The
ERISA
Industry
Committee

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 20510

RE: Pension Benefits Statement Project (RIN 1210-AB20)

Ladies and Gentlemen:

The ERISA Industry Committee is pleased to respond to the request of the U.S. Department of Labor (the "Department") for feedback on the Pension Benefits Statement Project (the "Pre-Rule").[1]

The ERISA Industry Committee ("ERIC") is a nonprofit association committed to the advancement of the employee benefit plans of America's largest employers. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families. ERIC is committed to preserving and enhancing the voluntary employer-provided retirement system.

The Department is proposing in the Pre-Rule that lifetime income disclosures would be required for all participants and beneficiaries (collectively "participants") on a quarterly basis. The proposal would expand the existing benefit statement, which currently requires a simple statement of the participant's current account balance. The additional disclosures would potentially include the participant's current account balance, a projected account balance, and lifetime income examples. The Pre-Rule would require companies to make these disclosures based on a number of assumptions.

ERIC applauds the Department for encouraging Americans to focus on the importance of adequately preparing for retirement and working to support the ongoing efforts of plans and plan sponsors in this regard. ERIC strongly supports the use of optional disclosures and educational materials to help workers understand their benefits. ERIC's members spend considerable amounts of time, money, and effort to educate their workers about retirement adequacy without providing investment advice.

However, ERIC's members have concerns about the approach taken by the Department in the Pre-Rule. We are concerned that the Pre-Rule – particularly the illustrations involving projections with regard to future accruals – exceeds the Department's statutory authority and is not an appropriate approach for addressing the Department's objectives. Instead of a prescriptive mandate, we believe the Department

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[1] 78 Fed. Reg. 26727 (May 8, 2013).

should issue guidelines that encourage innovation and flexibility. We also propose alternatives that we believe would be more effective than the approach described in the Pre-Rule.

ERIC looks forward to working with the Department to encourage lifetime income disclosures and planning tools that will ensure that participants get constructive and helpful information on their benefit statements in order to help them prepare for a secure retirement.

SUMMARY OF COMMENTS

The following is a high-level summary of ERIC's comments.

- Lifetime income disclosures should be voluntary, not mandatory and the guidance should be flexible enough to encourage innovation.
- The disclosures required by the Pre-Rule would be confusing and misleading for many participants. Employers are concerned that providing this information will eventually lead to litigation that, while ultimately lacking merit, will unnecessarily add to the cost of providing benefits. Moreover, we do not believe section 105 of the Employee Retirement Income Security Act of 1974 ("ERISA") authorizes the Department to require the projections described in the Pre-Rule.
- Instead of a prescriptive mandate, the Department should issue guidelines (along the lines of Interpretive Bulletin 96-1[2]) that encourage the use of more effective educational tools, such as online modeling.
- We believe there are many ways in which the Department can effectively encourage participants to save and plan for retirement without imposing a prescriptive mandate on employers.

DETAILED COMMENTS

I. Lifetime income disclosures should be voluntary, not mandatory, in order to preserve employer flexibility and foster innovation.

As discussed below, the current voluntary system has been very effective in encouraging innovation in retirement plans. This has been critical given the diverse nature of workers that are covered by the system. The Department should continue to foster this innovation instead of imposing a mandate on plans. Furthermore, we are concerned that the method by which the Department would impose a mandate (i.e., by defining "total benefits accrued" as something other than the value of the participant's accrued benefit) exceeds the Department's statutory authority.

A. The U.S. retirement system is built upon an effective voluntary system.

The U.S. retirement plan system is designed to be voluntary. While ERIC recognizes that the government regularly imposes requirements on this voluntary system, these mandates should be no more burdensome than necessary and not exceed the law's requirements. Allowing companies to

[2] 29 CFR §2509.96-1.

have flexibility to develop their own methods of disclosing retirement distributions encourages innovation and creativity that benefits both participants and the retirement system as a whole.

Without a mandate, companies and service providers have been actively developing tools to educate their workers on the importance of saving and retirement readiness. By imposing a mandate, the Department will stifle innovation with respect to participant disclosures in this area. The result will be that the vast majority of companies and service providers will focus on satisfying any safe harbor provided by the Department, instead of continually experimenting with new ways to educate and engage their workers regarding retirement savings.

A one-size fits all approach simply does not work in this area. Different employers have a variety of benefit structures and distinct populations of workers – all with different needs. For example, many employees work for large companies who sponsor defined benefit plans. For these workers and others, annuities often do not make sense. For many retirees, it is often better to keep defined contribution assets liquid for unanticipated cash needs – such as medical expenses, as an alternative to life insurance, and emergencies.

B. The Department's interpretation of "total benefits accrued" in the Pre-Rule does not appear to be reasonable.

The Preamble states that the proposal is based on ERISA section 105. ERISA section 105 states that the benefit statements must include "on the basis of the latest available information…the total benefits accrued…"

Under ERISA, the accrued benefit under a defined contribution plan is "the balance of the individual's account."[3] More generally, the concept of accruals under ERISA has always referred to rights that have already been earned. This concept is reflected, for example, in the anti-cutback rule, which has always distinguished between rights that have "accrued" and the possibility of future accruals. Based on the statute and the long history of interpreting the concept of benefits accrued, a statement of "total benefits accrued" should not have to include anything more than the account balance.

In contrast, the Pre-Rule seeks to require much more than simply the account balance. In addition to requiring that the balance be expressed in a different form (i.e., a hypothetical annuity), the Pre-Rule would require a projection of future earnings, compensation increases, and contributions. We do not believe a reasonable reading of the term "benefits accrued" can include these future additions that have not yet been made — and in many cases will not be made.

Indeed, the preamble to the Pre-Rule acknowledges that the Pre-Rule would require much more than the benefits accrued. The preamble states "An illustration based on a projected account balance will show, not what the participant has saved to date, but what he or she might realistically expect to have at retirement..."[4] Congress too has recognized that lifetime income disclosures cannot be required without a change to the statute.[5]

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[3] ERISA § 3(23).
[4] 78 Fed. Reg. at 26729.
[5] *See*, H.R. 2171 (May 23, 2013), S.1145.IS (June 12, 2013).

In short, the Department's interpretation of section 105 appears to exceed the Department's authority and is inconsistent with the Department's obligation to conform to a "permissible construction" of the statute.[6]

II. The disclosures that would be required by the Pre-Rule are likely to be confusing and misleading for participants and would create unnecessary uncertainty for plan sponsors.

A. Providing a projection of future balances would likely result in unrealistic expectations by participants.

The Pre-Rule would require projections of future balances and payments, using a number of assumptions to predict hypothetical annuities for participants. This approach will result in unrealistic expectations and confusion by participants as actual contributions, compensation, and investment earnings will not follow the assumed patterns. For example:

- Projections based on averages do not account for the fact that workers typically do not save consistently throughout their careers.[7] Participants can often save more at some times, and less at other times. For example, some participants may have recurring periods of unemployment, change jobs, move frequently, or have a spouse who has experienced periods of unemployment which can impact their ability to consistently make contributions and/or vest in employer contributions. Participants may also have breaks in service and financial challenges that could impact deferrals if they go back to school, raise children, care for elderly parents, deal with medical issues, etc. Indeed, Congress recognized the typical "lifecycle" of savings and that savings patterns are uneven over time when it allowed "catch-up" contributions. By allowing plan participants to make additional contributions to 401(k)-type plans at age 50 or older, Congress acknowledged the importance of facilitating additional retirement savings later in life, when it is most likely to occur. Simply projecting a recent contribution rate into the future will not account for these fluctuations – inevitably leading to unrealistic projections. Furthermore, the Pre-Rule would require projections even for workers who have terminated employment and clearly will not continue to receive contributions.

- The assumption that wages will consistently increase for all workers is unrealistic and inconsistent with experience.[8] The Pre-Rule suggests that workers can expect to remain employed and receive raises and promotions consistently throughout their careers.[9] Unfortunately, this is not the case. For example, the Bureau of Labor Statistics has indicated that there were 10 recessions between 1948 and 2011. During these recessions, a large number of previously employed individuals failed to see increases in their compensation or faced layoff.

- It is not appropriate to expect employer contribution levels to increase or remain constant throughout a worker's career. Participants may change employers and work for employers

[6] *See*, *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-843 (1984).
[7] *See*, Barbara A. Butrica and Karen E. Smith, *401(k) Participant Behavior in a Volatile Economy*, Center for Retirement Research at Boston College (Nov. 2012), available at http://bit.ly/15L6gAM.
[8] U.S. Bureau of Labor Statistics, *The Recession of 2007–2009* (Feb. 2012), available at http://1.usa.gov/Q4DBPO.
[9] *See*, ANPRM § 2520.105-1(d), 78 Fed. Reg. at 26737.

that offer different retirement benefits or who do not offer retirement plans at all.[10] Even employees who remain with a single employer often experience changes in employer contribution levels.[11] For example, during an economic crisis (much like the economic downturn in 2008), companies may need to cut back on retirement contributions in order to avoid layoffs and then reinstate the contributions when they are financially able to do so. It would be misleading to disclose projected benefits that do not account for these changes.

- Projecting future earnings can also be misleading[12] — as anyone who planned to retire around 2008 or 2009 can attest. Requiring the same standardized projection rate for all participants, without regard to age, also will not account for movement toward more conservative investments (that are expected to return far less than 7% per year) as one approaches retirement and beyond.

- A requirement to provide additional disclosures if the participant is married would be unnecessarily burdensome. Employers may not know if the worker is married. While we recognize that spousal protections exist, nevertheless, some workers do not notify their employers of their marital status, particularly if the worker does not use the company's health plan.

While the Department indicates that it wants to provide realistic amounts and avoid false impressions, the use of projections would improperly give participants the impression that they can obtain the benefits identified in their lifetime income disclosures. We appreciate the Department's efforts to address these problems by using whole percentages in its assumptions and by allowing disclaimers. As discussed below, however, we do not believe these efforts are sufficient to ensure that participants will understand the various assumptions that underlay the lifetime income illustrations. More importantly, we are concerned that participants may be confused when their actual ending account balance(s) prior to retirement is inconsistent with the account balance used as a basis for the lifetime income illustration disclosures they received throughout their working years.

B. The Department's proposed disclaimer will not effectively reduce confusion or unwarranted expectations.

The Department proposes to require a disclaimer to be made to participants that discloses the assumptions used, that these are illustrations only, and that actual payments may vary from the illustrations in the benefit statement.

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[10] U.S. Bureau of Labor Statistics, *Employee Tenure Summary* (Sep. 18, 2012), available at http://www.bls.gov/news.release/tenure.nr0.htm. U.S. Bureau of Labor Statistics, *Who has benefits in private industry in 2012?*, p. 2 (Sep. 2012), available at http://1.usa.gov/1aJ3lIh.

[11] *See*, Towers Watson, *Most U.S. Employers Have Restored 401(k) Matching Contributions, Towers Watson Analysis Finds* (Nov. 2, 2011), available at http://bit.ly/1684INN.

[12] The proposed projected present value calculation is particularly confusing. The Pre-Rule proposes to project earnings until normal retirement age at 7% per year and then discount the projection for inflation, using a discount rate of 3%. Requiring both a projection and a discount is confusing. A simpler approach would be to project at a lower rate that takes into account the discounting effect of inflation. This revision will be unnecessary, however, if the Department follows ERIC's recommendation to eliminate the projection requirement altogether.

The disclaimer proposed by the Department would not be effective in helping participants to fully understand the disclosures. As a practical matter, a disclaimer that accurately describes the projection's shortcomings will be so long that most participants will not read it; and those who do read it (and understand it) will simply conclude that the projection is not meaningful. A shorter disclaimer will not adequately convey the shortcomings of the projection.

The Department's explanation of its lifetime income calculator illustrates this point. The explanation contains 1,086 words and fills two pages, but does not even mention the effects that underperforming investments, changes to contribution rates, changes in employment status, plan and legal limits, and other changes can have on the amount of the participant's retirement income.[13] An explanation provided by a private employer – facing a constant threat of second-guessing and litigation – will inevitably have to be significantly longer.

Research shows that most participants would not even read the disclaimer. The average adult reads 250-300 words per minute[14] and spends only seconds reviewing these types of disclosures.[15] Thus, based on the data, the average participant would likely not read the Department's disclosures of assumptions at all, and those who did begin to read it would not even get past the Overview.

Furthermore, a disclaimer may subject plans to unnecessary risk without any corresponding benefit. The U.S. Supreme Court's decision in *U.S. Airways v. McCutchen* shows that despite a plan sponsor's best efforts, a court may interpret language written for the plan (such as a disclaimer) differently than the company intended.[16] Even if the lawsuit lacked merit, the cost of litigation would unnecessarily add to the cost of providing benefits.

III. Instead of a prescriptive mandate, the Department should issue guidelines that support innovation and education.

As discussed above, ERIC has significant concerns about the approach suggested by the Department in the Pre-Rule. ERIC recommends that the Department instead: (1) promote a voluntary system with flexible guidance based on broad principles that will encourage innovation; and (2) encourage the use of online modeling tools, which will allow workers to explore a variety of scenarios based on their individual situations.

A. Instead of imposing a mandate on plan sponsors, the Department should issue guidance that encourages companies to continue to use dynamic approaches to educate their workers about lifetime income issues.

The Department indicated in the preamble to the Pre-Rule that it is considering alternatives to issuing a regulation. It states "The Department intends to consider all reasonable alternatives to direct

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[13] U.S. Department of Labor, *Lifetime Income Calculator*, available at http://www.dol.gov/ebsa/regs/lifetimeincomecalculator.html.

[14] Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL (Aug. 4, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443908; Brett Nelson, *Do You Read Fast Enough To Be Successful?*, Forbes (Jun. 4, 2012), available at http://onforb.es/K9Q5ge.

[15] Rainer Bohme & Stefan Kopsell, *Trained to Accept? A Field Experiment on Consent Dialogs*, ACM (2010) (showing 75% of users spend less than 15 seconds). Becher, supra note 14 (showing users spend an average of 48 seconds).

[16] *U.S. Airways v. McCutchen*, 569 U. S. ____ (2013).

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."[17]

ERIC encourages the Department to adopt a regulatory approach that supports the current voluntary retirement system and the ability of plan sponsors to provide lifetime income information. ERIC recommends that the Department adopt interpretive guidance that provides guidelines, similar to the approach used in Interpretive Bulletin 96-1. The Department should allow plan sponsors to provide a lifetime income illustration based on broad principles, such as "generally accepted investment theories" and "generally accepted actuarial principles".[18] By taking this approach, the Department can also make clear that such disclosures are considered the furnishing of educational information and shall not be considered investment advice or a fiduciary act that gives rise to fiduciary liability under ERISA.

As the Department noted in the preamble to the Pre-Rule, many companies are already using innovative and creative methods to provide their workers with information to help them save for retirement.[19] Additionally, many organizations, third party administrators, and financial institutions provide useful materials and online retirement planning calculators to help workers prepare for retirement.

Furthermore, ERIC's proposal would be consistent with Executive Order 12866 "Regulatory Planning and Review" and Executive Order 13563 "Improving Regulation and Regulatory Review", which direct agencies to balance additional costs of regulations on companies with a corresponding benefit to the system. Executive Orders 12866 and 13563 direct agencies to maximize *net* benefits, promote flexibility and reduce regulatory burdens on companies. Any proposed rule created by the Department should take these objectives into account and not overly burden plan sponsors. ERIC's proposal would accomplish these objectives while minimizing the cost to and burden on plan sponsors.

If the Department requires plans to make mandatory lifetime income disclosures (instead of providing interpretive guidance), the vast majority of plan sponsors will simply comply with any safe harbor issued by the Department. For those plan sponsors who are already providing more meaningful information and tools, the Department's safe harbor will undermine the illustrations that they carefully crafted and implemented and that were tailored to the needs of their individualized workforce. Having plan sponsors abandon disclosure regimes that are deemed successful by them and their participants and replace them with a government-issued safe-harbor approach is just one example of how the approach taken in the Pre-Rule will stifle creativity and innovation. This one-size fits all approach will be counterproductive to the Department's and plan sponsors' goal of supporting the ability of workers to adequately prepare for and manage their assets in retirement in an appropriate manner. Additionally, because regulations are not updated frequently enough to take into account changes in plan design, product design and use of technology, these disclosures will quickly reflect outdated assumptions and become even less effective and useful to participants.

[17] 78 Fed. Reg. at 26727.
[18] Additionally, the Department should clarify that the term "generally accepted actuarial principles " does not refer to an Actuarial Statement of Opinion under the American Academy of Actuaries guidelines.
[19] *Id*. at 26731.

ERIC urges the Department to provide plans with the flexibility they need to continue to offer useful information and tools for their workers. Plans should have the option to provide their own types of disclosures based on broad and generally accepted economic principles. Additionally, any guidance should make clear that fiduciaries who comply with the safe harbor will not be subject to any liability.

B. The Department should promote online modeling tools that would enable participants to use assumptions that reflect their individualized situations.

Instead of paper disclosures, the Department should promote the use of online modeling tools. These dynamic tools would: (1) allow participants to generate more realistic projections for their scenarios, (2) encourage action, and (3) demonstrate interactively the uncertainty inherent in any projection.

In contrast, providing three additional numbers on a piece of paper – even with the best possible assumptions – cannot provide a complete picture.

A well-developed interactive tool would allow workers to take into account various factors about their financial situations that are unknown to the plan and project how prepared they could be for retirement under different scenarios. For example, they could understand the impact of future Social Security benefits, investment returns and losses, changes in compensation, changes in the IRS limits for participants' tax deferred contributions, etc. They could also consider the impact of the actual age of their spouse, which could be significantly higher or lower than their own age. Considering different scenarios can also help them to understand the impact of certain financial decisions, including the impact of temporary breaks in service to care for a child or elderly parent.

Research shows that people who use online calculators tend to more adequately prepare for retirement. The research found that individuals using an online calculator appear to set more adequate savings targets.[20] The Department has already developed two interactive calculators — one that participants can use to calculate lifetime income streams and another for workers to calculate more in-depth information.[21]

We note that the Department's concerns with electronic delivery/disclosure do not apply in this context. The Department has indicated that the target audience for lifetime income disclosures are persons who are still saving for retirement – that is, workers under age 65 with particular emphasis on younger workers who will have longer to save for retirement.

Today, we live in an ever increasing virtual environment fostered by smartphones, tablets, and applications for every task including online banking and financial management. Workers are required

[20] Jack VanDerhei and Nevin Adams, *A Little Help: The Impact of On-line Calculators and Financial Advisors on Setting Adequate Retirement-Savings Targets: Evidence from the 2013 Retirement Confidence Survey*, Employee Benefits Research Institute (EBRI) (Mar. 2013), available at http://bit.ly/164YWy5.

[21] U.S. Department of Labor, *Lifetime Income Calculator*, available at http://www.dol.gov/ebsa/regs/lifetimeincomecalculator.html; U.S. Department of Labor, *Taking the Mystery out of Retirement Planning*, available at http://askebsa.dol.gov/retirementcalculator/ui/general.aspx.

to be proficient in numerous workplace applications. In general, workers are now more comfortable using the online tools than ever before.[22]

Additionally, internet usage is very high among workers[23] and retirement income calculators are broadly available to participants. Numerous plan service providers offer a retirement income calculator to participants and a significant amount of plan sponsors offer the calculator on the plan's website.

The vast majority of working Americans would be able to use an online calculator or modeling tool created by the Department or a plan sponsor or a plan's service provider. For those workers who do not have access to the internet at home or at work, they could simply ask their Human Resources Department to provide them with a paper version based on the factors they provide, or if they prefer, access a computer at any local public library.[24]

This approach is also consistent with Congress's intentions. ERISA section 105 specifically requires a notice on benefit statements directing participants to the Department's website. Congress clearly contemplated that the Department and employers would encourage innovation by providing effective tools online. The Department should not take action that encourages employers to use a less-effective paper alternative. Furthermore, American workers are already receiving information about retirement online. The Social Security Administration has ceased to provide paper statements to Americans under age 60 and now only provides them with access to online statements.[25] They have called the program "a huge success" and indicated that in fewer than two months, a million people went online to check their statements.[26]

The Department should recognize that not only can the vast majority of workers access modeling tools online, but also that a paper substitute is not effective. Therefore, ERIC recommends that the Department encourage the use of an interactive tool created by the Department, a plan sponsor or a plan's service provider, such as a retirement calculator or online modeling application in this context.

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[22] Vanguard, *How America Saves 2013*, p. 91 (June 2013), available at http://bit.ly/11Z0qE8 (reporting that web interactions accounted for 95% of all participant contacts in 2012.). Additionally, a recent study found that 72% of workers were very or somewhat comfortable using online calculators. Ruth Helman, Craig Copeland and Jack VanDerhei, *The 2012 Retirement Confidence Survey: Job Insecurity, Debt Weigh on Retirement Confidence, Savings* 23, Employee Benefits Research Institute (EBRI), available at http://bit.ly/IjmVjg.

[23] U.S. Census Bureau, *Computer and Internet Use in the United States*, Table 2 (May 2013), available at http://www.census.gov/prod/2013pubs/p20-569.pdf (finding that over 80% of workers lived in households with computers and internet access and fewer than 10% of workers did not have an internet connection anywhere). Similarly, a study by the Pew Research Center found that 95% of adults age 18-29 and 87% of adults age 30-49 used the internet. Pew Research Center's Internet & American Life Project, *Change in internet use by age group, 2000-2010*, available at http://pewinternet.org/Infographics/2010/Internet-acess-by-age-group-over-time-Update.aspx.

[24] All public libraries (100%) offer internet access. Bertot, J.C., Sigler, K., McDermott, A., DeCoster, E., Katz, S., Langa, L.A., & Grimes, J.M., *2010-2011 Public Library Funding and Technology Access Survey: Survey Findings and Results* (2011), available at http://www.plinternetsurvey.org. 94% of households lived within 10 miles of a public library in 2002 and 83% lived within 5 miles of one. U.S. Department of Education, *Households' Use of Public and Other Types of Libraries: 2002* (Jan. 2007), available at http://1.usa.gov/175afF0.

[25] The Social Security Administration also provides one statement by mail at age 25. Social Security Administration, *Social Security Statement Now Available Online at www.socialsecurity.gov* (May 1, 2012), available at http://www.ssa.gov/pressoffice/pr/ss-online-statement-pr.html.

[26] Social Security Administration, *One Million People Go Online to Access their Social Security Statement* (June 29, 2012), available at http://www.ssa.gov/pressoffice/pr/ss-statement-pr.html.

C. The Department should encourage the voluntary disclosure of lifetime income amounts by providing model disclaimers.

ERIC supports the Pre-Rule's requirement that any lifetime income illustrations must include an explanation about how the information was calculated. However, as discussed above, we are concerned that participants either will not read or will fail to understand the content of any such disclaimer.

ERIC urges the Department to clarify that lifetime income disclosures do not establish any claim or right to benefits under the plan based solely on the illustration, provided the disclosure gives access to any assumptions related to the illustrations. The Department's guidance should state that the illustration is merely an estimate and that actual payments will vary from the illustration. In addition, the guidance should clearly state that employers who comply with the interpretive guidance are not subject to fiduciary liability relating to the lifetime income illustrations.

ERIC encourages the Department to provide model language that would be deemed to satisfy the disclosure requirement contained in the Pre-Rule to avoid needlessly subjecting plans to additional risk.

D. The Department should ensure that the provision of lifetime income information will not violate FINRA.

Financial Industry Regulatory Authority ("FINRA") rules prohibit certain broker-dealers from making the types of projections proposed in the Pre-Rule. Many plans use the services of broker-dealers that are subject to these FINRA rules.

Before proposing any new requirement, the Department should coordinate with FINRA to ensure that complying with the Department's requirements will not violate any FINRA rules. Also, broker-dealers who are service providers will need time to make any necessary system modifications.

E. If the Department insists on mandating lifetime income illustrations, it should provide a safe harbor and allow alternative methods of disclosures.

As discussed above, ERIC believes that participants would find an interactive online modeling tool to be more useful than the Department's proposal in the Pre-Rule. If the Department insists on issuing regulations that mandate lifetime income disclosures, ERIC urges the Department to make the following changes to the Pre-Rule:

- The Department should provide safe harbors for plans to comply with. Any guidance should make clear that fiduciaries who comply with the safe harbor will not be subject to any liability.

- Plans should only be required to disclose the current balance of the participant's account. As discussed above, ERIC does not support a disclosure based on a projection of future compensation or benefits that have not been earned and that the employer may change at any time.

- Plans should be allowed to report the value of the current account balance using alternate approaches. The goal of the Pre-Rule should be to assist participants to assess if they are on track to save for an adequate retirement and not to mandate disclosure of one financial product.
  - We urge the Department to permit illustrations based on a variety of financial products. The Pre-Rule is promoting a distribution form that is not required – and typically is not provided – by defined contribution plans. This suggests to participants that it is an appropriate option for them, regardless of their circumstances.
  - For many participants, other illustrations – such as installments over a fixed period or education about how much one can expect to withdraw per year without outliving his or her savings (e.g., 4% per year) – will be much more effective.
  - Alternatively, the Department should allow the disclosure to be based on generic numbers (e.g., a $1,000 balance) to make the point that the disclosure is intended to illustrate a concept rather than ***what will happen for you***.[27]
- Additionally, any information should only be provided annually and if the Department insists on requiring projections, any information should be projected at a lower (inflation-adjusted) rate.

Thus, ERIC strongly encourages the Department to issue flexible guidance that fosters innovation and promotes the use of online modeling tools. Nevertheless, if the Department insists on mandatory disclosures, we encourage the Department to provide a safe harbor and modify the Pre-Rule as described above.

IV. The Department should consider alternatives to the Pre-Rule that could facilitate the use of lifetime income solutions.

ERIC understands that the Department is also considering initiatives in addition to the Pre-Rule to facilitate the use of lifetime income solutions by retirement plans. ERIC encourages the Department to consider completing these projects even prior to taking additional steps with respect to the Pre-Rule. ERIC provides the following suggestions for areas where guidance is needed.

To facilitate the use of lifetime income solutions, the Department should clarify existing guidance.[28] Current regulations provide a "safe harbor" for the selection of an annuity provider and contract for benefit distributions from a defined contribution plan.[29]

While this guidance is helpful, it is not really a safe harbor.[30] A genuine safe harbor provides assurance that the requirements of the law will be satisfied (or deemed satisfied) if specified steps are

[27] The Department found this approach useful in the participant fee disclosure regulations. Dep't of Labor Reg. § 2550.404a-5.
[28] For more information, please see ERIC's earlier comment letter at available at http://bit.ly/1935wpA and testimony at http://bit.ly/13jNyKO.
[29] 29 C.F.R. § 2550.404a-4.

taken. The Department's purported safe harbor for the selection of an annuity provider offers no such assurance. The regulation is laced with critical undefined terms requiring subjective judgments[31] which prevent the regulation from providing the compliance certainty that a genuine safe harbor provides.

Lawsuits in recent years have made employers reluctant to add features like annuity options/products to their plans. To facilitate the use of lifetime income options, ERIC encourages the Department to provide additional information to transform the regulation's existing "safe harbor" into one on which plans can rely.

Furthermore, if the Department wants to promote the use of lifetime income options, it has alternatives other than mandating disclosures. For example, the Department can educate the public about lifetime income options and provide online modeling tools to engage workers and encourage interaction, without the need for a new prescriptive mandate.

ERIC encourages the Department to consider alternatives to imposing mandatory disclosures on plan sponsors.

In conclusion, ERIC urges the Department to recognize the value provided by the current voluntary retirement system. Disclosures should be helpful and appropriate for workers and not overly complicated. They should be based on the participant's current accrued benefit and not theoretical projections. We believe that an online modeling system is a better method to facilitate participants' understanding of their retirement readiness because individuals can tailor the assumptions to their particular circumstances. In order to support employers in their effort to educate participants on the importance of retirement savings and planning, we believe the Department should provide principles and guidelines regarding lifetime income illustrations and not require a one-size fits all disclosure.

ERIC appreciates the opportunity to provide comments on lifetime income disclosures. ERIC would be willing to participate in any meetings or a hearing held by the Department to discuss further the issues in this comment letter. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Kathryn Ricard
Senior Vice President, Retirement Policy

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[30] The regulation states that it sets forth an optional means, rather than the only means, for satisfying the duty of prudence. *See,* 29 C.F.R. § 2550.404a-4(a)(2). This is a description of an alternative method of compliance, not a safe harbor.
[31] The critical undefined terms include "thorough," "appropriately considers," "sufficient," "appropriately concludes," "reasonable," "necessary," and "appropriate expert."

cc: Phyllis Borzi, Assistant Secretary, Employee Benefits Security Administration

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