August 7, 2013

**Submitted electronically to e-ORI@dol.gov**

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

Attention: Pension Benefit Statements Project (RIN 1210-AB20)

Ladies and Gentlemen:

Buck Consultants LLC, a Xerox Company, is pleased to submit these comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) on the disclosure of estimated lifetime benefits on defined contribution plan statements.

Buck is a leading global employee benefits and human resources consulting firm that provides assistance to employers that sponsor retirement plans for their employees. Many of our clients would be materially affected by this proposal.

**Introduction**

Buck is a strong advocate of bringing tools to employees that will aid them with their retirement saving and distribution decisions. We appreciate this opportunity to comment on the ANPRM. While we applaud any guidance and relief that supports employer educational efforts aimed at helping employees better understand the amount of income their retirement savings may provide, we question whether the Department has the authority under ERISA to *require* lifetime income information on participant statements. We are also concerned that the statement mandate, as proposed, would not be particularly useful to participants, and may inspire employers to abandon other more useful, participant-friendly approaches such as modeling tools that allow participants to include other retirement assets.

**The Department does not have the authority to require this additional information**

The ANPRM notes, "Section 105(a)(2)(A)(i)(I) requires a benefit statement to indicate the participant's or beneficiary's ''total benefits accrued.'' The proposed rules being considered by the Department are pursuant to this section of ERISA, as well as ERISA section 505. Section 505, in relevant part, provides "that the Secretary may prescribe such regulations as the Secretary finds necessary or appropriate to carry out the provisions of title I of ERISA."

ERISA section 3(23) provides a definition of "accrued benefit" as:

> "(B) in the case of a plan which is an individual account plan, the balance of the individual's account. The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) [29 USC §1054(c)(2)(B)] with respect to the employee's accumulated contribution."

Although the statutory language of section 105(a)(2)(A)(i)(I) uses the phrase "total benefits accrued", there is nothing to suggest that this is different from the "accrued benefit" equal to the account balance. There is no lifetime equivalent of the account balance that exists as a benefit accrued under a defined contribution plan unless there is some specific product or mechanism specified by the plan. Indeed, the Department acknowledges in the ANPRM the concern of fiduciaries that annuity illustrations will be misinterpreted as guarantees—which they are not—because they are not the "total benefits accrued" under the plan.

Further, we note that although section 505 authorizes the Secretary to prescribe regulations, section 505 does not authorize regulations mandating requirements that are not provided for by title 1 of ERISA. In the absence of a legislative change, we believe the statute does not currently support this mandate.

The legislative history on this topic indicates that Congress has considered this issue of lifetime income in the past. The fact that legislation has been proposed suggests that Congress believes that the Department does not have the authority to regulate on this topic without Congressional mandate. The Lifetime Income Disclosure Act was introduced in the House and referred to Committee in the 113th Congress on May 23, 2013 as H.R. 2171. A companion bill, S.1145, was introduced in the Senate on June 12, 2013. Similar legislation had been considered by both the 111th and 112th Congresses as well. It is not appropriate to impose a requirement that could lead to the imposition of penalties without Congressional authorization. We encourage delaying this requirement until authorized by legislation.

**A mandate would be costly and ill-advised**

Plan sponsors and their providers will be concerned about the liability and exposure to litigation that could result from this mandate due to unmet expectations. This concern is recognized by the inclusion of a limit on liability in the proposed legislation. Past feedback to the Department asked for guidance framing expectations and responsibilities to address employer concern over the potential for litigation due to unmet expectations. Such guidance, in our view, would be the better "carrot" for achieving the desired result.

An additional concern is that the proposed requirement and its attendant notion of a safe harbor may discourage employer efforts to implement or enhance educational tools. It is very tempting to avoid controversy and the threat of litigation by sticking with an agency safe harbor. Some employers may even eliminate existing superior tools that deliver results that are inconsistent with the safe harbor.

Any mandate by the Department also will result in increased costs that will in many cases be passed along to participants—further depleting the funds that will be available to them for retirement. Even if the employer picks up the cost, there will likely be an impact to employees because the total dollars allocated for benefits is generally limited. Ideally, the Department would instead take steps to ensure that participants and beneficiaries get constructive and helpful lifetime income illustrations through a public resource. The recently issued Retirement Toolkit offers many helpful instructions and links. Included is a link to the collection of information at "Taking the Mystery out of Retirement Planning", which already provides information on how savings can grow over time and about how much will be needed in retirement. To assist employers who wish to voluntarily offer additional tools for plan participants, the Department should issue general guidelines and provide protections from liability.

Should the Department persist in making lifetime income projections on statements a requirement, we have recommendations for simplifying the mandate to more effectively manage impact and costs. Otherwise, the unanticipated result of the required changes may be an adverse impact on participant account balances and future income streams.

**There are better places to deliver projections than on participant statements**

Arguments can be made in support of informing participants of their progress toward reaching their retirement target by adding more information to the account statements. However, we are concerned that the message will be lost among the many other pieces of information provided concurrently. In addition, the volume of information needed to convey the associated caveats and assumptions will dwarf the substantive information the Department wishes to convey.

The idea that a single line of information using a uniform set of assumptions can provide meaningful information, while well-intentioned, is ultimately misguided. In reality, retirement outcomes will vary significantly depending on actual investment returns, actual inflation rates, actual contribution levels and actual retirement age. In addition, employees may have multiple retirement accounts and other savings beyond just the balance in a single defined contribution account. An effective tool will allow all of these elements to be gathered and evaluated with variable assumptions. The Department's earlier effort to provide a retirement savings worksheet came closer to the mark in providing something that would fill this need.

Adding more information, as proposed in the ANPRM, to participant statements would be costly. Vendors would need to build an engine for calculating the required information and develop procedures for feeding in current mortality and Treasury rates on an ongoing basis. Statement language would need to be developed. It is reasonable to imagine that at least a full additional page of information would be added to the existing statement. The cost of this development and maintenance would increase the cost of the plan to the employer, and in many cases this cost would be passed on to participants. For sponsors that mail statements, postage costs may also increase. Escalating costs invariably lead to lower account balances. Given that the resulting information is insufficient for most purposes and is generally misleading, the cost cannot be justified.

**Plan sponsors should have flexibility in how to present information**

In framing guidance (hopefully about expectations, sponsor protections and responsibilities rather than a mandate), we believe that the Department can promote innovation and offer cost-efficient opportunities to present valuable information by incorporating a number of flexible options.

*Delivery method:* The Department's current guidance on statement delivery allows for electronic distributions (Field Assistance Bulletin 2006-03). Any reversion to a paper mandate should be discouraged. It should be noted that the Social Security Administration has not only stopped mailing retirement projections, it has moved from a model of delivering statements to all participating individuals to an online model in which estimates are provided "on demand."

Participants who do not have work or home computers are not necessarily isolated from electronic communication. Internet usage, particularly via smartphone, is pervasive.

More and more frequently, the preferred method of communication is not paper. With each passing year, more of the population is accessing information electronically. Indeed, the youngest members of the workforce rely almost exclusively on electronic communication[1]. Millennials may be most enticed by a QR code that they can scan to gain access to a modeling tool, while employees in the decade approaching retirement might be more inclined to follow a traditional URL to a website with modeling capabilities.

An engaging public education campaign directing individuals to a website explaining the amount of savings needed and how to measure progress toward a suitable goal, particularly one with interactive tools, is likely to be more useful than extra information added to a quarterly statement that is quickly filed away or discarded—if it is reviewed at all. The sheer volume of information involved, including requisite legal disclaimers and language about underlying financial assumptions, can be intimidating, confusing and overwhelming. The information should be simple and straightforward to best assist the intended audience.

*Placement:* The Department should allow for the delivery of information in a variety of ways, not just on the quarterly participant statement. Some plan sponsors may opt to provide more robust information than currently proposed—perhaps a table showing a range of outcomes for multiple commencement ages and investment return rates—and this information may be more valuable if presented as a separate communication or in connection with annual enrollment materials or an annual benefits summary rather than a quarterly account statement. Allowing sponsors to determine the best way in which to present materials will make it more likely that the information can be appropriately highlighted to the participant.

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[1] For example, by 2016, 80% of the US population will use mobile phones. Source: http://ansonalex.com/infographics/smartphone-usage-statistics-and-trends-2013-infographic/

*Delivery timing:* If delivery on statements is selected, many vendors will likely find it easier to provide the lifetime income number on every statement rather than suppressing the information to meet an annual obligation. But for those who choose other communication routes, an annual communication should suffice. Indeed, an annual delivery might allow for greater attention. It would also make it less likely that participants would be confused by estimates that shift dramatically due to market volatility from quarter to quarter.

**Inaccurate assumptions lead to misleading expectations**

Our recommended approach is to provide a range of results or the ability to vary assumptions to produce such a range. However, if a single set of assumptions is put in place, we recommend a number of changes from those in the ANPRM.

*Form of payment*: We have two comments about the annuity information contemplated by the ANPRM. First, most defined contribution plans do not directly offer distributions in the form of an annuity. If the plan does not offer life annuities, it should not be required to provide any annuity illustrations—single life or joint life. Furthermore, experience has made it clear that the vast majority of plan participants do not purchase annuities with their defined contribution account balances. While this could change, we believe it is misleading to present information that is not based on realistic expectations or commonly experienced outcomes. The more logical presentation would reflect an estimate of the expected draw-down available over a period of time. The expected draw-down should reflect a period greater than life expectancy so as to stretch out payments to an age that most people are unlikely to surpass.

Our second comment about the form of payment concerns plans that do offer a true mechanism for annuitizing the participant's account. For these plans, we recommend that an illustration of joint and survivor values be based on a 75% survivor annuity rather than a 50% survivor annuity. Participants often assume that plan defaults are "recommendations". An expectation that a survivor can live on half of the couple's income will generally create a hardship for the survivor. We believe the better default is the 75% option.

*Draw-down or life annuity factor:* Consideration should be given to adjusting the draw-down or life annuity factor to reflect post retirement inflation. The Department's proposal would adjust the projected account balance to take inflation into account up to the normal retirement date, but then ignores the impact of inflation at normal retirement date (or later) by limiting the conversion to an annuity factor based on interest and mortality. This is inconsistent. Consideration should also be given to an adjustment for fees to purchase the annuity contract. Because these are typically charged on a sliding scale basis, it is difficult to select a single rate. We recommend erring on the high side to be conservative in the result.

*Current contribution amount:* The Department's safe harbor projection provides for an annual increase of 3% over the current annual dollar amount contributed. What is not defined is how to determine the contribution amount on which the projection is made. For example, is the contribution amount based on the current year, prior year, rolling 12 months or an annualization

of the current quarter? Many participants change the rate of deferral as life situations change and many higher paid individuals will front load contributions, reaching the IRC section 402(g) limit early in the year. In addition, in projecting contribution amounts for a younger participant, should the impact of catch-up contributions upon attaining age 50 be incorporated? Should illustrations be adjusted for taxes? When determining the monthly payout stream, will differentiation be needed between after-tax and pre-tax contributions? With the increase in plan sponsor adoption of Roth contributions , a participant with a qualified distribution of Roth contributions is at a significant advantage over a participant with pre-tax contributions because the tax has already been paid. Other complicating factors include handling of loan balances, which may or may not be paid off, and hardship withdrawals. A participant suspended for six months will have a lower contribution amount in a given year that will distort future contribution amounts and hence future annuity payouts.

For these reasons, the Department should reconsider the merits of requiring the inclusion of future contributions at all.

*Interest, inflation, and wage increase rates for projecting account balance:* The Department asks if it would do more harm to overestimate wage increases for workers whose wages will likely remain flat than would be done to underestimate wage increases for workers whose wages are likely to rise quickly. We see more harm in overestimating. The economy has been largely stagnant and raises have not been at the 3% rate for large segments of the population. Many employees have not received any raises since the onset of the recent financial crisis; others have experienced pay cuts. Factoring in a contribution rate increase based on a 3% wage increase can only lead to inflated expectations and, ultimately, dissatisfaction with results. Defined benefit plans do not provide participant statements that reflect salary increases. We recommend the same approach for defined contribution plans.

We are also concerned that the 7% interest and 3% inflation assumptions are both overly optimistic and excessively rigid for this type of projection. We believe participants would be better served, and would make better decisions about the amount they need to save, if the Department identifies indices that reflect long-term market conditions at the time of the projection. Much in the same way that 401(k) loan interest rates are typically tied to market rates, the interest and inflation assumptions used in the calculation should represent appropriate, conservative market rates at the time of the projection. Note that we recognize the disconnect between a general inflation rate assumption based on a suitable index and no wage increase assumption as suggested above, but believe this is justified due to ongoing economic uncertainties.

It is difficult to recommend any single rate or index as reasonable for all participants. Recommended strategies vary for different age groups and all participants have different investment portfolios. We believe that it is inherently riskier to overstate projections for a participant than to understate them. If the Department firmly believes that publishing a single interest rate for this purpose is necessary, we recommend the 5% rate mentioned in the

ANPRM rather than the 7% standard. Participants who view the projected amounts as insufficient may be spurred to save more, which could only serve them better in the future.

*Rounding*: To further emphasize that the values provided are strictly estimates, we recommend that the draw-down or annuity amounts be rounded down to the nearest $100 of benefit and that any projected account balance be rounded down to the nearest $1000. Providing exact amounts may lead participants to believe that the projected amounts are commitments of some kind.

*Target distribution age:* For various reasons, we recommend that the age for the commencement of projected distributions be set at 65, or current age if later, rather than the plan's normal retirement age. First, a defined contribution plan's normal retirement age is generally a non-event in terms of benefit rights. There is no particular reason to assume that the date defined by the plan will influence behavior. Participants are more likely to view eligibility for Medicare coverage—age 65—as the desired age to retire. A uniform age assumption across plans facilitates comparisons across plan accounts for individuals who have accounts in multiple plans or IRAs. Additionally, a uniform age may simplify administration for vendors and aid in limiting development and maintenance costs.

*Age of spouse:* When plans that offer annuities provide projections, plan administrators should be permitted to assume that all participants are married and have a spouse of the same age. Since the projections may reach years into the future, relying on current marital status does not seem a reliable way of determining which participants may need to consider financial protection for a spouse in their retirement years. Since many defined contribution plans do not maintain spousal data, assuming that there is a spouse and that the spouse is the same age as the participant would be the most cost effective way of handling spousal projections. In addition to the joint and survivor projections, single life projections could be provided for all participants as well.

*Benefit from current account*: The ANPRM suggests that the determination of the draw-down or annuity provided from the current account at normal retirement age would be based on the current account value, divided by the annuity factor at the normal retirement age, without adjusting the account balance to reflect any investment income for the intervening period. We recommend that any estimates presented for the current account reflect projected income, adjusted for inflation. Dividing a current balance by a factor for an age that is some number of years into the future as suggested in the ANPRM assumes the plan participant will hold their account in a non-interest bearing cash account for all those years. This can only present a discouraging picture to the participant. Although we see merit in applying conservative assumptions, making an assumption that the account stays flat for many years is unrealistic.

**Disclaimer should warn participants not to rely on these numbers**

We agree that the statement of assumptions and appropriate disclaimers should state that the values displayed are merely estimates and should not be construed as any sort of promise about future benefits. However, it would seem important to indicate to participants that these

numbers are only guesstimates. Although intended to educate participants about investing for potential retirement income, we emphasize that historic performance does not predict future results. Perhaps a label such as “Your Ballpark Retirement Numbers” could reinforce that the values presented are hypothetical and broadly framed. If such a label were used consistently from plan to plan, it could be used as the basis of a public service campaign that could reinforce the estimate concept and help drive participants to a Department website with additional tools and information. Consider pairing a consistent label with instructions to “go to www.DOL.gov to learn more about using your account balance to provide adequate retirement income.”

**Limiting litigation risk is imperative**

In many cases, what stands in the way of plan sponsor efforts to communicate relevant information to participants is fear of litigation. One of the key motivators for the establishment of defined benefit plans had been to manage the employer’s workforce by making it feasible for employees to retire rather than continuing to work past the point of being productive. Now that DB plans are on the wane, that motivator is still present—but is counterbalanced by concern for the risk presented by investment volatility and mortality improvements. Guidance from the Department that reduces risk of litigation would support the formation of tools and communications that can help employees manage expectations and understand what needs to be done to achieve their retirement goals.

**In closing**

We would like to thank the Department for this opportunity to comment on the ANPRM and hope that this process leads to the development of useful tools that help participants get good information in a way that meets their needs and reasonably insulates plan sponsors, fiduciaries, administrators, and vendors from litigation. Although we think providing information to participants is good, a mandate, particularly on the quarterly statement, is not the right approach. Participants need clear information, good tools, and a chance for a holistic view of their retirement prospects. Sponsors need flexibility and protection from liability. The marketplace appears to be moving rapidly to help employers address the underlying concerns. New resources are being introduced routinely. Employers also seem to be responding by generating demand for these offerings and taking steps to help individuals prepare more effectively for a secure retirement. We suggest the Department monitor these developments and allow employers, professionals, and employees to respond on their own, thus eliminating the need for special requirements.

These comments reflect combined input from a number of Buck colleagues. If further information would be helpful, please feel free to contact me.

Sincerely,

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cc:

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