



August 7, 2013

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

**Re: RIN 1210-AB20 – Pension Benefit Statements**

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter to the Department of Labor (DOL) in response to a request for comments on an advance notice of proposed rulemaking relating to the pension benefit statements required of defined contribution plans.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

### **Introduction**

On May 8, 2013, the Department of Labor issued an Advance Notice of Proposed Rulemaking (ANPRM) concerning lifetime income illustrations on pension benefit statements. The ANPRM follows a Request for Information (RFI) issued jointly by the DOL and Department of Treasury in 2010.<sup>1</sup> Although the RFI focused on lifetime income distribution options, the Chamber also commented on lifetime income illustrations by expressing concern that the plan

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<sup>1</sup>75 FR 5253, February 2, 2010.

sponsor may not be the best source for information on lifetime income products and that the DOL could provide such information on its web site or in materials that employers could provide to their employees.<sup>2</sup>

The ANPRM states that the DOL is considering a proposal that would require, on the pension benefit statement for all defined contribution plans, the value of the participant's current and projected account balance and the estimated lifetime income stream from each. The DOL is looking for comments on specific language and concepts. In addition, the summary states that the DOL will consider all reasonable alternatives to direct regulation, including whether there is a way short of a regulatory mandate that will ensure that participants and beneficiaries get constructive and helpful lifetime income illustrations.

The Chamber is concerned about mandating lifetime income illustrations on participant benefits statements. As explained below, we believe that a mandate will not serve the purpose of providing greater education about lifetime income options and may, in fact, deter such efforts. Moreover, we recommend that the DOL encourage plan sponsors to provide information on lifetime income options by clarifying the rules surrounding investment education and electronic delivery.

### Comments

**Lifetime Income Disclosures Should Not be Mandated.** Chamber members acknowledge that educating plan participants about lifetime income distribution options is an important tool to help participants realize the need to plan for the decumulation phase of their retirement. However, there is also concern that plan sponsors may not be the best source for information on lifetime income products, especially if they do not provide a lifetime income distribution option at retirement. Moreover, there is concern that becoming too involved in this area may increase an employer's fiduciary liabilities without providing an equal benefit in workforce productivity. Finally, many plan sponsors do not have sufficient information regarding individual retirement funding issues or various lifetime income options. For these reasons, the Chamber opposes the requirement that a lifetime income illustration be included on participant benefit statements.

Furthermore, we do not believe that mandating lifetime income disclosures is supported by statute. ERISA section 505 gives the DOL broad regulatory powers, but section 105 requires benefit statements to report only "benefits accrued" and vesting information. Under ERISA, a defined contribution plan's accrued benefit is defined as "the balance of the individual's account."<sup>3</sup> Therefore, the disclosure of the account balance fulfills the requirement of the statute. Any additional information that the DOL believes is important may be encouraged and facilitated but it should not be mandated.

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<sup>2</sup> US Chamber of Commerce, Comments on Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, May 3, 2010 at <http://www.uschamber.com/issues/comments/2010/rfi-lifetime-income-options-participants-and-beneficiaries>.

<sup>3</sup> ERISA section 3(24)(B).

**Notices and Disclosures Should Provide Meaningful Information.** In general, the Chamber is very concerned about the number of notices and disclosures that are required. In addition to administrative burdens and costs, plan sponsors and participants are overwhelmed by the disclosure requirements. We believe that participants are so overwhelmed by the sheer number of notices that they are not paying attention to any of them. As such, the Chamber has called for a congressional review of all retirement plan notices under ERISA and the tax code to determine where there is overlap and duplication.<sup>4</sup> Until that is done, we believe it is essential that the DOL carefully consider whether additional disclosures provide meaningful information. We argue that this one does not.

First, setting the rate of return in the regulation is misleading to participants. It gives the impression that this is the “right” rate of return rather than a general assumption that is not specific to the individual or his/her situation. Even with the disclaimers, setting a specific rate of return gives implicit substantiation that this is the appropriate rate for each individual. The DOL should not condone this type of imprecise information, particularly when the agency has been so diligent about precision in other areas (such as plan fee disclosure).

Second, setting the assumptions in regulations makes them static and unreliable. Again, the assumptions are based on generalities and averages over a period of time. As we have seen recently, such averages may differ greatly from an individual’s situation. While the assumptions that are included today (3% contribution increase and 7% investment return) may seem reasonable for now, they may not be reasonable in the future. Changing them will require time and discussion and may make these assumptions perpetually stale.

Third, the Chamber is concerned that mandating a safe harbor will essentially drive the practice to the safe harbor and, thus, eliminate the high-quality and meaningful education tools that are currently available. As the DOL notes in the preamble to the ANPRM, many plan sponsors are already providing calculators to their participants.<sup>5</sup> Additionally, ERISA section 105, that was included in the Pension Protection Act of 2006, requires individual account plan benefit statements to include a notice directing participants or beneficiaries to a DOL website for information about investing and diversification. That DOL website references a number of financial resources which includes links to four retirement income calculators.<sup>6</sup> These interactive tools provide participants with much more meaningful information than what is being considered in the ANPRM.

**The DOL Should Clarify that Education on Distribution Options is not Investment Advice.**

Plan sponsors currently provide plan participants with valuable information about retirement savings and how much individuals need to save for retirement. Many plan sponsors would also like to provide the tools necessary to help employees decide how to make their retirement savings last. Chamber members feel that there should be greater education generally on lifetime income as a distribution option. Particularly, since some employers may choose not to offer a

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<sup>4</sup> U.S. Chamber of Commerce, *Private Retirement Benefits in the 21<sup>st</sup> Century: A Path Forward*, 2012, p. 10, <http://www.uschamber.com/reports/private-retirement-benefits-21st-century-path-forward>.

<sup>5</sup> 78 FR 26727, May 8, 2013 at 26729.

<sup>6</sup> <http://www.dol.gov/ebsa/investing.html>.

lifetime income distribution option, education about the various distribution choices (either distribution from a defined contribution plan or after rollover into an IRA) to plan participants prior to retirement would significantly help plan participants to make informed choices regarding their retirement savings and income. However, plan sponsors may be concerned about the liabilities associated with providing this type of advice.

Interpretive Bulletin 96-1 (IB 96-1) has worked well in providing a path for employers to distinguish between education and advice.<sup>7</sup> As such, we recommend that IB 96-1 be affirmed and expanded to allow employers more flexibility in determining the types and manner of education that is most useful to its workers. There are many issues that participants consider at the time of distribution and factors that have to be addressed in order for lifetime income options to become an attractive choice for plan participants.<sup>8</sup> Greater education and information will increase awareness of lifetime income options, but will not address all of the reasons participants do not choose lifetime income products. In addition, distribution of a participant's account in the form of lifetime income may not be right for every participant. Therefore, the goal should be to provide participants with the necessary education and tools to enable them to make the right decision for themselves. As such, rules should provide plan sponsors with the protection and flexibility to educate their employees regarding their options. This will ensure that participants have good information to make an informed choice about the options available to them.

To further this goal, IB 96-1 should be expanded to allow for the provision of information to help participants to make choices regarding their decumulation strategies without being considered investment advice. For example, IB 96-1 could be broadened to allow for the provision of retirement calculators and similar tools that use reasonable assumptions and are based on generally accepted investment theories. In addition, the DOL should state that the provision of a retirement calculator does not result in a fiduciary act that creates personal or fiduciary liability under ERISA or create a basis for a claim or right under the plan. Moreover, the guidance should allow for the provision of information in a product-neutral manner. Efforts to provide greater education should not hamper continued innovation and growth of educational tools or financial products.

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<sup>7</sup> 61 FR 29586, June 11, 1996.

<sup>8</sup> Even when a lifetime income option is offered in a defined contribution plan, participants often do not choose it. There are many reasons for this including, but not limited to:

- Lack of education or confusion about how lifetime income options work or the difference among the various products;
- Participants feel that they can manage their own assets and generate better returns on their investments than the interest rates provided in lifetime income products;
- The participant is separating from service but not retiring;
- The plan distribution is only one part of the participants retirement assets (including Social Security which is paid as an annuity);
- The participant or his or her spouse is in poor health and the annuity option would not be best because annuity rates do not reflect health status;
- The participant does not understand the market risks associated with managing assets while also drawing on them for expenses;
- Mistrust of leaving money with the employer or a financial institution.

**Encouraging Electronic Disclosures Could Promote Education on Lifetime Income Disclosures.** As mentioned above, many plan sponsors encourage their participants to use income calculators that are provided by service providers. Using electronic disclosures could further this effort by enabling participants to simply click to the appropriate information immediately rather than having to enter a website address at a later date. Therefore, we recommend that the DOL change its standard for electronic delivery to encourage the use of electronic delivery and to allow, for those plan sponsors that wish, that electronic delivery be the default delivery option for benefit notices. The Chamber believes that modernizing the restrictive rules on electronic delivery in this manner is a critical element in the larger task of reforming employee benefit plan notice and disclosure requirements. These changes can allow for the provision of important information without it being submerged in an avalanche of rarely used information.

**The DOL Could Provide Information on Lifetime Income Options.** Plan sponsors are currently required in benefit statements to notify participants of information on investing that is provided through the DOL. The DOL's website is a good source of investment information for participants of all investing levels. This would also be an appropriate place to include additional information on lifetime income options. In addition to having a reliable repository of information, it would also alleviate employer concerns about increased liabilities since the information is coming from the DOL.

As noted above, the Chamber recommends that all approaches to distribution issues be done in a product-neutral manner. Recognizing the need to ensure that participants are not overwhelmed with choices and receive sound information must be balanced with allowing for continued innovation and growth of financial products.

**Further Regulatory Action Must Be Based Upon a Clearly Defined Basis of Need.** Even if there is statutory authority for further regulation, we urge the DOL to demonstrate that there is a clearly defined need for a mandated lifetime income illustration. Under the terms of Executive Orders 12866 and 13563, agencies contemplating regulatory action first have the duty to clearly define the basis of need for the contemplated regulatory action. Demonstrating the need for a regulation requires more than qualitative speculation that a problem "might" exist or that regulation "might" lead to improved outcomes. The demonstration of need for a regulation should be based on a solid foundation of empirical research that credibly shows the qualitative dimensions of the putative problem: numbers of individuals affected, economic value of losses incurred, etc. Thorough empirical research to explore and demonstrate the need for regulatory action is the foundation on which subsequent required analysis of the costs and benefits of alternative regulatory approaches can be built.

Under current rules, the plan sponsor is required only to provide information regarding the current account balance ("benefits accrued") and vesting information. The ANPRM suggests that there is a need to go beyond the current requirement and to require that the plan sponsor provide further information in the form of estimates of future lifetime income payments. However, the DOL's description of the need for regulation, as expressed in the ANPRM, is wholly speculative and qualitative. The DOL states that individuals do not adequately

comprehend the relationship between their current retirement account accumulation and the future income that they can reasonably expect to derive from it. The DOL assumes that individuals perceive their retirement savings account as simply a savings account and not as a vehicle for future income replacement. The DOL further assumes that this supposed difference in perception is a problem in the sense that it results in less retirement savings (and less future income replacement) than would otherwise occur. The DOL seems to be jumping to a number of conclusions without adequate empirical basis. Therefore, before proceeding with further regulatory action, the DOL should undertake a systematic program of research to establish the need (or lack of need) for regulation of this matter in quantitative terms. This research program should address several empirical questions through surveys, experiments and behavioral observations:

1. How do individuals perceive and apply the information regarding pension account balances that they currently receive? Do they perceive a difference between the uses of a retirement account and the uses of an ordinary savings account? How do their perceptions differ by critical variable such as age, educational attainment, earnings, marital status, etc.
2. To what extent, if any, are individual differences in these perceptions correlated with differences in their contributions to their own retirement savings, in investment decisions, including risk-taking?
3. To what extent, if any, do individual attitudes and saving behavior respond to different formats of information presentation? In particular, the DOL has the opportunity to conduct longitudinal research to present different randomly selected panels of individuals with various alternative streams of information and to track actual behavioral responses.
4. What is the monetary cost to individuals and to society of differences in perceptions and differences in behavior regarding retirement savings decisions?

These are just a few of the empirical questions that should be the subject of intense research sponsored by the DOL before proceeding toward any specific regulatory proposal. The answers to such questions will inform the regulatory need discussion that must be featured in the preamble to any proposed regulation, and the answers to these questions will also help frame the estimation of social welfare benefits that must be estimated and compared to the costs of any regulation proposal.

### **Conclusion**

We understand the DOL's concern about retirement security. As plan sponsors, our members want to ensure that the resources they have expended on providing retirement benefits result in actual retirement security. Educating participants about lifetime income options is an agreed goal. However, mandating information that is ambiguous and not meaningful to a participant does not further that goal. In addition, driving out innovative tools and ideas may move participants further away from that goal. We believe that by encouraging plan sponsors to provide lifetime income information – through clarifying the rules around investment advice and electronic delivery – we can all succeed in educating participants about lifetime income.

Thank you for your consideration of these comments and we look forward to further discussions with you on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson". The signature is fluid and cursive, with a large initial "R" and a long horizontal stroke at the end.

Randel K. Johnson  
Senior Vice President  
Labor, Immigration & Employee Benefits  
U.S. Chamber of Commerce

A handwritten signature in black ink, appearing to read "Aliya Wong". The signature is cursive and elegant, with a large initial "A" and a long horizontal stroke at the end.

Aliya Wong  
Executive Director  
Retirement Policy  
U.S. Chamber of Commerce