TOO BIG TO FAIL? THE U.S. RETIREMENT SYSTEM IN 2019

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This Article reviews the U.S. private retirement system and evaluates the extent to which it is successful. The Article includes recommendations for reform with respect to access to coverage, level of contributions, investment returns and fees, insufficient accumulations, portability, leakage, drawdown of benefits, and employer involvement.

I. Introduction

The U.S. retirement system is huge. According to the Investment Company Institute, total U.S. retirement assets (excluding Social Security) were $29.1 trillion as of March 31, 2019, almost three times the amount accumulated at the end of 2000.[1] The U.S. is the largest retire-

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1. *Retirement Assets Total $29.2 Trillion in Third Quarter*, INV. CO. INST., https://www.ici.org/research/stats/retirement/ret_19_q1 (last visited Oct. 14, 2019) ("These retirement assets were allocated as follows (in trillions of dollars): Individual Retirement Accounts (IRAs) 9.4; Private sector defined contribution plans 8.2;

ment plan market among twenty-two countries analyzed in Willis Towers Watson's Thinking Ahead Institute's Global Pension Assets Study, which showed that total U.S. retirement assets were then 61.5% of the global retirement plan market. The second largest was Japan, at 7.7%.[2]

Retirement assets accounted for 33% of all household financial assets in the United States at the end of March 2019.[3] According to the U.S. Census Bureau, "between 2000 and 2011, the share of wealth held in retirement accounts increased from 18% to 30% over the same period."[4] These large numbers are not, however, proof that the system is working well for ordinary Americans. Surveys repeatedly show that many people, including people close to retirement age, have little or nothing saved for retirement.[5]

In 2017, the National Institute on Retirement Security ("NIRS") found that 76% of Americans were worried about their retirement prospects, and 88% said that America faces a retirement crisis.[6] How successful is the current system? According to Senator Hatch, then chair of the Senate Finance Committee, "The good news is that the private employer-based retirement savings system in the United States—particularly 401(k) plans and Individual Retirement Accounts ("IRAs")—has become the greatest wealth creator for the middle class in history and

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Governmental defined benefit plans 6.3; Private sector defined benefit plans 3.2; Annuity Reserves 2.1. By way of comparison, the Gross Domestic Product (GDP) of the United States was $19.4 trillion in 2017, 31.28% of the world economy.") [hereinafter, *Retirement Assets*]; *see also United States GDP*, TRADING ECONOMICS, https://tradingeconomics.com/united-states/gdp (last visited Oct. 14, 2019); *A Summary of the 2019 Annual Reports*, SOCIAL SEC. ADMIN., https://www.ssa.gov/OACT/TRSUM/index.html (last visited Oct. 14, 2019) ("Over the [Social Security] program's 84-year history, it has collected roughly $21.9 trillion and paid out $19.0 trillion, leaving asset reserves of $2.9 trillion at the end of 2018 in its two trust funds.").

2. *Global Pension Assets Study–2019*, WILLIS TOWERS WATSON (Feb. 10, 2019), https://www.thinkingaheadinstitute.org/en/Library/Public/Research-and-Ideas/2019/02/Global-Pension-Asset-Survey-2019.

3. *Retirement Assets*, *supra* note 1.

4. Alfred Gottschalck et al., *Distribution of Household Wealth in the U.S.: 2000 to 2011*, U.S. CENSUS BUREAU, https://www.census.gov/library/working-papers/2011/demo/vornovitsky-01.html (last visited Dec. 16, 2019).

5. See the survey data cited *infra* Section VI; *see also* Emmie Martin, *Here's how many Americans have nothing saved for retirement*, CNBC (June 28, 2019, 8:00 AM), https://www.cnbc.com/2019/06/27/how-many-americans-have-nothing-saved-for-retirement.html.

6. Diane Oakley & Kelly Kenneally, *Retirement Security 2017: Americans' Views of the Retirement Crisis*, NAT'L INST. ON RETIREMENT SEC., https://www.nirsonline.org/reports/retirement-security-2017-americans-views-of-the-retirement-crisis/ (last visited Oct. 14, 2019) (stating these percentages had each increased since 2015).

represents truly shared prosperity."[7] According to The Onion (a satirical publication), on the other hand, "The majority of Americans have saved enough for retirement to live comfortably on the streets."[8]

The truth is somewhere in between, but there is undoubtedly room for considerable improvement. The 2018 Melbourne Mercer Global Pension Index ranked the United States only nineteen out of thirty-four countries surveyed, with an overall grade of "C."[9] This is two places lower than the 2017 ranking.[10]

A 2009 General Accountability Office ("GAO") report identified seven key risks in accumulating and preserving retirement benefits.[11] This Article will examine those risks to illustrate the current state of retirement savings in America. The seven key risks are: lack of coverage, insufficient contributions, poor investment returns, lack of portability, leakage, high fees, and inappropriate drawdown of benefits.

The dominant form of retirement plan today is the 401(k) plan.[12] In order for a 401(k) plan to provide adequate retirement savings for an

7. Aaron Fobes & Julia Lawless, *Hatch Outlines Priorities for Pension Reform and Retirement Savings in Speech at Financial Services Roundtable*, U.S. SENATE COMM. ON FIN. (Dec. 15, 2014), https://www.finance.senate.gov/ranking-members-news/hatch-outlines-priorities-for-pension-reform-and-retirement-savings-in-speech-at-financial-services-roundtable.

8. *Report: Most Americans Have Enough Saved for Retirement to Live Comfortably On Streets*, THE ONION (July 25, 2014), www.theonion.com/report-most-americans-have-enough-saved-for-retirement-1819576731; *see also* the survey data *infra* Section VI.

9. *Melbourne Mercer Global Pension Index 2018*, AUSTRALIAN CTR. FOR FIN. SERV. (Oct. 22, 2018), https://www.mercer.com.au/our-thinking/mmgpi.html.

10. *Id*.

11. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-642, PRIVATE PENSIONS: ALTERNATIVE APPROACHES COULD ADDRESS RETIREMENT RISKS FACED BY WORKERS BUT POSE TRADE-OFFS (2009) [hereinafter 2009 GAO Report].

12. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-342T, THE NATION'S RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY (2019) (stating the U.S. Comptroller General testified to Congress in February 2019, "Among those individuals who have access to employer-sponsored plans in the private sector, the structure of plans has changed over time, with a shift from traditional DB pension plans to defined contribution plans, such as 401(k)s, as the primary type of retirement plan. DB plans are traditional retirement plans that generally promise to provide a benefit for the life of the participant, based on a formula specified in the plan that typically takes into account factors such as an employee's salary, years of service, and age at retirement. DC plans are employer-sponsored account-based retirement plans, such as a 401(k) plan, that allow individuals to accumulate tax-advantaged retirement savings in an individual account based on employee and/or employer contributions, and the investment returns (gains and losses) earned on the account. The amount of assets held in individual retirement accounts also has increased significantly. Most of the

employee, the employee should (1) start to contribute at the earliest possible date; (2) contribute each year, without interruption, at least the amount required to obtain the maximum available employer match, and increase the rate of contributions as he or she ages; (3) make good investment choices and avoid paying excessive fees on a consistent basis;[13] and (4) avoid depleting the account by taking in-service distributions (e.g., for hardship) or failing to keep accumulated savings in an employer plan or IRA. After retirement, the individual must continue to manage the fund astutely for life and be able to respond to changing financial needs (e.g., for health care or long-term care) and declines in cognitive ability. Where did we get the idea that this was within the capacity of every American worker?[14]

II. Social Security: Its Importance to Older Americans

Social Security continues to be the largest single source of income for elderly Americans. In 2012, Americans aged sixty-five or older received 38% of their income from Social Security, with another 18.4% coming from pensions and annuities.[15] These percentages vary significantly by income quartile:

assets in IRAs are funded by assets rolled over from DC plans, and sometimes DB plans, when individuals change jobs or retire.").

13. *See, e.g.*, *The Effects of Conflicted Investment Advice on Retirement Savings*, EXEC. OFF. OF THE PRESIDENT OF THE U.S. (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf; Christian E. Weller & Teresa Ghilarducci, *The Inefficiencies of Existing Retirement Savings Incentives*, CTR. FOR AM. PROGRESS (Oct. 29, 2015), https://cdn.americanprogress.org/wp-content/uploads/2015/10/30090230/ExistingRetirementIncentives-briefCORRECTION 2016.pdf; John Chalmers & Jonathan Reuter, *Is Conflicted Investment Advice Better Than No Advice?*, THE NAT'L BUREAU OF ECON. RES. (Sept. 2015), available at https://www.nber.org/papers/w18158 (concluding that the answer is no); Matthew O'Brien, *The Crushingly Expensive Mistake Killing Your Retirement*, THE ATLANTIC (Feb. 15, 2014), https://www.theatlantic.com/business/archive/2014/02/the-crushingly-expensive-mistake-killing-your-retirement/283866/.

14. *See* Paul M. Secunda, *The Behavioral Economic Case for Paternalistic Workplace Retirement Plans*, 91 IND. L. J. 505, 505–48 (2016) ("The voluntary, inaccessible, employer-centered, expensive, and consumer-driven nature of these plans has combined to make retirement a type of corporate-inspired elder abuse in America.").

15. Cecilia Silverman et al., EBRI DATABOOK ON EMP. BENEFITS, 70, tbl. 3.1b, (stating that for 1974, the corresponding percentages were 42% and 14%); *see also* SOC. SEC. ADMIN., INCOME OF THE POPULATION 55 OR OLDER (Apr. 2016), www.ssa.gov/policy/docs/statcomps/income_pop55/2014/index.

TABLE 1: PERCENT OF TOTAL INCOME BY SOURCE FOR INDIVIDUALS AGED 65+, 2018[16]

	Social Security	Pensions
Lowest 25%	84.6	2.5
Second	82.4	6.7
Third	52.5	22.4
Highest	17.0	24.9

Social Security income replacement rates will decline significantly over the next twenty to thirty years, primarily because of

- The increase in the full retirement age from sixty-five to sixty-seven;[17]
- An increase in income taxation of benefits, because the income thresholds at which benefits are taxed are not indexed for inflation;[18] and
- An increase in out of pocket costs for beneficiaries under Medicare.[19]

The combined impact of these factors will reduce Social Security replacement rates for the average worker retiring at sixty-five by nearly a quarter—from a net 40% in 1985 to 31% by 2030. And these reductions are happening without any changes in current law. If benefits are cut back further to address Social Security's long-term financial shortfall, replacement rates will drop even more.[20]

16. THE JOINT COMMITTEE ON TAXATION REPORT, JCX-4-19, BACKGROUND DATA RELATING TO RETIREMENT INCOME (Feb. 4, 2019), tbl. 2F.

17. 42 U.S.C. § 416(l) (2018) ("The FRA, the age at which participants are eligible to receive full Social Security retirement benefits, increased from age 65 for people born before 1943 to age 66 for people born from 1943 through 1954. For people who turn 62 in or after 2017, the FRA will rise again by two months per year until it reaches age 67 for people born after 1959.").

18. I.R.C. § 86 (2018).

19. Louise Norris, *How much does the average Medicare recipient pay out of pocket for medical expenses?*, MEDICARERESOURCES.ORG (May 2, 2019), https://www.medicareresources.org/faqs/how-much-does-the-average-medicare-recipient-pay-out-of-pocket-for-medical-expenses/ ("According to a Kaiser Family Foundation study published in 2018, the average Medicare beneficiary paid $5,503 in 2013, including premiums and out-of-pocket costs for covered care, as well as out-of-pocket costs for things like dental care and long-term care, which are not covered by Medicare. This amounted to 41% of the average per capita Social Security income—and that's expected to increase to 50% by 2030.").

20. Alicia H. Munnell et al., *Falling Short: The Coming Retirement Crisis and What To Do About It*, CTR. FOR RETIREMENT RES. AT B.C. (Apr. 2014), https://crr.bc.edu/briefs/falling-short-the-coming-retirement-crisis-and-what-to-do-about-it-2/.

The 2019 Social Security Trustees' report projects that the trust funds will be depleted by 2035.[21] In December 2016, however, the Congressional Budget Office ("CBO") projected exhaustion in 2029.[22]

The financial outlook for Social Security is exacerbated by steady (though uneven) increases in life expectancy at sixty-five.[23] The number of elderly Americans in poverty will increase substantially in the coming decades.[24]

> Based on current rates of population growth and assuming no improvements in what is promised in Social Security benefits, there is likely to be an increase in the numbers of elderly poverty from 8.9 million in 2010 to 25 million in 2050—an increase of 180%. Most of this predicted 180% increase between 2010 and 2050—about two-thirds of it—can be attributed simply to the increase in the elderly population as Boomers get older. (The elderly population is predicted to grow about 106% during the same period, with the growth concentrated among those eighty-five and older.) The remaining third of this increase—the part that's not just a matter of having more elderly people—is America's weak retirement system. Established in 1935 and expanded until 1983, Social Security tends to do a marvelous job of reducing poverty rates among the elderly. But if nothing's done between now and 2050 to strengthen the retirement system, 25 million elderly Americans will be poor.[25]

21. THE 2019 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS (Apr. 22, 2019), https://www.ssa.gov/OACT/TR/2019/tr2019.pdf.

22. *CBO's 2016 Long-Term Projections for Social Security: Additional Information*, CONG. BUDGET OFF. (Dec. 21, 2016), https://www.cbo.gov/publication/52298; *see also CBO's Long-Term Social Security Projections: Changes Since 2017 and Comparisons With the Social Security Trustees' Projections*, CONG. BUDGET OFF. (Dec. 3, 2018), https://www.cbo.gov/system/files?file=2018-12/54711-SSProjections-Dec2018.pdf.

23. Liqun Liu et al., *National Center for Policy Analysis, Lifetime Income, Longevity and Social Security Progressivity*, NAT'L CTR. FOR POL'Y ANALYSIS (Dec. 11, 2012), http://www.ncpathinktank.org/pub/st342 ("Life expectancy has increased for both the rich and poor, but the longevity gap between them has widened over time.").

24. *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, U.S. CENSUS BUREAU (Dec. 12, 2012), https://www.census.gov/newsroom/releases/archives/population/cb12-243.html (stating that according to 2012 U.S. Census Bureau projections, "the population age sixty-five and older is expected to more than double between 2012 and 2060, from 43.1 million to 92.0 million. The older population would represent just over one in five U.S. residents by the end of the period, up from one in seven today. The increase in the number of the "oldest old" would be even more dramatic—those eighty-five and older are projected to more than triple from 5.9 million to 18.2 million, reaching 4.3% of the total population.").

25. Teresa Ghilarducci, *By 2050, There Could Be as Many as 25 Million Poor Elderly Americans*, THE ATLANTIC (Dec. 30, 2015), https://www.theatlantic.com/business/archive/2015/12/elderly-poverty-america/422235/.

In January 2019, Representatives John Larson, Conor Lamb, and Jahana Hayes introduced the Social Security 2100 Act to expand benefits and extend the program's solvency.[26] In a January 30, 2019, letter, the Social Security Office of the Chief Actuary stated that "[a]ssuming enactment of the proposal, we estimate that the combined Social Security Trust Fund would be fully solvent (able to pay all scheduled benefits in full on a timely basis) throughout the seventy-five-year projection period under the intermediate assumptions of the 2018 Trustees Report."[27] It is highly unlikely that this or similar legislation will be enacted in the near future.

III. Lack of Pension Coverage

A. In General

The private pension system is voluntary.

> Even though the system is centered in the workplace, no employer is required to offer pension coverage, and many do not. The voluntary character of private pension plans contrasts strongly with the Social Security system, in which both the employer and the employee are required to participate; and with the workers' compensation and unemployment insurance programs, which are obligatory.[28]

As a result, while approximately 96% of American workers are covered by Social Security,[29] only about half of workers at small companies (fifty or fewer) and fewer than 25% of part-time workers have access to a retirement plan at work.[30] In March 2018, the Bureau of La-

26. *See, e.g.*, Daniel Marans, *House Democrats Unveil Social Security Expansion Bill With Unprecedented Support*, HUFFINGTON POST (Jan. 30, 2019, 8:45 AM), https://www.huffpost.com/entry/john-larson-expand-social-security-bill-pass-house_n_5c50f4fee4b0f43e410c06e9 (updated Jan. 30, 2019).

27. Letter from Soc. Sec. Off. of the Chief Actuary to Chairman Larson, Senator Blumenthal, and Senator Van Hollen (Jan. 30, 2019) (on file with author), https://www.ssa.gov/oact/solvency/LarsonBlumenthalVanHollen_20190130.pdf (discussing SSA's estimates and the effect of numerous proposed changes on the solvency of the Social Security).

28. JOHN H. LANGBIEN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 4 (6th ed. 2015).

29. DAVID PRATT, SOCIAL SECURITY AND MEDICARE ANSWER BOOK 1–4 (7th ed. 2017).

30. *See* Monique Morrissey, *The State of American Retirement: How 401(k)s have failed most American workers*, ECON. POL'Y INST. 5 (Mar. 3, 2016), https://www.epi.org/files/2016/state-of-american-retirement-final.pdf ("Participation in re-

bor Statistics ("BLS") found that only 55% of private sector workers participated in a retirement plan.[31] Twenty-nine percent of private sector workers did not have access to an employer-sponsored retirement plan in 2018, and 71% did.[32]

> Among the half of workers who do not participate in a plan at their current job, 84% are with an employer that does not offer a plan, while the remaining 16% work for an employer that offers a plan but either choose not to participate or are not eligible to participate. Additionally, an increasing number of workers—such as, contractors or temporary workers—do not have a traditional employer-employee relationship, so they are also part of the group that lacks coverage from an employer.[33]

Why don't small employers offer retirement plans? A 2017 survey by The Pew Charitable Trusts found that small employers do not offer retirement plans because of the high cost, limited administrative resources, and lack of employee interest. According to that survey, key changes that could lead employers to offer a plan include greater profitability, financial incentives, and increased demand from employees.[34]

How do we encourage plan sponsorship? The primary approach to encourage plan sponsorship has traditionally been to offer tax incen-

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tirement plans has declined in the new millennium, with a steeper decline for workers in defined-benefit plans than in defined-contribution plans. For families headed by working-age workers (age 32–61), participation in any type of plan fell from 60% in 2001 to 53% in 2013.").

31. *Employee Benefits Survey, Retirement Benefits: Access, participation, and take-up rates*, U.S. BUREAU OF LAB. STAT. (Mar. 2018), https://www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm.

32. *Id.*

33. ALICIA H. MUNNELL ET AL., AN ANALYSIS OF RETIREMENT MODELS TO IMPROVE PORTABILITY AND COVERAGE, CTR. FOR RET. RES. AT B.C. (2018) [hereinafter MUNNELL]; *see also* David Pratt, *Private Pension Reform*, N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. (2015) ("Many employees who are offered a plan do not participate, generally because they do not wish to, or feel that they cannot afford to, contribute. Other workers are excluded, temporarily or permanently, by the plan's eligibility rules: they have not completed a year of service, or are under the age of twenty-one, work too few hours, are in an ineligible class of employees, or are classified as independent contractors. In America, we generally have a strong preference for voluntary programs rather than government mandates: however, it is unrealistic to expect that a system where employer sponsorship of a plan, employer contributions to a plan and employee contributions to a plan are all voluntary will succeed in providing adequate retirement income for most Americans, even when supplemented by Social Security.").

34. *Small Business Views on Retirement Savings Plans*, PEW CHARITABLE TR. (Jan. 11, 2017), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/small-business-views-on-retirement-savings-plans.

tives. Retirement plan contributions are currently deductible by the employer, within generous limits,[35] but are not (unlike most forms of compensation) currently taxable to the employee.[36] Small employers may receive a tax credit for retirement plan start-up expenses.[37] A recurring complaint of employers is that the rules are simply too complex and the qualification requirements are daunting.[38] Attempts to encourage plan sponsorship by making simpler plans available, however, such as simplified employee pension plans ("SEPs")[39] and SIMPLE plans[40] have had only limited success.[41] One 2014 study noted,

> Legal reforms now offer employers tax credits for sponsoring a plan, special plans with little or no discrimination tests like the auto-enrollment safe harbor 401(k) plan, and reduced fiduciary liability through participant investment discretion and the use of Qualified Default Investment Alternatives as investment options. Yet there has been no appreciable increase in the percentage of employers, particularly small to mid-size employers, willing to offer plans.[42]

Open multiple employer plans ("MEPs") have recently enjoyed bipartisan support, but they are clearly not a panacea.[43] A 2012 GAO study found no clear evidence that MEPs would shrink the coverage gap. "Overall, no consensus existed among MEP representatives and pension experts on whether or not MEPs such as [Professional Employer Organizations ("PEO")] MEPs or open MEPs would substantially expand pension coverage," the GAO report said.[44]

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35. *See* I.R.C. § 404 (2019).
36. *Id.* § 402.
37. *Id.* § 45E.
38. *See generally id.* § 401.
39. *Id.* § 408(k).
40. *Id.* § 401(k)(11), 408(p).
41. Greg Iacurci, *Legislation, DOL rule could boost multiple employer plans*, INVESTMENTNEWS (Nov. 14, 2016, 12:01 AM), https://www.investmentnews.com/article/20161114/FREE/161109934/legislation-dol-rule-could-boost-multiple-employer-plans.
42. C. Eugene Steuerle et al., *Entitlement Reform and the Future of Pensions*, PENSION RES. COUNCIL (Sept. 2014), available at https://pensionresearchcouncil.wharton.upenn.edu/publications/papers-2018/entitlement-reform-and-the-future-of-pensions/ [hereinafter Steuerle].
43. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-665, PRIVATE SECTOR PENSIONS: FEDERAL AGENCIES SHOULD COLLECT DATA AND COORDINATE OVERSIGHT OF MULTIPLE EMPLOYER PLANS 22 (Sept. 2012); *see also* John Manganaro, *Industry Weighs President Trump's Executive Order on MEPs, RMDs*, PLANADVISER (Aug. 31, 2018), https://www.planadviser.com/industry-weighs-president-trumps-executive-orders-meps-rmds/.
44. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-665, PRIVATE SECTOR PENSIONS: FEDERAL AGENCIES SHOULD COLLECT DATA AND COORDINATE OVERSIGHT OF MULTIPLE EMPLOYER PLANS 22 (Sept. 2012); *See also* Definition of "Employer" Under

The Trump administration has sought to block the Obama administration's attempts to encourage state-run plans for private sector employees,[45] though several states are moving ahead anyway.[46]

Originally, 401(k) plans required eligible employees to make an affirmative election to participate. More recently, many employers have begun to automatically enroll employees unless they affirmatively opt out. "The 2017 PLANSPONSOR survey found that 42.7% of [defined contribution ("DC")] plans overall use automatic enrollment, and 35.4% use automatic deferral escalation. This increases to 65.6% and 67.3%, respectively, for the largest plans."[47]

According to an analysis by Fidelity Investments, at the end of the second quarter of 2018, 33% of plans automatically enrolled new employees and that "[t]he percentage of employers that default participants at a 6% deferral rate or higher more than doubled in the past decade to 19%."[48] Furthermore, the study noted, "Plans with automatic enrollment had an 87% participation rate as of the end of the second

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Section 3(5) of ERISA—Association Retirement Plans and Other Multiple Employer Plans, 83 Fed. Reg. 53534 (proposed Oct. 23, 2018) (to be codified at 29 C.F.R. pt. 2510) (stating that "The Department of Labor proposes a regulation under title 29 of the Code of Federal Regulations to expand access to affordable quality retirement saving options by clarifying the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a workplace retirement plan."). The regulations were finalized on July 31, 2019. *See* Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple Employer Plans, 84 Fed. Reg. 37508 (finalized July 31, 2019) (to be codified at 29 C.F.R. pt. 2510).

45. *See* Liz Farmer, *Legal or Not, States Forge Ahead With 401(k)-for-Everyone Plans*, GOVERNING (Aug. 2017), https://www.governing.com/topics/mgmt/gov-401k-states-retirement-private.html (stating that Congress jeopardized the future of state plans to help private employees save for retirement).

46. *See, e.g.*, Yana S. Johnson, *Did You Know California Has a State Mandated Retirement Plan?*, JACKSON LEWIS P.C. (Feb. 14, 2019), https://www.benefitslawadvisor.com/2019/02/articles/state-mandated-retirement-plan/california-joins-other-states-with-a-state-mandated-retirement-plan/; Rebecca Moore, *OregonSaves Shows Initial Success*, PLANSPONSOR (Dec. 11, 2018), https://www.plansponsor.com/oregonsaves-shows-initial-success/ ("At the time of an analysis from the Center for Retirement Research (CRR) at Boston College, 62% of eligible workers were participating, and 93% of contributing participants had not changed their default deferral rate of 5%.").

47. Rebecca Moore & John Manganaro, *Retirement Program Designs of the Future: Beyond Automatic Plan Features*, PLANSPONSOR (Mar. 21, 2018), https://www.plansponsor.com/exclusives/retirement-program-designs-future-beyond-automatic-plan-features/.

48. Lee Barney, *Plan Sponsors Stepping Up Their Auto Enrollment Game*, PLANSPONSOR (Aug. 16, 2018), https://www.plansponsor.com/plan-sponsors-stepping-auto-enrollment-game/.

quarter, whereas plans without automatic enrollment had a participation rate of 52%."[49]

Actual coverage is correlated with numerous factors, including income, age, marital status, ethnicity, union status, size of company, industry, and full time or part time status. The BLS found that retirement benefits were available to 66% of private industry workers in the United States in March 2017.[50] Retirement benefits were available to 34% of private industry workers in the lowest wage category (the 10th percentile).[51] By contrast, 91% of workers in the highest wage category (the 90th percentile) had access to retirement benefits.[52] Because participation in 401(k) plans is voluntary, unlike most defined benefit plans, the take up rate was 75%. So, the actual percentage of workers who were participating was only 50%.[53] Firm size also had a significant effect: for firms with one to ninety-nine workers, the access and participation rates were 53% and 37%; for firms with 100 or more workers rates were 83% and 65%.[54]

According to another 2014 study from the Center for Retirement Research, "The low participation rates of lower-income respondents are driven primarily by weak labor force attachment and working for a firm without a pension."[55] As a result, providing universal pension coverage in the workplace would still leave a large fraction of lower-income individuals without coverage due to their low employment rates.[56] This suggests that expansion of participation requires measures to boost employment.[57]

A 2016 GAO report found that common plan design features greatly hinder employees' ability to save, including an age minimum of twenty-one years for eligibility, a one year of service requirement (generally requiring at least 1000 paid hours) for eligibility, and up to

49. *Id.*
50. Press Release, U.S. BUREAU OF LAB. STAT., Employee Benefits in the United States News Release (July 21, 2017), https://www.bls.gov/news.release/archives/ebs2_07212017.htm [hereinafter Employee Benefits].
51. *Id.*
52. *Id.*
53. *Id.*
54. *See id.*
55. April Yanyuan Wu et al., *Why Don't Lower-Income Individuals Have Pensions?*, CTR. FOR RETIREMENT RES. AT B.C. 1, 3 (Apr. 2014), https://crr.bc.edu/wp-content/uploads/2014/04/IB_14-8-508.pdf.
56. *Id.* at 2.
57. *Id.* at 4.

six years of service before being fully vested in benefits derived from employer contributions.[58]

B. The Contingent Workforce

Subject to special rules for statutorily defined "leased employees," an employer who allows non-employees to participate in a qualified retirement plan would jeopardize the plan's qualification, as a plan is required to be for the exclusive benefit of the employees or their beneficiaries.[59] This issue has two separate aspects: the misclassification of employees as independent contractors, and the feasibility of allowing independent contractors' plan participation within the present framework based on the assumption that all participants will either be employees or owners of the business (for example, partners).[60]

According to a 2015 GAO report, contingent work "may afford fewer worker protections than standard work, depending on a worker's particular employment arrangement. . . . GAO also found that contingent workers are about two-thirds less likely than standard workers to have a work-provided retirement plan and less than half as likely to have work-provided health insurance."[61]

The report stated that contingent workers, including part-timers and contractors, made up 35% of employed workers in 2006 and 40% in 2010, the latest years that data were available.[62]

Employers have an incentive to classify workers as independent contractors, not only to avoid providing retirement and other benefits, but also to avoid having to pay Social Security taxes, unemployment compensation premiums, and worker's compensation premiums.[63]

58. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-69, 401(K) PLANS: EFFECTS OF ELIGIBILITY AND VESTING POLICIES ON WORKERS' RETIREMENT SAVINGS (2016).

59. 26 U.S.C. § 401(a) (2018).

60. 26 U.S.C. §§ 401(a), (c).

61. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS (2015).

62. *Id.*

63. U.S. DEP'T OF LABOR, CONTINGENT WORKERS (2015), www.dol.gov/_sec/media/reports/dunlop/section5.htm (last visited Oct. 14, 2019) ("Unfortunately, current tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding,

According to a 2015 study:

> A sizeable share of the workforce is in an arrangement that does not take the form of full-time work with one employer . . . . A 2014 survey conducted by The Freelancers Union identifies more than 53 million Americans, or roughly 34% of the labor force, doing at least some freelance work. . . . Despite the imprecise measurement of its current scope, the online gig economy appears poised to grow. This prediction is based on rising consumer demand patterns in this sector of the economy. It seems clear that such work is an increasingly important feature of the U.S. labor market.[64]

The same report suggests that the increase in contingent work, and the emergence of new forms of contingent work, is driven by the preferences of both businesses and individual workers.[65] These issues were explored at a symposium held by the Aspen Institute on April 11, 2016.[66]

According to BLS, in May 2017, 3.8% of workers held contingent jobs.[67] These individuals reported that their jobs are temporary or they did not expect their jobs to last. Because of the difficulties of defining contingent work, under different methods of measurement, contingent workers represented 1.3% to 3.8% of total employment in May 2017—a reduction from 1.8% to 4.1% in 2005.[68]

The BLS survey also identified workers who have alternative work arrangements.

and will be relieved of responsibility to the worker under labor and employment laws. The worker will lose the protection of those laws and benefits and the employer's contribution to Social Security, but may accept the arrangement nonetheless because it gives him or her an opportunity for immediate and even illegitimate financial gains through underpayment of taxes. Many low-wage workers have no practical choice in the matter.").

64. Jane Dokko et al., *Workers and the Online Gig Economy*, HAMILTON PROJECT FRAMING PAPERS, Dec. 2015, available at https://www.hamiltonproject.org/assets/files/workers_and_the_online_gig_economy.pdf [hereinafter Dokko]; *see also* David Mitchell, *53 Million Americans are Contingent Workers; How Will They Retire?*, ASPEN INST., (May 4, 2016), https://www.aspeninstitute.org/videos/53-million-americans-are-contingent-workers-how-will-they-retire/ (last visited Oct. 14, 2019) [hereinafter Mitchell] (stating "[t]oday, 53 million Americans work independently as contractors, part-timers and solo business owners. It's safe to assume that in five years, the number of people working contingently will be nearly half of today's permanent workforce- as many as 66 million.").

65. *See* Dokko, *supra* note 64.

66. *See* Mitchell, *supra* note 64.

67. BUREAU OF LAB. STAT., CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS SUMMARY (May 2017), https://www.bls.gov/news.release/conemp.nr0.htm (last visited Oct. 14, 2019).

68. *Id.*

> In May 2017, there were 10.6 million independent contractors (6.9% of total employment), 2.6 million on-call workers (1.7% of total employment), 1.4 million temporary help agency workers (0.9% of total employment), and 933,000 workers provided by contract firms (0.6% of total employment). . . . The contingent workforce is comprised of two general categories: core and non-core. Core contingency workers include agency temps, direct-hire temps, on-call laborers and contract workers. Core contingency workers generally represent low wage earners that have non-standard work arrangements out of necessity. These workers are often subjected to exploitation and are usually not entitled to traditional employer-provided retirement and health benefits. The non-core category includes independent contractors, self-employed workers and standard part-time workers who work fewer than thirty-five hours per week. Non-core workers generally seek nonstandard work agreements as a matter of choice.[69]

Sir Anthony Atkinson, a British economist described by Thomas Piketty as a pioneer in historical studies of income and wealth, noted in 2015 that whereas in the twentieth century employment in developed countries was "largely characterised by regular jobs," in the twenty-first century there has been "a significant return to what is now regarded as nonstandard employment."[70] He comments that it is

> increasingly misleading to talk in terms of people having, or not having, a job. Work is not simply a (0,1) activity. The twenty-first century labour market is more complex, and this has implications for how we think about employment as a route out of poverty and full employment as a means of assisting us on the way to less inequality.[71]

Also, as Monique Morrissey, an economist at the Economic Policy Institute, points out, Social Security's near universal coverage and progressive benefit structure (the Social Security benefit replaces 90% of the lowest range of average earnings but only 15% of the highest range) should compensate for contingent workers' lower earnings and lack of access to employer benefits. "However, nonstandard workers are more likely to be to be paid under the table or to be classified (or misclassified) as independent contractors. Self-employed workers have greater incentive to underreport earnings or inflate expenses in tax returns, shrinking the tax base as well as their future Social Security benefits."[72]

69. *Id.*
70. ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 135–37 (Harv. U. Press 2015).
71. *Id.*
72. Monique Morrissey, *Exploring the 'Gig Economy' and the Future of Retirement Savings*, ECON. POL'Y. INST., Feb 6, 2018, at 3.

The reason is that they are required to pay not only income taxes (federal and state) on their net earnings from self-employment, but also self-employment taxes at a rate of 15.3%.

C. Recommendations to Improve Access

Access could be improved by adopting some (or preferably all) of the following changes:

1. Enforcing the rules to prevent misclassification of employees as independent contractors.
2. Reducing the permissible period of service for eligibility to no more than ninety days and including part-time employees who work more than a *de minimis* number of hours.
3. Reducing the minimum age for eligibility from twenty-one to eighteen or nineteen.
4. Eliminating the ability of an employer to exclude certain classes of employees, unless the exclusion is required by a bona fide collective bargaining agreement.
5. Requiring all employers to make a retirement plan available to their employees, to which they can contribute by payroll deduction, and requiring almost all employers to make matching contributions for all employees who have deferred any amount and have completed more than a brief period of service. This mandate could, for example, exempt new businesses and businesses with fewer than five employees.

IV. Insufficient Contributions

A. In General

U.S. Census Bureau researchers recently concluded that only about one-third of workers are saving in a 401(k) or similar tax-deferred retirement plan.[73] "Four out of five workers are employed by companies that offer a 401(k) or similar plan, but most workers aren't using them—either because they're not eligible or because they aren't signing

73. Ben Steverman, *Two-Thirds of Americans Aren't Putting Money in Their 401(k)*, BLOOMBERG (Feb. 28, 2017), https://www.bloomberg.com/news/articles/2017-02-21/two-thirds-of-americans-aren-t-putting-money-in-their-401-k.

up."[74] While auto-enrollment prompts more workers to sign up for 401(k) plans, the default automatic contribution level is often too low, typically 3% of income or less.[75]

Americans are saving less than they did in the 1980s. One explanation is that many lower income employees can barely pay their day-to-day bills, including student loans[76] and other debts.[77] According to the GAO, of all the workers who are not currently saving through their employer, 68% work for an employer that does not offer a plan and 16% are not eligible to participate in the plan.[78] Only 16% could take part but choose not to.[79]

Americans save very little outside retirement plans.[80] It is difficult, if not impossible, for low-income individuals—those who most need to save—to do so.[81] Lower-income and part-time workers must pay their bills, raise their children,[82] and live on whatever is left. As a former

74. *Id.*

75. MUNNELL, *supra* note 33, at 182.

76. Corie Hengst, *Student Loan Debt Causing Delays in Retirement Saving*, PLANSPONSOR.COM (May 12, 2016), https://www.plansponsor.com/student-loan-debt-causing-delays-in-retirement-saving ("Student loan debt is causing Americans to delay saving for the future and forcing them to take on multiple jobs, according to a survey from the American Institute of CPAs conducted by Harris Poll. Eight in ten U.S. adults with student loans say they have made financial or personal sacrifices because of loan debt, and half of respondents say they delayed contributions to retirement accounts, up from 41% in 2013.").

77. *See* Amar C. Bakshi, *Why America spends while the world saves*, CNN (Feb. 16, 2012), http://globalpublicsquare.blogs.cnn.com/2012/02/16/why-america-spends-while-the-world-saves/ ("U.S. household saving rates peaked in the 1980s at around 11%, and by 2005, they had plummeted to near zero" and that "we tend to have very high debt levels relative to our disposable income.").

78. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-408, LOW DEFINED CONTRIBUTION SAVINGS MAY POSE CHALLENGES (2016).

79. *Id.*

80. *See* Michelle Singletary, *Does America have a savings crisis?* WASH. POST (Feb. 21, 2019), https://www.washingtonpost.com/business/2019/02/21/does-america-have-savings-crisis/?utm_term=.19f0709b6b19; Alicia H. Munnell, *401(k)/IRA Holdings in 2013: An Update From the SCF*, CTR. FOR RETIREMENT RES. AT B.C. (Sept. 2014), https://crr.bc.edu/briefs/401kira-holdings-in-2013-an-update-from-the-scf/ (discussing how most saving by the working-age population occurs in pension plans and 2013 data showed that the typical household approaching retirement has only $12,500 of financial assets outside retirement saving, down from $18,300 in 2010).

81. *See, e.g.*, *Tax Reform Options: Promoting Retirement Security Before the S. Comm. on Fin.* 112th Cong. 33–40 (2011) (statement of Karen Friedman, Executive Vice President and Policy Director of the Pension Rights Center).

82. Mark Lino, *Expenditures on Children by Families, 2013*, U.S. DEP'T OF AGRIC., CTR. FOR NUTRITION POL'Y AND PROMOTION, MISCELLANEOUS NO. 1528-2013 (Aug. 2014), available at http://www.cnpp.usda.gov/sites/default/files/expenditures_on

high-ranking Treasury Department official wrote in 1993, "Lower income employees cannot be expected to provide for the future when current income is barely adequate for a minimum standard of living."[83]

In addition, as William G. Gale, an economist with the Brookings Institution, testified to the Senate Finance Committee in 2011, several factors threaten to reduce the vitality of the retirement system: real wages have stagnated, housing prices have fallen far below previous peaks, and the stock market is increasingly volatile.[84] These factors may cause workers to stop contributing to 401(k) plans or IRAs, to contribute less, to invest more conservatively (and thus reap lower investment returns), or to withdraw funds early to meet short-term financial needs.[85]

In 2014, the Center for Retirement Research found that the required saving rate was 15% of income for a middle-income household, which includes both employee and employer contributions. The required saving rates are very sensitive to assumptions about the starting and ending dates for saving and the rate of investment earnings. If savers delay retirement to seventy, the figure drops from 15% to 6%.[86] Thus, "[s]tarting to save earlier would bring the rate even lower."[87]

Like many other advocates, the Pension Rights Center has called for the savers' credit to be expanded and made refundable.[88] "The credit is quickly phased out, and many low- and moderate-income taxpayers who do not pay income tax fail to qualify for the credit. Others qualify

_children_by_families/crc2013.pdf (stating that the Agriculture Department recently reported that a middle-income family with a child born in 2013 can expect to spend about $245,340 ($304,480 adjusted for projected inflation) for food, housing, childcare, education, and other child-rearing expenses up to age eighteen. This does not include costs of pregnancy with that child).

83. Daniel I. Halperin, *Special Tax Treatment for Employer-Based Retirement Programs: Is It "Still" Viable as a Means of Increasing Retirement Income? Should It Continue?* 49 TAX L. REV. 1, 14 (1993) [hereinafter Halperin].

84. *Tax Reform Options: Promoting Retirement Security Before the S. Comm. on Fin.* 112th Cong. 7–10 (2011) (statement of William G. Gale, Senior Fellow, Brookings Institution).

85. *Id*.

86. *Id*.

87. Alicia H. Munnell et al., *How Much Should People Save?*, CTR. FOR RETIREMENT RES. AT B. C. (July 2014), https://crr.bc.edu/briefs/how-much-should-people-save/.

88. *Options for Increased Retirement Security, comments to the House Ways and Means Committee*, PENSION RIGHTS CTR, (Apr. 15, 2013), http://www.pensionrights.org/newsroom/speeches-statements/options-increased-retirement-security-comments-house-ways-means-committ (stating the rules governing the savers' credit appear in section 25B of the Internal Revenue Code).

for a credit that is far too small to be much of an incentive to save for people living near the poverty line."[89] Clearly, these changes should be made.

The chief drawback of most recent proposals is that they do *not* require employer contributions. Without employer contributions, it will be difficult for these plans to generate assets sufficient for a secure retirement. Assuming that these new plans have robust regulatory structures, "changing pension law to accommodate employer contributions without attaching imposing fiduciary duties could be considered."[90]

As Daniel Halperin, former Deputy Assistant Secretary of the Treasury Department and professor emeritus at Harvard Law School, pointed out in 1993,

> If, as a matter of public policy, it is important for people to be able to maintain their standard of living upon retirement, or at least maintain a minimum standard beyond what is provided by Social Security, rather than trying to encourage employer plans or individual savings, it would be more straightforward either to enhance Social Security benefits or to require employers to contribute to private plans for their employees.[91]

According to Phyllis Borzi, former head of the U. S. Department of Labor's Employee Benefit Security Administration ("EBSA"), "It's no accident that most countries have gone to a mandatory [defined contribution] system. You can't have sharp enough sticks or plump enough carrots to get to the goal of universal coverage. But in the U.S. we're not close to a mandatory system."[92]

As long ago as 1981, a Presidential Commission recommended a mandatory universal pension system, with a required employer contribution of 3% of pay.[93] This proposal was not enacted. Any attempt to mandate employer contributions in the U.S. would undoubtedly be resisted strongly by employers, and they would argue that they are already contributing 6.2% of wages (up to the taxable wage base) under Social Security.[94] But this is really a tax, not a pension contribution:

89. *Id.*
90. Steuerle, *supra* note 42.
91. Halperin, *supra* note 83, at 44.
92. Kerry Pechter, *Mind the Coverage Gap*, RET. INCOME J. (July 26, 2018), https://retirementincomejournal.com/article/mind-the-coverage-gap/.
93. THE PRESIDENT'S COMM. ON PENSION POL'Y, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY.
94. I.R.C. § 3111 (2018).

these payments by an employer do not provide retirement savings for its own employees.[95] As the Social Security Administration points out,

> Financing of the program is pay-as-you-go. The payroll contributions of workers each month help provide these benefits to eligible retirees, disabled workers, and survivors in the same month. In contrast, individual accounts provide benefits to each beneficiary using: (1) their own worker contributions; (2) the contributions to their account from their employer; and (3) investment earnings on these contributions. Thus, individual accounts are completely funded in advance.[96]

Teresa Ghilarducci and Hamilton "Tony" James have proposed "A Comprehensive Plan to Confront the Retirement Savings Crisis," which mandates employer and employee contributions:

> Our plan would build upon Social Security, which already mandates that workers contribute about 12.5% of their income. We've calculated that full-time workers need an additional 3% of their pay invested and earning a decent return to maintain their standard of living in retirement. So the first step is to mandate this 3% contribution, splitting it between workers and their employers. This mandate will apply to all workers, including those who work part time and/or are self-employed. . . . This is a much smaller gap to fill than most people assume, but there is only one way to fill it: the savings have to be mandated. This may be a politically loaded approach, but research and experience have made clear that nothing short of a mandate will provide future generations of Americans enough income for a secure retirement. And the Retirement Savings Plan makes this mandated contribution nearly costless—for the government and for most individual Americans alike—in a number of ways.[97]

In conclusion, the overwhelming (though not unanimous) conclusion of the experts who have studied the issue is that retirement plan contributions must be increased, and at least a portion of the increased contributions must be mandatory.

95. *See, e.g.*, Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration and the Quest for Worker Security*, 42 TAX L. REV. 433 (1987).

96. *Social Security Administration,* Provisions Affecting Individual Accounts, https://www.ssa.gov/oact/solvency/provisions/individualaccts.html.

97. Teresa Ghilarducci & Hamilton "Tony" James, *A Comprehensive Plan to Confront the Retirement Savings Crisis*, SCHWARTZ CTR. FOR ECON. RESEARCH, THE NEW SCHOOL RETIREMENT EQUITY LAB, available at http://www.economicpolicyresearch.org/images/Retirement_Project/Retirement_Security_Guaranteed_digital.pdf (last visited Oct. 14, 2019).

B. Recommendations to Increase the Level of Contributions

The level of contributions could be improved by adopting some, or all, of the following changes:

1. Enhancing the savers' credit, making it refundable, and making it easier to claim.[98]
2. Giving employers an incentive to include auto-enrollment in their 401(k) plans.
3. Giving employers an incentive to include auto-escalation in their 401(k) plans. If the starting auto-enrollment rate is 3% of pay, it should be increased frequently until it reaches at least 10%.
4. Requiring almost all employers to make matching contributions for all employees who have deferred any amount and have completed more than a brief period of service. Even better, require employers to contribute even if the employee has not deferred any amount. This mandate could, for example, exempt new businesses and businesses with fewer than five employees.
5. Reducing income inequality and creating more full-time jobs that pay more than a bare living wage.

V. Poor Investment Returns and High Fees

A. In General

> As little as 1% in administrative fees can have a significant impact on the retirement plan's final balance. For example, an employee with a 401(k) balance of $25,000, 7% return on investment with 0.5% in fees will have $227,000 in thirty-five years. If, however, the fees and expenses were instead 1.5% the balance is only $163,000 after thirty-five years. The 1% difference in fees annually reduces the account balance by 28% ($64,000) in retirement.[99]

98. *Id.* at 4 (stating that the Ghilarducci/James proposal "redirects government retirement savings support toward the bottom 90% of the income distribution-workers who need help the most-replacing a regressive system of subsidies with a simple tax credit.").

99. Dax Hill, *Retirement Plan Fees: Small Percentages Can Have Big Impacts*, HILL, CHESSON & WOODY: A GALLAGHER COMPANY (Oct. 23, 2018), https://www.hcwbenefits.com/retirement-plan-fees-small-percentages-can-have-big-impacts/; *see also* Pam Martens, *PBS Drops Another Bombshell: Wall Street Is Gobbling Up Two-Thirds of Your 401(k)*, WALL ST. ON PARADE (Apr. 25, 2013), https://wallstreetonparade.com/2013/04/pbs-drops-another-bombshell-wall-street-is-gobbling-up-two-thirds-

Fees tend to be significantly higher in small plans than large plans:

> Even if small employers were willing to offer 401(k) plans, the current architecture leads to very high costs for small plans. . . . [D]ata from BrightScope indicate that the economies of scale for large plans (over $100 million in assets) almost uniformly result in fees below 1% of assets, with the largest plans' fees typically below 0.50%. But these relatively low fees stand in stark contrast to those for small plans, where the average is about 2% and with many plans paying more. Paying 2% or more in fees makes investing prohibitively expensive and cuts balances at retirement nearly in half compared to a no-fee world. So the challenge in the coverage area is not just providing retirement plans for the uncovered population but doing so in a cost-effective way.[100]

The average expense ratio on investments in 401(k) plans dropped slightly to 0.41% of assets in 2017, according to a survey, which noted that many investors are paying more than 0.41%, though, many index funds charge investors next to nothing. "While much of the investment world has gravitated toward lower-cost, passively managed index funds, a lot of the older money in 401(k) plans remains in actively managed funds."[101] Actively managed funds typically charge significantly higher fees.

According to a 2015 report, investment fees are the most likely reason that defined contribution plans earn lower returns than traditional pension (defined benefit) plans.

> The reason for the higher fees is that defined contribution plans invest through mutual funds, while defined benefit plans do not. . . . [F]ees vary significantly not only across fund types—0.44% for the median return in an index equity fund versus 1.18% in an equity value fund—but also within fund types—bond funds range from 0.48% to 1.65%.[102]

of-your-401k/ (stating "[p]ull up a compounding calculator online. Take an account with a $100,000 balance and compound it at 7% for fifty years. That gives you a return of $3,278,041.36. Now change the calculation to a 5% return [reduced by the 2% annual fee] for the same $100,000 over the same fifty years. That delivers a return of $1,211,938.32. That's a difference of $2,066,103.04."); *How Fees And Expenses Affect Your Investment Portfolio,* SEC OFF. OF INV'R EDUC. AND ADVOC. (Sept. 8, 2016), https://www.sec.gov/investor/alerts/ib_fees_expenses.pdf.

100. MUNNELL, supra note 33, at B.C.

101. Suzanne Woolley, *How Does Your 401(k) Compare? A new survey looks at trends in fees and investment options-and shows there's lots of room for improvement*, BLOOMBERG: BUS. (Aug. 23, 2017, 5:00 AM), https://www.bloomberg.com/news/articles/2017-08-23/retirement-plan-fees-level-out-how-does-your-401-k-compare.

102. Alicia H. Munnell, et al., *Investment Returns: Defined Benefit vs. Defined Contribution Plans*, CTR. FOR RETIREMENT RES. AT B. C. (Dec. 2015), https://crr.bc.edu/briefs/investment-returns-defined-benefit-vs-defined-contribution-plans/ [hereinafter Munnell, et al., *Investment Returns*].

Defined benefit plans have consistently outperformed defined contribution plans and IRAs, partly because of lower fees. The report found that the geometric rates of return were:

TABLE 2[103]

	1990–2012	2000–2012
DB	6.6%	4.7%
DC	5.9%	3.1%
IRA		2.2%

Defined benefit plan assets are generally invested as a single fund by the Trustees, who typically are advised by one or more investment advisors if the Trustees themselves do not have the necessary expertise.[104] This centralized investing allows economies of scale and a longer investment horizon.[105] By contrast, in 2013, 88% of 401(k) plans allowed participant investment direction of all assets.[106] Many if not most participants suffer from lack of knowledge and behavioral biases.[107] As Robert C. Merton, an economics professor at MIT Sloan and Nobel Memorial Prize winner, points out,

> [P]utting relatively complex investment decisions in the hands of individuals with little or no financial expertise is problematic. Research demonstrates that decision making is pervaded with behavioral biases. . . . More dangerous yet is the shift in focus away from retirement income to return on investment that has come with the introduction of saver-managed DC plans: Investment decisions are now focused on the value of the funds, the returns on investment they deliver, and how volatile those returns are. Yet the primary concern of the saver remains what it always has been: Will I have sufficient income in retirement to live comfortably?[108]

103. *Id.* at 2.

104. *See Responsibilities of Retirement Plan Trustees–And What to Do About It*, BENEFITS LAW GRP. OF CHI.: BENEFITS BULLETINS (Sept. 2013), https://www.benefitslawgroupofchicago.com/bulletins/Responsibilities-of-Retirement-Plan-Trustees/.

105. *See* Munnell et al., *Investment Returns*, *supra* note 102.

106. Alicia H. Munnell, *401(K)/IRA Holdings in 2013, an Update from the SCF*, CTR. FOR RET. RES. AT B. C. (Sept. 2014), https://crr.bc.edu/briefs/401kira-holdings-in-2013-an-update-from-the-scf/.

107. Gopi Shah Goda et al., *The Role of Time Preferences and Exponential-Growth Bias in Retirement Savings*, NAT'L BUREAU OF ECON. RES. (Aug. 2015), available at https://www.nber.org/papers/w21482 (finding that if employees could eliminate two biases, present bias [putting current happiness above future well-being] and exponential-growth bias [the failure to realize how savings compound over time] retirement savings could increase by 12%).

108. Robert C. Merton, *The Crisis in Retirement Planning*, HARV. BUS. REV.: FIN. MGMT. (2014), https://hbr.org/2014/07/the-crisis-in-retirement-planning.

Recent academic research also stresses the importance of structuring the plan's investment menu properly:

> Although the participant's allocation may have been the legal cause of the losses, research shows that the selection of the menu, even if it is adequately diversified, also bears a causal relationship to the participant's allocation. Studies have shown that large menus have the effect of substantially reducing plan participation rates, thereby resulting in huge financial losses to workers. There is also empirical evidence that large menus result in investment options that are lower quality and more expensive, lead to inferior asset allocation decisions, and impair the effectiveness of disclosure due to information overload.[109]

One recent survey found that "[f]orty-two percent [of employers] have streamlined their investment menu in the past three years, and another 41% plan to do so by 2020."[110]

Under the plan proposed by Ghilarducci and James,

> Each person's guaranteed retirement account would be legally owned by the specific individual. But that money would be invested as part of pooled strategies, combining the retirement savings with other GRAs across the country. Individuals would be able to choose their own manager from a national exchange. Managers could include traditional money management firms, state agencies that manage public pensions, or possibly a self-funded federal entity. By combining their funds—and their investing power—investors can build stronger portfolios than any one individual would be able to on their own. Individual holders would select their "GRA pension manager" based on fees and investment performance. They would be able to choose their preferred manager or change from one to another at the beginning of each year. Accounts would be fully portable and the assets would transfer based on the account balance.[111]

109. Mercer Bullard, *The Social Costs of Choice, Free Market Ideology and the Empirical Consequences of the 401(k) Plan Large Menu Defense*, at 27 (May 10, 2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263353.

110. Lee Barney, *Sponsors Making Great Strides on Their Retirement Plans*, PLANSPONSOR (Feb. 26, 2018), https://www.plansponsor.com/sponsors-making-great-strides-retirement-plans/.

111. Teresa Ghilarducci & Hamilton James, *A Comprehensive Plan to Confront the Retirement Savings Crisis*, SCHWARTZ CTR. FOR ECON. RES., 2016, at 16.

B. Recommendations to Address Poor Investment Returns and High Fees

These problems of poor investment returns and high fees could be addressed by adopting some (or preferably all) of the following changes:

1. Encouraging plan sponsors to offer participants at least one option under which their accounts would be managed by professional money managers who owe fiduciary duties to the employee.
2. Restructuring the options to reduce the number of redundant options and make it easier for employees to set up a well-balanced and diversified portfolio that meets their needs and risk tolerance to the extent that employees still have responsibility for investments.
3. The U. S. Department of Labor should intensify its efforts to educate plan sponsors and employees about investment selection and the effect of fees on plan accumulations.
4. Simplifying all communications to plan sponsors and employees to try to achieve a much higher level of understanding. Communications should be written so that they are understandable by ordinary employees, not only by investment professionals.
5. The SEC and the Department of Labor should investigate establishing a structure, primarily designed for small plans, under which employers can limit their fiduciary exposure with respect to investments by following certain procedures.
6. Under section 404(c) of ERISA, employers and other fiduciaries to a plan can avoid liability for losses resulting from an employee's investment choices, if certain requirements are satisfied. The current DOL regulations[112] should be reviewed and revised to the extent necessary to provide adequate protection to employees, in view of changes that have occurred since the regulations were issued.[113]

112. 29 C.F.R. §§ 2550.404c-1, 2550.404c-5 (2018).

113. *See generally* Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plants, 75 Fed. Reg. 64,910 (Oct. 20, 2010) (amending 29 C.F.R. §

VI. Insufficient Accumulations

One of the key tests for the adequacy of a retirement system is the extent to which it replaces an individual's pre-retirement income.

> How much income retirees actually have seems like a straightforward question. Researchers often rely on nationally representative surveys to measure the financial resources available to households and inform evaluations of the employer retirement system and the Social Security program. But recent research has undermined confidence in survey data by focusing attention on the understatement of retirement income in one specific dataset—the Current Population Survey ("CPS")—and thereby has called into question prior studies showing many households are not well-prepared for retirement. The question is whether other datasets frequently used by researchers also under-estimate retirement income and, if so, by how much and where in the income distribution? . . . The final section concludes that while recent research suggests that older households may have a lot more income than is captured in survey data, those results are unique to the CPS. Other survey data provide income estimates that are much more consistent with administrative data and still suggest that about half of households face a retirement shortfall.[114]

What replacement level is deemed adequate? To maintain a household's pre-retirement standard of living, most studies suggest accumulating enough assets to produce income in retirement that is approximately 75% to 80% of the household's pre-retirement income. These studies also suggest that between 40% and 60% of households are unlikely to achieve this goal.[115]

Nearly half of all working-age families have no money at all in retirement accounts, other than their Social Security benefits.[116]

2550.404c-1); *see also* Default Investment Alternatives Under Participant Directed Individual Account Plans, 73 Fed. Reg. 23,349 (Apr. 30, 2008) (amending 29 C.F.R. § 2550.404c-5).

114. Anqi Chen et al., *How Much Income Do Retirees Actually Have?*, CTR. FOR RET. RES. AT B.C., Nov. 2018 [hereinafter Chen]; *see also* Vickie Bajtelsmit & Anna Rappaport, *Retirement Adequacy in the United States: Should We Be Concerned?*, SOC'Y OF ACTUARIES, Mar. 2018, at 4 [hereinafter Rappaport] ("The most common method used for measuring retirement adequacy is to calculate a replacement ratio of post-retirement income to some measure of pre-retirement income, and then to compare this value to a target percentage replacement that is deemed to be 'adequate.' ….This approach has four main problems: (1) there are many ways to measure both the numerator and the denominator of the ratio; (2) there isn't an agreed-upon definition of what constitutes an "adequate" replacement ratio; (3) focusing on replacement ratios at the date of retirement ignores changes in income and expenses that may occur over the retirement period; and (4) target ratios do not consider individual circumstances.").

115. *See* Chen, *supra* note 114.

116. Monique Morrissey, *The State of American Retirement: How 401(k)s have failed most American workers, Economic Policy Institute Retirement Inequality Chartbook*,

> That makes median (50th percentile) values low for all age groups, ranging from $480 for families in their mid-thirties to $17,000 for families approaching retirement in 2013. For most age groups, median account balances in 2013 were less than half their pre-recession peak and lower than at the start of the new millennium.[117]

According to one 2016 report,

> [T]he median family has $5000 saved. Even for people between the ages of fifty-six and sixty-one, the median retirement account savings is a paltry $17,000. While the top 10% have at least $274,000 saved, the bottom 50% have next to nothing. The large gap between mean retirement savings ($95,776) and median retirement savings ($5000) indicates inequality—that the large account balances of families with the most savings are driving up the average for all families.[118]

A 2015 GAO report found that about half of households age fifty-five and older have no retirement savings in a 401(k) plan or IRA. "About 29% have neither retirement savings nor a defined benefit plan. Among the 48% of households with some retirement savings, the median amount is approximately $109,000, equivalent to an inflation-protected annuity of $405 per month for a sixty-five-year-old."[119]

In 2018, the National Institute on Retirement Security ("NIRS"), using U.S. Census Bureau data, reported that "among all working Americans, the median retirement account balance is zero. Further findings were that 57%, or 100 million Americans, own no assets in a workplace retirement plan, individual retirement account ("IRA") or

ECON. POL'Y INST. (Mar. 3, 2016), https://www.epi.org/publication/retirement-in-america/.

117. *Id.*

118. David Dayen, *The Retirement Revolution That Failed: Why the 401(k) Isn't Working*, FISCAL TIMES (March 4, 2016) https://www.thefiscaltimes.com/Columns/2016/03/04/Retirement-Revolution-Failed-Why-401k-Isn-t-Working.

119. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-419, MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS 7 (2015); *see* Jack VanDerhei, *GAO Report on Retirement Savings: Overall Gaps Identified, but the Focus of Retirement Security Reform Should be on the Uncovered Population*, EMP. BENEFIT RES. INST., June 4, 2015 (commenting on the report); *see also* Jack VanDerhei, *Retirement Savings Shortfalls: Evidence from EBRI's Retirement Security Projection Model*, EMP. BENEFIT RES. INST., Feb. 2015, available at www.ebri.org (noting "the extreme importance of longevity risk and nursing home and home health care costs in simulating Retirement Savings Shortfalls."); Kent Conrad et al., *Securing Our Financial Future: Report of the Commission on Retirement Security and Personal Savings*, BIPARTISAN POL'Y CTR., June 2016, https://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Retirement-Security-Report.pdf.

pension. . . . Growing income inequality widens the gap in retirement account ownership."[120]

According to the Center for Retirement Research at Boston College, about half of all households are at risk of having insufficient income in retirement, up from about one third in 1983.[121] Solutions include longer work lives, more saving, and more effective use of households' assets.[122]

The same report notes,

> [W]orking longer makes an enormous difference. First, it increases the size of an individual's monthly Social Security check by 7–8% for each year of delay. The difference between claiming at age sixty-two and age seventy is an eye-popping 76%. And maximizing Social Security benefits is particularly important because they last a lifetime, include spousal protection, and are inflation-indexed. Second, working longer allows people to contribute more to their 401(k) and provides more time for assets to grow; between ages sixty-two and seventy, a typical individual's 401(k)/IRA assets are estimated to nearly double. And, third, working longer substantially shrinks the number of years over which an individual needs to stretch his retirement nest egg. It is important to recognize that not everyone will be able to work longer. Some workers are not physically capable of delaying retirement. But the majority of American workers who can delay retirement should do it. And while it is not realistic to think that everyone will work until seventy—recall that the current average retirement age for men is only sixty-four—even working a few additional years will go a long way to boosting retirement security.[123]

A 2018 study by the Society of Actuaries concluded:

> After careful consideration of this body of research, it is clear that the U.S. retirement system lies somewhere between crisis and serendipity. The research shows that a large majority of Americans are on track to support a reasonably comfortable retirement. The people who are at least risk are those in the highest-income groups, who have many types of income and assets to support their retirement, and those who have participated in employer-sponsored pensions and retirement plans throughout their career.

120. Lee Barney, *Over Half of Americans Have Nothing Saved in a Retirement Account*, PLANSPONSOR (Sept. 17, 2018), https://www.plansponsor.com/half-americans-nothing-saved-retirement-account/.

121. Alicia H. Munnell, *Falling Short: The Coming Retirement Crisis and What To Do About It*, CTR. FOR RETIREMENT RES. AT B.C., Apr. 2015, at 2, https://crr.bc.edu/briefs/falling-short-the-coming-retirement-crisis-and-what-to-do-about-it-2/.

122. *Id*. at 6–7.

123. *Id.* at 5; Steuerle, *supra* note 42 ("Retiring so many people for so long is simply not viable, which is a problem plaguing developed countries around the world. This labor market issue is not going to be solved by financial manipulations. To provide income in retirement at the same relative level as before retirement, roughly speaking, people would need to save around one-third of their incomes each year. Alternatively, it would require a Social Security tax rate of about 33% if government were required by itself to provide that level of income support.").

> For the lowest-income groups, Social Security will replace a substantial proportion of pre-retirement earned income. Those who face the greatest challenges include vulnerable populations, such as the disabled, widowed, divorced, unemployed, and people employed in industries or jobs that typically do not provide retirement benefits to workers.[124]

Although most observers agree that there is a retirement crisis, or at least that the current system fails way too many people, there are dissenters, one of the most vehement of whom is Andrew Biggs of the American Enterprise Institute:

> Are some Americans falling short? Unquestionably, and retirement policy needs to help them. The data show that the biggest retirement danger isn't that Americans haven't saved enough. It is politicians, both past and present, who promise Social Security benefits without paying for them. That's the true retirement crisis the presidential candidates need to address.[125]

A 2018 study by the Employee Benefit Research Institute found that "57.4% of all US households will not run short of money in retirement. Nearly 43% of households will not achieve retirement success according to the model, though some may fall short by relatively small amounts. This translates into an aggregate national retirement savings shortfall of $4.1 trillion."[126]

The Survey of Consumer Finances ("SCF") indicates, unsurprisingly, that the ability to accumulate retirement savings depends on the individual's income level.

> In addition, the disparities in average account balances by income level have increased markedly over time. For example, according to SCF data, households in the top 10% of income level appeared to be substantially better prepared for retirement than most others, with an average account balance of more than $720,000 in 2016. In contrast, households with below average income, in the second quintile, had an average account balance of about $47,000.[127]

Under the plan proposed by Ghilarducci and James,

> [T]he [Guaranteed Retirement Accounts] would be risk free. At the time of an individual's retirement, the federal government would guarantee that each individual has earned a minimum return of 2%. This would both smooth the threat of market volatility if someone retires at a bad time in

124. Rappaport, *supra* note 114, at 5.

125. Andrew G. Biggs, *The 'retirement crisis' that isn't*, WASH. POST (Dec. 29, 2015), https://www.washingtonpost.com/opinions/the-retirement-crisis-that-isnt/2015/12/29/b5d76dac-aa8a-11e5-9b92-dea7cd4b1a4d_story.html.

126. Jack VanDerhei, *EBRI Retirement Security Projection Model (RSPM)-Analyzing Policy and Design Proposals*, EMP. BENEFIT RES. INST., May 31, 2018, at 2.

127. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-342T, THE NATION'S RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY 17 (2019) [hereinafter GAO-19-342T].

> the markets—as well as engender confidence in the system. It is also a promise that will be essentially costless, because the accounts are highly likely to perform significantly better than 2% over the long term. The government could charge a modest insurance premium to cover this cost if desired. . . . [O]ver the forty- to fifty-year lifespan of the account, the worker would be entitled to a minimum compounded return of at least 2% on their contributions over that period. Regular annual contributions will dampen volatility through dollar averaging of investments in good markets and bad. In addition, all these accounts will be professionally managed with balanced, pension-style portfolios. These factors, and the one-time test at the end of the long forty- to fifty-year marking period, mean it is very unlikely that the guarantee will have much in the way of actual cost to the government.[128]

Increasing retirement accumulations could be accomplished by adopting some or all of the recommendations set out in sections 4.2 and 5.2 above. In addition, there should be a comprehensive examination of the amount and structure of Social Security finances and benefits to shore up its financial position, and reallocate more benefits to those groups who lose out under the current benefit structure.[129]

VII. Lack of Portability

A. Rollovers

Most employees change jobs several times during their working lifetime[130] and a lump sum distribution is almost always available on

128. *Id.* (stating in 2000, Regina Jefferson proposed an insurance program for defined contribution plan accounts); Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607 (2000) ("This proposal provides insurance protection for defined contribution plans comparable in amount and objective to the insurance protection currently available for defined benefit plans. Using this approach, participants of defined contribution plans would be insured against the risk of earning less than average investment returns, over their working lives…. Insurance protection would be determined by the extent to which an account complied with a prescribed allocation formula. In connection with the prescribed allocation formula, it would be necessary to develop an indexing system to evaluate all investment funds, so that the level of risk of a participant's investment allocation could be compared to the risk of the prescribed allocation.").

129. *See infra* Part II.

130. Press Release, Bureau of Lab. Stat., Number of Jobs, Labor Market Experience, and Earnings Growth: Results from a National Longitudinal Survey (Aug. 22, 2017), available at https://www.bls.gov/news.release/pdf/nlsoy.pdf (stating "[i]ndividuals born in the latter years of the baby boom (1957-1964) held an average of 11.9 jobs from age 18 to age 50, the U.S. Bureau of Labor Statistics reported today. Nearly half of these jobs were held from ages 18 to 24.").

termination of employment.[131] Ensuring that such amounts are kept in a retirement savings account is an important step in limiting pre-retirement leakage from the retirement system. The most common way of effectuating this purpose is for the participant to elect a tax-free rollover.[132]

A participant who is entitled to receive a lump sum distribution from an employer plan typically has four options:[133]

1. Leaving the money in the plan. In the past, plans have often been reluctant to retain funds of terminated employees, and the plan may force a distribution if the amount is $5000 or less.[134]
2. Transferring the funds to a new employer's plan. Some plans do not accept rollovers or make rollovers difficult because of concerns that acceptance of a rollover from a plan that is not fully in compliance with the Internal Revenue Code may taint their plans.[135] "Two straightforward changes could help here. First, workers switching jobs should always be allowed to keep their 401(k) assets with their previous employer. . . . Second, workers should always be allowed to move their 401(k) assets from a previous employer to a new employer."[136] According to a 2014 article by Darla Mercado, a personal finance writer for CNBC.com, record keepers for the plan in which the benefits have accumulated make it so difficult to transfer the assets to a new plan "that it's easier to move into individual retirement accounts." She quotes Corby Dall, president of 401(k) Advisors Intermountain, as saying "[Providers] hope that people will throw their hands up in frustration and leave their money there."[137]
3. Transferring the funds to the participant's Individual Retirement Account either directly (the plan cuts a check to the IRA) or indirectly (the plan cuts a check to the participant who then deposits some or all of the funds in the IRA). A

131. Daniel R. Kleinman et al., *FINRA and SEC to Focus on IRA Rollover Practices in 2014*, MORGAN LEWIS (Feb. 6, 2014), https://www.morganlewis.com/pubs/eb_im_lf_finraandsecfocusonirarolloverprac-tices_06feb14?source=homepg&p=1.

132. *See, e.g.*, I.R.C. § 402(c) (2018).

133. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 13-30, 401(K) PLANS- LABOR AND IRS COULD IMPROVE THE ROLLOVER PROCESS FOR PARTICIPANTS (2013).

134. I.R.C. § 417(e) (2018); 29 U.S.C. § 1053(e) (2018).

135. Alicia H. Munnell et al., *Will Regulations to Reduce IRA Fees Work?*, CTR. FOR RETIREMENT RES. AT B.C. (Feb. 2013), https://crr.bc.edu/briefs/will-regulations-to-reduce-ira-fees-work/.

136. *Id.*

137. Darla Mercado, *Mountains of paperwork make 401(k) transfers a tough hill to climb*, INVESTMENTNEWS (Apr 10, 2014, 10:55 AM), https://www.investmentnews.com/article/20140410/FREE/140419996/mountains-of-paperwork-make-401-k-transfers-a-tough-hill-to-climb.

direct rollover is generally preferable as it avoids the 20% mandatory income tax withholding that would otherwise apply.[138]

4. Keeping the money and paying income tax on the amount distributed in the year of receipt plus, in most cases where the participant is under age fifty-nine-and-a-half, a 10% additional income tax.[139]

As FINRA has noted, "Each choice offers advantages and disadvantages, depending on desired investment options and services, fees and expenses, withdrawal options, required minimum distributions, tax treatment, and the investor's unique financial needs and retirement plans."[140]

An IRA rollover has several advantages. It severs the tie with the former employer, gives the participant the greatest degree of control, and makes it possible for the participant to take irregular distributions or to stretch out distributions to the greatest extent allowed by the age seventy-and-a-half minimum required distribution ("MRD") rules.[141]

There are also significant disadvantages, however, which are often not understood by the participant. First, the participant is now responsible for the successful long-term investment of the funds, generally with no review of available options by an employer or another fiduciary.[142] "Loss of fiduciary protections can be particularly important at advanced older ages when the risk of cognitive impairment is greater."[143]

Second, the participant must avoid engaging in any "prohibited transaction," as that would trigger immediate taxation of the entire account.[144] Figuring out how the prohibited transaction rules apply to IRAs is fiendishly difficult.[145]

138. I.R.C. § 3405(c) (2018).

139. I.R.C. § 72(t) (2018).

140. *The IRA Rollover: 10 Tips to Making a Sound Decision*, FINRA (Jan. 23, 2014), https://www.finra.org/investors/alerts/ira-rollover-10-tips-making-sound-decision [hereinafter *10 Tips*].

141. *Cf.* Tim Parker, *Top 7 Reasons to Roll Over Your 401(k) to an IRA*, INVESTOPEDIA (Sept. 27, 2019), https://www.investopedia.com/articles/personal-finance/071715/8-reasons-roll-over-your-401k-ira.asp.

142. John A. Turner & Bruce W. Klein, *Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?*, BENEFITS Q. 1, 47 (2014), https://www.iscebs.org/Documents/PDF/bqpublic/bq414f.pdf [hereinafter Turner & Klein].

143. *Id.*

144. I.R.C. § 408(e)(2) (2018); I.R.C. § 4975 (2018).

145. *See generally* I.R.C. § 4975 (2018).

Third, the individual no longer has the benefit of the ERISA fiduciary responsibility rules,[146] as many victims of Bernie Madoff and other Ponzi schemes discovered to their chagrin.[147] Most courts have held that the duties of an IRA custodian are limited to those it accepted in its contract with the IRA owner, a contract almost always drafted by the custodian.[148]

Fourth, employer plans often offer lower fees, typically provide more transparent fee disclosures, and give better access to advice.[149]

> Here's the bottom line for me: Most employers spend a lot of time and money designing their 401(k) plans to help their employees. They don't make money from their 401(k) plan, and in fact it often costs the business to have this program in place. By contrast, any financial institution you'll be dealing with needs to make a buck (or lots of bucks) off of your investments. Which option sounds better to you?[150]

Fifth, if the individual is still working at age seventy-and-a-half, he or she does not need to comply with the minimum distribution rules[151] with respect to any benefits under a plan of the current employer: required distributions are deferred until he or she retires.[152] This advantage is lost if the funds are rolled into an IRA.[153] Five percent owners are not eligible for this exception.[154] An employer plan may allow loans to participants. Loans are not available from an IRA.[155]

146. U.S.C. §§ 1101–1103 (2018).
147. Elizabeth T. Dold et al., *Federal Court Relieves IRA Trustees of Liability for Madoff Investments*, IRALERT 1, 2 (Apr. 27, 2011) https://www.groom.com/wp-content/uploads/2017/09/998_FISERV-Liability-of-IRA-custodians.pdf.
148. *See, e.g.*, Paszamant v. Ret. Accounts, Inc., 776 So. 2d 1049 (Fla. Dist. Ct. App. 2001).
149. Steve Vernon, *Rolling your 401(k) to a IRA? Think twice*, CBSNEWS: MONEYWATCH (May 17, 2012, 6:45 AM), https://www.cbsnews.com/news/rolling-your-401k-to-a-ira-think-twice/.
150. *Id.*; *see also 10 Tips*, *supra* note 140.
151. I.R.C. § 401(a)(9) (2018).
152. *Id.*
153. *See RMD Comparison Chart (IRAs vs. Defined Contribution Plans)*, IRS, https://www.irs.gov/retirement-plans/rmd-comparison-chart-iras-vs-defined-contribution-plans (last visited Oct. 14, 2019) (comparing IRAs to defined contribution plans to demonstrate that IRAs require minimum distributions at seventy-and-a-half years of age even if employed).
154. *Retirement Topics–Required Minimum Distributions (RMDs)*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-required-minimum-distributions-rmds (last visited Oct. 14, 2019).
155. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-30, 401(K) PLANS: LABOR AND IRS COULD IMPROVE THE ROLLOVER PROCESS FOR PARTICIPANTS (2013) available at http://www.gao.gov/assets/660/652881.pdf [hereinafter GAO-13-30].

A March 2013 GAO report found that rollover processes are inefficient, that IRAs are heavily marketed, and that participants are often given incomplete, misleading, or false information about IRA rollovers.[156] In some cases, the advice was given by a party that had a direct financial interest in steering the participant to a particular IRA provider.[157] Alicia Munnell has correctly noted,

> In most cases, however, the most effective option for preserving and accumulating retirement saving is rolling over money to the new employer. Unfortunately, this option turns out to be the most difficult. In short, in most cases as employees move from one large employer with a low-fee 401(k) to another, the smartest move would be to roll over their balances from the old plan to the new plan. But given the enormous hurdles, participants are much more likely to cash out or move their balances into a high-fee IRA. Cash-outs and high fees dramatically reduce balances at retirement. This problem is fixable. Let's fix it.[158]

The GAO report also found that financial services firms generally encourage IRA rollovers without making sound determinations that an IRA rollover is in the investor's best interests.[159] The GAO noted that "[much] of the information participants receive is through the marketing efforts of service providers touting the benefits of IRA rollovers and is not always objective."[160]

The amounts involved are enormous:

> Pension rollovers are an important source of revenue for money managers. One estimate projects that rollovers to IRAs from other pensions will account for 40% to 50% of the net new money received by investment advisors through 2015. An estimated $2.1 trillion is predicted to be rolled over from defined contribution plans to IRAs in the next five years.[161]

In 2016, a representative of Aon Hewitt testified before a U.S. Department of Labor Advisory Council and stated:

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156. *Id.*; *see also Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts*, FINRA (Dec. 2013), https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p418695.pdf (stating that a recommendation to roll over plan assets to an IRA typically involves securities recommendations subject to FINRA rules regarding suitability, and that related marketing must be "fair, balanced and not misleading"); *see generally* Daniel R. Kleinman et al., *FINRA and SEC to Focus on IRA Rollover Practices in 2014*, MORGAN LEWIS (Feb. 6, 2014), http://www.morganlewis.com/pubs/EB_IM_LF_FINRAandSECFocusOnIRA RolloverPractices_06feb14?source=homepg [hereinafter Kleinman].

157. Kleinman, *supra* note 156.

158. Alicia H. Munnell, *Opinion: 401(k) accounts need to be easier to move from job to job*, MARKETWATCH (June 1, 2017, 7:21 AM), http://www.marketwatch.com/story/401ks-need-to-be-easier-to-move-from-job-to-job-2017-05-31.

159. GAO-19-342T, *supra* note 127.

160. *Id.*

161. Turner & Klein, *supra* note 142, at 42.

> According to our data, approximately 85% of assets that leave qualified defined contribution plans are rolled over to either an individual retirement account or another qualified retirement plan and 15% are cashed out or forced out (due to force out rules for small balances). The data tell a different story when we look at worker behavior -primarily because workers with smaller balances are less likely to roll over their accounts to a qualified plan and more likely to cash out their balance. More than half of workers (52%) received their benefits as cash or were forced out, slightly higher than the percentage (48%) that opted to roll their balance over. This means that while workers with large balances tend to continue to benefit from tax deferral, frequent job changers or those who are unable to accumulate significant balances are highly likely to eradicate their balance when they leave their employer. To the extent that this habit is repeated with each job change, workers can be left with very little or no retirement savings, in spite of saving along the way.[162]

Having a number of relatively small accounts over a lifetime poses potential problems for building up retirement saving. Some of these accounts may simply get lost. From 2004 through 2013, workers leaving their jobs also left behind at least 16 million retirement accounts with balances of $5000 or less, according to the Government Accountability Office.[163] "That money belongs to retirees, but such small balances can easily be devoured by fees or lost track of by their owners. All told, such orphan accounts totaled $8.5 billion in retirement savings whose owners may barely remember them."[164]

The shift from 401(k)s to IRAs moves the employee's money to an environment with fewer regulatory protections, more potential conflicts of interest, and higher fees. IRAs, unlike 401(k)s, are not subject to the fiduciary requirements of the Employee Retirement Income Security Act of 1974 (ERISA).[165] A GAO study found that participants in IRAs are more likely to invest in products such as individual variable

162. Alison T. Borland, Head of Defined Contribution, FSA, & Krista Cooper, Defined Contribution Client Leader, FSA, Testimony on Behalf of Aon Hewitt before U.S. Dep't of Labor's Advisory Council on Emp. Welfare and Pension Benefit Plans, ERISA Advisory Council: Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation (June 8, 2016).

163. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-19, WORKPLACE RETIREMENT ACCOUNTS: BETTER GUIDANCE AND INFORMATION COULD HELP PLAN PARTICIPANTS AT HOME AND ABROAD MANAGE THEIR RETIREMENT SAVINGS, at 2 (2018).

164. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-73, 401(K) PLANS: GREATER PROTECTIONS NEEDED FOR FORCED TRANSFERS AND INACTIVE ACCOUNTS (2014) [hereinafter GAO-15-73].

165. *See* Investopedia Staff, *Which Retirement Accounts Does ERISA Cover?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/09/erisa-coverage.asp (last updated Aug. 2, 2019).

annuities or retail mutual funds, which generally have higher fees.[166] Another potential concern is that IRAs can be more susceptible to pre-retirement withdrawals than 401(k)s.[167]

B. Forced Transfers

If a plan makes a single sum distribution in excess of $1000 and the participant does not elect otherwise, the plan administrator is generally required to make a direct transfer to an IRA in the name of the participant (i.e., a "forced transfer").[168] A 2014 GAO report examined what happened to forced transfers to IRAs over time, the challenges of managing multiple accounts and what can be done to help, and how other countries deal with inactive accounts.[169]

The GAO found that "because fees outpaced returns in most of the IRAs analyzed, these account balances tended to decrease over time. Without alternatives to forced-transfer IRAs, current law permits billions in participant savings to be poorly invested for the long-term."[170] The GAO also noted that a plan may disregard previous rollovers when determining if a balance is small enough ($5000 or less) to force out.[171]

The GAO recommended that Congress consider amending current law to permit alternative default destinations for plans to use when transferring participant accounts out of plans, and repealing the provision that allows plans to disregard rollovers when identifying balances eligible for transfer to an IRA.[172] The GAO also recommended that the Department of Labor convene a taskforce to explore the possibility of establishing a national pension registry.[173]

166. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-641, RETIREMENT SAVINGS: BETTER INFORMATION AND SPONSOR GUIDANCE COULD IMPROVE OVERSIGHT AND REDUCE FEES FOR PARTICIPANTS, at 13 (2009).

167. Alicia H. Munnell & Anthony Webb, *The Impact of Leakages From 401(k)s And IRAs*, CTR. RETIREMENT & RES. AT B.C., (Feb. 2015), https://crr.bc.edu/working-papers/the-impact-of-leakages-from-401ks-and-iras/ [hereinafter Munnell & Webb].

168. I.R.C § 401(a)(31)(B) (2018).

169. *See* GAO-15-73, *supra* note 164.

170. *Id.*

171. *Id*.

172. *Id*.

173. *Id.*

In 2016, Jeanne Medeiros, director of the Pension Action Center at the University of Massachusetts-Boston, estimated that unclaimed pension benefits could total as much as $8 billion annually.[174] In addition, 401(k) plans terminated or abandoned by their sponsoring employers have owed more than $8 billion owed to former employees who changed jobs. "Advocates have urged the government to set up a searchable registry of unclaimed pensions and retirement accounts nationwide, as Britain and Australia have done."[175]

According to a 2018 survey, 11.3% of separated, defined contribution account records have a stale address. "Based on the number of separated participants in defined contribution plans, this suggests that there are, at minimum, approximately three million missing participant accounts. This number continues to grow as participants change jobs and relocate, leaving their retirement behind."[176]

C. Vesting

The law allows employer contributions and investment earnings thereon to be subject to graduated vesting, under which an employee has to complete a stated number of years of service before having a fully vested (nonforfeitable) interest in the account.[177] Although the number of years of service required for full vesting under an individual account plan, such as a 401(k) plan, has been reduced from fifteen years in 1974 (when ERISA was enacted) to six years,[178] a plan can still define a "year of service" as a twelve-month period in which the individual has 1000 or more paid hours.[179] Thus, a permanent part-time employee may never become fully vested.

A recent GAO report suggested the following:

174. Carol Matlack, *The Case of the Missing Pension*, BLOOMBERG BUSINESSWEEK (Mar. 24, 2016, 1:01 PM), https://www.bloomberg.com/news/articles/2016-03-24/the-case-of-the-missing-pension [hereinafter Matlack].

175. *Id*.

176. *The Definitive Guide to Missing Participants in Retirement Plans*, RETIREMENT CLEARINGHOUSE, https://rch1.com/missing-participants (last visited Jan. 13, 2020); *see also* HARTHILL, GOLDBERG & FAMILONI, MISSING AND UNRESPONSIVE PARTICIPANTS IN ERISA PLANS: CURRENT CHALLENGES AND RECOMMENDATIONS, N.Y.U. REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION (2019).

177. I.R.C. § 411(a) (2018) (originally enacted as 29 U.S.C. § 203(a) (1974)) (stating "[b]enefits derived from employee contributions are always fully vested."); Matlack, *supra* note 174.

178. I.R.C. § 411(a)(2)(B)(2018) (originally enacted as 29 U.S.C. § 203(a)(2)(B) (1974)).

179. I.R.C. § 411(a)(5) (2018) (originally enacted as 29 U.S.C. § 203(a)(5) (1974)).

> Vesting policies may also potentially reduce retirement savings. . . .The Department of Treasury (Treasury) is responsible for evaluating and developing proposals for legislative changes for 401(k) plan policies, but has not recently done so for vesting policies. Vesting caps for employer matching contributions in 401(k) plans are fifteen years old. A re-evaluation of these caps would help to assess whether they unduly reduce the retirement savings of today's mobile workers.[180]

D. Recommendations to Enhance Portability

Some options for enhancing portability include:

1. Expanding the definition of an "eligible rollover distribution"[181] and harmonizing the rules for rollovers between different types of tax-favored plans;
2. Making it easier for participants to roll their balances from one 401(k) plan to another;
3. Accelerating vesting for all defined contribution plans. Ideally, all plans would provide immediate vesting for all accounts;
4. Setting up a public registry for accounts; and
5. Creating a clearinghouse to roll over small accounts and more broadly to facilitate rolling over balances within the system.[182]

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180. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-69, 401(K) PLANS: EFFECTS OF ELIGIBILITY AND VESTING POLICIES ON WORKERS' RETIREMENT SAVINGS, 61 (2016) (stating that "[t]o ensure that current vesting policies appropriately balance plans' needs and interests with the needs of workers to have employment mobility while also saving for retirement, Treasury should evaluate the appropriateness of existing maximum vesting policies for account-based plans, considering today's mobile labor force, and seek legislative action to revise vesting schedules, if deemed necessary.").

181. I.R.C. § 402(c)(4) (2018).

182. Notice of Exemption Involving Clearinghouse, LLC (RCH or the Applicant) Located in Charlotte, North Carolina, 84 Fed. Reg. 37,337 (July 31, 2019); *see* Robert Toth, *DOL RCH Advisory Opinion Illustrates the Difficulties Inherent to Bulk IRA/Auto Portability Programs*, TOTH L. & TOTH CONSULTING (Nov. 15, 2018), https://www.businessofbenefits.com/2018/11/articles/auto-ira-2/dol-rch-advisory-opinion-illustrates-the-difficulties-inherent-to-bulk-ira-auto-portability-programs/ (citing the DOL's issuance of an Advisory Opinion 2018-01 on the Retirement Clearinghouse IRA/auto portability program.); *see also DOL Finalizes RCH Clearinghouse PTE*, OCT. THREE (Aug. 7, 2019), https://www.octoberthree.com/dol-finalizes-rch-clearinghouse-pte/.

VIII. Leakage

A 2015 report found that about 1.5% of assets leak out of the 401(k)/IRA system each year.[183] In-service withdrawals and cash-outs (on termination of employment) appear to be the most significant of the different forms of leakage; aggregate 401(k) and IRA retirement wealth is at least 20% lower than it would have been without the current leakage rules.[184] The report points out that the barriers to accessing funds are even lower in IRAs (which now hold more assets than 401(k) plans) than 401(k)s. In other countries, similar plans are more restrictive in allowing withdrawals.[185]

According to a study by the Federal Reserve Board, forty cents of every dollar contributed to 401(k) plans by people under fifty-five leaks out of the system.[186] About 75% of cash-outs involve accounts less than $20,000.[187]

Studies have consistently shown that participants in plans with a loan option and/or provision for hardship withdrawals have higher contribution rates.[188] "The potential reduction in participation and contribution rates from reducing or eliminating access to cash-outs at job change would likely be even greater."[189] Also, as GAO pointed out in

183. Alicia H. Munnell & Anthony Webb, The Impact of Leakages From 401(k)s And IRAs, Center for Retirement Research at Boston College, CRR WP 2015-2.

184. *Id.*

185. *See* Gillian B. White, *Can 401(k) Plans Be Improved?* THE ATLANTIC (May 19, 2015), https://www.theatlantic.com/business/archive/2015/05/can-401k-plans-be-improved/393608/ ("[T]he U.S., far and away, has the most lenient policies toward retirement withdrawals and also the largest problem with overall wealth inequality."); *see also* John Beshears et al., *NBER Working Paper Series, Liquidity in Retirement Savings Systems: An International Comparison* (Nat'l Bureau of Econ. Research, Working Paper No. 21168, 2015), http://www.nber.org/papers/w21168 (finding that the 6 countries studied, "with the sole exception of the United States, have made their DC systems overwhelmingly illiquid before age fifty-five.").

186. Lee Barney, *Leakage is a Serious problem for 401(k) Plans*, PLANSPONSOR (Feb. 8, 2016), https://www.plansponsor.com/leakage-is-a-serious-problem-for-401k-plans/.

187. *Id.*; *see also* MERV AKBAS, DEFINED CONTRIBUTION INSTITUTIONAL INV. ASS'N, PLAN LEAKAGE: A STUDY ON THE PSYCHOLOGY BEHIND LEAKAGE OF RETIREMENT PLAN ASSETS (2016).

188. *See Hardship Distributions of Elective Contributions, Qualified Matching Contributions, Qualified Nonelective Contributions, and Earnings*, 84 Fed. Reg. 49,651, 49,659 (Sept. 23, 2019) (to be codified at 26 C.F.R. pt. 1).

189. *The Impact of Leakage on 410(k) Accumulations at Retirement Age, Statement for the Record, ERISA Advisory Council: Hearing on Lifetime Participation in Plans before the U.S. Dep't of Labor* (2014) (statement of Jack VanDerhei, Ph.D.).

2009, "Retirement experts have noted that prohibiting hardship withdrawals and loans also can make workers worse off in the short term if they face a financial emergency, such as a pending home foreclosure, and do not have other savings to draw from."[190] The 2015 Center for Retirement Research report recommended that (1) hardship withdrawals could be limited to serious, unpredictable hardships,[191] (2) the age for non-penalized withdrawals could be raised from fifty-nine-and-a-half to at least Social Security's earliest eligibility age, currently sixty-two,[192] and (3) the law could be changed to prohibit lump-sum distributions upon termination of employment.[193]

Enactment of these recommendations would likely significantly reduce the amount of leakage. Another approach, recommenced recently by several commentators, would be to encourage employers to facilitate saving by employees in a separate "rainy day fund."[194] This would eliminate or reduce the need for employees to withdraw retirement funds to pay unexpected, but often relatively small, bills.[195] This proposal has considerable merit. According to a recent Federal Reserve study, 27% of adults would need to borrow or sell an asset to pay an

190. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-642, PRIVATE PENSIONS: ALTERNATIVE APPROACHES COULD ADDRESS RETIREMENT RISKS FACED BY WORKERS BUT POSE TRADE-OFFS, 50 (2009).

191. *See* Munnell & Webb, *supra* note 167 (suggesting that balances available for any in-service withdrawal could be limited to employee contributions).

192. *Id.* (stating "in-service withdrawals after 59 ½ from 401(k) plans have grown dramatically. Although recent information suggests that the bulk of the money is rolled over, roughly 30% leaks out. And post-59 ½ distributions must certainly account for growing leakages from IRAs. Given the need to work longer as a result of increased life expectancy and a contracting retirement income system, age 59 ½ is too early in most cases to be withdrawing money from either a 401(k) plan or an IRA.").

193. *Id.* (stating "[t]he allowable options could be limited to leaving the money in the prior employer's plan (even balances under $5,000), to transfer the money to the new employer's 401(k), or, for those leaving the labor force, to roll over the plan balance into an IRA. Under such limitations, sponsors would no longer be able to compel cashouts of accounts with less than $1,000. And the new employer would be compelled to accept the rollover. In addition, the procedures for rolling over balances, which are now a cumbersome and paper-intensive process, could be streamlined. If the option of cashing out—even with a 10% penalty—is left open, participants will continue to withdraw money at termination instead of keeping it intact until retirement.").

194. *See, e.g.*, David John et al., *From saving to spending: A proposal to convert retirement account balances into automatic and flexible income*, BROOKINGS INSTITUTION (July 2019), https://www.brookings.edu/wp-content/uploads/2019/07/ES_201907_JohnGaleIwryKrupkin.pdf.

195. *Id.*

unexpected $400 expense, and one quarter of adults skipped necessary medical care in 2018 because they could not afford the cost.[196] An emergency fund would give those who live paycheck to paycheck a better alternative than taking a hardship withdrawal from their 401(k) account, which is currently taxable and permanently reduces their retirement savings.[197]

IX. Inappropriate Drawdown of Benefits

A. Lump Sum or Lifetime Income

It has been estimated that only 2% of the defined benefit plans of large- and medium-sized sponsors offered lump sum distributions ("LSDs") in 1989, but that by 1997, 23% of such plans offered LSDs.[198] By 2005, this had increased to 52%.[199] These distributions, unlike annuity benefits, may be rolled over to another plan or an IRA, and raise two questions in connection with pension de-risking.[200] First, the amount of the distribution reflects only the current accrued benefit at the time of the distribution, not any increases in the accrued benefit that would have resulted from longer service or increased average compensation.[201] Second, with current low rates of return, will the amount of the distribution be enough to buy an annuity, at the deferred annuity beginning date, that is at least equal to the amount of the accrued benefit?[202]

196. Eric Rosenbaum, *Millions of Americans are only $400 away from financial hardship. Here's why*, CNBC (May 23, 2019), https://www.cnbc.com/2019/05/23/millions-of-americans-are-only-400-away-from-financial-hardship.html.

197. *See* I.R.C. § 402(a) (stating if the individual is younger than 59 ½, the amount withdrawn will generally be subject to a 10% penalty tax in addition to regular income tax, state and federal. Internal Revenue Code § 72(t)).

198. James H. Moore, Jr. & Leslie A. Muller, *An Analysis of Lump–Sum Pension Distribution Recipients*, 125 MONTHLY LAB. REV. 29, 30 (2002).

199. U.S. DEP'T OF LAB., BULLETIN 2589, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2005, 66 (2007).

200. I.R.C. § 402(c).

201. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-74, PRIVATE PENSIONS: PARTICIPANTS NEED BETTER INFORMATION WHEN OFFERED LUMP SUMS THAT REPLACE THEIR LIFETIME BENEFITS (published January 27, 2015) ("Another longstanding rule that provides an incentive for offering a lump sum window is the rule that allows sponsors to exclude certain additional plan benefits when calculating the amount of the lump sum.").

202. *Id*.

A 2017 survey found that more than one out of five workers who accepted a lump sum from their employer-sponsored retirement plan had spent it all.[203] Those who reported spending their lump sum said it took them an average of five and a half years to spend the money.[204]

Lifelong management of DC assets and IRAs involves longevity risk and cognitive risk, including vulnerability to financial exploitation.[205] Retirement income options could improve retirement security for millions of Americans by providing more predictable income in retirement; some solutions can also relieve retirees of the burden of managing investments, a task for which many may not be well-equipped. Employer plans are also able to buy lifetime income options more cheaply than individuals can. "By taking advantage of longevity risk pooling and institutional pricing beyond what may be available in the individual market, employer-sponsored DC plans can offer these options in a cost-effective manner."[206]

Annuities are unattractive to most participants, particularly in the current low interest rate environment: the individual annuity market is not robust, and annuities are too expensive.[207] Maintaining an account

203. Cyril Tuohy, *Retirement Lump Sums Being Depleted Quickly*, ADVISOR NEWS (Apr. 28, 2017), https://insurancenewsnet.com/innarticle/retirement-lump-sums-depleted-quickly#.WaxQtrKGPIU.

204. *Id.*

205. Keith J. Gamble et al., *How Does Aging Affect Financial Decision Making?*, CTR. RET. RES. B.C., 1, 5 (Jan. 2015), http://crr.bc.edu/wp-content/uploads/2015/01/IB_15-1-508.pdf [hereinafter Gamble] ("The final section concludes that declining cognition has a noticeable adverse effect on financial literacy, but not on individuals' confidence in managing their finances. Perhaps not surprisingly then, more than half of those experiencing a significant cognitive decline retain primary responsibility for managing their finances. Individuals with declining cognition are more likely to get help with their finances. But the study finds that over half of all elderly individuals with significant declines in cognition get no help outside of a spouse. Given the increasing dependence of retirees on 401(k)/IRA savings, cognitive decline will likely have an increasingly significant adverse effect on the well-being of the elderly.").

206. *Position Statement: Retirement Income Options in Employer-Sponsored Defined Contribution Plans*, AM. ACAD. ACTUARIES (Oct. 2017).

207. *See* Robert Steyer, *Adding annuities to DC plans still open to debate*, PENSIONS&INVESTMENTS (June 15, 2015, 1:00 AM), https://www.pionline.com/article/20150615/ONLINE/150619903/gfor-adding-annuities-to-dc-plans-still-open-to-debate ("The environment for incorporating annuities into defined contribution plans remains uncertain for sponsors and participants because of many risks and not enough offerings that meet the goals of providing security at an acceptable price, several DC plan researchers, sponsors and regulators said Monday. The challenges include investment risk, income risk, capital market volatility, longevity risk and inflation risk, said Olivia Mitchell, executive director of the Pension Research Council and a professor at the University of Pennsylvania's Wharton School.").

balance, however, exposes the account owner to longevity risk, investment risk and, for older individuals, cognitive risk.[208]

According to Mark Warshawsky, Deputy Commissioner for Retirement and Disability Policy at the Social Security Administration,

> The life annuity is indeed an effective instrument for distributing retirement assets to produce lifetime income; it functions generally somewhat better than the withdrawal rules in widespread use. Because the life annuity is subject to inflation risk and is illiquid, and because household needs and preferences are so diverse and critical, the governmental stance toward this issue should be one of mild encouragement of and education about life annuities.[209]

It is also challenging for retirees to convert their retirement plan accumulations into a source of steady income.

> For prospective retirees who don't simply want to annuitize most or all of their wealth, determining how best to invest a retirement portfolio to generate income is a substantial challenge. Not only because of the need to invest for enough growth to sustain inflation-adjusting retirement distributions over time, and managing portfolio volatility to avoid triggering an adverse sequence of returns in the first place . . . but also because, as retirement investing has evolved beyond simple strategies like "buy the bonds and spend the coupons" and into more total return strategies, it's surprisingly difficult to come up with a system to actually generate the distributions themselves.[210]

In 2016, the Bipartisan Policy Center recommended the following:

> [P]lan sponsors [should] integrate sophisticated but easy-to-use lifetime-income features within retirement savings plans. For example, it should be easy for plan participants to purchase a guaranteed lifetime-income product in automatic installments. In defined contribution plans, participants aged fifty-five and older should be allowed to use their retirement savings to purchase annuities that begin payments later in life.[211]

208. *See* Gamble, *supra* note 205, at 6 (stating a recent study found that that declining cognition has a noticeable adverse effect on financial literacy, but not on individuals' confidence in managing their finances. "The study finds that over half of all elderly individuals with significant declines in cognition get no help outside of a spouse. Given the increasing dependence of retirees on 401(k)/IRA savings, cognitive decline will likely have an increasingly significant adverse effect on the well-being of the elderly.").

209. Mark J. Warshawsky, *Government Policy on Distribution Methods for Assets in Individual Accounts for Retirees*, MERCATUS CTR. GEO. MASON UNIV. (June 9, 2015), https://www.mercatus.org/publications/government-spending/government-policy-distribution-methods-assets-individual-accounts.

210. Michael Kitces, *How Do You Actually Create A Steady Retirement Paycheck from A Volatile Retirement Portfolio?*, KITCES (Oct. 31, 2018, 7:04 AM), https://www.kitces.com/blog/retirement-paychecks-diversified-total-return-retirement-portfolio-withdrawal-policy-statement/.

211. *Securing Our Financial Future: Report of the Commission on Retirement Security and Personal Savings*, BIPARTISAN POL'Y CTR. 1,9 (June 2016), http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Retirement-Security-Report.pdf.

Sponsors that want to offer something other than a traditional, guaranteed annuity may consider

> a managed-payout mutual fund, but it is not guaranteed, and it is going to fluctuate. Sponsors that have recently decided to use in-plan annuities often have chosen to go with the guaranteed minimum withdrawal benefit ("GMWB") type—a variable annuity that gives retirees an assurance they will receive at least a specified minimum benefit monthly, whatever their account balance or the market conditions.[212]

Plan sponsors have been reluctant to offer annuity options in their DC plans for several reasons. First, there is little demand from participants.[213] Second, an annuity option makes compliance with the Qualified Joint and Survivor Annuity ("QJSA") rules more complex.[214] Third, and perhaps most important in the current litigation environment, there is concern regarding fiduciary liability for selecting the wrong annuity provider.[215]

Some comments made to the ERISA Advisory Council in 2018 questioned whether annuities should be offered as a distribution option in defined contribution plans.[216] The Plan Sponsor Council of America ("PSCA") cited its prior testimony to the Council which acknowledged:

> DC retirement plan sponsors do not provide annuities for a variety of reasons: a plan sponsor offering an annuity option must manage attendant administrative and compliance requirements; sponsors offering a plan annuity option assume fiduciary responsibility for selecting the annuity vendor; sponsors know that where annuity options are offered they are not utilized; their own employees have not asked for an annuity option; and sponsors know that if a retiring participant wants to annuitize some or all of their lump sum they can do so in an IRA. "Little has changed in the past thirteen years," the PSCA said. "Participant preferences have not changed and are reflected by single digit annuity take-up rates—a level of interest that, for many, perhaps most plan sponsors, does not justify the administrative cost or fiduciary risk involved in offering an in-plan annuity."[217]

In 2008, the U.S. Department of Labor ("DOL") issued a regulation on the selection of annuity providers in a defined contribution

212. *Id.*

213. Robert Steyer, *Sponsors see proposals as low-priority item*, PENSIONS&INVESTMENTS (Mar. 4, 2019, 12:00 AM), https://www.pionline.com/article/20190304/PRINT/190309995/sponsors-see-proposals-as-low-priority-item [hereinafter Steyer].

214. *See* 29 U.S.C. § 1055 (2018).

215. Steyer, *supra* note 213.

216. Rebecca Moore, *Groups Question Efficiency of Offering Annuities in DC Plans*, PLANSPONSER (Aug. 15, 2018), https://www.plansponsor.com/groups-question-efficiency-offering-annuities-dc-plans/.

217. *Id.*

plan.[218] The DOL said that plan sponsors should engage in an objective, thorough and analytical search and consider competing annuity providers.[219] They should consider the financial security of the insurer and its ability to make all future payments and the reasonableness of fees.[220] A 2015 Field Assistance Bulletin ("FAB") further clarified the safe harbor, and provided that sponsors were responsible only for relying on information about the insurer available at the time of the selection of the annuity.[221]

Plan sponsors and their advisors consider the current guidance to be inadequate and unhelpful.

> "The current guidance requires employers to conduct an exhaustive financial appraisal of annuity providers," says Roberta Rafaloff, vice president of Institutional Income Annuities at MetLife. "An appraisal that most companies have neither the resources nor the expertise to perform." A provision in the recently introduced Retirement Enhancement and Savings Act "would safeguard plan sponsors from liability issues stemming from any losses from the insurer's ability to meet financial obligations."[222]

According to the Life Insurance and Market Research Association ("LIMRA") Secure Retirement Institute, three million participants had access to an in-plan income guarantee through an employer-sponsored plan in 2014, a 32% increase from 2013.[223] There was a 24% increase in the number of participants electing an in-plan guarantee, to 71,300 (still a remarkably low number), and the number of plans offering in-plan guarantees grew by 41%, to 33,500.[224]

> A guaranteed lifetime withdrawal benefit ("GLWB") and deferred income annuities ("DIA") are the two types of in-plan guarantees currently sold in retirement plans, according to LIMRA. These products allow participants in retirement plans to protect some of their savings to provide future

218. 29 C.F.R. § 2550.404a-4 (2018); Selection of Annuity Providers-Safe Harbor for Individual Account Plans, 73 Fed. Reg. 58,447 (Oct. 7, 2008).

219. *Id*.

220. *Id*.

221. Memorandum from John Canary, Dir. of Regulations and Interpretations on Selection and Monitoring under the Annuity Selection Safe Harbor Regulation for Defined Contribution Plans (July 13, 2016), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2015-02.

222. Amanda Umpierrez, *Future Regulation Holds the Key for Lifetime Income Options in DC Plans*, PLANSPONSOR (Dec. 19, 2018), https://www.plansponsor.com/exclusives/future-regulation-holds-key-lifetime-income-options-dc-plans/?utm_source=newsletter&utm_medium=email&utm_campaign=Newsdash.

223. Rebecca Moore, *Sponsors, Participants Warming Up to Guaranteed Income Options*, PLANSPONSOR (May 21, 2015), https://www.plansponsor.com/sponsors-participants-warming-up-to-guaranteed-income-options/.

224. *Id.*

> retirement income while they are still working and contributing to their plans.[225]

A study by the Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA-CREF") shows that 34% of Americans who participate in a retirement plan say the primary goal of their plan is to generate guaranteed monthly income.[226] Another 40% want to ensure their savings are safe regardless of what happens in the financial markets. Yet 72% of respondents either do not have or are unaware if their retirement plan has a lifetime income option, which can help provide the retirement security they seek.[227]

Under the plan proposed by Ghilarducci and James, savings would be automatically annuitized on retirement or disability.

> In a nationwide retirement pool, actuarial risks are shared and mitigated, costs are spread—and everyone benefits. . . . The annuity plans that are currently available carry high costs because of the process of adverse selection. In the current annuity marketplace, insurers anticipate that those who purchase annuities do so because they expect to live longer than average—and in anticipation of this longevity risk, insurers increase the cost of the annuity.[228]

In its 2018 testimony,[229] the Plan Sponsor Council of America ("PSCA") cited a 2016 GAO report, which made recommendations for lifetime income options in 401(k)s.[230] Furthermore,

> Many PSCA members would agree with the first two GAO recommendations: Clarifying the safe harbor for selecting an annuity by providing sufficiently detailed criteria to better enable plan sponsors to comply with safe harbor requirements related to assessing a provider's long-term solvency, and considering providing legal relief for plan fiduciaries offering an appropriate mix of annuity and withdrawal options, upon adequately informing participants about the options, before participants choose to direct their investments into them.[231]

225. *Id.*

226. *TIAA-CREF Survey: One in Three Americans Say Guaranteed Income Is Top Retirement Priority*, TIAA-CREF INST. (Jan. 29, 2014), https://www.tiaa.org/public/about-tiaa/news-press/press-releases/pressrelease487.html.

227. *Id.*

228. Teresa Ghilarducci & Hamilton "Tony" James, *A Comprehensive Plan to Confront the Retirement Savings Crisis*, THE NEW SCHOOL SCEPA 7, 13 (2016), http://www.economicpolicyresearch.org/images/Retirement_Project/Retirement_Security_Guaranteed_digital.pdf.

229. Rebecca Moore, *Groups Question Efficiency of Offering Annuities in DC Plans*, PLANSPONSOR (Aug. 15, 2018), https://www.plansponsor.com/groups-question-efficiency-offering-annuities-dc-plans.

230. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-433, 401(K) PLANS: DOL COULD TAKE STEPS TO IMPROVE RETIREMENT INCOME OPTIONS FOR PLAN PARTICIPANTS (2016).

231. *Id.*

B. The Minimum Distribution Rules

The original minimum distribution rules were enacted in 1962 for Keogh plans (plans for the self-employed and their employees) to ensure that the tax benefits were used to fund retirement and not be an indefinite tax shelter.[232] At that time, life expectancy at sixty-five was 13.3 years for males and 17.7 years for females. In 2012, the numbers were 18.9 and 20.9. "While their original intent may have been valid, the rules have become increasingly outmoded in today's labor market and social conditions, to say nothing of the strict regulatory regime controlling pensions."[233]

The (highly complex) minimum distribution rules apply to employer plans and non-Roth IRAs, and generally require funds to be withdrawn over a period geared to life expectancy, beginning at age seventy-and-a-half or (in the case of a non-owner covered by an employer plan) actual retirement, if later.[234] Failure to take the required minimum subjects the individual to a confiscatory 50% excise tax.[235]

The lifetime minimum distribution rules should be repealed: why should individuals be required to take money out at age seventy-and-a-half when they may live for another twenty years and need to preserve funds for increasing health and other expenses in their later years?[236] The law should, however, generally require complete distribution within a short period after the deaths of the account owner and his or her spouse.

In August 2018, President Trump signed an executive order aimed at "boosting retirement security" for everyday Americans.[237] The order called on the Treasury Department to review and update its rules mandating withdrawals from retirement accounts no later than six months after an individual's seventieth birthday.[238]

232. Self-Employed Individuals Tax Retirement Act of 1962, I.R.C. § 401 (2011).

233. H.R. Rep. No. 107-788, at 53 (*citing* Mark Warshawsky, *The Optimal Design of Minimum Distribution Requirements for Retirement Plans*, 4 BENEFITS QUARTERLY 36 (1998)).

234. I.R.C. § 401(a)(9) (2010). Similar rules apply to tax-sheltered annuity programs, IRAs, Roth IRAs and eligible deferred compensation plans: sections 403(b), 408, 408A and 457.

235. I.R.C. § 4974 (2010).

236. *See* Corie Hengst, *Inflation Higher for Retirees*, PLANSPONSOR (Apr. 19, 2016), https://www.plansponsor.com/inflation-higher-for-retirees/.

237. John Manganaro, *President Trump Orders Review of Open MEPs, RMD Rules*, PLANSPONSOR (Aug. 31, 2018), https://www.plansponsor.com/president-trump-orders-dol-review-open-meps-rmd-reductions/.

238. *Id.*

In November 2019, the Treasury Department issued proposed regulations which, by incorporating updated mortality assumptions, would reduce the amount of the required distributions.[239] Two pending bills, The Retirement Security and Savings Act and The Retirement Enhancement and Savings Act, would also revise the rules.[240]

C. Inflation and Other Risks

According to Fidelity Investments, a sixty-five-year-old couple retiring in 2019 will need $285,000 to cover health care and medical expenses throughout their retirement.[241]

Data from the Centers for Medicare and Medicaid Services ("CMS") show that health care spending per person for the population age sixty-five and older averaged $18,424 in 2010, three times higher than spending per working-age person ($6,125) and five times higher than spending per child ($3,628).[242] CMS noted that overall health care expenditures increased 5.3% in 2014, significantly higher than the general inflation rate.[243]

Inflation's impact on seniors is not limited to healthcare. Social Security beneficiaries lost 22% of their buying power between 2000 and 2015, according to a study by the Senior Citizens League ("TSCL").[244] Of thirty-four goods and services measured, price increases on twenty-two exceeded the amount of increase in the Social Security cost-of-living adjustment ("COLA") over the same period.[245] The survey found that the COLA had increased benefits 43% since 2000, but typical senior expenses had increased 74%.[246]

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239. 84 Fed. Reg. 60,812 (Nov. 8, 2019).

240. The Retirement Security and Savings Act (S 1431) was introduced on May 13, 2019. The Retirement Enhancement and Savings Act (HR 1007) was reintroduced in the House on Feb. 6, 2019 and was introduced in the Senate on April 1, 2019 (S 972).

241. *How to plan for rising health care costs*, FIDELITY (Apr. 1, 2019), https://www.fidelity.com/viewpoints/personal-finance/plan-for-rising-health-care-costs.

242. Corie Hengst, *Inflation Higher for Retirees: Older Americans experience higher inflation rates than other consumers, predominantly because of health care*, PLANADVISER (Apr. 19, 2016) https://www.planadviser.com/inflation-remains-top-threat-for-older-americans/.

243. *Id*.

244. Mark Miller, *Fighting Inflation in Retirement*, MORNINGSTAR (Dec. 7, 2015), https://www.morningstar.com/articles/725155/fighting-inflation-in-retirement.html.

245. *Id*.

246. *Id*.

LIMRA Secure Retirement Institute illustrated the effect of 2% annual inflation on a twenty-year retirement.[247] Using a fixed monthly income of $1,341 (the average monthly retirement benefit then paid by Social Security) and assuming that monthly expenses increase from $1,341 to $1,993 at the end of the twenty-year period, inflation results in a shortfall of $73,376.[248] When the calculation is run at 3% inflation, the shortfall increases to more than $117,000.[249]

A January 2019 report found:

> As life expectancy rises, more retirees will face late-life financial risks, including: high health costs, financial mistakes due to cognitive decline, and widowhood. To date, the research literature suggests that these risks severely affect only a minority of retirees, but the impact may become more widespread in the future. The reasons include growing health costs; the rise of 401(k)s, which can be more vulnerable to fraud; and the declining role of Social Security's widow benefits.[250]

X. Should Employers Continue to be Involved in Providing Retirement Benefits?

In 2007, one of the proposals made by the Conversation on Coverage was the establishment of a national clearinghouse structure to administer portable individual retirement accounts.[251] In the same year, the ERISA Industry Committee ("ERIC") issued a comprehensive reform proposal, a new structure that would provide benefits through independent Benefit Administrators, who would compete based on quality, use of information technology, plan design and cost.[252]

Susan Stabile has argued that the failures of the employer-based retirement system cannot be rectified by incremental changes and that

> [T]here are really only two possible models. The first is to jettison the employer-based system entirely and provide a government pension

247. *Even When Inflation Is Low, It's Higher for Retirees*, LIMRA (Apr. 19, 2016), https://www.limra.com/en/newsroom/industry-trends/2016/even-when-inflation-is-low-its-higher-for-retirees/.

248. *Id.*

249. *Id.*

250. Matthew S. Rutledge & Geoffrey T. Sanzenbacher, *What Financial Risks Do Retirees Face in Late Life?*, 19-1 CTR. FOR RETIREMENT RES. AT B.C. (Jan. 2019), https://crr.bc.edu/wp-content/uploads/2018/12/IB_19-1.pdf.

251. THE PENSION RIGHTS CTR., COVERING THE UNCOVERED: FINAL REPORT OF THE CONVERSATION ON COVERAGE at 3 (2007), http://www.conversationoncoverage.org/about/final-report/covering-the-uncovered.pdf.

252. *See* THE ERISA INDUSTRY COMM., A NEW BENEFIT PLATFORM FOR LIFE SECURITY 20 (May 2007), https://www.eric.org/forms/uploadFiles/ccea00000007.filename.ERIC_New_Benefit_Platform_FL0614.pdf.

> [providing a livable pension for all elderly Americans] for everyone. The second is to retain the employment-based system but move to a mandatory system with more stringent regulation of defined contribution plans than currently exists.[253]

According to Katherine Stone, the current system of benefits originated in the industrial era of the twentieth century, when employers sought to secure a stable workforce, that this employer-centered model of benefits has largely outlived its usefulness in the new "boundaryless" workplace of the twenty-first century, and that it must be replaced with an alternative that is more portable and more affordable for the vast majority of workers.[254]

More recently, Eugene Steuerle, Benjamin Harris and Pamela Perun have argued:

> In a DC plan system where the majority of the risks and responsibilities for saving fall on workers, where independent financial services companies provide investments, and where professional administrators manage the plan, it is self-defeating to continue to insist that employers as plan sponsors remain the ultimate guarantors of the plan and all its functions. There is increasing recognition that the next bold move in the evolution of the 401(k) plan system could be to transform employers into facilitators of their employees' saving. This merely requires activating an employer's payroll system to transfer employee contributions to a saving plan run by an external entity. Such a system has been in place for decades in the 403(b) plan universe where employers typically make supplemental savings plans available to their employees. In such plans, employers are not fiduciaries, and their primary responsibility is to transfer elective contributions, limited in amount as in the 401(k) world, to the plan chosen by the employee.[255]

XI. Potential Legislation

On December 19, 2018, Senators Rob Portman (R-Ohio) and Ben Cardin (D-Maryland) introduced the Retirement Security and Savings Act of 2018, S. 3781.[256] According to Sen. Portman's website, the sena-

253. Susan J. Stabile, *Is It Time to Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 325 (2007).

254. Katherine V.W. Stone, *A Fatal Mismatch: Employer-Centric Benefits in a Boundaryless World*, 11 LEWIS & CLARK L. REV. 451, 479 (2007).

255. C. EUGENE STEUERLE, BENJAMIN H. HARRIS & PAMELA J. PERUN, PENSION RESEARCH COUNCIL, ENTITLEMENT REFORM AND THE FUTURE OF PENSIONS 18 (Sept. 2014), PRC WP2014-08.

256. *Comprehensive Retirement Savings Enhancement Bill Introduced*, ASCENSUS (Dec. 21, 2018), https://www2.ascensus.com/news/industry-regulatory-news/2018/12/21/comprehensive-retirement-savings-enhancement-bill-introduced/ [hereinafter *Comprehensive Retirement Bill*].

tors intend to continue their efforts to improve the legislation and establish a foundation for a broader bipartisan, bicameral retirement policy debate in the 116th Congress.[257] The bill includes numerous provisions designed to expand access, encourage automatic enrollment and automatic escalation, liberalize the savers' credit, exempt small retirement balances from required minimum distributions ("RMDs"), increase the RMD age gradually to age seventy-five, reduce the excise tax for RMD failures, modernize the mortality tables that dictate RMD amounts, enhance the small employer tax credit for establishing a retirement plan, and enhance the ability to partially annuitize retirement benefits.[258]

On February 6, 2019, Representatives Ron Kind (D-Wisconsin) and Mike Kelly (R-Pennsylvania) and seven co-sponsors reintroduced the Retirement Enhancement and Savings Act ("RESA"), H.R. 1007.[259] This bipartisan bill "has long been a focus of retirement industry lobbyists. The legislation has now been introduced in multiple Congresses but has so far failed to make it into law, despite significant amounts of bipartisan support in both the House and Senate chambers."[260]

In February 2019, the House Ways and Means Committee heard testimony from a group of retirement and financial experts, with the stated goal of promoting solutions to American workers' significant projected retirement savings shortfall.[261]

In the same month, the Senate Special Committee on Aging held a hearing on "Financial Security in Retirement: Innovations and Best Practices to Promote Savings."[262]

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257. Press Release, Senator Rob Portman, Portman, Cardin Introduce Sweeping Reforms to Strengthen Americans' Retirement Security (Dec. 19, 2018), https://www.portman.senate.gov/public/index.cfm/press-releases?ID=F4E2B93E-713F-4080-8596-D6CD2E7DFC02.

258. *Comprehensive Retirement Bill*, *supra* note 260.

259. Lee Barney & John Manganaro, *Retirement Enhancement and Savings Act Reintroduced*, PLANSPONSOR (Feb. 7, 2019), https://www.plansponsor.com/retirement-enhancement-savings-act-reintroduced/ (The bill was introduced in the Senate on April 1, 2019 (S 972). A third bill, The SECURE Act (HR 1994), passed the House by 417-3 on May 23, 2019. The three bills share many common features.).

260. *Id.*

261. John Manganaro, *Experts Push Ways and Means Committee for Retirement Reforms*, PLANSPONSOR (Feb. 6, 2019), https://www.plansponsor.com/experts-push-ways-means-committee-retirement-reforms/.

262. Rebecca Moore, *Hearing Witnesses Offered Recommendations to Promote Retirement Savings*, PLANSPONSOR (Feb. 12, 2019), https://www.plansponsor.com/hearing-witnesses-offered-recommendations-promote-retirement-savings/.

XII. Conclusion

We must hope that legislation to improve both the private pension system and Social Security will have sufficient bipartisan support to be enacted in the 116th Congress. The stakes, for almost all Americans, are very high. According to one comment,

> Despite the frequent—and sometimes bitter—disagreements that seem to permeate lawmaking on Capitol Hill, there is widespread bipartisan support for pension reform. This was evident from the witness testimony and from the senators' and representatives' comments and questions during the hearings. While there remains disagreement about the depth of the retirement savings crisis and about the best remedies, both Democrats and Republicans substantially agree on many matters.[263]

Similarly, enactment of The Social Security 2100 Act (HR 860) discussed in section 2 above would greatly improve the financial health of the Social Security system, the bedrock of financial security for the elderly, but passage of that or any similar legislation is almost inconceivable as long as the Republicans control the Senate.

Postscript: On December 20, 2019, President Trump signed into law H. R. 1865, The Further Consolidated Appropriations Act, 2020, Pub. L. 116-94. The Act includes, as Division O, the long-pending SECURE (Setting Every Community for Retirement Enhancement) Act which addresses some of the issues described above.[264]

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263. *Retirement Spotlight: Congressional Hearings a Harbinger of Pension Reform?*, ASCENSUS (Feb. 21, 2019), https://www2.ascensus.com/news/industry-regulatory-news/2019/02/21/retirement-spotlight-congressional-hearings-a-harbinger-of-pension-reform/.

264. There are numerous summaries of the Act. *See, e.g.*, Roberts & Holland LLP, *Update-The SECURE Act is Signed into Law* (Dec. 26, 2019), https://www.robertsandholland.com/siteFiles/Articles/The_SECURE_Act_Is_Signed_Into_Law.pdf; Morgan Lewis, *SECURE Retirement Legislation Becomes Law: Overview of Provisions Affecting Retirement Plans* (Dec. 23, 2019), https://www.morganlewis.com/pubs/secure-retirement-legislation-becomes-law-overview-of-provisions-affecting-retirement-plans.