United States Senate
WASHINGTON, DC 20510

November 17, 2014

The Honorable Jacob Lew
Secretary of Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Lew:

We recently held a hearing in the Finance Committee on the state of retirement savings in this country and, frankly, we have some significant challenges ahead of us. Our private retirement system has provided retirement security to millions of Americans, and it has many excellent features that we need to preserve and enhance. But, at the same time, we need to do a better job at targeting retirement benefits at the Americans who most need our help.

As members of the Finance Committee, we have committed to focusing on the issue of retirement savings and working to implement policies that will help low and moderate income families prepare for a financially secure retirement. To that end, the panel of expert witnesses at our hearing made a number of commonsense suggestions that Treasury could make today that would go a long way towards helping Americans save for retirement. We urge the Treasury Department to implement these changes as soon as possible.

Automatic enrollment

Our hearing highlighted the importance of automatic enrollment in 401(k) plans in increasing private retirement savings. By simply enrolling an employee automatically in a 401(k) plan, participation rates increase tremendously. The employee is not forced to stay in the plan – he or she can opt-out of participation – but data shows that most employees will stay in the plan and save for retirement.

Unfortunately, however, not enough plans are using automatic enrollment. Today, we are releasing data compiled by the Finance committee staff showing that, in 2012, only 11% of 401(k) plans had an automatic enrollment feature. For small plans, the numbers are even smaller. In 2012, 3% of 401(k) plans with less than 100 participants used automatic enrollment.

Our understanding is that small employers do not use automatic enrollment in part because of concern over the penalties if they make a mistake. Under current law, if an employer inadvertently fails to automatically enroll an employee in their 401(k) plan and the error is not discovered in the first three months of the year, the employer will be required to make corrective contributions under the Employee Plans Compliance Resolution System ("EPCRS"). Errors in a small plan's operations are usually uncovered *after* the end of the year when the third party administrator is completing testing and reporting. However, by that time, the EPCRS "safe harbor" correction will require that in addition to making the matching and non-elective contributions the employee should have received, the employer also must make a corrective contribution for that employee equal to 50% of the average deferral being made by other employees in the same group. Many small employers see this as an unfair result, discouraging them from adopting automatic enrollment.

We commend the efforts the Treasury Department and Internal Revenue Service have already taken to expand automatic enrollment in 401(k) plans. However, more can be done and we urge the Treasury Department to implement a "safe harbor" correction method under EPCRS that is available to automatic enrollment retirement plans that is both fair to the employee and the small business. In developing the safe harbor, we would encourage you to have a dialogue with stakeholders regarding how best to protect employees and at the same time eliminate material disincentives for small businesses to adopt automatic enrollment.

Make it Easier for Small Employers to Sponsor Retirement Plans

Another theme that came through at our hearing is that small businesses face greater challenges than large businesses in setting up retirement plans for their employees in part because smaller plans lack economies of scale and thus are more expensive. In addition, small businesses generally lack the administrative resources to manage a plan.

One effective means of enhancing small business retirement plan coverage is through greater use of multiple employer plans. Under a multiple employer plan, many small businesses can band together to participate in a single plan that allows the small businesses to achieve some of the economies of scale available to larger employers. This can be a very effective means to make retirement plans available to small businesses at a lower cost. In addition, the plan sponsor assumes the administrative burden of managing the plan and overseeing plan services on behalf of the participating employers.

However, under current Treasury regulations, if one employer participating in a multiple employer plan violates the tax qualification rules applicable to retirement plans, the entire plan can be disqualified, with potentially devastating tax consequences for all of the participating employers and their employees. This not only seems unfair, but it is also materially impeding the growth of multiple employer plans among small businesses.

Small business owners can be very hesitant to join a multiple employer plan if the actions of another employer can create enormous tax liabilities for them and their employees. For small business owners concerned about potential liabilities, the possibility of such tax burdens often discourages them from joining a plan that could provide retirement security to their employees.

This is a problem that can be addressed by Treasury, since the position in the Treasury regulations is not required by the statute. Therefore, we urge Treasury to revisit this regulatory position, which discourages multiple employer plans.

Small Financial Incentives

One of our witnesses, Professor Brigitte Madrian from the Harvard Kennedy School, stated that, "[i]ronically, what could perhaps be a very effective financial incentive to encourage individuals to enroll in a workplace savings plan – a small but immediate financial reward – is actually not allowed in 401(k) or 403(b) plans under current law." Professor Madrian was referring to Code Section 401(k)(4)(A), which provides that a 401(k) plan will not be treated as a qualified plan if any "other benefit" (other than a matching contribution) is contingent upon an employee making a salary deferral contribution to the plan. Treasury regulations define "other benefit" very broadly, including life insurance, dental plans, vacations, and dependent care assistance, among other things.

Employers want to increase participation in 401(k) plans. And one method to do this would be to allow employers to offer small incentives to encourage employee participation in the plans. For example, an effective incentive could be providing every employee who enrolls in the employer's 401(k) plan with a $25 gift card. However unfortunately, the current definition of "other benefit" is so broad that even offering such small incentives would appear to run afoul of the regulation. This seems like a counterproductive and therefore, we encourage Treasury to amend the regulation to provide for an exception to the "other benefit" definition for incentives that are small enough that they do not undermine employers' motivation to provide matching contributions but are large enough to have an impact on savings by low and moderate income employees.

Thank you for your attention to this matter. We look forward to working with you on these issues and the many other challenges we face together in enhancing the retirement security of hard-working Americans across the country.

Sincerely,

Ron Wyden
Ron Wyden
U.S. Senator

Debbie Stabenow
Debbie Stabenow
U.S. Senator

Bill Nelson
Bill Nelson
U.S. Senator

Ben Cardin
Benjamin L. Cardin
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Sherrod Brown
Sherrod Brown
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