This fall is bound to be a fascinating time in Washington DC. The confirmation process for President Trump’s U.S. Supreme Court nominee, Brett Kavanaugh, is underway. Negotiations are underway to avert a government shutdown at the beginning of October. The ongoing trade dispute between China and the United States continues to escalate.

On top of all of that, the epic midterm elections have the potential to change the balance of power in Washington. And, let’s not forget the pending release of Special Counsel Robert Mueller’s potentially game-changing report on his investigation of Russian interference in the 2016 election.

While the noise and distractions from Washington may be unrelenting, there are some key issues that retirement plan administrators, sponsors and participants should keep their eyes on as 2018 winds down.

**President signs Executive Order on retirement savings**

On August 31, President Trump signed an Executive Order directing his administration to take steps to improve retirement savings opportunities. He asked the Treasury Department to review the required minimum distribution rules for IRAs, 401(k)s and other employer-sponsored retirement plans. Those rules require retirees to begin taking distributions from their retirement accounts at age 70 ½, but the White House noted that they have not been updated since 2002. A review could lead to an easing of the withdrawal requirements, which could help retirees spread their savings over a longer period of time and keep more money invested.

The order also directs the Labor and Treasury Departments to work on rules making it easier for small businesses to join together to offer retirement plans to their employees. “We will try to find policy ideas that will make joining a 401(k) plan a more attractive proposition for small employers to the ultimate benefit of their employees,” said Assistant Secretary of Labor Preston Rutledge in a call with reporters to discuss the executive order. The order also calls on the two departments to consider ways to reduce paperwork and other administrative burdens that discourage businesses from offering retirement savings opportunities to employees.

In each case, the directive simply instructs the agencies to “consider” issuing regulations. Once the issues have been reviewed, the agencies could choose to propose rules, which would then go through the regular public comment and review process before potentially being finalized. Those steps could take a year or more, so any changes to the retirement system remain a ways off.

Meanwhile, there is also an effort on Capitol Hill to move retirement legislation before the end of the year, including some of the ideas announced in the president’s executive order. House Ways and Means Chairman Kevin Brady (R-TX) proposed a Tax Reform 2.0 bill to make permanent the individual tax cuts enacted at the end of 2017, which are set to expire after 2025. The bill includes several proposals to improve retirement savings, including expansion of open multiple employer plans, as well as provisions that would ease portability of lifetime income investments in plans,
repeal the maximum age for contributing to a traditional IRA, and block loans from qualified employer-provided plans through credit cards. The legislation would also create universal savings accounts, also called rainy-day accounts, which give people another opportunity to save. While approval of a broad tax bill is highly unlikely, the retirement provisions are expected to receive strong bipartisan support and could be broken out into their own legislation this fall.

The SEC and the “Best Interest” proposal

No issue has the potential to more dramatically alter the landscape for investment advice than the SEC's proposed rules that seek to clarify the standard of conduct for broker-dealers and investment advisers. As a reminder, last April, in the wake of the court's decision to invalidate the Department of Labor's (“DOL”) fiduciary rule, the SEC proposed two new rules and some new guidance:

- Regulation Best Interest – The proposed rule requires broker-dealers to act in the best interest of retail customers when making recommendations. Broker-dealers would need to disclose and mitigate or eliminate conflicts of interest. Unlike the DOL rule, which applied only to retirement accounts, the SEC proposal applies to both taxable and nontaxable accounts.
- Relationship Summary Form – Investment advisors and broker-dealers would be required to provide retail investors with a document of no more than four pages that highlights the services being offered, the legal standards of conduct that apply, fees, and conflicts of interest. Additionally, broker-dealers would not be allowed to use “adviser” or “advisor” as part of their title—a change that would help customers more easily distinguishes broker-dealers from investment advisors.
- Investment Advisor Interpretation – The SEC's proposed interpretation reaffirms and clarifies existing fiduciary duties that investment advisors owe to their clients. Unlike broker-dealers, depending on their agreements with their clients advisors have a duty to monitor clients' portfolios on an ongoing basis. With respect to conflicts of interest, advisors would need to consider the interpretation's statement that disclosure alone is not always sufficient. The SEC also requested comments on whether it should propose new rules for advisors including continuing education requirements, mandatory account statements, and financial responsibility obligations (like net capital or fidelity bonding).

More than 5,000 comments were submitted by the SEC's August 7 deadline. SEC staff and commissioners also had held nearly 100 meetings with interested parties by late August and held six public roundtables in cities across the country. Charles Schwab & Co., Inc. (“Schwab”) submitted a detailed comment letter generally supporting the rule package but making a number of recommendations for changes and improvements. One of the firm's top suggestions was to reduce the four-page “relationship summary form” to a simpler, one-page document that highlights the most important elements of the relationship between an investor and an ad broker-dealer or investment advisor. Schwab also opposed any new broker-like rules to be applied to investment advisers and provided a detailed rationale for that opposition. Schwab's complete letter, which includes independent research Schwab commissioned to ask retail investors about their understanding of “fiduciary” and “best interest,” and the content, method, and frequency of disclosures they prefer when it comes to terms relating to the investment...
advice they receive, can be found here.

Now the agency is in the process of reviewing those comments and determining what, if any, changes should be made to its proposal before it is finalized. There is no deadline for when that will happen, but the complexity and controversy of the proposal makes it more likely that a final decision won’t come until 2019. One complicating factor is turnover at the SEC. Commissioner Michael Piwowar stepped down from the agency in July and has been replaced by Elad Roisman, formerly a long-time staffer at the Senate Banking Committee. Commissioner Kara Stein will step down at the end of the year and a replacement has not yet been named. It’s likely, though, that two new commissioners who were not part of the agency when the best interest rule was proposed will cast votes deciding the proposal's fate.

Midterm election preview

With less than two months to go before the November election, both parties are fully engaged in an intense battle for control of Congress. In the House of Representatives, Democrats are feeling optimistic that they can pick up the 23 seats needed to win the majority. Republicans are battling history – over the last 100 years, the party that has the White House has lost an average of 30 House seats in the first midterm election – and the current atmosphere, where polls and pundits show Republicans to be on the defensive. Voters tend not to focus on House elections until the final weeks, so a lot can change, but Democrats appeared to have a good chance of winning the majority as September began.

The story is a little different in the Senate, where Republicans hold a narrow 51-49 majority. But just nine Republican Senate seats are up for election this fall, as opposed to 26 seats currently held by Democrats (including two independent Senators who caucus with the Democrats). Ten of the Democrat-held seats are in states that Donald Trump won in the 2016 election; defending those seats is the top priority of Democrats this fall. Three of the seats currently held by Republicans – open seats in Arizona and Tennessee, as well as Senator Dean Heller's seat in Nevada – are considered toss-ups in November. If Democrats were to sweep those three seats, however, they would still need to win at least 25 of the 26 seats they are defending in order to emerge with a razor-thin majority. It’s not impossible, but it’s a daunting hill to climb. One thing seems virtually certain: No matter which party holds the majority in the Senate, it’s likely to be an extremely narrow margin, perhaps one or two seats. And that’s a recipe for more gridlock in 2019.
As Vice President for Legislative and Regulatory Affairs, Townsend is responsible for analyzing legislative and regulatory proposals to determine how they would affect individual and institutional investors, and develops and executes strategies to communicate their interests to lawmakers, the media, employers and their employees, as well as individual investors. He specializes in tax issues, retirement savings, charitable giving issues, market structure issues, and financial literacy. He also speaks regularly to employee and client groups about how the political and policy environment in Washington affects investors.

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