American Bankers Association

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Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Corporation
U.S. Department of Labor
200 Constitution Ave., NW, Suite N-5655
Washington, D.C. 20210

Re: Advance Notice of Proposed Rulemaking – Pension Benefit Statements, RIN 1210-AB20

Dear Mr. Canary:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments on the Advance Notice of Proposed Rulemaking (ANPR) issued by the Department of Labor (DOL) on information proposed to be included in pension benefit statements of participants and beneficiaries (collectively, participants) in defined contribution plans (Participant Statements). We understand that DOL staff is considering a rule that would require a participant's accrued benefits: (i) to be expressed on Participant Statements as an estimated lifetime stream of payments, in addition to being presented as an account balance; and (ii) to be projected on Participant Statements to a participant's retirement date and then converted to, and expressed as, an estimated lifetime stream of payments. As stated by DOL, the goal of the ANPR "is to provide an early opportunity for interested stakeholders to provide advice and input into the policy development of future proposed regulations" affecting pension benefit statement information.[2]

ABA shares DOL's view that there are tangible benefits to providing financial information to participants that will assist them in planning for a secure retirement. We further support DOL's goal to equip participants with useful information that will encourage them to monitor and manage more actively their financial goals for retirement. ABA is not convinced, however, that a regulatory mandate is at this time necessary or appropriate. Moreover, the proposed regulatory language in the ANPR raises several concerns that, if implemented in its current form, would result in increased costs in plan administration while falling short of achieving active participant involvement in retirement planning. While affirming our view that a regulatory mandate would be unnecessary and likely counterproductive, in the spirit of an ANPR, we are pleased to provide

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA) Learn more at www.aba.com.

[2] Department of Labor, Pension Benefit Statements, Advance Notice of Proposed Rulemaking (ANPR), 78 Fed. Reg. 26,727 (May 8, 2013).

comments on some of the particular issues involved in the proposal. These are focused on keeping plan administrative, operational, and other costs to a minimum while providing sufficient incentives for participants to actively engage in their retirement planning.

I. General Concerns on the ANPR.

A. Regulatory Mandate.

At the outset, DOL asks whether a solution short of a regulatory mandate will ensure that participants receive constructive and useful lifetime income illustrations.[3] We believe that to be the case, as more and more plans independently adopt account balance and related disclosures that assist participants in retirement planning. There are also growing, multiple methods of providing financial information that continue to be tested and adopted by various plans, tested in ways that will help identify methods and formats of providing information that are most useful to participants. In that regard, it would be premature and likely harmful to impose any one particular structure or format at this time, if at all.

Some plans, for example, have begun disclosing the estimated amount of lifetime income stream payments based on a current account balance, while other plans additionally disclose projected income streams at a given retirement age. Among the latter plans, there is great variation on the projections given, based on multiple assumptions that may differ among providers of this service. Over time, an industry-generated and -approved "gold standard" of disclosure may emerge, making any near-term mandate premature and unnecessary.

DOL, therefore, should allow the market additional time to come up with the most appropriate standards to be used for financial disclosures, including a set of assumptions that best capture an accurate portrayal of projected lifetime income streams. Once there is a convergence of standards, DOL could then weigh their efficacy among participants and thereby assess whether a regulatory mandate is necessary or appropriate. Alternatively, as discussed in greater detail herein, DOL could generate its own set of current and projected lifetime income streams in chart format, to which all participants may refer. This would not only permit a participant to view his current financial data but also allow him to see how incremental increases in his contributions would substantially add to the total amount saved over time. For those participants with multiple defined contribution plans, it would ensure uniformity and consistency in comparing and contrasting financial data between and among a participant's pension benefit statements.

B. Disclosure of Lifetime Income Stream Payments.

DOL suggests proposed regulatory language which would require pension benefit statements to include what the agency refers to as "lifetime income illustrations." These disclosures would comprise four dollar amounts: (i) the participant's current account balance; (ii) the estimated lifetime income payment stream, expressed as a monthly payment, of the current account balance; (iii) a projection of the participant's account balance at retirement age; and (iv) the projected lifetime income payment stream at retirement age.[4] The amounts in (ii) through (iv)

[3] *See id*.
[4] *See* 78 Fed. Reg. at 26,729-30.

would be determined based on a set of "reasonable" assumptions, taking into account generally accepted actuarial principles.[5] The proposal, however, includes a compliance "safe harbor" by which assumptions would be deemed reasonable.[6] The actuarial assumptions contained in the safe harbor include: (a) a participant contribution rate of 3%, compounded annually; (b) an investment return of 7%, compounded annually; and (c) a discount rate of 3% compounded annually, which would be used to determine the present value of the projected account balance.[7]

DOL's stated objective is to have participants who look at these amounts realize that (in most cases) they are not saving enough for retirement. Viewing the current balance as an estimated monthly lifetime income stream, together with the other projected amounts, presumably would provide a strong incentive for participants to place additional funds in their respective retirement accounts. In other words, the purpose of providing projected lifetime income streams and a projected total amount is to modify participant behavior toward saving more for retirement. While there may be some value in providing these figures on pension benefit statements, it is unclear whether these figures (beyond the current account balance) would be meaningful to participants. The agency's goal of modifying participant behavior, moreover, raises two questions: (1) do the amounts shown on the pension benefit statement indicate that the participant is in fact saving enough for retirement? and (2) are the projected amounts able to predict accurately the amounts that will be available at retirement?

First, these amounts by themselves do not indicate whether a participant is saving enough for retirement since *expenses*, once retirement age is reached, are generally unknown. Specifically, if a participant believes he is not saving enough, he will not know how much will be "enough" if retirement expenses cannot reasonably be foreseen. All the participant really knows is that, short of contributing the maximum allowable amount, he could presumably be saving more in his retirement plan.

Second, if the assumptions contained in the proposed safe harbor are not realistic, then the projected amounts will likely misstate (and perhaps greatly exaggerate) the amounts that may be available at retirement. This may result in unrealistic participant expectations for account growth. Furthermore, any change in the assumptions, however slight, may significantly affect the dollar amount figures shown under the lifetime income streams and total dollar figure at retirement age. Thus, the dollar amount figures may be subject to tremendous variation and ultimately may not accurately – nor perhaps even remotely – reflect the amount that will actually be available at retirement age. Indeed, since these projections would *not* fairly represent a participant's "total benefits accrued" as required under Section 105 of ERISA, it is possible that DOL has exceeded its interpretive statutory authority.[8]

For example, the proposed safe harbor assumes that there will be a 3% annual increase in the participant's contributions. This does not appear to reflect what most participants actually do

[5] *See* 78 Fed. Reg. at 26,737-39.
[6] *See* 78 Fed. Reg. at 26,738.
[7] *See id*.
[8] Section 105(a)(2)(A)(i)(1) of ERISA requires a pension benefit statement to include the participant's "total benefit accrued." Section 3(23)(B) of ERISA states that "the term 'total benefit accrued' means – in the case of a plan which is an individual account plan, *the **balance** of the individual's account.*" [Emphasis added.]

regarding their annual contribution to their 401(k) plan. Rather, most participants will set the amount they choose to contribute to their 401(k) plan and remain with that amount beyond multiple annual increases in compensation. The 3% assumption also does not factor in disruptions in retirement savings over the lifetime of many employees, such as (i) unemployment; (ii) a job loss followed by employment elsewhere at a reduced wage; (iii) temporary loss of funds due to loans from the participant's defined contribution plan; and (iv) permanent loss of funds due to premature withdrawal (*e.g.*, hardship distribution or other early withdrawal). These are not isolated occurrences: last year, according to one published report, nearly one-third of employees took hardship loan or distributions from their 401(k) plans.[9] Loans or withdrawals based on any of these events (some which may occur *multiple* times over the working life of the employee) can substantially and irrevocably alter the participant's savings amount otherwise available at retirement age. Projected savings amounts, therefore, may be of limited usefulness to participants, and should not be required by regulation if they cannot be made accurate and meaningful to the participant.

C. Disclosure of Assumptions Used to Calculate Amounts.

The proposed regulatory language would further require plans to disclose to participants the assumptions used to establish the present value of projected account balances and the lifetime income illustrations.[10] It is not clear, however, whether participants will actually read such disclosures, and if they do, whether they will understand their meaning or import. As a practical matter, most participants may be inclined to look no further than to the required dollar- amount figures appearing on the pension benefit statement. Therefore, rather than requiring cryptic, confusing disclosures, any additional language should state simply that the amounts represented on the pension benefit statement are based on certain assumptions and projections, which disclosure then references a link to the plan's website providing a detailed explanation of those assumptions and projections. Therefore, we recommend that the text explaining any disclosed amounts be a concise, easy-to-understand, plain-English disclosure, as follows:

> The dollar amounts shown on this statement as lifetime income illustrations are based on a number of assumptions and projections, any change in which could greatly affect the actual amount available at retirement age. Please refer to the Department of Labor's website, www.dol.gov, for more information.

D. Administrative and Plan Costs.

The additional requirement of regularly disclosing additional dollar amount figures on pension benefit statements (the projected amount of assets at retirement age and two monthly lifetime income stream figures) would entail significant costs to plan service providers in the form of new and reprogrammed information technology systems.[11] Such

[9] Karen Weise, "In Spite of Recovery, More Workers Are Borrowing from 401(k)s," Bloomberg Businessweek (March 15, 2013). Moreover, nearly half (45%) of 401(k) loans and distributions were taken by lower-income employees ($35,000 – $60,000 annual salary). *See id.*

[10] *See* 78 Fed. Reg. at 26,737-39.

[11] For example, special programming costs would arise from comparing vested account balances with total account balances for purposes of displaying lifetime income streams, and from required re-coding of recordkeeping systems whenever a participant terminates employment with his current employer.

costs would be passed on to plans, which then would likely pass on the costs to participants. There may be additional costs to certain service providers, depending on their recordkeeping systems and software.

For example, the proposal is not clear as to whether the amounts to be disclosed are vested amounts or non-vested amounts. Further, some service providers' record keeping systems and software may have difficulty incorporating amounts in self-directed brokerage accounts into aggregate account balance projections. Finally, certain record keepers may find it difficult and costly to accommodate plans which do not use the proposal's safe harbor assumptions, since the record keeper will need to establish and maintain recordkeeping systems that support multiple sets of assumptions. All of these costs likewise would be passed on to the plans, and ultimately to the participants.

Rather than having such costs imposed on participants, ABA believes that the lifetime income initiative can be effectively implemented through the use of the DOL's tools and resources, as described below. This would further have the advantage of a single source and standard by which all lifetime income stream figures may be viewed and compared. Use of DOL's rather than industry resources would also be consistent with Executive Order 13563 that regulatory rulemaking involve the "least burdensome tools for achieving regulatory ends,"[12] and OMB Circular A-4, which advises agencies to consider rulemaking alternatives that would enable the achievement of regulatory objectives with fewer regulatory burdens and costs.[13]

II. **<u>Proposed Modified Approach to Disclosure of Lifetime Income Illustrations</u>.**

Although there may be some benefit to showing lifetime income illustrations on pension benefit statements, we believe that such dollar amount figures may be neither accurate nor meaningful. Rather, we believe that ongoing investor education and participant initiative is the best way to modify retirement savings habits. Participants may be more likely to manage their retirement savings actively if they initially took steps on their own to determine first how much they have saved for retirement, rather than having to pay for dollar amount figures that are passively handed to them. There are a number of ways to achieve this optimal outcome.

First, DOL can inform participants of various retirement tools, such as interactive financial calculators, available on the agency's website that can assist participants in determining various amounts that can be targeted for retirement age. The use of calculators and other online tools would allow for much more than a static, snapshot figure appearing on the pension benefit statement by permitting the participant to make multiple real time and projected calculations.[14]

[12] Executive Order 13563 (Jan. 18, 2011).
[13] *See* OMB Circular A-4 (Sept. 17, 2005).
[14] DOL can further provide on its own website – as the single "go-to" source – the historical average annual and calendar year total returns for key asset classes, such as domestic equity, foreign equity, domestic bonds, foreign bonds, emerging equity/bonds, stable value, and money market rates. In doing so, DOL can employ and reference well-known market-based indices. By showing average and annual returns, participants can receive a clearer picture of various asset classes' performance and volatility. Based on this information, a participant would be able to choose an investment return on a DOL-provided online calculator, consistent with the participant's risk-level tolerance.

A participant would further be able to calculate alternative scenarios by modifying the assumptions and projections. The composite figures calculated, collectively, would provide a more realistic picture of a participant's needs and projected saved amounts at retirement.

Indeed, by increasing the amounts saved as part of the calculations performed, participants would readily see the differences in the benefits of increased savings. A participant who actively works with the DOL online calculators would be more likely to employ them again and again, thereby producing a much more proactive approach to saving for retirement than merely glancing at a quarterly or annual paper statement. Moreover, recent research indicates that the use of online calculators successfully raises participant awareness and engagement in retirement planning.[15] An agency-generated financial calculator also could enable participants to incorporate outside income sources, such as IRAs and old 401(k) plans, so that they can generate more accurate retirement savings amounts as well as take on a holistic, rather than piecemeal, approach to retirement planning.

Second, DOL can generate a one-page savings income chart, listed in successive, tiered amounts (*e.g.*, in increments of $5,000 up to $100,000, and in increments of $10,000 up to $250,000, etc.), which would show in four separate columns: (i) the amount saved, (ii) that amount's current monthly lifetime income stream, (iii) the monthly lifetime income stream at retirement age, and (iv) the projected total amount at retirement age. The chart, which can be included as an annual "stuffer" to 401(k) statements that are mailed out, should be sufficient to show approximate figures applicable to the vast majority of participants.[16] A participant can refer to the chart quickly to obtain an approximate dollar amount figure for items (ii) through (iv) above. The chart further allows the participant to see readily how his savings can increase if he were to allocate more of his salary to his 401(k) account, information that otherwise would not be available in his pension benefit statement materials.

III. **Retaining Distinction Between Investment Education and Investment Advice.**

In setting out lifetime income illustrations, DOL would need to ensure that a plan's provision of such data does not transform participant investment education into investment advice. Plans and service providers will want assurance that any figures provided, any other disclosures made, and services performed in connection with these figures or other disclosures, by themselves, do not trigger investment advice which would lead to fiduciary status under ERISA. Consequently, the activities deemed investment education should be appropriately insulated from any determination that investment advice is offered in connection with lifetime income illustrations.

For example, once a participant sees the dollar amount figures for lifetime income streams (present and projected) and the projected total retirement asset figure, would a bank be able to suggest that the participant attempt to increase his contribution toward the maximum amount without triggering investment advice under ERISA? Could a bank present to the participant

[15] *See* Robert Steyer, "Retirement Calculators Evolve in to Sophisticated Tools," Pensions & Investments, May 13, 2013, pp. 6, 36 ("Independent research and surveys by record keepers show that [web-based financial] calculators can change participants' attitudes about retirement savings and, more importantly, influence actions.").

[16] DOL can further make available on its website an expanded chart listing higher amounts applicable to participants whose retirement savings amounts exceed those on the chart.

materials that would describe possible shifts in the investment product asset mix that may increase the lifetime income stream figures presented on the statement without being deemed "investment advice"? Would online calculators that contain certain assumptions and projections inadvertently be cast as investment advice rather than investor education? ABA believes each of these situations involves investment education, not investment advice, but the ANPR is unclear. We would recommend that DOL clarify through rulemaking that these and similar situations would not rise to the level of investment advice that would trigger fiduciary status.

IV. Conclusion.

We are confident that the above suggestions, if implemented, would eliminate the need for a regulatory mandate on lifetime income illustrations while empowering participants to manage their retirement savings actively. We would be glad to work with DOL staff to craft guidelines aimed at increasing participants' awareness and use of appropriate agency online tools and materials to achieve this worthy objective.

Thank you for your consideration of these views. If you have any questions or require any additional information, please do not hesitate to contact me at 202-663-5479.

Sincerely,

Timothy E. Keehan

Timothy E. Keehan
Vice President & Senior Counsel