

COMMENT LETTER



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Office of Regulations and Interpretations
Employee Benefits Security Administration
United States Department of Labor
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210
Attention: Pension Benefit Statements—Lifetime Income Illustrations, RIN 1210-AB20

Re: Pension Benefit Statements—Lifetime Income Illustrations
RIN 1210-AB20

This letter is submitted on behalf of the Defined Contribution Institutional Investment Association (“DCIIA”). We appreciate the opportunity to comment on the Department’s Request for Information on the “Pension Benefit Statements—Lifetime Income Illustrations” interim final rule (the “Rule”).

DCIIA’s members support initiatives aimed at encouraging retirement savings and closing the retirement adequacy gap, and there is strong consensus within the membership that lifetime income illustrations are a helpful tool to accomplish these goals. DCIIA believes that Congress had this same aim when it passed Section 203 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”). DCIIA applauds the Department for issuing this Rule on a timely basis. DCIIA also appreciates the Department’s efforts in issuing the Rule, and understands that the Department was directed in certain aspects of its rulemaking by the requirements (including model disclosure requirements) of the SECURE Act.¹ DCIIA’s members are pleased to see Congress embrace lifetime income illustrations and the Department following suit with this Rule.

DCIIA also encourages the Department to be receptive to the opinions and voices of those in the retirement industry who have sought to innovate and will continue to innovate to improve retirement outcomes, and to ensure that the Rule and any additional supporting guidance the Department may issue furthers the common goal of “strengthening retirement security” in practice.² In this regard, while individual DCIIA members may have differing views regarding certain aspects of the Rule, DCIIA members urge the Department to take steps to ensure that the Rule is a foundation for, rather than a limitation on, the development of additional lifetime income illustrations and information. More specifically, DCIIA members urge the Department to amend the Rule before it becomes effective, and/or add support in the preamble, to make clear that the Rule does not preclude other forms of lifetime income illustrations and education. The risk is that without further guidance and assurance, the Rule

¹ SECURE Act Section 203(b) (<https://www.congress.gov/bill/116th-congress/house-bill/1994/text#toc-H422E4CAC6E7F487CBD3FCDB7DE98BB68>).

² Interim Final Rule, *Pension Benefit Statements—Lifetime Income Illustrations*, RIN 1210-AB20 (<https://www.federalregister.gov/documents/2020/09/18/2020-17476/pension-benefit-statements-lifetime-income-illustrations>).

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will limit fiduciary decision-making in a plan committee setting in the context of existing communications regarding lifetime income and will limit the future development of communications to strengthen retirement security. More specifically, the concern is that ERISA counsel and other advisers, who are reluctant to invite additional risk of regulatory noncompliance or litigation, may advise fiduciaries that communications which are not aligned with the explicitly protected, and required, model disclosure as currently set out in the Rule are not protected by the Rule and should be discontinued.

For all of these reasons, DCIIA believes it is important for the Department to provide reassurance that, and specific examples as to how, good actors seeking to help plan participants achieve secure retirements can safely, without the threat of costly litigation, provide lifetime income information and education to participants and beneficiaries as “investment education” and not fiduciary “investment advice” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). We believe such clarification is consistent with the Department’s views of retirement income education. This support would assist plan fiduciaries, administrators and service providers who are committed to strengthening retirement security and wish to go beyond the assumptions and form of the model disclosure covered by the Rule, including based on the goals, objectives and specific facts and circumstances of the plans they serve.

Background on DCIIA:

DCIIA’s membership is composed of leading voices in the retirement industry on this topic, including record-keepers, investment consultants and advisers, investment managers, education and advice providers, trustees and custodians, law firms, plan sponsors and other industry participants. DCIIA has also been a long-standing participant in past regulatory conversations regarding participant benefit statements, including commenting and publicly testifying on the topic in 2013.³ DCIIA has established several committees, including committees that focus on retirement income, public policy, plan design and administration, that engage in lively and constructive conversations on emerging retirement industry trends and governmental and regulatory initiatives.

DCIIA offers the following comments on the Rule:

Support for the Department’s Current Approach

A number of DCIIA members are supportive of the approach adopted by the Department in the Rule, as well as the model disclosure included in the Rule, due to the ease of administration of a single form of lifetime income disclosure. DCIIA members appreciate that the Rule was issued as a result of the mandated assumptions and model disclosure requirements of Section 203 of the SECURE Act.⁴ DCIIA members also appreciate the benefits of simplicity and “portability”⁵ for participants by the Department articulating a single, standardized form of lifetime income illustration to increase understanding of annual benefit statement disclosures and result in other positive outcomes, including increased

³ See DCIIA Comment Letter at: <https://dciia.org/resource/collection/044CF8FF-07F1-4A52-8038-D778C0ECBED4/8-2013-Comment-Letter-Response-to-DOL-Re-ANPRM.pdf>.

⁴ SECURE Act Section 203(b)

(<https://www.congress.gov/bill/116th-congress/house-bill/1994/text#toc-H422E4CAC6E7F487CBD3FCDB7DE98BB68>).

⁵ The number of employers an American worker works for throughout his or her lifetime is ever-increasing. See Median Years of Tenure with Current Employer for Employed Wage and Salary Workers by Industry, Selected Years, 2010-2020, U.S. Bureau of Labor Statistics at <https://www.bls.gov/news.release/tenure.t05.htm>. This means that consistency and portability may be important from plan to plan. If plan administrators and third-party administrators all must produce lifetime illustrations under a set of standardized assumptions, presumably a participant who changes jobs and rolls over retirement assets into the new employer’s plan will see a comparable lifetime income illustration and resulting monthly income projection.

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participant contributions and investment changes.⁶ Further, the more complex the lifetime income illustration assumptions, the more difficult it may be for participants to understand the message that the illustrations set out to convey, and the more likely that lifetime income illustrations and other important benefit statement content will become buried among lengthy disclosures. Creating an objective means of complying with the Rule and the SECURE Act can also reduce confusion and remove the subjective “guessing game” and ambiguity as to whether legal compliance has been achieved.

The Rule Should Serve as a Foundation for Additional Disclosures and Illustrations

As noted above, DCIIA members would like the Department to clarify that the model disclosure provided in the Rule is a foundational illustration that would not preclude providing additional forms of lifetime income information, illustrations and investment education. Such clarity would reassure both plan sponsors and service providers that they can safely provide such information, illustrations and education to participants and beneficiaries as “investment education,” and not fiduciary “investment advice” under ERISA, without the threat of costly litigation. Importantly, the SECURE Act does not prohibit the Department from being more expansive in issuing regulatory guidance to provide plan administrators more flexibility and the ability to provide additional lifetime income illustrations designed to improve plan participant retirement outcomes.

Many DCIIA members are concerned that, without these assurances, the Rule’s required disclosure will limit innovation aimed at strengthening retirement savings, or unnecessarily limit the offering of other valuable tools and solutions. The concern is that by providing one required disclosure, without accompanying assurances around supplemental disclosures, advisers may interpret supplemental disclosures which are not expressly protected by the Rule as creating additional legal risk. This will inadvertently (or implicitly) create barriers to continuing to provide other legally compliant information, tools, illustrations and education. Instead, the Rule should make clear that such other legally compliant information, tools, illustrations and education would be treated as investment education, and as such will carry no greater risk to fiduciaries than providing the required model disclosure. In the following sections, we discuss more fully reasons for protecting additional disclosures through expansion of Interpretive Bulletin 96-1.

Impact on Participant Understanding

Some DCIIA members are concerned that the “one size fits all” approach underlying the Rule’s single set of assumptions and disclosures may fail to account for plan-specific demographics and individual participant preferences. In this regard, these DCIIA members point to how framing can influence participant behavior. DCIIA’s Retirement Research Center (“RRC”) has been analyzing important studies on this topic.⁷ The DCIIA RRC’s findings thus far are that phrasing and ordering of participant information, and/or options often influence participant choices and behavior. For example, research shows that small changes in information presentation, including on benefit communications, can have

⁶ The Federal Thrift Savings Plan has been displaying monthly income equivalents on participants’ benefit statements since 2012. The 2017 Thrift Savings Plan survey results found that 86% of respondents read and rely on their annual benefit statements. Of the respondents who use the annual benefit statement, 89% express satisfaction with the information in the statement. Even more to the point, 58% of participants under age 70 agree that the estimate of monthly retirement income is helpful, including 65% of individuals ages 50 to 59. In addition, 29% of active participants took some action based on the monthly income estimate, with 12% increasing their contribution levels and 10% changing their account investments. See 2017 FTRIB Participant Satisfaction Survey.

⁷ Those studies include: Benartzi and Thaler (2007), “Heuristics & Biases in Retirement Savings Behavior,” Read and van Leeuwen (1998), “The Effects of Appetite and Delay on Choice,” Tversky and Kahneman (1981), “The Framing of Decisions and the Psychology of Choice.”

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a significant impact on participant actions (or inactions). In recognition of the impact of framing, assumptions can and should be tested and changed over time to reflect actual, resultant behavior. Thus, DCIIA requests that the Department acknowledge that as new information emerges on participant behavior, changes in the assumptions and model language may need to be considered.

Support for Customization

Some DCIIA members also support customization in disclosures for individual participants and ask that the Department support disclosures that allow the assumptions behind the disclosures to incorporate the fact that additional contributions may be made up to a participant's retirement age. These members point out that not every participant thinks about retirement the same way and supporting different tools for participant groups of varying ages could have additional positive outcomes and support current industry trends of personalization, digitization and customization. Consider the example of a participant wishing to retire earlier than 67. Allowing that participant to adjust his or her retirement age for the projection may produce more positive participant behaviors. For example, if a participant wants to retire early, and sets a lower retirement age, the lifetime income illustration may encourage a higher savings rate over a shorter time period. If a participant has a later start to their career, and thus anticipates and chooses a later retirement date, the lifetime income illustration might encourage a more realistic savings rate for that participant. While DCIIA is sensitive to the value of simplicity and uniformity, we encourage the Department to support personalized disclosures to supplement the mandated disclosures required under the Rule.

There may also be additional value in plan-specific income illustration approaches that allow plans to use their own demographic data, including to set their own retirement age assumptions.⁸ Some DCIIA members have also noted an interest in encouraging the Department to support the use of illustrations that allow for some level of additional contributions, including for plans that offer auto-enrollment and auto-escalation of contributions. As with personalized disclosures, thought should be given to how the regulatory regime can best protect plan-specific modifications that are provided to supplement the disclosures required under the Rule.

Impact on Existing Solutions

A theme that we heard from many DCIIA members is concern about the unintended impact of the Rule's required disclosure on existing communication solutions. For decades the industry has dedicated significant resources toward the research and development of participant communications, tools and solutions to assist participants in understanding and achieving "retirement readiness." Many of these solutions are already being used by plans and plan participants, producing positive, proven results. These solutions come in many forms, including in the form of benefit statement lifetime income illustrations (similar to the SECURE Act's new illustration mandate) and web-based retirement income calculators and modeling. DCIIA believes that if the Department takes into account our recommendations, the new required disclosure could even help to strengthen the use of these existing tools. To avoid any step back from these existing participant resources, DCIIA asks the Department to issue guidance that confirms that existing communications can continue as investment education to complement the Rule's required disclosure, or as part of a separate program, without creating undue fiduciary risk. The Department might also consider recognizing (or grandfathering) tools that

⁸ Such customization would add complexity and cost, and there is a variety of perspectives within the DCIIA membership as to whether the potential impacts on behavior will be meaningful enough to justify the added administrative burden and expense.

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participants may already use. This is of particular importance because a positive residual effect of the Rule could be to increase participant use of existing tools, information and resources.

Impact on Future Innovations

DCIIA notes that, partly because a focus on retirement income is still relatively new, there are still many unknowns when it comes to participant retirement savings behavior. For example, a single method of compliance devised today cannot account for future findings and our future understanding of participant behavior. Academic research and industry innovations are under development to create more effective solutions to strengthen retirement savings and to enhance the participant experience. Future research and innovations have yet to be imagined. Accordingly, the Rule's method should not become (rightly or wrongly) the only method for providing lifetime income information. By coupling the Rule with clarification that other disclosures are and remain permissible as education, we believe that continued research and development will be encouraged. Without this, research and development may be stunted or discouraged, or the Rule could act as a disincentive for developing additional resources only because plan fiduciaries would not be willing to take on the additional risk to offer such solutions.

The Department Could Identify Examples of Investment Education

Accordingly, as a possible solution to these concerns, DCIIA members strongly encourage the Department to expand the guidance in the Rule by identifying how additional disclosures or illustrations will be considered investment education and not investment advice, with the same effect as the limitation of liability provision of the SECURE Act. The Department could identify examples of lifetime income illustrations and other disclosures that are investment education (and not fiduciary investment advice), similar to the types of guidance and information as has been provided in Interpretive Bulletin 96-1.

Interpretive Bulletin 96-1 has been relied on time and again by defined contribution plan fiduciaries and recordkeepers. Even so, since Interpretive Bulletin 96-1 was adopted in 1996, defined contribution plans have been refocused and reimagined to address decumulation, lifetime income and participant outcomes in ways that were not anticipated in 1996. DCIIA urges the Department to include in the Rule clarification that the Rule does not preclude other forms of lifetime income illustrations (or other educational illustrations) and how such illustrations will not constitute "investment advice" under ERISA. The Department could also allow for a section in the required disclosure that points participants to a call center or website where they can access alternate tools, illustrations and education. This would support the use of the Rule's disclosure as a starting point, and still encourage the industry to continue to develop and offer other tools and illustrations for educational purposes.

Technical Comments

DCIIA members also noted technical comments that would be helpful to address, in order to ease the administration and implementation of the Rule, as follows:

Participant Loans

A request was made for the Department to confirm that a reference to a participant being "in default of repayment on such loan" in the Rule is intended to reference the applicable guidance for loans that are deemed distributed under Internal Revenue Code section 72(p).⁹ Deemed defaulted loans are

⁹ See 26 U.S. Code § 72(p); 26 CFR § 1.72(p)-1.

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reportable on Form 1099-R to the participant, so this approach would provide a clear rule for plan administrators and recordkeepers to follow.

Regulatory Coordination

Another technical point to be addressed is to respectfully ask the Department to coordinate its rulemaking with FINRA and other regulators with jurisdiction over participant account and guaranteed income statements to provide for consistency with other applicable disclosure requirements.

Timing, Grandfathering and Transition Relief

A request was made for the Department to confirm that the disclosure must be provided in the first pension benefit statement furnished after September 18, 2021 and provide an example of the timing. An additional request was made for the Department to provide grandfathering or transition relief for existing disclosures. The concern is that the Department should not impose significant new obligations on plan administrators without providing sufficient time for any required changes to be implemented.

Special Plan Features and Annuity Products

There is a range of different annuity features and products that exist, including stable value,¹⁰ Guaranteed Lifetime Withdrawal Benefits (“GLWB”) and/or guaranteed minimum withdrawal benefits (“GMWB”). DCIIA members are also seeing significant interest in the industry in developing innovative target date structures that incorporate these features. As such structures become more prevalent, it will become more important for the Department to define how annuity products, whether GLWB, stable value contracts with annuitization features or other annuity products and plan features, should be reflected in annual benefit statement disclosures and still receive protections from fiduciary liability.

The Department has noted:

The Department requested feedback from interested parties on the role of these features in lifetime income illustrations when it issued the ANPRM. Commenters on the ANPRM however, as a general matter, did not provide the Department with sufficiently detailed or consistent proposals on whether or how these features should be treated on pension benefit statements. Therefore, the Department requests comments in response to the IFR as to whether, and how, to incorporate such features into the IFR’s framework for lifetime income illustrations. Commenters also are encouraged to provide data and observations about the prevalence of these and similar features in annuities purchased by retirement savers.

DCIIA members urge the Department to provide additional guidance on these types of annuity features and products for purposes of benefit statements. Such guidance would also serve as a follow-up to the Department’s information letter on including deferred annuity contracts in target date fund structures,¹¹ which was issued in tandem with IRS Notice 2014-66.¹² IRS Notice 2014-66 provided: “Treasury and

¹⁰ For example, Stable Value fixed fund investment options provided by insurance contracts contain annuity purchase provisions, as with any group annuity contract. While traditionally these provisions have not been utilized by plans, this may change with a newfound focus on retirement income as a plan objective.

¹¹ Letter to J. Mark Iwry at the Department of the Treasury (Oct. 23, 2014) from Phyllis C. Borzi, at <http://www.dol.gov/ebsa/regs/ils>.

¹² IRS Notice 2014-66, 2014-46 I.R.B. 820 (Nov. 10, 2014).

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the IRS are considering whether or not to provide guidance related to issues arising from the use of GLWB and GMWB features in defined contribution plans.”¹³

Some DCIIA members would urge the Department to amend the Rule to allow for GLWB-specific lifetime income illustrations by treating GLWBs in the same way deferred income annuities are proposed to be treated under the Rule. Alternatively, the Department could address this in the near term as a separate project. Currently, the Rule does not permit plan sponsors to base the required lifetime income illustration on the GLWB available to plan participants. That will result in participants receiving disclosures that do not accurately reflect the actual benefit they could receive in retirement; and, inaccurate disclosures could be confusing and misleading to participants.

Other DCIIA members point to the complexity and differences among deferred annuity and GLWB products. These members believe that plan administrators should be able to use the assumptions and model disclosures for non-annuity-investments to satisfy the lifetime income disclosure obligation under the Rule, regardless of the investments held in participants’ accounts. The concern is that data sharing to support the disclosure could be cumbersome and significant as it would include many unique data points. Instead, the preference would be to allow additional information on annuity and GLWB information to be included or referenced on benefit statements, with such additional disclosures being permitted and protected by the Rule.

Conclusion

In sum, there is general consensus among DCIIA’s members in support of initiatives, such as the Rule, that are aimed at encouraging retirement savings and closing the retirement gap. DCIIA encourages the Department to consider clarifying that the Rule is not the only form of presenting lifetime income illustrations (or other educational illustrations) that can be furnished to plan participants without constituting “investment advice” under ERISA. Such clarification would clearly demonstrate that offering additional investment education, communications and future innovation does not create additional risk for fiduciaries. At the same time, disclosure that is accurate and administratively practicable will permit efficient implementation and effective communication. We believe that the considerations and approaches set forth in this letter will help the Department craft the Rule to achieve its goal, support existing communications and encourage continued innovation to improve participant outcomes and further strengthen the retirement savings of working Americans. This would also assist plan sponsors and service providers that wish to go beyond the required form of lifetime income illustration covered by the Rule and provide plan sponsors and service providers with needed assurance.

DCIIA also requests that the Department review our technical comments and our comments on special plan features and annuity products. These are important considerations given that plans are considering the adoption of these types of products as they look to evolve their offerings.

Please let us know if you would like to meet with us to discuss any of these topics. We thank the Department again for its continued support of lifetime income disclosures and efforts to strengthen the retirement savings of working Americans.

¹³ Id.