



AMERICAN BENEFITS  

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COUNCIL

September 16, 2013

Larry Good  
Executive Secretary  
ERISA Advisory Council  
U.S. Department of Labor  
Suite N-5623  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Mr. Good:

On behalf of the American Benefit Council (the "Council"), I would like to thank you and the ERISA Advisory Council (the "EAC") for the hearings held in June and August, and the opportunity to participate in those hearings. We believe that the discussions in the hearings were very constructive and helpful, and contributed greatly to important public policy dialogues.

We have additional comments to offer on the de-risking issue which are set forth below. We also request the opportunity to present these views during the September 23 teleconference.

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.

**Additional Comments on Private Sector Pension De-risking and Participant Protections.**

At the end of the August 29<sup>th</sup> hearing, the EAC outlined possible recommendations for inclusion in the report that it will produce on the de-risking project. This letter focuses on those possible recommendations.

Overall, the Council is very supportive of the possible recommendations discussed for inclusion in the report. The EAC did an excellent job of working through the issues and identifying constructive areas for further work by the Department of

Labor ("DOL"). However, there are three areas of very significant concern. ***As discussed further below, we believe that three aspects of the possible report should be revisited to avoid potential harm to the system both retroactively and prospectively: (1) a recommendation that the DOL provide guidance on the distinction between settlor and fiduciary actions without the opportunity for public comment, (2) a recommendation that Interpretive Bulletin 95-1 ("95-1) be modified without the opportunity for public comment, and (3) modifications to the disclosure rules that could have implications for past actions unless done through the regulatory process.***

**Causes of de-risking.** Before addressing those three issues, we want to briefly address one critical issue not discussed in the context of the possible recommendations. Throughout the June 5<sup>th</sup> hearing, there was substantial testimony regarding the causes of de-risking. Briefly, the main causes identified were funding and accounting volatility, especially in the case of companies where the pension liability is large compared to the size of the business. Another cause referenced was the growing cost attributable to PBGC premiums and the signs that this cost will continue to grow.

In light of the importance of the de-risking issues, we would urge the EAC to consider including a recommendation that the DOL work within the Administration to address these causes for de-risking. For example, when the Administration proposed raising PBGC premiums by \$16 billion in 2011, we promptly heard discussion of de-risking through the offering of lump sums or the distribution of annuity contracts. We passed that on both orally and in writing as one of many reasons not to pursue the premium increase. Now, following the very large premium increase in MAP-21, the Administration has recently proposed another \$25 billion increase in PBGC premiums. It seems clear that this will send another powerful signal to plan sponsors about the importance of considering de-risking through the offering of lump sums or the distribution of annuity contracts.

The DOL is an active part of the Administration; in fact, the Secretary of Labor is Chair of the PBGC's Board of Directors. In this capacity, the DOL can play a major role in helping shape legislative recommendations, such as the recently proposed PBGC premium increase, that have very significant effects on de-risking activity.

**EAC possible report.** Here are the components of the possible EAC report on de-risking, as we understood them.

- (1) **Additional disclosures regarding lump sums.** The EAC would recommend that the DOL use its power to interpret the fiduciary rules under ERISA section 404 to require additional disclosures to participants who are offered lump sums. For example, if a lump sum does not reflect a subsidy available under an annuity distribution option, that would have to be disclosed. It was indicated that this would be "layered on top of the IRS' relative value rules." According to the EAC, the required disclosures should also include a comparison of the income derived from investing the lump sum with the income derived from the annuity. The

disclosure would be limited to objective factors with respect to lump sums and annuities.

The EAC would recommend that there be enhanced disclosures with respect to lump sums offered post-retirement. For example, one issue that was mentioned was that it should be pointed out that older individuals have a shorter time horizon and therefore may need to invest more conservatively, which can affect the rate of return that they can earn on the lump sum amount.

- (2) Possible additional disclosure of de-risking transactions on the Form 5500. It is not clear whether the EAC will include this recommendation in its report.
- (3) Expand/clarify 95-1. The report would include a recommendation that DOL Interpretive Bulletin 95-1 ("95-1") – establishing fiduciary standards applicable to the selection of an annuity provider with respect to defined benefit plan benefits – should be clarified/expanded to cover any purchase of an annuity contract that will be distributed to participants in satisfaction of the plan's obligations to the participants, not just annuity purchases in connection with a plan termination.
- (4) Guidance under ERISA section 502(a)(9). This provision of ERISA deals with annuity purchases in connection with the satisfaction of some or all of a plan's obligations to participants. If such a purchase violates the plan terms or part 4 of ERISA, an action can be brought by the DOL, a participant or beneficiary, or a fiduciary for "appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts." It is unclear whether the EAC will make a recommendation regarding the issuance of guidance under this provision.
- (5) Education and guidance for employers. The EAC's contemplated report would recommend that the DOL provide education and guidance to employers in two respects.
  - a. The DOL should provide educational materials explaining that there are various ways to de-risk, other than offering lump sums and distributing annuity contracts. Such other ways include investment strategies, such as liability-driven investing and buying annuity contracts to hold as plan investments. The objective of the education is to stimulate more use of such "in-plan" types of de-risking.
  - b. The DOL should provide sub-regulatory guidance, in the form of a Field Assistance Bulletin or FAQs, on the distinction between settlor functions and fiduciary functions. The guidance should not "break new ground," but should simply provide basic education to plan sponsors.

- (6) Participant education regarding lifetime income. The DOL should continue its current efforts to educate participants about lifetime income issues. Such efforts should have a formal component, such as the pending project on including lifetime income illustrations on benefit statements. In addition, DOL should use informal means, such as speeches, to further this education.
- (7) Multi-agency review of lump sum rules. The contemplated EAC report would recommend that the DOL, Treasury, and PBGC jointly review the statutory and regulatory rules related to lump sum distributions to determine whether the current rules are promoting lump sums in a way that is not helpful from a public policy perspective.

Concerns regarding contemplated EAC report. There are three areas of the contemplated EAC report that cause us concern.

- (1) Settlor versus fiduciary. One of the most important distinctions in the law is the distinction between settlor functions and fiduciary functions. Very generally, plan design issues are settlor functions, and implementation issues are fiduciary functions. As a settlor, a plan sponsor has an obligation to its shareholders to make plan design decisions based on what is best for the company. A decision to terminate or freeze a plan is an example of a settlor decision. A plan design decision to purchase and distribute annuity contracts or to offer lump sums is also clearly a settlor function. On the other hand, the implementation of such settlor decisions, such as the selection of an annuity provider, is a fiduciary act.
- a. Importance of distinction. If the distinction between settlor and fiduciary functions is blurred, the consequences could be extremely harmful. If elements of any plan design decision, such as offering lump sums or distributing annuity contracts, were to be treated as fiduciary actions, employers' ability to manage risk could be severely restricted. Lawsuits regarding the offering of lump sums or distributing annuity contracts could become common. These lawsuits could arise in the context of de-risking transactions like the recent ones, or in connection with plan terminations, thus undermining employers' ability to manage risk and/or threatening the core element of the voluntary system—the option to choose not to maintain a plan. In the current environment, with extremely volatile funding and accounting obligations and skyrocketing PBGC premiums, restrictions on employers' ability to manage risk and/or terminate a defined benefit system could have very adverse effects.
- b. Testimony regarding distinction. In the course of the hearings, many recommendations were made regarding what should be considered a fiduciary violation, examples of which can be provided if that would be helpful. A large number of these recommendations, including some referred to as clarifications, would create fiduciary obligations where none exists today in our view. If DOL guidance were to follow any of these

recommendations in providing guidance on the distinction between settlor and fiduciary functions, the harm to plan sponsors and the voluntary retirement system could be very significant.

- c. **Our recommendation.** *The EAC report should state very clearly that any guidance on the settlor/fiduciary distinction should be issued through the regulatory process with the opportunity for public comment. This distinction is one of the bedrock principles of ERISA law and the foundation of the voluntary system. With the recent discussion of means to vastly expand fiduciary principles, it is critical that any guidance be implemented carefully with full opportunities for public comment. We agree that the EAC report should also state that the guidance should not break any new ground. But public comment is needed because views on what is breaking new ground could differ sharply.*

- (2) **Expansion of Interpretive Bulletin 95-1.** *In our view, 95-1 already applies to purchases of annuity contracts for distribution, without regard to whether the purchases are in the context of a plan termination. Thus, no expansion or clarification is needed. If any modification of 95-1 is recommended, again the modification should be done in the context of a proposed regulation with the opportunity for public comment.*

- a. **Need for regulatory process.** *The need for the regulatory process is amply illustrated by testimony regarding how the DOL should modify 95-1. For example, one witness stated that 95-1 may apply differently outside the plan termination context and went to provide examples of fiduciary duties that could be imposed under 95-1 that in our view would radically change the law.*
- b. **Our recommendation.** *Even though 95-1 was originally issued outside the regulatory process, the importance of the issues today make it clear that nothing should be done to modify 95-1 without the opportunity for public comment.*

- (3) **Disclosure.** *We support full disclosure to participants regarding the decision as to whether to take a lump sum. However, this too needs to be done through the regulatory process for two reasons.*

- a. *First, if this requirement is not implemented through the regulatory process, it will be difficult to clarify that the requirements are only prospective. In other words, the DOL would be interpreting the general fiduciary rules to require additional disclosures. Since the ERISA statute has not changed, any new non-regulatory interpretation would naturally be an interpretation of current law, which could mean that the new fiduciary rules would apply to past disclosures that were provided before the new rules were even in existence. This risk even exists in the regulatory*

context, since the statute has not changed. But at least there are mechanisms to make regulations prospective.

- b. Second, there is a great need to coordinate any new disclosure rules with Treasury, which has issued the relative value regulations (Reg. sec. 1.417(a)(3)-1) and is working on regulations regarding the consequences of failing to defer distributions (Prop. Reg. sec. 1.411(a)-11(c)(2)(vi)). There is a great deal of overlap between the disclosures discussed by the EAC and especially the relative value regulations. The regulatory process provides the best way for the two agencies to coordinate, so as to avoid duplicative or inconsistent guidance that would confuse rather than help participants.

We thank you for your consideration of our comments and request to speak during the September 23 teleconference.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley  
Senior Vice President, Policy