November 16, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue
Washington, DC 20210

Filed Electronically

Re: Pension Benefit Statements – Lifetime Income Illustrations, **RIN 1210-AB20**

Dear Sir or Madam:

As the second-largest retirement services provider in the U.S. with over 9 million people in the more than 40,000 plans we serve, Empower Retirement appreciates the opportunity to share our comments with the Department of Labor (DOL) Employee Benefit Security Administration with respect to the Interim Final Rule (IFR) on Lifetime Income Illustrations (LIIs) that must be provided at least annually on pension benefit statements under Section 105 of the Employee Retirement Income Security Act (ERISA) of 1974 as amended by the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019.

We appreciate DOL's efforts in drafting the IFR with the goal of minimizing administrative burdens. At Empower we have long advocated the use of lifetime income projections. We believe these projections are a very effective tool that can assist participants in measuring their progress toward retirement security. Our comments on the IFR can be broken down into two areas: preserving the availability of existing LIIs and providing recommendations regarding the model LII under the IFR.

Additional Lifetime Income Illustrations

We were appreciative of the language in the preamble to the IFR regarding existing lifetime income projections. As DOL noted: "(M)any plans already provide illustrations and have done so for decades, including through the use of continuous access websites and other similar technologies. Many of these illustrations are interactive, stochastic, and tailored to the individual plan and plan participant. According to the commenters, these highly adaptive, highly personal, sophisticated illustrations are, in many respects, superior for financial and retirement planning

purposes to a one-size-fits-all, deterministic model like that in the IFR. The Department does not want to undermine these best practices or inhibit innovation in this area. The Department encourages the continuation of these practices."[1]

Empower is among the providers that currently offer an LII. We have devoted significant resources to developing an interactive lifetime income projection model that is available on our participant website. Our LII does take into consideration future earnings and contributions and provides a "Lifetime Income Score" that projects the percentage of pre-retirement income a participant may anticipate replacing. Participants have the ability to adjust the underlying assumptions (e.g., retirement age, contribution rates) driving the income projection. Once a change is made the participant receives immediate feedback on how the change might impact their retirement income projection. Our LII also allows a participant to include any additional sources of retirement income that may be available in the projection (e.g., IRAs, retirement savings with prior employers, spousal retirement savings) and incorporates Health Savings Accounts and Social Security estimates.

We are constantly evaluating how participants use our projection model and make frequent modifications to increase its effectiveness specifically related to guiding people to adopt better saving behaviors. On average, over the last three years one-third (30-40%) of individuals who interacted with our LII have made a savings rate change, and 68-82% of those changes have been savings rate increases, with an average increase of 35-43%. We are continually looking for opportunities to innovate and create new experiences that drive further results. For example our "Health Cost Estimator" gives individuals an estimated view of future healthcare expenses, allowing them to plan for one of the most confusing aspects of retirement. This tool has also driven approximately 2% higher savings — a 25% increase, especially among savers who are closer to retirement.

We do have some concerns with the IFR and the possibility that it may have the unintended consequence of discouraging the use of more robust LIIs. The SECURE Act directed DOL to provide plan fiduciaries with relief from liability when providing the LII mandated by the Act. Paragraph (f) of the IFR provides that: "No plan fiduciary, plan sponsor, or other person shall have any liability under Title I of the Act solely by reason of providing the lifetime income stream equivalents."[2] Paragraph (g) of the IFR states that "Nothing in this section precludes a plan administrator from including lifetime income stream illustrations on the benefit statement in addition to the illustrations described in paragraphs (b)(3) and (4)."[3]

We would note that many of these additional LIIs are not included on the participant benefit statements but are accessed through participant websites, mobile phone applications or a variety of other platforms. The ability to utilize a website or other platform in providing an LII allows for

[1] 85 Fed. Reg. 59,141 (September 18, 2020).
[2] 85 Fed. Reg. 59,157 (September 18, 2020).
[3] Ibid.

the interactive functionality that gives participants the ability to model the impact of changes to their retirement assumptions. In addition, we need the flexibility to innovate as new delivery tools are developed. It would be helpful if DOL would clarify that the IFR is not intended to limit additional LIIs to only being offered on benefit statements with the DOL-prescribed model but may be provided on a variety of platforms and formats.

The fiduciary liability relief provided under paragraph (f) is not available for any additional LIIs that might be provided. In the preamble to the IFR, DOL states: "(T)he Department is unable to extend the relief in paragraph (f) of the IFR to all of these practices. Comments, however, are solicited on whether the Department, either separately or in conjunction with the adoption of a final rule, should issue guidance clarifying the circumstances under which the provision of additional illustrations described in this paragraph may constitute the rendering of 'investment advice' or may, instead, constitute the rendering of 'investment education' under ERISA. Such guidance could assist plan sponsors, service providers, participants, and beneficiaries in ensuring that activities designed to educate and assist participants and beneficiaries in making informed decisions do not cause persons engaged in such activities to become fiduciaries with respect to a plan by virtue of providing 'investment advice' to plan participants and beneficiaries for a fee or other compensation."[4]

Our concern is that, in the absence of clear guidance to the contrary, plan fiduciaries may view that there are additional risks associated with providing additional LIIs. They may view the DOL model as being the "officially government-sanctioned" LII. This could have the unfortunate result of discouraging the use of proven tools that have helped participants increase their retirement security.

While the language in the preamble to the IFR encourages the continued use of additional LIIs, we believe DOL should take the additional steps noted in the request for comment and issue additional guidance. This could be done by including additional language in the Final Rule clearly outlining that additional LIIs, with the appropriate disclosures, do not constitute investment advice.

DOL could also consider revising Interpretive Bulletin 96-1 (IB 96-1). IB 96-1 was recently reinstated following the vacatur of DOL's 2016 fiduciary rule and related best interest contract exemption.[5] DOL could consider using the revisions to IB 96-1 that were part of the 2016 rulemaking effort as a model, particularly as they relate to investment education and interactive models. Unlike the current version of IB 96-1, the 2016 revision did not focus solely on investment and asset allocation guidance but also considered "estimates of retirement income

[4] 85 Fed. Reg. 59,141 (September 18, 2020).
[5] 85 Fed. Reg. 40,590 (July 7, 2020).

that could be generated by an actual or hypothetical account balance,"[6] clarifying that these estimates would not be considered investment advice. We would add a caveat to any revisions to the IFR or IB 96-1. We believe it is important that the guidance be broad based and flexible in order to permit further innovation of LIIs.

The SECURE Act required DOL to issue model disclosure language to accompany the LII. The IFR includes a series of model language inserts as well as full model disclosures in an appendix to the IFR. In order to be eligible for the liability relief under the IFR, the benefit statement must include language substantially similar in all material respects to the IFR model language or model disclosures. In the preamble to the IFR, DOL states that plan administrators may make minor non-substantive changes to the model language. We would ask DOL to clarify that plan administrators may, but are not required to, include additional language with the model language advising participants that additional LIIs are available and providing instructions on how they may be accessed. The additional language should also include an explanation that the income projection on the additional LII may differ from the DOL model LII due to the limitations on the assumptions under the IFR.

Model Lifetime Income Illustrations under the Interim Final Rule

As noted above, in addition to concerns with how the IFR may impact existing lifetime income projections, we have some comments regarding the IFR and model LII.

The IFR becomes effective one year after publication in the Federal Register, September 18, 2021. From the language of the IFR, it was unclear when the first statement including an LII would have to be provided to participants. In informal discussions, representatives of DOL have stated that the requirement to provide an LII at least annually begins on September 18, 2021. Under this interpretation the first LII must be provided prior to September 18, 2022. As an example, for a calendar year plan providing quarterly benefit statements, the plan administrator would meet the requirement if participants received an LII no later than with the June 30, 2022, quarterly benefit statement. It would be helpful if DOL would verify this interpretation in a Final Rule. In addition, depending on when a Final Rule is issued and what, if any, changes from the IFR it may include, recordkeepers may need additional time to make any necessary changes required by a Final Rule. We would request that DOL allow recordkeepers to rely on the IFR for a reasonable period of time, such as one year from the effective date, in order to implement any changes.

The IFR sets out four assumptions to be used in calculating the LII: the commencement date and the participant's age on that date, the marital status of the participant, the interest rate, and the expected mortality of the participant and spouse. Most of the assumptions are determined based

[6] 81 Fed. Reg. 20,999 (April 8, 2016).

on data available as of a given date. For purposes of marital status, the IFR assumes that the participant is married. The one assumption that includes some degree of variability is the age of the participant as of the commencement date. The IFR requires that we assume the participant is age 67 unless the participant is older, in which case the participant's actual age is used. We would request that DOL simplify the IFR by using age 67 in all cases regardless of the participant's actual age.

Plan sponsors do not always provide employees' dates of birth to their service providers. This is particularly true for smaller employers. Requiring this data would increase the administrative burden for both these employers and their service providers. In the IFR, DOL sought to minimize administrative burdens. A good example of this is using the unisex mortality tables from the Internal Revenue Code. As was noted in the preamble, "(T)o the extent plan administrators and their service providers do not have gender data for all plan participants, the use of unisex mortality tables reduces administrative burden for plan administrators who lack gender data while still using reasonable assumption."[7]

We would suggest that a similar approach would be appropriate for determining the participant's age as of the commencement date. We do not believe that using age 67 for a participant who is older than 67 would result in an unreasonable estimate. An estimate for an older participant would almost always be more reasonable than an estimate for a younger participant. It would also seem inconsistent to require using a participant's actual age if it is over 67 while continuing to assume that the spouse is the same age as the participant.

Another area of concern is the annuitization of the participant's account and the potential confusion it may create. Because the LII offers a participant the ability to visualize their retirement through a lifetime income stream, the disclosure may cause a participant to request an annuity distribution from their plan. If the plan does not offer annuities as a form of distribution, the disclosure may confuse the participant. As DOL indicates, a large majority of plans do not currently offer annuities.[8] With respect to Empower, only about 12% of ERISA plans Empower services offer plan-wide annuity forms of distribution. Therefore, we recommend that DOL amend the 105-3(d)(8)(ii) disclosure to clarify, as specified below, that a participant is only eligible to annuitize from their plan if the plan allows that form of distribution.

> ''The estimated monthly payments in this statement are based on prevailing market conditions and other assumptions required under federal regulations. If you wish to purchase an annuity **from your plan, the plan must allow annuities as a form of benefit**. Upon purchase, the actual payments you receive will depend on a number of factors and may vary substantially from the estimated monthly payments in this statement. For example, your actual age at retirement; your actual account balance (reflecting future

[7] 85 Fed. Reg. 59,135 (September 18, 2020).
[8] 85 Fed. Reg. 59, 144 (September 18, 2020).

investment gains and losses, contributions, distributions, and fees); and the market conditions at the time of purchase will affect your actual payment amounts. The estimated monthly payments in this statement are the same whether you are male or female. This is required for annuities payable from an employer's plan. However, the same amount paid for an annuity available outside an employer's plan may provide a larger monthly payment for males than for females since females are expected to live longer.''

We also have concerns about plan administrators properly disclosing the LII if plan assets are held at multiple vendors. While any ERISA plan can have multiple vendors, 403(b) plans are most impacted.

Historically, due to the nature of the 403(b) market, plan sponsors allowed participants to select investment products from multiple vendors rather than through one consolidated platform investment provider. Because of this multiple vendor reality, plan administrators will have significant difficulty providing participants with a consolidated LII. Therefore, we request that DOL clarify that plan administrators can meet their obligations under the IFR if they require each applicable plan investment vendor to provide an LII for any participant account balance attributable to that vendor.

Finally, we would request that DOL consider revising the IFR with respect to deferred income annuities (DIAs). The IFR requires the exclusion of any DIA when calculating the LII. We would first note that there does not appear to be a clear definition of what constitutes a DIA. We assume DOL intends to treat DIAs and qualifying longevity annuity contracts (QLACs) the same for the purpose of the LII because both products require a participant to surrender portions of their account balance to pay premiums for a right to receive a future income stream at a defined future date. The purchased future annuity payments are illiquid to the participant.

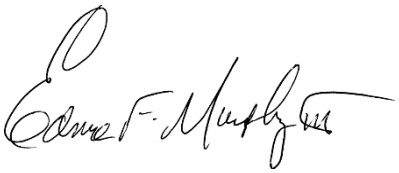
We also assume DOL intends to differentiate these products from other retirement annuity products, such as guaranteed lifetime withdrawal benefits (GLWBs) or traditional accumulation group or individual annuity contracts, because the annuity payment stream in these annuities is derived from liquid investments, and the future annuities are not paid until an indeterminate future date when the investment is either exhausted (in the case of a GLWB or guaranteed minimum withdrawal benefit) or when a participant chooses to distribute their participant account balance through an immediate payout annuity offered through their plan's accumulation annuity contract.

We would appreciate DOL confirming our understanding that DOL intends to define deferred income annuities in the narrow way described above.

We would note that in our experience very few plans provide participants the opportunity to purchase a QLAC. With respect to investment options that offer but do not require annuitization, it would seem inappropriate to exclude this balance when calculating the LII. We would also note that nothing in the language of the SECURE Act addressed the exclusion of DIAs. We would recommend that DOL adopt the same optional approach for DIAs as they did for plans with distribution annuities.

We appreciate the opportunity to provide our thoughts and comments, and we would welcome any opportunity to discuss our comments.

Sincerely,



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