November 16, 2020

Submitted via www.regulations.gov

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

Attention: Pension Benefit Statements — Lifetime Income Illustrations, RIN 1210–AB20

Dear Sir/Madam:

The American Benefits Council ("the Council") appreciates the opportunity to comment on the Department of Labor's (DOL) interim final rule regarding the requirement that plan administrators of individual account plans include lifetime income illustrations at least annually on pension benefit statements.[1] The inclusion of this information is newly required under amendments made to Section105 of the Employee Retirement Income Security Act (ERISA) by the Setting Every Community Up for Retirement Enhancement (SECURE) Act.

The Council strongly supports educating retirement plan participants about the benefits provided under their plans, including helping participants understand what their account balance in a defined contribution plan might look like when translated into a lifetime income stream. In this regard, we generally support the inclusion of lifetime income illustrations on pension benefit statements, although our members have different perspectives on the most effective and meaningful way to do so. On balance, the Council generally supports, in a number of regards, the approach taken by DOL in the interim final rule implementing this requirement, and we recognize that some elements of the prescribed approach are required by statute. Nevertheless, the Council

[1] 85 Fed. Reg. 59,132 (Sept. 18, 2020).

has some comments, questions, and requests for clarification on the interim final rule, which are described below.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

COMMENTS ON THE INTERIM FINAL RULE

The Council's comments, questions, and requests for clarification with respect to the interim final rule are described below.

Provision of additional lifetime income illustrations and information or tools beyond what is required under the interim final rule

The interim final rule provides that no plan fiduciary, plan sponsor, or other person shall have any liability under Title I of ERISA "solely by reason of providing the lifetime income stream equivalents" required to be provided under the interim final rule, provided that the prescribed assumptions are used and the required model disclosure language is included.

Although the rule's language limiting liability is helpful with respect to the lifetime income illustrations that must be included on benefit statements, Council members are concerned that its narrow scope could be viewed as inferring that the provision of additional lifetime income estimates or illustrations and related tools would be inconsistent with meeting one's fiduciary duty. As a result, our members are concerned that plan sponsors will choose to limit their provision of other helpful tools and information related to lifetime income to avoid any perceived or actual additional liability.

The fact is that, prior to enactment of the SECURE Act, many Council members provided lifetime income illustrations on benefit statements or made available calculators and other tools that provided similar information. Until the passage of the SECURE Act and the statements in the preamble to the interim final rule, there was little concern that these disclosures and tools would result in liability if they used reasonable assumptions that were adequately disclosed. However, in light of the proliferation of what are often baseless lawsuits against plan fiduciaries, we ask DOL to

give plan sponsors comfort that they may continue to provide more robust illustrations beyond those that are now required by law.

Some of the increase in plan sponsors' anxiety relates to the reinstatement of Interpretive Bulletin (IB) 96–1 that occurred in connection with the invalidation of the DOL's 2016 "Conflict of Interest" rule and the recent technical amendment reinstating the five-part test for determining fiduciary status. The 2016 rule had expanded the definition of investment education beyond what was described in IB 96-1, including an explicit mention of education regarding lifetime income. When IB 96–1 was reinstated, the definition of investment education reverted to the seemingly more limited one. Although IB 96–1 is not intended to provide an exhaustive list of what activities constitute investment education, the absence of an explicit reference to lifetime income is contributing, once again, to plan sponsor uncertainty.

The Council's members have suggested a variety of approaches that we believe would help preserve and encourage the use and continued development of innovative tools and information that address lifetime income.[2] At a minimum, we ask DOL to (1) clarify that the statutory and regulatory protection provided under the SECURE Act with respect to the required lifetime income illustrations is not the *only* protection for plan sponsors in this regard, and (2) confirm that furnishing participants with, or otherwise making available, other lifetime income illustrations or similar information is consistent with meeting one's fiduciary duty provided that reasonable assumptions are used.

On a related point, we ask DOL to confirm that the liability relief provided under the interim final rule is not limited with respect to benefit statements, but that such relief would also apply when the lifetime income stream equivalents required by the rule (using the prescribed assumptions and including the required model language disclosures) are provided elsewhere, such as on a website, in addition to the benefit statement.

Required assumptions

Many of the Council's members generally agree that the assumptions the interim final rule prescribes for converting an account balance into a lifetime income stream are reasonable for this purpose. Some members have expressed concern, however, that the simplified nature of the calculations will not produce estimates that are sufficiently accurate so as to be relevant to participants, and that some of the assumptions set forth

[2] For example, Council members have suggested that DOL should expand the safe harbor in the interim final rule that limits liability or deem additional lifetime income disclosures and calculators as constituting investment education.

in the interim final rule exacerbate this concern. Recognizing the need for simplicity and administrability in the required calculations, our members shared the following comments regarding the interim final rule's mortality and interest rate assumptions and the treatment of plan loans.

Mortality

The interim final rule provides that the mortality assumptions used to convert an account balance into equivalent lifetime income streams must equal those reflected in the applicable mortality table under Code Section417(e)(3)(B) in effect for the calendar year that contains the last day of the statement period. The DOL notes in the preamble that Section417(e)(3)(B) provides a unisex mortality table, which aligns with the requirement that lifetime annuities offered by ERISA plans must be priced on a gender-neutral basis. Furthermore, DOL states that several commenters on the 2013 advance notice of proposed rulemaking proposed using the Section417(e)(3)(B) mortality table, in part because doing so would be administratively simple.

Some Council members find that the applicable mortality table under Code Section417(e)(3)(B) is not ideal for this purpose for several reasons, including that the data used to develop the mortality assumptions is based on a shrinking defined benefit plan population whose demographics could differ in meaningful ways from the demographics of defined contribution plan participants. These members also expressed caution over broadening the use of the mortality assumptions under Section417(e)(3)(B), which many pension plan practitioners view as inherently flawed.

In light of these concerns, some Council members have suggested that DOL should consider the following alternative: require administrators to use the single life and joint and last survivor mortality tables under Treasury regulation Section1.401(a)(9)-9 to calculate the required lifetime income illustrations.[3] Similar to the mortality assumptions under Code Section417(e)(3)(B), the tables under Treasury regulation Section1.401(a)(9)-9 are readily accessible to plan administrators and provide unisex rates. However, the latter assumptions were designed using data that some of our members expect would more closely reflect the population of defined contribution plan participants, thus contributing to the provision of more meaningful and accurate lifetime income illustrations.

[3] Note that the required minimum distribution rules have three tables: the single life table, the uniform lifetime table, and the joint and survivor table. These are all used in different situations. But for this purpose, the uniform lifetime table would not be usable as it does not include age 67, whereas the other two tables do.

Additionally, use of the Treasury regulation Section1.401(a)(9)-9 tables would make for a simpler lifetime income calculation because a plan administrator would simply divide a participant's account balance by the appropriate factor on each table (i.e., assuming the participant is age 67, or in the case of the joint and survivor illustration, assuming both the participant and spouse are age 67), then divide further by 12 to produce a monthly income amount. Plan administrators would not need to separately take into account an interest rate factor. This avoids using a zero (or nearly zero) percent interest rate as a proxy for annuity pricing purposes during the current low interest rate environment. Use of a zero (or nearly zero) percent interest rate renders the interest rate effectively meaningless for purposes of the calculations and is not reflective of how the commercial annuity market operates.

To be clear, some Council members support the current assumptions in the interim final rule as is, including the use of the 417(e)(3)(B) mortality table. Our goal in raising this alternative for consideration is to help DOL evaluate alternatives that, upon further review, might provide a better estimate.

Interest rate

The interim final rule requires that the rate of interest used to convert an account balance into equivalent lifetime income streams equals the 10-year constant maturity Treasury (CMT) securities yield rate for the first business day of the last month of the period to which the benefit statement relates.

Some Council members questioned whether the 10-year CMT rate will remain a good proxy for the interest rates reflected in the pricing of commercial annuities if the current very low interest rate environment continues to persist, especially in light of the economic uncertainty created by the ongoing COVID-19 pandemic. In addition, this assumption will significantly understate the expected lifetime income for the many individuals who do not annuitize their balance with a commercial annuity but rather continue to invest their savings in a mix of stocks and corporate bonds. Although we do not have a recommendation specific to the interest rate assumption, we wanted to share these concerns that were expressed by some of our members, and we note that these concerns would be moot if DOL instead, as discussed above, requires use of the mortality tables under Treasury regulation 1.401(a)(9)-9, because there would be no need for a separate interest rate assumption.

Plan loans

The interim final rule requires that the account balance used to calculate the equivalent lifetime income streams must "includ[e] the outstanding balance of any participant loan, unless the participant is in default of repayment on such loan."

Council members would appreciate additional clarification regarding when a plan loan should be excluded from the account balance. If a participant fails to repay a loan while still employed, taking into account the plan's cure period, the loan is generally "deemed distributed" under Internal Revenue Code ("Code") Section 72(p). The loan remains outstanding and will not be offset until there is a distributable event under the plan's terms. In some cases, the participant might begin repaying the loan again. At that point, the loan may not be viewed as "in default" even though a deemed distribution has occurred. We believe DOL intends that a loan that is in default is excluded regardless of whether there has been a loan offset. Another question is, how should a loan be treated if there is a deemed distribution for other reasons, such as the loan balance exceeding the limits under Code Section72(p)?

Exclusion of future contributions and earnings from account balance

The interim final rule generally requires plan administrators to calculate equivalent lifetime income streams based on the "value of the account balance as of the last day of the statement period." As such, the required lifetime income disclosures do not include an estimation of or otherwise account for the impact of future contributions and future earnings on a participant's ultimate account balance at retirement.

The Council's members have expressed a variety of views on this point. Some members are concerned that, with respect to newer and younger savers in particular, translating what may be a small account balance at the beginning of their saving years into a lifetime income stream could be discouraging because the illustrated annuity payment could appear quite small. These members generally believe it would be much more meaningful to provide participants with a lifetime income estimate that takes into account future earnings (and possibly contributions).[4] Other members, however, believe that calculating lifetime income streams based only on the current account balance is an appropriate approach when considering the desire for simplicity and challenges presented by estimating both future contributions and earnings.

[4] We recognize that the SECURE Act could be read to preclude the inclusion of future contributions. We think it is less clear that excluding future earnings is mandated by the SECURE Act.

Clarification on effective date and requirement to furnish lifetime income disclosures annually

The interim final rule provides that its provisions will be effective "on the date that is one year after the date of publication of the interim final rule, and shall be applicable to pension benefit statements furnished after such date." With a publication date of September 18, 2020, the interim final rule is thus effective on September 18, 2021.

Under the new law, plan administrators must furnish a benefit statement for individual account plans that includes a lifetime income disclosure "[a]t least annually." On a webinar sponsored by the Council, Acting Assistant Secretary Jeanne Klinefelter Wilson stated that the first statement that must contain a lifetime income illustration must be provided not by September 18, 2021, but within one year of that date. We very much appreciate that clarification.

We would appreciate further confirmation regarding how this annual requirement interacts with the interim final rule's effective date. For example, in the case of a plan that is required to provide benefit statements at least once each calendar quarter, must a statement including the lifetime income disclosure be furnished for the first time no later than with respect to the second quarter of 2022 (so that it is furnished prior to the 12-month period ending September 18, 2022)? Or, must it be initially furnished no later than with respect to the third quarter of 2022, which would be the first quarterly statement following the one-year anniversary of the effective date (and generally required to be provided within 45 days after the end of the third quarter of 2022)?

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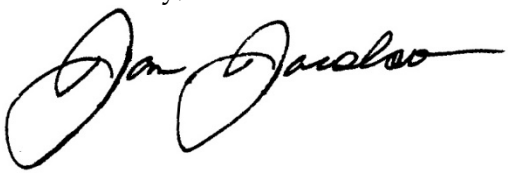
Thank you for your consideration of our comments. If you would find it helpful to discuss any of these matters with us, please contact me at jjacobson@abcstaff.org.

Sincerely,



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