INVESTMENT COMPANY INSTITUTE®

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Filed Electronically

November 17, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
Attention: RIN 1210–AB20

Re: *RIN 1210–AB20; Pension Benefit Statements—Lifetime Income Illustrations*

Dear Sir or Madam:

The Investment Company Institute[1] is pleased to submit comments on the Department of Labor's (the Department's) interim final rule (IFR) implementing the new lifetime income disclosure requirement under section 105 of the Employee Retirement Income Security Act of 1974 (ERISA). Section 203 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act), amends section 105 of ERISA to require defined contribution (DC) retirement plans to include a lifetime income stream estimate at least annually on participant benefit statements. The estimate must set forth the lifetime income stream equivalent of the participant's total account balance under the plan, calculated as both a single life annuity (SLA) and a qualified joint and survivor annuity (QJSA).

As a threshold matter, our letter strongly recommends that the Department provide guidance clarifying the circumstances under which the use of alternative methods of illustrating retirement income estimates would not constitute the rendering of fiduciary investment advice under ERISA. This guidance is critical to ensuring that the innovative and effective retirement income illustration methods and tools already in use today and valued by participants (or future tools yet to be developed), are not

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$26.1 trillion in the United States, serving more than 100 million US shareholders, and US$7.7 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

supplanted by the "one-size-fits-all" annuity approach required by the SECURE Act. The loss or discontinuation of such widely used tools would have an untenable impact on the ability of plan participants and beneficiaries to understand how their savings and investment actions can impact their retirement preparedness and achieve better outcomes in retirement. We also recommend in Parts II and III of the letter that the Department modify certain assumptions and supplement the model disclosure language specified in the IFR, including:

- Permitting use of the age 67 assumption regardless of the participant's actual age;
- Changing the QJSA estimate to reflect a 50 percent survivor annuity;
- Adding model language explaining the impact for women of purchasing an annuity outside of an employer's plan;
- Adding model language making clear that an annuity distribution option may not be available from the plan;
- Adding model language regarding the potential impact of insurance loads on the monthly payment shown under the illustration; and
- Adding model language regarding the existence of other calculation methods for estimating the retirement income that could be generated by a participant's account balance.

In Part IV, we urge the Department to modify the special rules regarding participants who purchased deferred annuities to permit use of the generally applicable assumptions described in section 2520.105-3(c) as an alternative to use of the actual annuity contract terms. In Part V, we recommend certain clarifications to the limitation on liability set forth in section 2520.105-3(f) and expansion of the liability relief to cover lifetime income disclosures relating to deferred annuities. Finally, we urge clarification of the effective date and other miscellaneous issues, as discussed in Parts VI and VII below.

I. Provide Clarity that Alternative Illustrations are Education Rather than Advice

The Department must provide greater clarity about providing alternative retirement income illustrations beyond the single life annuity and joint and survivor annuity illustrations required by the IFR. In addition to confirming the general permissibility of alternative illustrations (as the IFR does),[2] guidance should confirm that alternative retirement income illustrations and modeling tools meeting certain basic criteria are considered educational in nature rather than fiduciary investment advice under ERISA. Failure to provide assurance that alternative illustrations are not considered fiduciary advice likely will prompt risk-averse decisions by plan sponsors to offer only the standardized illustrations required by the rule, much to the detriment of plan participants.

Beginning long before enactment of the SECURE Act, many of ICI's members developed retirement income illustrations and interactive modeling tools in response to the needs of plan participants and

[2] 85 Fed. Reg. 59132, 59141 (September 18, 2020); 29 C.F.R. § 2520.105-3(g).

beneficiaries.[3] These tools allow plan participants and beneficiaries to efficiently assess how their savings and investment actions can impact their retirement preparedness and achieve better outcomes, commonly using calculation methods that differ from the SECURE Act's annuity-based calculation method. These tools also are refined over time in response to market changes and participant input.

We appreciate that the Department has acknowledged the value of these disclosure tools and specified in the IFR that plan administrators are not prohibited from including additional lifetime income stream illustrations on benefit statements. The preamble includes the following observations:

> Many of these illustrations [already being provided] are interactive, stochastic, and tailored to the individual plan and plan participant. According to [prior] 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.[4]

Because the IFR grants a liability safe harbor only to the specified annuity-based illustrations, we have genuine concerns that plan sponsors may use only illustrations for which a fiduciary safe harbor is available, causing other, more advanced illustrations—like those recognized by the Department in the IFR—to ultimately be supplanted to the detriment of plan participants. It is critical that the Department ensure the continued availability of these alternative illustrations by providing clarity, either in the final rule (or its preamble) or in separate guidance (such as an updated Interpretive Bulletin 96-1), that alternative illustrations and modeling tools meeting certain basic criteria[5] are considered educational in nature rather than fiduciary investment advice.[6]

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[3] See, e.g., "Getting Income Projections Right," *PlanAdviser*, October 16, 2020, available at https://www.planadviser.com/exclusives/getting-income-projections-right/.

[4] 85 Fed. Reg. 59132, 59141.

[5] For example, conditions could include that the materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time; that there is an objective correlation between the income stream generated by the materials and the information and data either supplied by the participant or otherwise used to generate the income stream; and that all material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, projected contribution, earnings and inflation rates, rates of return and other features, and rates specific to income annuities or systematic withdrawal plans) which may affect a participant's assessment of the different income streams are either disclosed or specified by the participant.

[6] The Department too has signaled recognition of the need for this guidance: "Comments . . . 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 . . . 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

The continued availability of these innovative and valuable retirement income illustrations and modeling tools is essential. Merely confirming that plans may provide alternative illustrations on the benefit statement, which the IFR does in section 2520.105-3(g), is not sufficient in the face of the limitation on liability in section 2520.105-3(f) offered only to the annuity-based estimates required by the IFR. Providing plans assurance that alternative illustrations—whether included on the benefit statement or other materials, or made available on plan websites—are not considered fiduciary advice is necessary to avoid a "race to the bottom" where only the standardized estimates are provided and future innovation in this area is stifled.

Such clarification also would be complementary to the Department's recent modernization of the rules regarding electronic delivery of retirement plan communications, which includes a new safe harbor for delivery of ERISA-required notices.[7] Among the many benefits the Department cited in support of the proposed e-delivery rule,[8] is providing plans the flexibility "to take advantage of existing and developing technology and to create internet-based experiences that result in a better understanding of the disclosed information,"[9] including, for example, the proliferation and availability of "apps with interactive features that will allow participants to navigate with ease and conduct account transactions."[10] In addition, the Department recognized "that participants can be nudged to save more as they interact more with various website tools and gain more financial knowledge," and it was "encouraged to find that many plan administrators now offer on their websites various financial education tools, including retirement income planning tools and budgeting tools."[11]

Finally, many existing illustrations include projections of future contributions and earnings on the account balance, in contrast to the IFR's assumptions, which require the estimates to be based on the participant's current account balance. Projected account balances can give participants, particularly younger or newer participants, a more realistic picture of future retirement income. For younger participants and participants new to the plan, illustrations based on a snapshot of the current account balance will have very little value, and could even discourage continued plan participation. The Department should likewise confirm that illustrations and interactive modeling tools that incorporate account balance projections are education rather than advice.

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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. 85 Fed. Reg. 59132, 59141.

[7] 85 Fed. Reg. 31884 (May 27, 2020).

[8] 84 Fed. Reg. 56894 (October 23, 2019).

[9] Id. at 56900.

[10] Id. at 56916.

[11] 85 Fed. Reg. 31884, 31916.

II. Modify Certain Assumptions Specified in the IFR

The assumptions specified in the IFR (at section 2520.105-3(c)) generally represent a reasonable approach to implementing the statutory requirement of providing SLA and QJSA illustrations. We recommend, however, that the Department make the following minor adjustments to the assumptions.

A. Age assumption. The IFR requires an assumption that the participant is age 67 on the commencement date, unless the participant is older than age 67, in which case the participant's actual age must be used. We recommend that the final rule require an age 67 assumption even if the participant is older. In some cases, the participant's date of birth may not be readily available (and in some cases unattainable) to the recordkeeper or other service provider preparing the benefit statement. The ability to use age 67 for all participants would be more practical.

B. QJSA percentage. For purposes of the QJSA illustration, the IFR requires plan administrators to use a qualified joint and 100 percent survivor annuity, which will pay the same fixed monthly amount for the life of the surviving spouse after the participant's death. We recommend that the final rule require illustration of a 50 percent survivor annuity. A 50 percent survivor annuity is more commonly offered in plans with annuity distribution options.

III. Improve Certain Aspects of the Model Disclosure Language

We recommend expanding the IFR's model disclosure language (provided in section 2520.105-3(d)) to convey critical information regarding certain inherent limitations of the illustration.

A. Gender-specific mortality. The IFR (at section 2520.105–3(d)(8)(i)) requires an explanation that the actual monthly payments that may be purchased with the value of the account will depend on numerous factors and may vary substantially from the illustrations provided. The model language for this explanation includes the following statement:

"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 of an employer's plan may provide a larger monthly payment for males than for females since females are expected to live longer."

We think it would be clearer to directly articulate the impact for women, as well as for men, of purchasing an annuity outside of an employer's plan. We recommend that the model language also highlight that the payment for females may be lower than what is illustrated, if an annuity is obtained outside of the employer's plan, since that annuity will be based on longer female life expectancies.

B. Annuity availability. As currently drafted, the generally-applicable model explanation language could imply that an annuity is available from the plan. The final rule should include language

that an annuity distribution option may not be available from the plan, despite the illustration's use of annuity-based estimates.

C. Insurance loads. The preamble to the IFR indicates that the Department determined not to include in the calculation a separate assumption regarding insurance loads,[12] which refers to the difference between the market price of an annuity and the price of an actuarially fair annuity. As acknowledged, there is wide variation in insurance loads charged in the marketplace.[13] The model disclosure language should include a disclaimer regarding the potential impact that such loads may have on the monthly payment shown under the illustration.

D. Existence of other illustration methods. As described above, the Department should add a disclaimer to the model language explaining that there are other calculation methods for illustrating retirement income, other methods may generate different estimated amounts from the amounts on the benefit statement, and the plan administrator may provide other illustrations or tools for estimating retirement income. As the Department recognizes, other calculation methods are, in many respects, superior for financial and retirement planning to a one-size-fits-all model like that in the IFR. It is clear that participants and beneficiaries would benefit from being made aware that alternatives are available to them.

IV. Modify Special Rules Regarding Participants that Purchased Deferred Annuities

We urge the Department to modify the IFR's special rules regarding participants who purchased deferred annuities, as set forth in section 2520.105-3(e)(2), to permit use of the generally applicable assumptions described in section 2520.105-3(c) for those participants. The IFR currently requires that if any portion of a participant's accrued benefit currently includes a deferred lifetime income stream purchased by the participant in the form of a single life annuity or a qualified joint and survivor annuity pursuant to a contract with an issuer licensed under applicable state insurance law, such as a deferred income annuity contract or a qualifying longevity annuity contract, the amounts payable under that contract shall be disclosed on the participant's benefit statement using the terms of the contract. For example, the benefit statement must include the date payments are scheduled to commence under the contract, the age of the participant on such date, and the frequency and amount of such payments payable as of the commencement date. Unlike the rule for plans that offer distribution annuities in section 2520.105-3(e)(1), this provision would not permit the option to use the otherwise applicable assumptions from section 2520.105-3(c) for satisfying the lifetime income stream disclosure requirement.

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[12] 85 Fed. Reg. 59132, 59136.

[13] Id.

The terms "deferred annuity" and "deferred lifetime income stream" as used in the IFR are not expressly defined. These terms could be interpreted to include the multitude of fixed and variable annuity contracts available as accumulation investment options in defined contribution retirement plans. Under these products, participants are entitled to elect an annuity payout based on the amount in the participant's account and the annuitization factors under the contract. Alternatively, participants may choose not to annuitize the assets held in such investment options and may choose to exchange out of the annuity investment and reinvest the money in a different (non-annuity) investment option available under the plan, possibly subject to surrender charges or other restrictions. We urge the Department to treat these annuity investment options the same as other investment options available under a plan, by permitting use of the IFR's generally applicable assumptions described in section 2520.105-3(c) (and the explanations set forth in section 2520.105-3(d)) to generate the lifetime income stream illustration for the participant's entire plan account, regardless of how the participant's account is allocated among the available investment options.

Because of the wide range of products that could fit into the category of "deferred annuity," including products which may combine deferred annuities with other investment components, we caution against a separate and rigid rule for "deferred annuities." In some cases, it may be difficult or practically impossible to separate the deferred annuity from the other components of the investment for satisfying section 2520.105-3(e)(2) of the IFR. Furthermore, providing separate lifetime income estimates for different portions of a participant's account balance could be confusing for participants.

Instead of requiring plans to use the specific contract terms as currently set forth in section 2520.105-3(e)(2), the Department could require plans to provide additional information to participants who are invested in deferred annuity products, such as how to obtain annuity quotes and other details about the annuity option. This type of information ordinarily is provided through other required disclosures, but reminders in conjunction with the benefit statement illustration may be helpful.

We believe this approach is preferable to the IFR's current approach. It is consistent with section 2520.105-3(e)(1), which provides options for plans that offer distribution annuities, rather than requiring use of the contract terms. The optional approach also is consistent with the statutory language of section 203 of the SECURE Act, which does not require segregation of the portion of a participant's accrued benefit that is invested in an annuity option for purposes of the disclosure requirement.

V. Expand Application of Limitation on Liability

Regardless of whether the Department modifies the special rules regarding participants who purchased deferred annuities as recommended above, we strongly recommend that the Department expand the limitation on liability described in section 2520.105-3(f) to cover lifetime income disclosures relating to deferred annuities. The liability limitation in the IFR currently covers only those illustrations derived using the assumptions set forth in section 2520.105-3(c) (generally applicable assumptions) or section 2520.105-3(e)(1) (special rules for distribution annuities) and accompanied by the associated model

disclosure language or Model Benefit Statement Supplement. It would not cover illustrations provided in accordance with section 2520.105-3(e)(2) for participants who purchased deferred annuities.

There is no reason to deprive plan administrators of the liability relief in the context of deferred annuity disclosures, given that plan administrators will have to rely on information provided by third party providers to generate these disclosures. The plan administrator may have no ability to independently generate or verify the information needed to generate the annuity disclosure. The Department could condition the availability of liability relief on the plan administrator reasonably and in good faith relying on information received from or provided by the issuer of such deferred annuity investment or investment manager of the investment that includes an annuity component. We note that the Department has provided similar relief to plan administrators in other contexts where reliance on third-party information is necessary.[14]

In addition to expressly covering deferred annuity disclosures, we recommend the following modifications to the limitation on liability set forth in section 2520.105-3(f):

A. "Substantially similar" standard. The Department should clarify the "substantially similar" standard for the required explanations set forth in section 2520.105-3(d)(1) and section 2520.105-3(e)(1)(iii) (and, if modified as recommended, section 2520.105-3(e)(2)), by adding the following underlined language to section 2520.105-3(f)(2): "[t]he benefit statement includes language written in a manner calculated to be understood by the average plan participant and substantially similar in all material respects to . . . ." This additional language, which is from ERISA section 105(a)(2)(A)(iii) relating to participant benefit statements, is important to avoid "foot faults."

B. Additional explanation language. The Department should explicitly state that a plan administrator will not lose the liability relief under section 2520.105-3(f) solely by providing additional clarifying information designed to supplement the Department's model disclosure language or Model Benefit Statement Supplement. For example, many plan administrators likely will want to include a statement explaining that an annuity distribution option is not available from the plan—language which currently is not included in the Department's model language. Providing such key information should not result in loss of the liability relief.

C. Model language as safe harbor. The Department should consider specifying that use of either the model disclosure language or one of the Model Benefit Statement Supplements provides a safe harbor method of qualifying for the liability relief under section 2520.105-3(f), and that

[14] See, e.g., Labor Reg. § 2550.404a-5(b)(1), describing the fiduciary requirements for disclosure in participant-directed individual account plans: "A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative."

other approaches to providing the required explanations could qualify for the liability relief as long as the content requirements are met.

D. Delivery method. With the increasing use of electronic forms of communication and the enhanced effectiveness of information and tools provided on plan websites, the Department should consider permitting flexibility in the delivery of the lifetime income illustration. For example, the illustrations could be furnished on a secure participant-designated page of the plan website in reasonable proximity to the required annual benefit statement and in a manner calculated to be understood by the average plan participant. It should not matter whether the illustration is embedded within an electronically-generated benefit statement or appended to the end of an electronically-generated benefit statement. Rather, plan administrators and their service providers should have the flexibility to design a benefit statement with all the required content provided through layered disclosure,[15] as long as a link prominently identified on the benefit statement landing page directs the participant where to find each required component of the statement. The Department should recognize that this method will meet the requirements for furnishing the lifetime income illustration and will be eligible for the limitation on liability.

VI. Clarify Application of Effective Date and Reliance on IFR

The Department should clarify how to apply the effective date of the rule and whether plans may rely on the IFR to the extent any changes are made in the final rule.

A. Deadline for first required lifetime income estimate. The IFR is scheduled to be effective September 18, 2021 and shall apply to pension benefit statements furnished after that date. Because the rule requires only one benefit statement in a given year to include the lifetime income estimate, questions have been raised as to the deadline for plans to provide the first required lifetime income estimate. We understand that Department officials have informally stated that plan administrators will satisfy the rule if the lifetime income disclosure is provided in any quarterly benefit statement that is provided within 12 months after the effective date. The Department should formally confirm this interpretation in the final rule or preamble.

B. Reliance on IFR. We appreciate the Department's intention to adopt a final rule sufficiently in advance of the IFR's effective date to minimize compliance burdens.[16] Importantly, plan administrators and their service providers have begun building systems to implement the requirements. To the extent the final rule contains any changes from the IFR, the specific

[15] Layered disclosure has been widely recognized as a more effective disclosure methodology. See https://www.sec.gov/news/press-release/2020-172.

[16] 85 Fed. Reg. 59132, 59141.

assumptions and rules set forth in the IFR should be grandfathered for a reasonable period. Reprogramming for any changes from the IFR will take time and may not be administratively practicable by the effective date.

VII. Clarify Other Miscellaneous Issues

The Department should address certain other miscellaneous issues arising in special circumstances, including certain issues unique to 403(b) plans, which may offer participants the choice of different investment platform providers (or "vendors") with their own separate recordkeeping arrangements.

A. Accounts held by more than one recordkeeper. For plans with multiple recordkeepers, such as a multi-vendor 403(b) plan, it is important that the Department confirm that the lifetime income illustration provided with respect to the participant or beneficiary's account balance held by one recordkeeper/vendor does not need to take into account any balances held by another recordkeeper/vendor for the same participant. Any other interpretation would be administratively unworkable for these types of plans.

B. Grandfathered pre-2009 403(b) contracts or accounts. In the past, the Department has provided relief from various requirements under ERISA for certain 403(b) plan annuity contracts and custodial accounts issued prior to 2009, in view of significant 403(b) regulatory changes applying after that date which raised a need to treat such accounts as grandfathered.[17] With respect to 403(b) annuity contracts and custodial accounts that were issued prior to 2009 and considered grandfathered under FAB 2009-02, we recommend that the Department provide relief similar to FAB 2012-02R, Q&A 2 (providing relief from the participant fee disclosure requirements of 29 CFR § 2550.404a-5). The guidance we envision would indicate that:

> The Department will not take enforcement action against any plan administrator with respect to any annuity contract or custodial account described in section 403(b) of the Internal Revenue Code if:
>
> 1. the contract or account was issued to a current or former employee before January 1, 2009;
>
> 2. the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account for periods before January 1, 2009;

[17] See Field Assistance Bulletin (FAB) 2009-02 (July 20, 2009), FAB 2010-01 (Feb. 17, 2010), and FAB 2012-02R (July 30, 2012).

3. all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and

4. the individual owner is fully vested in the contract or account.

The requested relief parallels the conditions of FAB 2012-02R and would provide consistent treatment for pre-2009 grandfathered accounts with respect to the new lifetime income disclosure requirements.

C. Potential conflict with tax qualification requirements. Plans subject to survivor annuity requirements under the Internal Revenue Code, such as a defined contribution plan in which the participant elects a life annuity option, generally must provide as part of a written QJSA explanation required under Code section 417(a)(3), a description of the financial effect of electing each optional form of benefit available to the participant (i.e., the amounts and timing of payments to the participant under the form of benefit during the participant's lifetime, and the amounts and timing of payments after the death of the participant). The content of this required QJSA explanation could conflict with the estimates required by the IFR and the Department should confirm that the provision of the QJSA explanation will not violate its rule.

D. Other potential regulatory conflicts. The Department should consider conferring with the Financial Industry Regulatory Authority (FINRA) and other regulators with jurisdiction over investment disclosures and guaranteed income statements to ensure that any conflicts (actual or perceived) between the requirements of the IFR and the requirements of other regulators are addressed in a manner that provides comfort to plan administrators and their service providers that such requirements can be met simultaneously.

* * *

ICI appreciates the opportunity to comment on the IFR. If you have any questions about our comment letter, please feel free to contact David Abbey (202-326-5920 or david.abbey@ici.org) or Elena Barone Chism (202-326-5821 or elena.chism@ici.org).

Sincerely,

/s/ David Abbey

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/s/ Elena Barone Chism

Elena Barone Chism
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