American Benefits Council

August 7, 2013

Submitted electronically via regulations.gov

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

Re: Advance Notice of Proposed Rulemaking – lifetime income illustrations; (RIN 1210-AB20)

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to provide information and comments to the Department of Labor (DOL) on the Advance Notice of Proposed Rulemaking (ANPRM). The ANPRM relates to a possible requirement that a participant's accrued benefit be expressed on his/her pension benefit statement as an estimated lifetime stream of payments, in addition to being presented as an account balance. The Council also appreciates the additional time provided for comment as we believe this will help ensure adequate time for more complete and thoughtful input.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

Importance of This Project

Council members recognize the importance of this project. Presenting account balances as lifetime income streams can help participants understand how much they need to save; a lump sum amount may seem to be a substantial amount of money, but

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when translated into an annual income, it may seem far more modest. The Council also agrees that the retirement security of millions of baby boomers and future generations depends not only on their ability to accumulate sufficient assets for retirement but also on how those resources are utilized to provide retirement income. Presenting account balances as lifetime income streams on benefit statements can be an important educational step toward prompting participants to consider the income they will need in retirement to maintain their standard of living. As illustrated by this letter, there is a wide range of views on various aspects of the issues based on the significant experience and expertise of benefits professionals and we urge the DOL to continue to pursue an open dialog on this very important subject to make sure that the final regulations create an excellent solution that works.

ELECTRONIC DELIVERY

This project also highlights the importance of preserving the electronic delivery rules in Field Assistance Bulletin 2006-3 (the "FAB"). More and more plan sponsors are offering on-line interactive tools that can allow participants to understand not only how much lifetime income they have earned, but also to understand what factors – such as future contributions and plan earnings -- can affect that income and to what extent. Without the provisions of the FAB, these interactive tools will be less common; the FAB facilitates their growth.

Moreover, the more important the disclosure, the more important it is that the disclosure is available on-line where it can be accessed from anywhere and cannot be lost. We urge the DOL to preserve the electronic delivery rules of the FAB.

MANDATE

Council members remain concerned about mandates rather than voluntary disclosures, and would instead recommend that the DOL encourage this disclosure by, for example, providing models and on-line resources such as the on-line calculator created by the DOL as part of this project.[1] Similar to the fee examples provided in the prospectus of a registered security, the DOL model could illustrate that a lump sum of X could create an income stream of Y at age 65 and provide the relevant interest rate and mortality assumptions. Under one approach in a voluntary system, plan sponsors would be permitted to continue to evaluate how best to serve their participants' needs, and whether a lifetime income illustration would be helpful, consistent with the voluntary nature of the private plan system. If plan sponsors decide to provide lifetime

[1] Some Council members have questioned whether the DOL has the legal authority to require significant calculations and projections when the statute merely requires reporting of the participant's "total benefits accrued." The Council recommends the DOL perform a thorough legal analysis of this issue in connection with the benefit statement project.

income illustrations, they could choose whether to provide illustrations on benefit statements, provide access to a tool on the plan website (that could be interactive and permit modeling based on different assumptions), or direct participants through a link, for example, to the DOL website. In the event that the DOL determines that an income illustration becomes an additional required element in a participant statement, such a requirement could be satisfied by simply adding a link or web address to the statement.

The Council believes disclosure and education are the first steps toward increasing the availability and use of lifetime income products but recommends a simpler approach than outlined in the ANPRM. It is important to keep in mind that this additional disclosure will not be made in isolation and that the benefit statement already contains much useful information. Required disclosures that will make benefit statements overly complicated to review would likely be counterproductive for participants.

FIDUCIARY ISSUES

By far the most important issue for our members is ensuring that the lifetime income annuity illustrations do not give rise to new liabilities that can interfere with companies' ability to participate effectively in the voluntary private retirement system.

The maintenance and growth of defined contribution plans depend to a large extent on how well the potential liabilities associated with such plans can be managed. We are hearing a consistent message from our members that potential litigation liabilities are having a material effect on employers' interest in introducing new retirement tools and solutions. Over the last 10 years or so, the frequency and intensity of this message have grown enormously.

It is certainly true that the litigation liabilities have not been an issue with respect to the existing lifetime income disclosures being made today on benefit statements on a voluntary basis. But that does not give our members any meaningful comfort. Litigation issues evolve; some types of litigation that are common today were rare 10 years ago. There is no assurance that lifetime income illustrations will not develop into a material litigation issue.

In this context, we have already heard serious concerns from plan sponsors about ensuring that the required disclosures do not give rise to new liabilities. For the plan sponsors we have heard from, it was of great concern that the ANPRM does not include any explicit protections from fiduciary liability. For example, one plan sponsor was concerned that the 7% safe harbor for future returns may not be a safe assumption with respect to a participant population or portion of a participant population that, for example, invests heavily in money market funds. Others are concerned more generally that, for example, income illustrations that overstate available lifetime income streams could give rise to claims that the illustrations were misleading or that the participants have a right to such amounts.

We believe that a lawsuit based on the fact that an employer's projections turn out to be erroneous would have no merit, especially if such projections are in accordance with a regulatory requirement. So one argument for not having explicit protection from liability is that it is unlikely to be needed in light of the requirement that there be a lifetime income illustration. But if this is the argument, why not eliminate any uncertainty by making it explicit that there is no fiduciary liability for complying with the lifetime income illustration rules.

Another argument that explicit fiduciary protection is unnecessary is that the liability issue can be addressed simply by disclosures that make it clear that the illustrations are just estimates, based on assumptions and projections. Again, this does not address our members' concerns because claims could theoretically be based on the use of ill-advised estimates, assumptions, and projections that are not appropriate for a particular workforce or participant.

Moreover, without such explicit protection from fiduciary liability, there could very well be meritless suits filed that are expensive and time-consuming to deal with.

If employers will be required to provide speculative disclosures that will by definition be directional rather than precise for the participant population, employers need a clear path to complete protection from lawsuits. Without that clear path, the rule in the ANPRM could have severely counterproductive effects on the defined contribution plan system.

Accordingly, we ask that the proposal include a provision that exempts any fiduciary from liability by reason of providing disclosures that comply with the requirements of the new rule. Moreover, this fiduciary protection should be framed broadly to apply to any reasonable lifetime income illustrations regardless of whether the illustrations are required. This is very important for two reasons. First, it would be severely counterproductive to limit fiduciary protections to required illustrations, thus casting doubt on illustrations and interactive tools that go beyond what is required. Second, without broad fiduciary protection, there could be a negative inference with respect to illustrations and tools that are being provided today, thus "punishing" those who have attempted to do exactly what the ANPRM is trying to achieve.

It would also be very helpful to clarify that the provision of projections is not directly or indirectly considered to be "investment advice," giving rise to fiduciary status.

Finally, the provision of a model disclosure with model disclaimer language would be helpful in connection with the fiduciary protection, keeping in mind our earlier discussion regarding the need to make any disclosures that are required to be part of the statement concise and simple, and taking advantage of the availability of electronic disclosure discussed earlier as well.

ANPRM Issues Generally

In case the DOL decides not to go with a simplified approach with website links or addresses for additional information as previously described, and instead decides to pursue requiring benefit projections as outlined in the ANPRM, our members have additional comments for your consideration.

Safe Harbor

The issue we would like to raise with regard to the safe harbor structure is whether the DOL should publish a safe harbor that requires use of particular assumptions or a more flexible safe harbor based on an approach similar to the approach the DOL took in Interpretive Bulletin 96-1. We have members with different views on this issue. Some of the Council's members would prefer a single set of mandated assumptions so that all participants will receive projections based on the same assumptions. These members believe that a single set of mandated assumptions will eliminate a large amount of participant confusion that would be generated by having the same account balance produce different lifetime income streams based on which employer is providing the benefit statement. These members also believe that avoiding confusion is critical to fulfilling the purpose of effective communication to participants.

Other Council members believe that there should not be specific safe harbor assumptions. Instead there should be a single "reasonableness" standard that effectively becomes the safe harbor. These members point out that the use of specific safe harbors could be interpreted in such a manner as to stifle innovation and discourage the provision of, for example, interactive tools that help participants to better understand their own situations as well as the effects of modifying certain variables, such as contribution levels.

Still other Council members prefer a combination of consistency and flexibility. The remainder of this letter is based on the assumption that the ANPRM's regulatory structure — with both a reasonableness standard and specific safe harbors — is retained.

Simplicity Critical

The ANPRM would require the presentation of seven numbers, in addition to the current account balance, as illustrated by Appendix A of the ANPRM. From a theoretical perspective, we perfectly understand the rationale underlying each of the seven numbers. But the presentation of a total of eight numbers will be overwhelming for many participants and will undermine the purposes of this project—to communicate effectively to participants. This is especially true in light of the recent increases in the amount and complexity of the information presented on the benefit statement.

From a policy perspective, we urge you to simplify the requirements so that only two numbers are required: the current account balance and an income stream over the participant's lifetime. This is a simple understandable presentation that will achieve the key goals of the ANPRM: (1) illustrate that a seemingly large lump sum may not translate into a sufficient stream of lifetime income, and (2) convey to participants the importance of thinking about their retirement savings in terms of lifetime income.

Some Council members believe that the annuity should be a form of inflation-indexed annuity, which would provide a more accurate picture of the buying power of the annuity. Those members point out the inconsistency of discounting projected accounts for inflation but showing an unadjusted annuity.

Some Council members point out that it would be less expensive to provide these lifetime income illustrations if a uniform age, such as age 65, could be used as the commencement date for the lifetime income being illustrated. The use of a single age, which does not vary based on plan terms or a participant's date of birth (unlike Social Security retirement age), will make it simpler and less expensive to program the illustrations, which will save plans and participants unnecessary expense. Moreover, in the context of a defined benefit plan, "normal retirement age" has far less significance than in other contexts, so that the use of each plan's normal retirement age does not serve a sufficiently meaningful purpose to justify the cost.

Another point raised by some Council members is that rounding conventions may be appropriate in presenting lifetime income amounts. Without such rounding, there could be an appearance of precision that could be misleading.

PROJECTIONS

If the benefit statement only provides one lifetime income amount, the next question is whether that amount should include a projection of future contributions and account earnings. Our members have different views on that topic. Some believe that projections are too speculative and will lead to unjustified confusion and misperceptions. These members favor showing lifetime income based on the current account balance. In this regard, it may be simpler to describe the lifetime income amount as based on a projection of no account earnings and no contributions, rather than based on the assumption that the participant has achieved normal retirement age. Although economically identical, the former is understandable, the latter is confusing. (Of course, in this case, there would be no discount for inflation.)

Other members believe that showing an unrealistic number based on no account earnings or future contributions is itself very misleading, and further, could be viewed as particularly inconsistent for participants that have been auto-enrolled and whose current allocations will continue without definitive action on their part. Moreover, such a number will show small income streams for young participants, thereby not conveying to them the enormous power of compounding interest and the importance of contributing at young ages.

Finally, other members favor projecting account earnings, but not future contributions. Account earnings are based on actual amounts already in the plan and convey effectively to young participants the importance of contributing early. Future contributions are far more speculative, since they depend on, for example, future tenure with the employer, future plan designs, and the future financial condition of the employee. Finally, using last year's contribution level as a safe harbor may or may not be appropriate, depending on the circumstances.

ANNUITY VERSUS INSTALLMENTS

The next question is whether the lifetime income stream presented should be based on annuity payments, as under the ANPRM, and/or on installment payments. Council members have different views on this issue.

Some Council members support the position taken in the ANPRM regarding the use of annuity payments. Those members point out that one of the key aspects of the lifetime income illustration is to raise awareness of the longevity risk, i.e., the risk that participants will outlive their retirement savings. The use of annuity illustrations highlights this issue for participants and focuses attention on the only products that guarantee income for life. In addition, some members note that permitting either annuity or installment illustrations will result in even more material differences between employers, leading to significant participant confusion that will defeat the purpose of the illustration. These members note that the new required disclosure on the participant statement would not change the more customized tools available to participants that can be varied based on actual distribution approaches, but would, on the contrary, make participants more likely to use such other tools. In this way, the more inquisitive participants can explore different approaches without creating confusion for other participants who look only at the required numbers.

Other Council members favor flexibility in allowing use of systematic drawdown in addition to or in lieu of annuities for the lifetime income illustration. These systematic drawdowns could have some guarantees if coupled with products such as guaranteed withdrawal benefits and longevity insurance. Council members favoring this approach point out that installment payments are far more common in present practice and that basing illustrations on less common behavior is not as effective, and note that focusing exclusively on annuity payments favors one industry's products over another's. Also, limiting illustrations to annuity payments restricts flexibility, can stifle innovation, and may not reflect future product developments.

Finally, using systematic drawdowns may produce smaller lifetime income amounts, which could stimulate greater contributions.

SAFE HARBOR ASSUMPTIONS

Council members also expressed a number of concerns regarding the specific safe harbor assumptions set forth in the ANPRM. Some Council members have questioned using a 7 percent investment return and 4 percent real rate of return, asking whether these figures could present an overly optimistic view of a participant's savings. These members are concerned that this could have counterproductive effects by causing participants to save less and/or invest too conservatively. Other Council members believe that the 7 percent safe harbor is appropriate from an economic perspective, and provides participants with a helpful perspective on the true time value of money and thus the value of contributing as early as possible.

Some Council members have expressed concern regarding the use of a unisex safe harbor mortality table. Council members holding this view point out that female participants are not well served by the use of a unisex table, since if they have to purchase an annuity on the retail market, the illustration on the benefit statement will systematically overstate the amount of the annuity that they can buy with their account balance.

From a more technical perspective, Council members have asked for more guidance on how to project contributions. The text of the proposed requirement simply references the "current annual dollar amount." The preamble indicates that this is a reference to the actual contribution amount for the prior year. If this is the intent, it should be clarified in the language of the regulation. In addition, Council members have pointed out that basing safe harbor projected contributions on the prior year's contributions does not work for new participants. Nor does it work well for individuals who only participated for part of the prior year.

Council members also question whether the potential future effects of contribution limits (e.g., sections 402(g) and 415) need to be taken into account when the participant is already contributing the maximum allowed.

The Council also recommends the DOL closely coordinate with FINRA on any projection requirements that require performance assumptions. We understand that, for service providers subject to FINRA regulations, FINRA Rule 2210 currently prohibits predicting or projecting performance or implying past performance will recur. In addition, some service providers subject to FINRA oversight also may be offering "investment analysis tools," which are interactive technologies that produce simulations based on the likelihood of various investment outcomes. There tools are made available under a separate FINRA Rule (2214) that has specific disclosure and other requirements. The Council recommends that the DOL rule accommodate other methods of projections currently permitted under the FINRA rules and clarify (with the assistance of FINRA) that the type of disclosure required by the DOL would meet FINRA's requirements for projections without additional disclosures. It would also be helpful for the DOL to clarify whether proper assumptions used in the context of benefit statement projections can be used for other similar purposes without fiduciary liability.

ANNUITY OPTIONS

As we read the ANPRM, if a plan offers an annuity distribution option, the assumptions used under the annuity option are automatically treated as the safe harbor method for converting an account into an annuity. We agree that such assumptions should be a safe harbor method, but they should not be the only safe harbor method. For example, if the annuity option is used very little, it may not make sense to preclude use of the generally available safe harbor. We also note that as this is a developing area, over time a plan may have more than one annuity provider, which would complicate this requirement.

It may also be appropriate to establish another safe harbor for plans that permit participants to use defined contribution plan accounts to purchase annuities under the employer's defined benefit plan, based on the assumptions underlying such purchases. We would, in fact, favor a broad single safe harbor, treating all of the above as acceptable approaches.

Also, as a technical matter, the ANPRM refers to a plan's terms as containing the assumptions underlying an annuity distribution option. In general, such assumptions are set forth in the annuity contract, not in the plan terms.

The ANPRM also asks questions as to how in-plan annuities should be treated, and suggests three possible approaches. Our members note that the type of annuity could determine the most appropriate approach, and so believes that all three approaches should be permitted and be subject to the fiduciary protection described above.

DISCLOSURE TIMING

The ANPRM asks for comments on the frequency of disclosure. If the DOL decides to require lifetime income disclosure, some Council members believe that the DOL should require that the disclosure be provided no more frequently than annually, but more frequent disclosures would be subject to the same fiduciary protections. This would allow some flexibility for plan sponsors that want to provide the disclosures more frequently while allowing other plans to provide a more cost-effective annual notice. Annual disclosures highlight the lifetime income issue very effectively.

We have also heard from some members that annual reporting would be more burdensome than quarterly reporting because of the need to modify the statements once a year. Some members further support a quarterly requirement in order to further consistency among employers and increase participant awareness of the lifetime income issue.

RETIREMENT SECURITY

The Council would also note that lifetime income projections and products alone will not lead to a secure retirement. It would be difficult to live off the proceeds of an annuity purchased with, for example, $5,000. We should all continue efforts to support increases in plan participation and rates of contribution among plan participants.

Again, we appreciate the opportunity to provide information and comments on the subject of lifetime income projections in the ANPRM. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700.

Sincerely,

Jan Jacobson
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American Benefits Council