strong Retirement Act and the RISE & SHINE Act, as discussed above in Section V. A, part-time workers would have to qualify to participate and to be vested in employer contributions to a §401(k) or a §403(b) plan after two years in each year of which they have accrued at least 500 hours of service. Applying a similar maximum two-year service requirement to full-time employees when a shorter period is not otherwise required would serve the apparent equitable purpose of treating part-time employees as well as, but not better than full-time employees. It would also reinforce the idea that employers may not delay any employee's plan participation for more than two years as discussed above.[245] It would also make the administration of 401(k) plans

[235] §4974(d).

[236] *See also*, Mega-IRAs, Note 8, above, at 198 (also arguing for a greater excise tax to discourage owners from treating the tax as a small toll charge for achieving annual earnings far in excess of the current 6% penalty tax rate).

[237] *2021 Instructions for Form 5329*, IRS (Sept. 1, 2021), https://www.irs.gov/pub/irs-pdf/i5329.pdf (see instructions for lines 15, 23, 31, 39, and 47, 50).

[238] §401(k)(2)(C), §403(b)(1)(C).

[239] §411(a)(2)(B). There is a similar requirement enforceable by participants under ERISA §203(a)(2)(B), 29 U.S.C. §1053.

[240] §401(k)(12)(E)(i).

[241] §401(k)(13)(D)(iii).

[242] §410(a)(1)(A) and §410(a)(3). There is a similar requirement enforceable by participants under ERISA §202(a)(1)(A) and ERISA §202(a)(3), 29 U.S.C. §102(a)(1)(A), 29 U.S.C. §102(a)(3),

[243] *See*, Amazon 401(k) Plan as described in EY Report of Independent Auditors, 2020 Form 5500 for the Plan, Note 1 to Financial Statements, General and Eligibility, at 5, https://investyourvalues.org/files/amazon-com/amazon-401k-plan-form-5500-filing-and-attachment-2020.pdf

[244] §4101(a)(1)(B). There is a similar requirement enforceable by participants under ERISA §202(a)(1)(B), 29 U.S.C. §1052.

[245] *But see* §410(a)(4) (permitting plans to delay entry date no later than the earlier than the first day or the plan year or the first six months after satisfying the participation requirement). There is

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much simpler since complicated graded vesting rules could be discarded. Shortening the permissible vesting periods this change would probably be particularly helpful to workers with inadequate or modest retirement savings since such workers tend to have lower incomes. Lower income workers are more likely to leave employer retirement plans prior to being fully vested.[246]

Prof. Samantha Prince has thus argued that employer contributions to 401(k) plan by mega-employers with high-turnover should not be forfeitable, because this change would not only eliminate undue plan complexity and administration expense but would permit a large number of workers with inadequate retirement savings to enhance those savings.[247] For example, Amazon provides that employer matching contributions of 50% of the employee's contributions, but limited to 2% of the employee annual compensation.[248] This match is considerably below the requirement that a qualified automatic contribution plan provide a match of at least a 3.5% maximum of employee compensation.[249] Those contributions are subject to three-year cliff vesting, which means that the employee forfeits all the employer contributions unless the employee completes three years in each of which the employee provides more than 1,000 hour of service. which vest only after the employee has completed three years of service.[250] As a result, in 2020, 92,861 participants terminated employment without any vested benefits.[251] Prof. Prince finds further support for the high-level of Amazon turnover by citing a finding that the median Amazon employee tenure is 1.0 years,[252] which would seem to mean the reduction of the vesting requirement to two years suggested herein would still leave the majority of new employees being unable to keep any employer matches.[253] Prof. Prince also observed that such behavior is observed in a significant number of other large employers. including Home Depot, that have high turnover rates and slow vesting schedules.[254]

G. Limit the Availability of Roth Treatment to Workers with Middle Incomes

When first introduced Roth IRAs were limited to working Americans with middle incomes.[255] This concept can be restored if Roth conversions of non-Roth accounts are prohibited, and the same income limits that apply to Roth IRA contributions apply to Roth designated accounts.[256] This would limit these supercharged retirement plans to those who are most likely to use those accounts for normal retirement expenses, which is why we provide tax incentives to such plans. Such limits are politically feasible as shown by the 2021 House vote to limit Roth conversions. [257] Similar or more extensive limits should be added. Thus, such provisions should be added to the Bill.

H. Curb Mega-IRAs and Mega-Plan Accounts

Tax-advantaged employer retirement plans that are defined benefit plans may provide single life annuities

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a similar requirement enforceable by participants under ERISA §202(a)(4), 29 U.S.C. §1052.

[246] Regina T. Jefferson, *Increasing Coverage in Today's Private Retirement System*, 6 Drexel L. Rev. 463, 474 (2014).

[247] *See* Samantha J. Prince, *Megacompany Employee Churn Meets 401(k) Vesting Schedules: A Sabotage on Workers' Retirement Wealth* (Mar. 10, 2022). https://ssrn.com/abstract=4054884 (arguing that the federal government needs to collect more specific data on gender, race, and pay of those who terminate prior to vesting , and that megacompanies with high turnover workforces should not be permitted to deprive their workers of employer plan contributions by failing to vest their employees retirement plans that are defined benefit plans may provide single life annuities that do not exceed $245,000. The Dept. of Labor would estimate that benefit could be generated by an account balance of less than $3,800 immediately) and Brett Arends, *This giant pension scandal is hiding in plain sight* (May 13, 2022), https://www.marketwatch.com/story/this-giant-pension-scandal-is-hiding-in-plain-sight-11652392239 (arguing that retirement plans should be required to vest immediately all employer contributions).

[248] Amazon 5500, Note 243, above, Note 1 to Financial Statements, Contributions, at 6.

[249] §401(k).

[250] Amazon 5500, Note 243, above, Note 1 to Financial Statements, Vesting, at 6.

[251] *Id.*, Part II item 6, at 2.

[252] Samantha Prince, Note 247, above, at 21.

[253] *But see The Least Loyal Employees, Payscale, https://www.payscale.com/data-packages/employee-loyalty/least-loyal-employees*, cited in Samantha Prince, Note 225, above, at 21 as the source for the median tenure (attributing the Amazon brief tenure in part to the many new employees being hired who have not had a chance to be with the company for very long, which is consistent with the number Amazon 401(k) plan participants eligible to make deferrals increased in 2020 597,200 to 1,043,093).

[254] Samantha Prince, Note 247, above, at 9-11, and 20-27.

[255] *See Id.* at 190.

[256] *See Id.* at 199.

[257] Albert Feuer, *Approaching Equitable Retirement Tax Incentives*, 49 Tax Mgmt. Comp. Plan. J. No. 10 at 5 (Oct. 1, 2021) (describing, but criticizing the proposals for not going far enough). *Cf.*, Anne Tergesen, *Retirement Savers Love the Backdoor Roth IRA Strategy. It Might Not Last*, Wall St. J. (Sept. 24, 2021), https://www.wsj.com/articles/retirement-savers-love-thebackdoor-roth-ira-strategy-it-might-not-last-1163247580 (describing how more employers are permitting well paid participants to make after-tax contributions and after-tax Roth conversions within their employee plans).

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that do not exceed $245,000.[258] The Dept. of Labor would estimate that benefit could be generated by an account balance of less than $3,800.000.[259] Yet there are no limits on the balances or benefits that tax-advantaged individual or employer retirement plans, which permit almost 4,000 IRA owners to have balances in excess of $10,000,000 in 2019, as discussed above in Section I. The only reason for such disparate treatment between defined contribution and defined benefit retirement plans seems to be that is the way we have proceeded in the past.

We can do better for American families and workers. It would be good tax policy to prevent those individuals from continuing to obtain retirement tax incentives for amounts in excess of a taxpayer's expected reasonable retirement needs. It would be good retirement policy to devote such tax expenditures to those with retirement savings, whether those savings are measured in tens of thousands, hundreds or thousands, or several million dollars. Shifting such tax expenditures to those with inadequate or modest retirement savings would improve retirement equity. I offered a number of proposals for curbing Mega-IRAs and Mega-Plan Accounts in an earlier article,[260] including following the 2016 RISE Act proposal that used five million dollars as the amount of a taxpayer's expected reasonable retirement needs.[261] It is politically feasible to enact such limits as shown by the 2021 House vote to limit Mega-IRAs and Mega-Plan Accounts, which were defined therein as those in excess of 10 million dollars. [262] Thus, such provisions should be added to the Bill.

VIII. CONCLUSIONS

The Bill would widen tax inequity, economic inequity, racial inequity, and ethnic inequity with respect to retirement savings. An overwhelming majority of the Bill's benefits are allocated to individuals with far more than adequate retirement savings, i.e., those least in need of those benefits.[263] Such benefit allocations include almost all of the Bill's revenue raising provisions, which consist almost exclusively of making Roth benefits more widely available. Those provisions would reduce long-term federal tax revenues by reducing the tax burdens primarily of those with far more than adequate retirement savings. Many of the Bill's proposals described as intended to clarify and simplify retirement rules would result in more undetected violations of those rules, particularly by those with far more than adequate retirement savings. Finally, the Bill fails to shift any retirement tax incentives directed at those with retirement savings far in excess of their retirement needs, such as those with Mega-IRAs or Mega-Plan Accounts to those with inadequate or modest retirement savings.

America can and should do substantially better. Revising the Bill and the RISE & SHINE Bill, as described, would better assist the many American workers and their families with inadequate or modest retirement savings and substantially narrow our nation's retirement equity gaps. That is the outcome that Americans should obtain from a bill that is named, Securing a Strong Retirement Act.

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[258] *Retirement Topics - Defined Benefit Plan Benefit Limits*, IRS (Nov. 8, 2021), https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-defined-benefit-plan-benefit-limits .

[259] Employee Benefits Security Administration, *Lifetime Income Calculator*, U.S. Dept of Labor (calculation made on May 31, 2022), https://www.askebsa.dol.gov/lia/ .

[260] *See also*, Mega-IRAs, Note 8, above.

[261] *Id.*, at 196-198.

[262] Albert Feuer, Note 257, above, at 3-5 (describing and criticizing the proposals for not going far enough and for being applicable only to taxpayers whose income exceeds a threshold).

[263] *Cf.* Paul Bonner, *'SECURE 2.0' would further expand retirement savings options*, J. Accountancy (Mar. 30, 2022), https://www.journalofaccountancy.com/news/2022/mar/secure-2-0-further-expand-retirement-savings-options.html (treating expansion of retirement options as a boon without any consideration of whose options would be expanded or the extent that different groups would benefit from the expansion).

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