American Benefits Council

Testimony Of

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on behalf of the

American Benefits Council

for the

ERISA Advisory Council:

Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation

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My name is Allison Klausner and I am a Principal at Xerox HR Services. I serve as the Government Relations Leader for the Knowledge Resource Center. I am here today on behalf of the American Benefits Council, 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 American Benefits Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. I am an officer of the American Benefits Council's Board of Executive Directors and actively participate through the American Benefits Council in public policy discussions regarding benefits issues confronting our country.

Thank you for the opportunity to appear before you and testify on the issue of Participant Plan Transfers and Consolidation for the Advancement of Lifetime Plan Participation in employer-sponsored defined contribution plans ("employer DC plans"). Much attention has been given to the role played by employer DC plans in preparing Americans for a secure retirement. However, most of the focus has been on eligibility and access, accumulation of retirement assets and, finally, the spend-down or "decumulation" of such assets. In recent years, progress has been made in each of these three areas. The collaboration of the Department of Labor (DOL), together with the business community, plan sponsors and service providers, has been instrumental to this effort. On behalf of the American Benefits Council, I note our thanks to the ERISA Advisory Council for taking on the next challenge – lifetime participation in employer DC plans.

BACKGROUND

All of us are quite aware of the continuing and accelerating decline of the defined benefit plan system and the rise of employer DC plans. With this dramatic shift, we are mindful of the need to ensure that individuals remain in such plans and that the accumulated assets are not lost, literally or figuratively.

We are here today to discuss potential solutions to help individuals overcome the challenges to lifetime participation in employer DC plans. Thus, my testimony today is designed to support and assist the ERISA Advisory Council, and therefore the DOL, in crafting solutions to achieve its important goal. In that regard, I do note that any such solutions should be designed with flexibility and be structured to encourage the voluntary participation by employers, employees and retirees in the employer sponsored DC plan system.

LEGACY CHALLENGES/IMPEDIMENTS

Understanding the challenges and impediments to lifetime participation in employer DC plans is necessary to craft effective solutions. Testimony heard by the ERISA Advisory Council over the last few years has outlined some of those challenges. These include:

- **Varying and dynamic (not static) individual needs and wants:** Individuals have spending needs and wants relating to items such as food, clothing, shelter, education (including student loan debt), and healthcare, as well as vacations and other non-essential purchases.

- **Availability of alternative financial accumulation vehicles:** Individual retirement accounts (IRAs), 529 plans and health savings accounts (HSAs), are just a few of the many options available to individuals to save and accumulate the financial resources needed for a reasonably secure retirement. But, employees may find themselves unsure as to how to avail themselves of all (or at least some) of these resources.

- **Broad range of stakeholder fiduciary risk tolerance and capabilities:** Compliance with ERISA fiduciary requirements is difficult to navigate, even for sophisticated and ably-advised fiduciaries. And the newly minted conflict of interest rule intensifies this challenge.

- **Opportunities to break continuity:** Assets that could be held for retirement may be steered away from their original purpose when they are distributed by physical checks, or become available for distribution or withdrawal, including by way of (i) premature distributions, in the form of loans and withdrawals or (ii) cash-outs of small account balances.

One thing is clear. Creating solutions to achieve lifetime employer DC plan participation among a greater percentage of our working and retired population will need to be based on a strong understanding of these (and other) broad, and somewhat overlapping, challenges and impediments. Interestingly, our discussion today on the challenges to achieving lifetime participation in employer DC plans mirrors, to a large degree, our prior discussions on the challenges associated with participants taking a lump sum distribution from defined benefit plans, a relatively new phenomenon that many employers are adding as an option. In both cases a primary concern is that, with longer and healthier life expectancies, more Americans may be at greater risk for outliving their retirement savings/income without simple tools that allow them to keep their assets on course for their ultimate use as retirement income. One such tool is the ability to utilize life time plan participation when it makes sense.

New Challenges

In addition to the legacy challenges described above, there are new challenges that the DOL should focus on to improve the likelihood that individuals will achieve lifetime participation in employer-sponsored DC plans. These new challenges include:

- **The final fiduciary rule's limited, and perhaps ambiguous or unclear, exception for employees of the plan sponsor**
- **The upcoming changes to the determination letter program**
- **The DOL's state run retirement program guidance, as well as the nexus requirement for private-sector open-MEPs (but not those that are state-run)**

Potential Solutions to New and Legacy Challenges

Each of the areas identified above are ripe for exploration by the ERISA Advisory Council. Below I discuss them in greater detail, together with potential solutions that we believe support the DOL's desire to achieve greater lifetime participation in employer DC plans.

1. Modify Fiduciary Rule to broaden (or clarify) exception for employees of the employer (plan sponsor)

Under the new fiduciary rule, individual employees of a plan sponsor may be at risk of unwittingly becoming fiduciaries when they engage in certain activities designed to encourage and advocate for lifetime participation in the employer DC plan system. If a plan sponsor's employee has job responsibilities that include helping with plan issues, which is often the case for in-house human resources, benefits or compensation department employees (each, an "HR Employee"), and such HR Employee recommends to another employee/participant to leave 401(k) assets in the plan or to roll such assets to another tax-qualified employer DC plan (or, if appropriate, to take a cash-out or to roll such assets to an IRA), the final rule leaves open the possibility that the HR Employee may be exposed to fiduciary risk.

As the DOL reflects on this point, it would be helpful if the following is also considered.

- Engaging employees is often more than simply providing them with education. Financial literacy is an important aspect of good decision-making to achieve financial wellbeing. However, for many employees, perhaps most, it is not enough. A strong understanding of the value of lifetime employer DC plan

participation may be vital to achieving financial wellbeing. Yet, an HR Employee's engagement efforts in support of that understanding may cross the line separating education from advice. For example, if an HR Employee were to take action by way of a communication with another employee that is intended to counter an "opportunity to break continuity" (as described earlier in my testimony) which could occur, by way of example, in the form of loans or in-service withdrawals, or a comparison of the features of a rollover to an IRA versus another employer DC plan, the HR Employee could be found to have provided an investment recommendation not excepted under the final fiduciary rules.

- Assuming that in a given situation retaining funds in employer DC plans is superior, without regard to any individual circumstance that may produce a different result under a best interest standard, an obstacle to achieving greater lifetime plan participation may be the inability of HR Employees who have plan responsibilities to more fully engage with fellow employees and guide them without exposing themselves and their companies to fiduciary liability. Although the final rule provides an exception from fiduciary status for some employees of an employer, the exception may not be broad enough to cover HR Employees with responsibilities for helping with plan related issues, including investment decisions. It appears that the exception could apply if, for example, an HR Employee is instructed *not* to help with investment issues and the HR Employee "inadvertently" provides information that otherwise would amount to fiduciary investment advice. But if the HR employee is instructed to proactively encourage choices that result in lifetime participation in an employer DC plan (or, at least, prevent a break in lifetime participation at the point in time of such decision-making), the exception presumably does not apply. Indeed, an HR Employee may be the one person most likely to engage with and help a participant to make a sound financial wellbeing decision, but the final rule stands in the way. If the in house HR Employee exception under the new fiduciary rule were broader then this could be avoided and greater engagement could be had without fiduciary concern.

- Providing a broad exception for HR Employees to recommend actions encouraging lifetime employer DC plan participation is consistent with testimony provided during the ERISA Advisory Councils' 2013 hearing on so-called "lost" participants. In my testimony (which was also provided on behalf of the American Benefits Council), I noted that "providing information about the rollover process could be helpful," but cautioned against going so far as to giving "advice," which the DOL will view as a fiduciary act." Likewise, I noted that"[p]roviding participants with information about the opportunity to consolidate multiple plan account balances through the rollover process may help reduce the number of Lost Participants." Without a doubt, encouraging

consolidation of multiple employer-sponsored DC plan accounts will also facilitate lifetime participation in such plans.

- Although fiduciary liability is "personal," most – if not all or virtually all – employers indemnify their employees for (and/or provide insurance to cover) fiduciary liability that arises in the course of employment. Thus, risk of fiduciary liability for an HR Employee is a business/employer issue, too. Remarkably, during a 2012 hearing before this Council on income replacement during retirement and lifetime distribution options, I specifically stated (during my testimony on behalf of the American Benefits Council) that "reduction of the fiduciary burdens associated with direct rollovers could be extremely helpful." That holds true, today, as well. Thus, broadening the exception for HR Employees would help to address the concern of employers who are risk adverse – as it relates to fiduciary responsibilities and potential fiduciary liability – or whose risk tolerance is relatively low. As noted earlier in my testimony, this is a legacy challenge and it can be addressed, at least in part, by a broadening of the exception for HR Employees.

Notably, many stakeholders advocated for a broad exception for HR Employees. Indeed, pending the issuance of the final rule, during the DOL's four day hearing in August 2015, as well as in written comments submitted to the DOL, the American Benefits Council noted this concern. Specifically, the American Benefits Council stated that "it would help for the Department to (1) clarify that employees of a plan sponsor who are not paid any extra compensation with respect to advice are not giving fiduciary advice because they are not receiving 'a fee or other compensation' for any advice given" and requested that the rules provide that "no plan sponsor employee" -- including HR Employees – be deemed a fiduciary with respect to assistance provided to a participant, beneficiary, or plan fiduciary unless such employee receives additional compensation for the assistance.

To achieve lifetime participation in employer-sponsored plans, we recommend the fiduciary rules be modified to provide a broader exception for employees of the employer (plan sponsor).

2. Create Incentives for Rollovers without a Current Determination Letter

To support lifetime plan participation, consolidation of assets in the form of rollovers from one employer DC plan to another will need a more supportive framework. This is especially true if individuals change jobs more frequently over the course of their working lifetime.

Currently, many plan sponsors, and thus many record-keepers, facilitate rollovers from one employer's tax-qualified plan to another only if the issuing plan provides a

current IRS determination letter (DL) that the plan is tax-qualified and/or if the plan sponsor provides a certification or otherwise attests to the tax-qualification of the plan. In some instances, the recipient plan requires an additional statement to the effect that nothing has occurred that would (and in some cases, could) subject the plan to disqualification. With the upcoming changes to the DL program, fewer plans will have a current DL to provide in support of the tax-qualified status of a rollover. Thus, on a go-forward basis, it will be harder for plan sponsors and record-keepers (as contractual liabilities between the two may subject the latter to risk of liability for taking rollovers absent a DL), to support the DOL's goal of lifetime participation in employer DC plans as the risk of accepting plan assets absent a current DL may be perceived as too great.

Recipient plans receiving rollovers from another employer's DC plan will want greater assurance that no liability would attach for transactions whereby a rollover is not accompanied by a DL. Furthermore, recipient plans may want the rules modified to provide that, absent a finding of fraud or abuse, rollover contributions need not be returned if they came from a plan that is later determined to be disqualified. Such assurance could come by way of an IRS safe-harbor. On this point, we understand that a robust discussion with Treasury and the IRS would be necessary. However, given that few plans, if any, are ever disqualified, we anticipate that fashioning a rule acceptable to Treasury and the IRS is attainable, particularly as it would simplify the rollover process between employer DC plans and support lifetime participation in them.

To achieve lifetime participation in employer-sponsored plans, we recommend a stronger safe-harbor for the tax-qualification rules for rollovers without a determination letter.

3. Encourage 401k Plan Sponsorship, including open-MEPs, rather than State Run Auto IRAs

To achieve lifetime participation in employer DC plans, one must be a participant in the first instance. As has been pointed out by many in the administration, the congress and by highly regarded studies published and discussed by think-tanks, many plan workers do not have access to such a plan and are not otherwise saving for retirement in a tax-favored vehicle. (We recognize that other workers have access and do not enroll or stay enrolled. As noted in the beginning of my testimony, there are a variety of reasons, some of which include competing individual needs and wants.)

A. State Run Automatic IRAs

To address lackluster savings by employees, in November, 2015 the DOL issued Interpretive Bulletin 2015-2 and a proposed rule, both applicable to state run retirement programs for private employers. Although the interpretive bulletin relates to savings

programs that are covered by ERISA, the proposed rule relates to private employers automatically enrolling employees in a state run IRA that escapes ERISA obligations.

Although American Benefits Council members have differing views on the DOL guidance, the overwhelming response is one of concern. Some are concerned that mandates from up to 50 states will cause administrative chaos. For example, an employee working and living in different states may be subject to two or more state laws that conflict with one another. Likewise, employers' internal (and vendor) payroll operations would need to accommodate the patchwork of rules arising from up to 50 state rules.

For today's hearing focused on lifetime participation in employer DC plans, we simply note that the DOL's guidance may discourage new businesses from establishing such plans and motivate existing businesses that sponsor DC plans to exit the DC plan system. As noted in our comment letter, some employers have made clear that "if there [is] an alternative to maintaining a plan, they might well use it." For this reason, we request that the ERISA Advisory Council recommend that, before the DOL finalizes its proposed regulations encouraging state run auto IRAs, it consider whether doing so could interfere with or defeat its goal of lifetime participation by a greater number of workers in employer DC plans.

To achieve lifetime participation in employer-sponsored plans, we recommend the DOL review whether its state run auto IRA guidance will (unintentionally) create a new obstacle to achieving lifetime participation in employer-sponsored DC plans and undermine the workings of the existing retirement system that is currently providing benefits to millions of Americans.

B. Open multiple employer plan ("MEPs")

In addition to the points noted above, the DOL's interpretive bulletin creates an unfair playing field between the rules for private sector employers, on the one hand, and states, on the other, acting as market participants by providing that state-sponsored open MEPs will be treated as single ERISA plans – but not affording the same treatment for private-sector open MEPs. To encourage lifetime participation in employer DC plans, we urge the DOL to provide equal treatment for both state-sponsored and private-sector open MEPs. Essentially, as participation in employer DC plans, single or multiple, rises, so will lifetime participation.

The bottom line is that, if the DOL treats private–sector open MEPs by unrelated employers – ones without an employment-based common nexus –as a single plan under ERISA, the DOL would take a meaningful step toward facilitating plan sponsorship and thus lifetime participation in employer DC plans.

To achieve lifetime participation in employer DC plans, we recommend the DOL permit private-sector open MEPs to be sponsored by employers without a nexus.

CONCLUSION

We applaud the ERISA Advisory Council for addressing the key public policy issue of lifetime plan participation in employer DC plans. Facilitating use of this tool will help ensure that individuals will have sufficient retirement assets to achieve retirement security and achieve total financial wellbeing – a status that assumes not outliving one's retirement assets, having sufficient assets to maintain a lifetime of good physical and mental health, and to address financial demands when health declines.

In closing, I hope that this testimony will assist the ERISA Advisory Council, and thus the DOL, in crafting solutions to facilitate lifetime plan participation in employer DC plans. And, on behalf of the American Benefits Council and all its members, I respectfully request that such solutions be designed with flexibility and structured to encourage the voluntary participation -- by all stakeholders, employers, employees and retirees – in the employer DC plan system.

Thank you for the opportunity to appear before you today. I welcome your questions and comments.