

# GROOM LAW GROUP

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Hon. Jeanne Klinefelter Wilson  
Acting Assistant Secretary  
U.S. Department of Labor  
Employee Benefits Security Administration  
200 Constitution Ave., NW  
Room N-5655  
Washington, DC 20210

**Re: Proposed Regulation on Lifetime Income Illustrations  
RIN 1210-AB20**

Dear Assistant Secretary Wilson:

Groom Law Group, Chartered, is providing these comments on behalf of a group of major insurance companies (the “Group”), each of which is a provider of annuity contracts to employer-sponsored retirement plans subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). We write to provide comments on the U.S. Department of Labor’s (“DOL” or the “Department”) interim final rule with requests for comments for *Pension Benefit Statements - Lifetime Income Illustrations*, 85 Fed. Reg. 59132 (Sept. 19, 2020) (the “IFR”).

The provision of lifetime income and annuity products to retirement plan participants and beneficiaries is core to the Group members’ respective businesses. The Group’s members appreciate the role of guaranteed lifetime income products, including guaranteed annuity benefits, in providing American workers with a more financially secure retirement. In particular, the Group believes it is vitally important to begin providing 401(k) plan participants and beneficiaries with clear, easily understood explanations of how their accumulated savings may be applied to the purchase of annuity income streams and the approximate levels of annuitized income that might be achieved through those savings. The Group’s comments on DOL’s lifetime income illustration (“LII”) disclosure rules are informed by these experiences and beliefs.

The Group applauds the Department’s timely and thoughtful approach to the IFR, which will facilitate and legally enable the delivery of LII disclosures as required under Section 203 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”). Below, we describe several changes that we believe would improve the IFR and make the final regulation both less burdensome for plan administrators and their service providers to comply

with and drive more disclosures to plan participants and beneficiaries. Specifically, the Group believes that improvements can be made in the following areas:

1. The factors used to calculate the LII;
2. The optional LII disclosure where a plan offers an annuitization option;
3. By retaining the electronic disclosure method described in Field Assistance Bulletin 2006-03 (“FAB 2006-03”);
4. To the required additional LII disclosure where a plan offers a deferred income annuity;
5. To the LII disclosures for guaranteed lifetime withdrawal benefit products; and
6. To the scope of the IFR’s limitation of fiduciary liability;

Each of these is discussed below.

**I. Factors used to calculate the LII.**

The IFR requires the use of the 10-year Constant Maturity Treasury (“CMT”) rate as of the first business day of the last month of the period to which the benefit statement relates for the interest rate assumption and the unisex mortality tables under section 417 of the Internal Revenue Code of 1986, as amended (“Code”) for the mortality assumption.

We are concerned about the potential administrative difficulties associated with the requirement to use interest rate and mortality factors that frequently change, which could prove expensive to implement. The CMT changes daily and the Code section 417 mortality tables are updated annually. Therefore, recordkeepers will need to build systems that can pull this data from outside sources or will need to rely on human interaction to load the correct information.

The Group encourages the Department to consider requiring or permitting the use of stated or static factors, particularly with regard to the interest rate, rather than variable factors in the final rule. The Group believes that this could reduce the cost to build the systems necessary to calculate the LII. Moreover, the use of stated or static factors would cause the LII to better reflect how growth in a participant’s account balance influences potential lifetime guaranteed retirement income levels over time, rather than reflecting changes in interest rates that are beyond the participant’s ability to influence. For example, a significant but temporary drop in the CMT could overwhelm a more permanent increase in the size of the participant’s account balance used in the LII calculation, which would seem to run counter to a key objective of the disclosure.

The final regulation should also include an explanation of whether the LII should reflect a negative interest rate assumption in the event the CMT, or whatever interest rate assumption is used in the final rule, turns negative. While the idea of the CMT turning negative would have been unthinkable even a few years ago, today the rate is well under 1% and significant parts of the global sovereign debt market have recently experienced negative rates so this is, unfortunately, now a viable concern.

The IFR requires the LII of the participant's current account balance as an annuity and does not require or permit the projection of account values into the future. As a result, a participant is likely to see an LII disclosure that is significantly lower than what is likely to be achieved if reasonable projected account growth, including reasonable investment gains, were included in the disclosure. For example, a 27 year old with a \$25,000 account balance would see an LII of approximately \$125, based on current interest and mortality assumptions. However, projecting that account balance 40 years into the future to age 67, using a mere 4% real rate of return, would instead show an LII of \$600.

The Group believes that by not projecting account balances, the LII could potentially discourage savings, particularly among younger workers, and increase leakage from retirement accounts. The Group understands that Section 203 of the Secure Act used the term "total accrued benefits," so the Department may have felt constrained in its rulemaking regarding this point. However, we believe that Congress, by delegating to the Department the task of determining the assumption that will be used to determine the lifetime income streams, granted the Department sufficient authority to include a market return factor in the proscribed LII calculation. Alternatively, we would suggest that the final rule should make it clear that a plan administrator may include additional LII disclosures on a participant's pension benefit statement and, assuming that the factors used to create those disclosures are reasonable, that the limitations made available under ERISA section 105(a)(2)(D)(iv) would extend to such disclosures.

**II. Optional LII disclosures where a plan offers the right to annuitize an account balance.**

The IFR permits the administrator of a plan that includes annuity distribution forms to calculate the LII disclosures using the actual terms of the plan's annuity contract. Unfortunately relatively few defined contribution plans contain annuity benefit forms at the present time. Given that relatively low number, some recordkeepers may be reluctant to build systems flexible enough to allow eligible plan administrators to take advantage of this optional LII calculation. For that reason, the Group believes that plans and participants may be better served if this alternative LII calculation were allowed to be separately provided, or furnished as a companion to the standard LII disclosures.

Alternatively, we believe that DOL should affirm its past statement that a plan administrator can satisfy its pension benefit statement furnishing obligation through multiple documents<sup>1</sup> and that plan administrators could rely upon the plan's annuity provider to satisfy the LII disclosure requirement on their behalf in a document that is separate from a participant's pension benefit statement.

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<sup>1</sup> See FAB 2006-03 (Dec. 20, 2006).

**III. Retain Field Assistance Bulletin 2006-03 for pension benefit statement information including the LII disclosures.**

As part of its recent electronic disclosure rulemaking, DOL announced that the new electronic disclosure safe harbor would supersede the special rule memorialized in FAB 2006-03 permitting pension benefit statement information to be delivered through a secure continuous access website. This rule allows pension benefit statement information to be provided on such a website subject to the requirements to provide an initial notice describing the delivery method and rights to request and receive paper copies, and an annual notice thereafter. The Group believes that eliminating the current website delivery rule for section 105 benefit statement information will, particularly in light of the new LII disclosure requirements, result in excessive administrative costs, is inconsistent with ERISA, and is contrary to the Administration's Executive Order 13847 *Strengthening Retirement Security in America*<sup>2</sup> directive to expand the use of electronic disclosure as much as possible.

Since FAB 2006-03 was issued, the use of continuous access websites has become a common method of delivery of pension benefit statement information for 401(k) plans in particular. Many of the Group's members rely on this method in order to deliver pension benefit statement information and would continue to rely on it to furnish the LII disclosures, if permitted. In the Group's experience, very few participants opt out of website delivery, and the method of delivery is successful and widely utilized by participants.

FAB 2006-03 saves plan sponsors and plans millions of dollars that would otherwise be spent on printing and mailing quarterly statements. The elimination of this method of delivery will result in plan administrators being required to mail hard copies of quarterly benefit statements, made longer and more complex by the inclusion of the LII disclosure and accompanying required language, to plan participants for whom the employer does not have (or does not provide) an electronic address. Thus, the transition from the FAB 2006-03 delivery method to the new safe harbor will result in a substantial new expense for plans. Moreover, many plan participants have been receiving pension benefit statement information through a website ever since the Pension Protection Act of 2006 ("PPA") first began to require plans to automatically furnish that information. To transition these participants away from the method they have clearly become accustomed to, at the same time the Department increases the amount of information that needs to be included on the pension benefit statement, would be an unnecessary increase in plan costs and may result in the new disclosures being overlooked when received in the mail.

The Group urges the DOL to reverse its earlier rulemaking and leave in place the existing rule established by FAB 2006-03 solely for purposes of delivering pension benefit statements under section 105 of ERISA, and to codify the "continuous access website" rule within the final rule. In this regard, there is a separate statutory authorization for the use of electronic delivery in

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<sup>2</sup> <https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/>

connection with section 105 pension benefit statements. Under section 105(a)(2)(A)(iv) of ERISA, pension benefit statements under section 105 “may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.” This provision of ERISA, added by the PPA, is a broad authorization from Congress to deliver pension benefit statements in electronic form that is separate from and more flexible than the more general requirement to deliver ERISA disclosures through a method “reasonably calculated to ensure actual receipt” under 29 C.F.R. 2520.104b-1(b). The Group believes that this statutory authorization to use electronic delivery under section 105(a)(2)(A)(iv) authorizes the DOL to articulate a separate and more flexible website delivery standard specifically for section 105 benefit statement information within the final rule.

**IV. Special requirements for participant accounts with a deferred income annuity (“DIA”) allocation.**

Under the IFR, if the participant’s account balance includes a DIA component, the amount attributable to the DIA must be subtracted from the account balance before the account balance is converted to an LII and the plan administrator must separately illustrate the portion of the participant’s account balance that has been allocated to a DIA. However, many of the in-plan lifetime income product innovations currently available involve target date funds with embedded DIA allocations. The Group is concerned about the potential for administrative complexity where those DIA allocations, which are a component of the target date’s NAV and are therefore reflected in participant account balances, would somehow need to be “backed out” of the account balance before the balance is converted to an LII, and then separately illustrated. Therefore, the Group encourages the Department to remove this requirement and permit plan administrators to calculate a participant’s LII disclosure based upon the current value of the participant’s account balance, including account balances that reflect the value of an underlying DIA. Information about the DIA can be provided separately either by the plan administrator, or more likely the DIA provider, at the direction of a plan administrator.

The Group is also concerned about the Department’s inclusion of footnote 20 in the IFR.<sup>3</sup> While the Group will discuss the scope of the limitation of fiduciary liability in a subsequent section of this comment letter, it wanted to specifically note how unhelpful footnote 20 is to the continued inclusion of DIAs in retirement plans. While likely not intending to call into question whether the plan faces any additional fiduciary liability for including a DIA in the investment line-up of the plan or in making the disclosures required by the IFR, the inclusion of an explicit statement that puts these products outside of the limitation of fiduciary liability provided to other annuity products and other disclosures may result in fewer plans adding DIAs into their line-up

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<sup>3</sup> 85 FR 59132, 59140 (September 18, 2020). The footnote reads: “[a]s a result, and as discussed further below in section B(6) of this preamble, Limitation on Liability, plan administrators and other parties will not be able to avail themselves of the liability relief provided in paragraph (f) of the IFR. The SECURE Act amended ERISA to provide such relief when both specified annuity assumptions and model language provided by the Department are used; neither applies with respect to disclosure concerning deferred income streams.”

and additional plans questioning whether to retain them. The Group strongly encourages the Department remove footnote 20 from the final rule, and to explain why it is doing so.

Additionally, the Group encourages DOL to reconsider its position regarding the coverage of DIAs under the limitation of fiduciary liability and its decision not to provide model language for the DIAs disclosures. DIAs are an important part of the lifetime income product marketplace and should be provided with the same protection as other annuity products are given when communicating with plan participants and beneficiaries.

**V. The LII disclosures for guaranteed lifetime withdrawal benefit (“GLWB”) products.**

As noted in the preamble of the IFR, a number of annuity features and products exist in the retirement plan market, the treatment of which currently is not reflected in the IFR, for example, GLWBs. The Department requested feedback from interested parties on the role of these features in LIIs when it issued the advance notice of proposed rulemaking (“ANPRM”). However, according to the IFR’s preamble discussion, commenters on the ANPRM, 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 requested comments in response to the IFR as to whether, and how, to incorporate such features into the IFR’s framework for LII disclosures.<sup>4</sup>

The Group believes that GLWB and similar products are likely to develop a more significant presence in the retirement plan marketplace following the SECURE Act’s adoption. It is important that the Department address how these products should be treated for purposes of the LII disclosure. The Group notes that GLWB features are quite complex, so incorporating those features into the standard LII disclosure calculation, and backing out the applicable investment value, would be difficult and would likely not have an impact commensurate with overcoming those difficulties. Therefore, the Group believes that it would be appropriate to disclose any amounts that participants have invested in funds covered by a GLWB feature as part of the participant’s account balance that is converted to the standard LII disclosure with the actual benefits provided by the GLWB feature itself disregarded for purposes of calculating the LII. A legend could be added to the disclosure alerting participants to the fact that the GLWB features have been disregarded for purposes of the LII disclosure. Information about the GLWB can be provided separately either by the plan administrator, or more likely the GLWB provider, at the direction of a plan administrator. Finally, DOL should provide model language for LII disclosures that include GLWBs and explicitly bring those disclosures within Section 203’s limitation of fiduciary liability.

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<sup>4</sup> See 85 FR 59132, 59136-37

**VI. Scope of the IFR's limitation of fiduciary liability.**

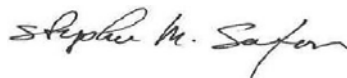
The IFR provides a limitation of fiduciary liability if the IFR's factors and model language are used. Notably, despite stating that the Department does not want to disrupt current practices, the limitation of fiduciary liability is not extended to preexisting or separate retirement income disclosures that are commonly provided by recordkeepers (i.e., those which are not based on the IFR's factors). The Group is concerned that by limiting the scope of the limitation of fiduciary liability, DOL will end up disrupting current practices and stifling potential services and models that could be more customizable and helpful to plan participants and beneficiaries by moving plan administrators to rely exclusively on the factors specified by the regulation and to discontinue using other disclosures and modeling tools. The Group strongly encourages DOL to confirm, as part of the final regulation, that any LII disclosures that used or uses reasonable factors are education and not guarantees or investment advice.

As part of the IFR's preamble DOL stated that "[c]omments, however, 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 described in this paragraph may constitute the rendering of "investment advice" or may, instead, constitute the rendering of "investment education" under ERISA."<sup>5</sup> The Group strongly encourages the Department to issue such guidance as part of the final regulation.

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We thank the DOL for all of its work in developing and finalizing the IFR and for the opportunity to submit these comments. We hope our comments are helpful. We would be happy to discuss these comments with members of the DOL in person or by telephone. Please let Tom Roberts, Michael Del Conte, Kevin Walsh or me know if that would be helpful.

Very truly yours,



Stephen M. Saxon

Cc: Tom Roberts  
Michael Del Conte  
Kevin Walsh

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<sup>5</sup> See *Id.* at 59141