

November 17, 2020

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

Re: Interim Final Rule: Pension Benefit Statements – Lifetime Income Illustrations,
RIN 1210-AB20

Ladies and Gentlemen:

The American Bankers Association¹ (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on an interim final rule that would require certain information to be provided on pension benefit statements of defined contribution plans as mandated by the recently amended section 105 of the Employee Retirement Income Security Act of 1974 (ERISA).² Specifically, the interim final rule would require plan administrators of defined contribution plans to express on the plan’s pension benefit statement at least annually the current account balance of the plan participant or beneficiary (retirement investor) both as (i) a single life annuity income stream, and (ii) a qualified joint and survivor annuity income stream. Both of these dollar amount figures will appear on the pension benefit statement together with a series of disclosures that, among other things, are intended to inform the retirement investor the basis upon which the amounts were determined. The interim final rule is open to public comment, after which the Department intends to issue a finalized regulation (final rule) that would supersede the interim final rule.³

We commend the Department for its timely efforts to implement section 203 of the SECURE Act governing lifetime income illustrations. The final rule will assist retirement investors in better understanding how the funds that they currently have saved will translate into a monthly lifetime income stream at retirement. We therefore support the Department’s implementing regulation on lifetime income illustrations, with recommendations for additional modifications as described below that are intended to improve regulatory functionality and achieve compliance certainty.

¹ The American Bankers Association is the voice of the nation’s \$21.1 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly \$17 trillion in deposits, and extend nearly \$11 trillion in loans. Learn more at www.aba.com.

² See 29 U.S.C. § 1025. ERISA section 105 was amended in December 2019 by the SECURE Act. See n. 4, *infra*.

³ See 85 *Fed. Reg.* 59,132 (2020) (“The Department’s intention is to adopt a final rule prior to the effective date [of the interim final rule] after consideration of public comment, with an adoption date sufficiently in advance of the effective date in order to minimize compliance burdens.”).

I. The Interim Final Rule.

Section 105 of ERISA describes the content requirements for pension benefit statements that plan administrators must furnish retirement investors. Among other things, section 105 requires that a benefit statement indicate the retirement investor's "total benefits accrued" (*i.e.*, the balance of the retirement investor's account). In December 2019, ERISA section 105 was amended by section 203 of the Setting Every Community Up for Retirement Act of 2019 (SECURE Act amendments).⁴ As amended, section 105 requires that an annual lifetime income disclosure be included in pension benefit statements that sets forth the lifetime income stream equivalent of the retirement investor's total benefits accrued. A "lifetime income stream equivalent" means the amount of monthly payments that the retirement investor would receive if the total accrued benefits of such retirement investor were used to provide a (i) single life annuity, and (ii) a qualified joint and survivor annuity.⁵ The SECURE Act amendments further require the Department to implement regulations that will (i) set forth assumptions which plan administrators may use to convert total accrued benefits into lifetime income stream equivalents as described in the final rule, and (ii) provide an annual model disclosure for inclusion in the pension benefit statement, written so that it can be understood by the average plan participant.⁶

As a result of the SECURE Act amendments, a pension benefit statement will consist of (i) the dollar amount of a retirement investor's account balance as of the last day of the statement period, (ii) the account balance expressed as a lifetime income stream payable in equal monthly payments for the life of the retirement investor (single life annuity), and (iii) the account balance expressed as a lifetime income stream payable in equal monthly payments for the joint lives of the participant and spouse as a qualified joint and survivor annuity. In addition, a plan administrator must include in the pension benefit statement a lifetime income disclosure that (i) explains that the lifetime income stream equivalent is provided only as an illustration, (ii) explains that the actual payments will depend on numerous factors that may vary substantially from the lifetime income stream equivalent in the disclosure, (iii) explains the assumptions on which the lifetime income stream equivalent was determined, and (iv) provides such other similar explanations as determined by the Department.⁷

The SECURE Act amendments, therefore, expressly set forth the parameters for the Department's implementing regulation. As directed by these statutory amendments, the Department has provided assumptions and model disclosure language in the interim final rule. We believe, however, that several modifications to the interim final rule should be made that would (i) ensure consistency with the Department's investment advice regulation, (ii) preserve the intent of the SECURE Act's amendments on disclosures, (iii) encourage retirement investor engagement and participation, and (iv) provide effective transition relief and regulatory consistency. These recommendations are set forth below.

⁴ The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act of 2020. See SECURE Act, Pub. L. 116-94 (Dec. 20, 2019).

⁵ See 85 *Fed. Reg.* at 59,132.

⁶ See SECURE Act § 203(b).

⁷ See *id.*

II. Distinction Between Investment Education and Investment Advice.

A. Confirm that providing lifetime income illustrations, and related retirement investor communications and services performed in connection with these illustrations and other related disclosures, are investment education and do not constitute investment advice that would lead to fiduciary status under ERISA and the Department’s investment advice regulation.

In the preamble to the interim final rule (preamble), the Department states that some plans, in presenting lifetime income illustrations on pension benefit statements, already may be providing similar lifetime income illustrations for their retirement investors. The Department further acknowledges that many of these illustrations “are interactive, stochastic, and tailored to the individual plan and plan participant.”⁸ The agency then asks whether the provision of these additional illustrations may constitute the rendering of “investment advice” under ERISA or Department regulations or whether, instead, such provision may be considered “investment education,”⁹ and further, whether it would be helpful for Department staff to issue clarifying guidance in this area. Such guidance, the Department believes, “could assist . . . 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.”¹⁰

We agree that agency guidance would be helpful to ensure that a plan’s provision of lifetime income illustrations that do not rely on the Department’s assumptions does not transform investment education into investment advice. Activities that come within “investment education” should be appropriately insulated from any determination that investment advice is offered in connection with lifetime income illustrations. We believe, however, that activities deemed to be “investment education” should be expanded further to include (i) conversations and other communications with a retirement investor that arise or follow from the lifetime income illustrations, and (ii) non-advisory services and materials that are provided in connection with the lifetime income illustrations.

For example, once a retirement investor sees the dollar amount figures for lifetime income streams, a bank – whether or not it is a fiduciary under ERISA – should be able suggest that the retirement investor attempt to increase his or her contribution toward the maximum amount, without such suggestion being considered investment advice under ERISA or Department regulations. Moreover, a bank should be able present to the retirement investor materials that would describe possible shifts in the investment product asset mix that may increase the lifetime income stream figures presented on the pension benefit statement, without being deemed “investment advice.” The use of online calculators that contain certain assumptions and projections likewise should be cast as investment education rather than investment advice. In short, as long as the assumptions are disclosed, the illustrations and tools are based on generally

⁸ 85 *Fed. Reg.* at 59,141.

⁹ See ERISA § 3(21)(A); 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (commonly known as the “five-part test”). See also 29 C.F.R. § 2509.96-1 (Interpretive Bulletin 96-1: activities deemed to be investment education).

¹⁰ 85 *Fed. Reg.* at 59,141.

accepted investment theories, and no product or solution is recommended, any such materials and content that may be provided to the retirement investor should be considered investment education and not investment advice. We recommend, therefore, that the Department clarify in the final rule that these and similar situations would not rise to the level of investment advice that, if compensation were received in connection with such advice, would trigger status as an investment advice fiduciary under ERISA and Department regulations.

III. Model Lifetime Income Disclosure Language.

A. Modify the interim final rule to be consistent with section 203 of the SECURE Act, which requires only the explanations contained in the SECURE Act’s model lifetime income disclosure, and not the Department requirement that the language be “substantially similar in all material respects to the model language.”

Plan administrators and other plan fiduciaries have long been concerned that providing lifetime income illustrations could expose them to liability and litigation risks from retirement investors if their actual account balances at retirement do not generate the income stream that was indicated in past pension benefit statement illustrations. In response to this concern, the SECURE Act amendments include a limitation of liability for plan administrators providing lifetime income stream equivalents on the pension benefit statement. Specifically, as amended, ERISA section 105 provides that no plan fiduciary, plan sponsor, or other person will have any liability solely by providing lifetime income stream equivalents that are derived from the interim final rule and “which include the explanations contained in the lifetime income disclosure” described in the SECURE Act amendments.¹¹

In order to rely on this limitation of liability, the Department requires that plan administrators must include the model disclosure language as expressly provided under the interim final rule. The Department states in the preamble that “[w]ord-for-word adoption of the model language is not required, and plan administrators can make minor, non-substantive changes” to the model language “without losing relief from liability.”¹² Any such changes, however, may not affect the substance, clarity, or meaning of the model language; otherwise, the Department states that relief from liability would not be available.¹³ The examples of allowable changes to the language provided in the preamble, moreover, indicate that any permitted deviation from the model language is severely limited.¹⁴

We believe that the Department’s interpretation of the model language requirements is inconsistent with the language of amended section 105. Specifically, the SECURE Act amendments provide that the limitation on liability is available for the provision of lifetime income stream equivalents which include “the *explanations* contained in the model lifetime income disclosure described in [the SECURE Act amendments],” not the express language

¹¹ SECURE Act § 203(b) (amending ERISA section 105 by adding a new section 105(a)(2)(D)(iv)).

¹² 85 *Fed. Reg.* at 59,140.

¹³ *See id.*

¹⁴ For example, a plan administrator may refer to “your statement” instead of “this statement” and may describe a single life annuity as a “payment form” rather than an “arrangement.” *See id.*

mandated by the Department. In other words, as provided under amended section 105 of ERISA, the model lifetime income disclosure need only be written in a manner that would be understood by the average plan participant, and further be required to explain that (i) the lifetime income stream equivalent is provided only as an illustration, (ii) the actual payments will depend on numerous factors that may vary substantially from the lifetime income stream equivalent in the disclosures, and (iii) the assumptions upon which the lifetime income stream equivalent was determined.¹⁵ The statutory language thus allows plan administrators the flexibility to craft disclosure language appropriate for the plan’s pension benefit statement while still being permitted under the statute to rely on the liability limitation provision. Consequently, we recommend that the Department modify the interim final rule to be consistent with the language of amended section 105 of ERISA by requiring only the explanations that are set forth in the relevant section of the statute applicable to the model lifetime income disclosure in place of the Department’s requirement that the language be “substantially similar in all material respects to the [interim final rule] model language.”

B. Modify the interim final rule’s model language to be a “safe harbor” in order to provide a non-exclusive means of achieving compliance with the disclosure requirements.

As stated above, the interim final rule allows for little flexibility to achieve compliance on the model lifetime income disclosure requirement. The current multiple approaches by plans to provide lifetime income disclosures, however, indicate that the use and explanation of lifetime income illustrations is not a “one-size-fits-all” exercise. Acknowledging these “highly adaptive, highly personal, sophisticated illustrations,” the Department states in the preamble that it “does not want undermine these best practices or inhibit innovation in this area.”¹⁶

We recommend, therefore, that the Department finalize the model disclosure language as a “safe harbor”; that is, establish a non-exclusive means for plan administrators to (i) achieve regulatory compliance with the model lifetime income disclosure requirement, and (ii) rely on the liability limitation. This would provide flexibility for plan administrators to meet the disclosure requirements of the SECURE Act amendments¹⁷ and Department’s regulatory expectations while allowing them to adapt the disclosure language to the individualized standards of the plan’s pension benefit statement. It would further appropriately make allowance for those unintended instances of technical non-compliance with the safe harbor’s model language that do not warrant forfeiture of the liability limitation provided under amended section 105 of ERISA.¹⁸

Additionally, we request that the disclosure requirements for investments in deferred income annuities be optional rather than mandatory, since plan administrators should be able to satisfy the lifetime income disclosure obligations under the interim final rule regardless of the investments that are held in the accounts of retirement investors.¹⁹

¹⁵ See SECURE Act § 203(b) (amending ERISA section 105 by adding a new section 105(a)(2)(D)(ii)). The disclosures also may include such other similar explanations as provided by the Department. See *id.*

¹⁶ 85 *Fed. Reg.* at 59,141.

¹⁷ See discussion in Section III.A., above.

¹⁸ Any such technical non-compliance, moreover, generally may be remedied with an appropriate cure period and with the understanding that such disclosures are provided at least annually to retirement investors.

¹⁹ We note that the interim final rule does not include model language for deferred income annuities.

IV. Encouraging Retirement Investor Engagement and Participation.

- A. Add to the interim final rule (or in an accompanying release) information on how retirement investors can access and use the Department's retirement tools, such as interactive financial calculators, on the agency's website that can assist retirement investors in determining various amounts that can be targeted for retirement age, since this would allow for much more than a snapshot dollar amount figure appearing on a pension benefit statement by permitting the retirement investor to make multiple real time and projected calculations.

The SECURE Act amendments and implementing Department rules will ensure that retirement investors receive the tangible benefit of seeing how their accrued retirement savings appear (and presumably, will continue to grow) as a lifetime income stream equivalent. Nevertheless, the dollar amount figure appearing on the two lifetime income illustrations may not enable the retirement investor to fully comprehend or appreciate the actual *value* of the figures. Indeed, since the figures will appear on the pension benefit statement as a small fraction of the total accrued amount, retirement investors may become discouraged and disincentivized to save more for their retirement.

We believe that ongoing retirement investor education and initiative is the optimal approach for encouraging retirement saving. Retirement investors may be more likely to manage their retirement savings actively if they initially took steps on their own to determine first how much they have saved, and could save, for retirement, in addition to being provided lifetime income illustrations on their pension benefit statements. In particular, the Department can inform retirement investors of various retirement tools, such as interactive financial calculators available on the agency's website, that can assist retirement investors in determining various amounts that can be targeted for retirement age. The use of calculators and other online tools would allow for much more than snapshot figures appearing on the pension benefit statement by permitting the retirement investor to make multiple real time and projected calculations.²⁰ A retirement investor would further be able to calculate alternative scenarios by modifying the assumptions and projections. The composite figures calculated, collectively, would supplement the lifetime income illustrations and provide a more complete picture of the retirement investor's needs and projected saved amounts at retirement.

By increasing the amounts saved as part of the calculations performed, retirement investors would readily see the differences in the benefits of increased savings. A participant who actively works with the Department's online calculators would be more likely to employ them again and again – a much more proactive approach to retirement saving than simply glancing at a quarterly or annual pair of lifetime income illustrations on the pension benefit statement (helpful as these are). Moreover, retirement research indicates that the use of online calculators successfully

²⁰ The Department further can provide on its own website – as the single “go-to” source – the historical average annual and calendar year total returns for key asset classes, such as domestic equity, foreign equity, domestic bonds, foreign bonds, emerging equity/bonds, stable value, and money market rates. In doing so, the Department can employ and reference well-known market-based indices. By showing average and annual returns, retirement investors can receive a clearer picture of various asset classes' performance and volatility. Based on this information, a retirement investor would be able to choose an investment return on a Department-provided online calculator, consistent with the retirement investor's risk-level tolerance.

raises participant awareness and engagement in retirement planning.²¹ An agency-generated financial calculator also could enable participants to combine and integrate outside income sources, such as IRAs and old 401(k) plans, so that they can generate more accurate retirement savings amounts as well as take on a holistic, rather than piecemeal, approach to retirement planning. We recommend, therefore, that the Department incorporate into the final rule (or provide in an accompanying release) information on how retirement investors can access and use the Department's retirement tools, such as interactive financial calculators, on the agency's website that can assist retirement investors in determining various amounts that can be targeted for retirement age.

B. Add to the interim final rule (or in an accompanying release) the availability of a Department-generated lifetime income chart, listed in successive, tiered amounts, which would allow a retirement investor to see readily how retirement savings can increase if more salary were allocated to the retirement account, information that is not available on the pension benefit statement.

Similarly, we believe the Department itself can make available additional information to retirement investors that would provide an incentive to increase retirement savings. Specifically, the Department can generate a one-page savings income chart, listed in successive, tiered amounts (*e.g.*, in increments of \$5,000 up to \$100,000, and in increments of \$10,000 up to \$250,000, etc.), which could show, for example, in four separate columns: (i) the amount saved, (ii) that amount's current monthly lifetime income stream, (iii) the monthly lifetime income stream at retirement age, and (iv) the projected total accrued amount at retirement age. The chart, which can be included as an annual "stuffer" to 401(k) statements that are mailed out or that are made available online, should be sufficient to show approximate figures applicable to the vast majority of retirement investors.²² An individual can refer to the chart quickly to obtain an approximate dollar amount figure for items (ii) through (iv) above. The chart further allows retirement investors to see readily how their retirement savings can increase if they were to allocate more salary to their 401(k) account, information that otherwise would not be available in the pension benefit statement materials.

We recommend, therefore, that the Department incorporate into the final rule (or provide in an accompanying release) the availability of a lifetime income chart, listed in successive, tiered amounts which would allow a retirement investor to see readily how retirement savings can increase if more salary were allocated to the retirement account. We have attached to this letter a

²¹ See Nathan Voris, "Taking a 'Calculated' Approach to Retirement Readiness," PLANSPONSOR, Aug. 2, 2019 (available at www.plansponsor.com/taking-calculated-approach-retirement-readiness). (In a Logica Research survey of one thousand 401(k) plan participants, just over half used an online retirement planning calculator. Of those who used this type of calculator, 61% took the next positive step, such as (i) increasing their 401(k) contribution level, (ii) altering their spending habits, (iii) accessing online advice through their 401(k) plan, and (iv) asking a financial professional for advice, and even opening a new retirement account.). See also Robert Steyer, "Retirement Calculators Evolve in to Sophisticated Tools," Pensions & Investments, May 13, 2013, pp. 6, 36 ("Independent research and surveys by record keepers show that [web-based financial] calculators can change participants' attitudes about retirement savings and, more importantly, influence actions.").

²² The Department can further make available on its website an expanded chart listing more graduated and/or higher amounts applicable to participants whose retirement savings amounts exceed those on the chart.

sample one-page chart (Attachment A) to show how these amounts might be presented to retirement investors.

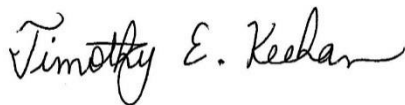
V. **Effective Date and Regulatory Coordination.**

- A. **(1) Confirm that the final rule will be effective at least 12 months after publication in the *Federal Register* (with lifetime income illustrations required beginning no later than one year from the final rule’s effective date). (2) Coordinate with the Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority, Inc. (FINRA) to ensure that the final rule’s requirements do not conflict with SEC and FINRA rules, guidance, and policy.**

The Department states that the interim final rule will be effective one year after publication in the *Federal Register* (i.e., September 18, 2021 as the effective date).²³ On this basis, we request that the Department confirm that the first annual lifetime income illustrations be required no later than September 18, 2022 (i.e., up to one year after the effective date). The Department, however, “intends to issue a final rule sufficiently in advance of the IFR [interim final rule] effective date,” so that the “final rule would supersede the IFR.”²⁴ Since the Department anticipates that the final rule will supersede the interim final rule, we request that the Department likewise confirm that the effective date of the final rule will be at least 12 months after publication in the *Federal Register* (with lifetime income illustrations required beginning no later than one year from the final rule’s effective date). Finally, we request that Department staff coordinate with the SEC and FINRA staffs to ensure that the requirements of the final rule (including the lifetime income illustrations and disclosure language requirements) do not conflict with SEC and FINRA rules, guidance, and policy.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,



Timothy E. Keehan
Vice President & Senior Counsel

²³ U.S. Department of Labor, Employee Benefits Security Administration, *Fact Sheet: Pension Benefit Statements – Lifetime Income Illustrations* (Aug. 18, 2020).

²⁴ *Id.*

ATTACHMENT A

Lifetime Income Savings Chart

Monthly Income Stream

Retirement Saving Amount	<u>Single Life Annuity</u>		<u>Qualified J&S Annuity</u>		Projected Total Amount at Retirement
	Today	Retirement Age	Today	Retirement Age	
\$5,000	\$23	\$65	\$20	\$58	\$14,256
\$10,000	\$46	\$130	\$40	\$117	\$28,512
\$15,000	\$69	\$195	\$61	\$175	\$42,768
\$20,000	\$91	\$261	\$82	\$233	\$57,024
\$25,000	\$114	\$326	\$102	\$292	\$71,280
\$30,000	\$137	\$391	\$123	\$350	\$85,536
\$35,000	\$160	\$456	\$143	\$408	\$99,793
\$40,000	\$183	\$521	\$164	\$466	\$114,049
\$45,000	\$206	\$586	\$184	\$525	\$128,305
\$50,000	\$228	\$652	\$205	\$583	\$142,561
\$55,000	\$251	\$717	\$225	\$641	\$156,817
\$60,000	\$274	\$782	\$245	\$700	\$171,073
\$65,000	\$297	\$847	\$266	\$758	\$185,329
\$70,000	\$320	\$912	\$286	\$816	\$199,585
\$75,000	\$350	\$977	\$307	\$875	\$213,841
\$80,000	\$366	\$1,042	\$327	\$933	\$228,097
\$85,000	\$392	\$1,132	\$348	\$991	\$242,353
\$90,000	\$411	\$1,173	\$368	\$1,050	\$256,609
\$95,000	\$434	\$1,238	\$389	\$1,108	\$270,866
\$100,000	\$457	\$1,303	\$409	\$1,166	\$285,122

For amounts greater than \$100,000, please visit the Department of Labor at <http://www.dol.gov>.

Assumptions: (1) current savings amount is for a 40-year-old; (2) the individual will die at age 80; (3) the individual will retire at age 67; (4) the retirement account earns no interest once the individual begins to withdraw funds; (5) no taxes, fees, or fines have been considered in this example; and (6) assumed statement date is as of June 30, 2020.