



AMERICAN BENEFITS  
COUNCIL

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TESTIMONY OF JANET BOYD,  
DIRECTOR OF GOVERNMENT RELATIONS FOR THE DOW CHEMICAL COMPANY  
ON BEHALF OF THE AMERICAN BENEFITS COUNCIL  
BEFORE THE JOINT HEARING OF THE DEPARTMENTS OF LABOR AND THE TREASURY  
ON LIFETIME INCOME PRODUCTS

My name is Janet Boyd and I am the Director of Government Relations – Tax and Benefits for The Dow Chemical Company (“Dow” or the “Company”). I am testifying today on behalf of the American Benefits Council (the “Council”). My testimony focuses on the fiduciary barriers and the disclosure and education needs of lifetime income products from the perspective of an employer.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

I serve on the Council’s Board of Directors and actively participate both directly and through the Council in public policy discussions regarding benefits issues confronting my company, which is typical of US companies providing retirement benefits to employees.

At the end of 2009, Dow employed approximately 52,000 people worldwide and manufactured more than 5,000 products at 214 sites in 37 countries across the globe. About 24,000 of Dow’s employees are in the US, and Dow provides retiree benefits to more than 100,000 retirees in the US.

Specifically, Dow provides a range of retirement benefits for its US employees, including a defined benefit plan, a 401(k) plan and health benefits. U.S. employees are eligible to participate in defined contribution plans by contributing a portion of their compensation, which is partially matched by the Company. In general, for the first 2%

of base annual compensation that the employee contributes to the Plan, the Company will provide a 100% matching contribution. Then, for the next 4% of base annual compensation that they contribute to the Plan, the Company will provide a 50% matching contribution.

New Dow employees are automatically enrolled (with an opt out option) in the 401(k) Plan within 60 days following their date of hire, and 3% of base annual compensation is contributed to the plan as a pre-tax contribution (with Company matches as previously described). If the employee fails to designate an investment option, their contributions will default to the applicable life cycle fund based on their date of birth. Additionally, under the automatic enrollment program, employee contributions are automatically increased each year effective April 1 by 1% until the employee reaches a contribution rate of 6%. Employees can also voluntarily participate in the automatic increase program. Dow's plan also allows employees the option to make Roth 401(k) Contributions and post tax contributions.

Dow allows plan participants to receive distributions in lump sum (which can be rolled over to an IRA or other non-Dow eligible pension plan) or they can roll over their accounts to the Dow defined benefit pension plan, subject to specified minimum and maximum amounts. Such rollover will be converted to an annuity and paid according to the terms of the Dow plan. We do not offer any other lifetime income options.

Dow's 401(k) plan has approximately 40,000 participants and more than \$6.1 billion in assets. Approximately 88 percent of our active employee population is enrolled in and contributing to the plan.

Our employees also have access to a defined benefit plan, with most of our employees hired before 2008 under a pension equity plan design and the remainder under a more traditional cash balance plan design qualified under the Pension Protection Act (PPA).

In 2009, Dow contributed \$355 million to its pension plans. Dow expects to contribute \$304 million to its pension plans in 2010. Our contributions reflect the strong support we receive from our employees for our retirement program, which, as previously mentioned, also serves as an access to lifetime income products. Accordingly, we urge both the Department of Labor and the Department of Treasury to issue guidance as soon as possible under PPA that facilitates account based plans, particularly pension equity designed plans.

Dow continues to evaluate the potential for offering more lifetime income options within its 401(k) plan. However, our assessment to date is that the current market is too immature to move in that direction anytime soon, and we welcome the development of public policies that would facilitate the design of new options that are less complex and have lower costs than available today.

## **Fiduciary Concerns**

The notice of this hearing requests testimony on the fiduciary safe harbor for selection of lifetime income issuers or products, and for plan sponsors desiring to add lifetime income products to their plans. As I mentioned previously, Dow has not incorporated any lifetime income products to our plans, other than the option to rollover into our qualified defined benefit plan. The most significant obstacles to Dow and other Council companies are fiduciary concerns. Under current law, the selection of an annuity provider is fraught with potential missteps that could result in continued liability for the plan sponsor well into the future. To rectify this, plan sponsors need clear, simple fiduciary guidance allowing them to make lifetime income options available to plan participants without risking a significant increase in potential fiduciary liability.

Although Department of Labor guidance does make clear that the “safest available annuity” standard in Interpretive Bulletin 95-1 does not apply to the selection of an annuity contract provider for distributions from a defined contribution plan, the guidance requires significant due diligence on the part of plan sponsors without a clear “safe harbor”. This due diligence includes an assessment of the annuity provider’s continued ability to fulfill its contractual obligations and plan sponsors, including Dow, are understandably concerned that courts will make this assessment with the advantage of hindsight, resulting in potential litigation liability years later. A clear, simple safe harbor is a necessary first step to increase the interest of plan sponsors in adding lifetime income options to their plans.

Many Council companies are starting to focus on lifetime income products that allow plan participants to roll over plan benefits into an IRA, with an annuity platform which allows the IRA to obtain multiple bids from different insurance companies selling annuity products. This isn’t too different from what many plan sponsors, like Dow, do now – allow rollovers to a qualified pension plan. However, we would urge DOL to provide a safe harbor that would address fiduciary liability concerns that plan sponsors currently have if they inform participants about the availability of the annuity platform for rollover IRAs, without any endorsement that could imply fiduciary responsibility. Specifically, we need clear guidance from the Department indicating the necessary due diligence steps (including what types of information should be provided to plan participants) that could be taken by plan sponsors to avoid future liability. If plan sponsors are encouraged to provide access to such annuity platforms for rollover IRAs without becoming subject to fiduciary liability, more plan participants would have access to lifetime income products.

## **Disclosure and Education**

The Council’s companies strongly believe disclosure and education are the first steps toward increasing the availability and appropriate use of lifetime income products. The

agencies should encourage but not require defined contribution plan sponsors to provide illustrations of how account balances translate into lifetime payments at age 65 by publishing model disclosures which, if used, would not give rise to fiduciary liability. The Department of Labor could provide examples in the model (for example, a lump sum of X could create an income stream of Y at age 65, providing the relevant interest rate and mortality assumptions). The model could also show the variance based on different interest rates to avoid employee relations problems whenever interest rates decline and future illustrations show lower payments.

The Council is also a strong proponent of financial literacy education and agrees with the agencies that educating participants on the management and spend down of retirement assets is a crucial goal as an increasing number of baby boomers approach retirement. However, plan sponsors who want to educate their employees on the benefits of lifetime income and other management and spend down concepts may be deterred by the lack of guidance on how to provide appropriate education in this area without triggering fiduciary liability. The Department of Labor's Interpretive Bulletin 96-1 which provides detailed guidance on the difference between investment advice and investment education, has been very useful for both plan sponsors and participants, resulting in increased investment education that otherwise likely would not have been provided. Expansion of this interpretive bulletin to cover education on the management and spend down of retirement benefits could have a similar effect on educating participants on the concepts they will need to know for the retirement phase. Similarly, the Council recommends expansion of the Department of Labor's Advisory Opinion commonly known as "SunAmerica" to address computer advice on the spend down of retirement benefits.

Thank you, again, for providing the opportunity for me to present the Council's testimony, from the perspective of a plan sponsor. I welcome any questions you may have.