

**2015 ERISA Advisory Council
Model Notices and Disclosures for Pension Risk Transfers
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**Submission of
American Federation of Labor and Congress of Industrial Organizations**

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On behalf of the 56 national and international labor unions and the more than 12 million working people it represents, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) appreciates the invitation to address the Council as it considers developing model notices and disclosures for pension risk transfers.

The AFL-CIO works every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded and that their workplaces are safe. Protecting and enhancing the retirement security of America’s workers and retirees is a top priority for the AFL-CIO. We actively participate in legislative debates regarding the funding of pension plans in both the private and public sectors and the structuring of the different pension and retirement savings plans to be made available to workers. We also regularly comment on proposed rules issued by the three agencies responsible for administering ERISA’s provisions to ensure that the voices of working men and women are heard and their rights and benefits protected.

With respect to pension risk transfers, the AFL-CIO applauds the ongoing interest of the Council in this topic as these transfers currently pose yet another threat to the declining retirement security of working families as part of the decades-long erosion of secure defined benefit pension plans. We testified before the Council two years ago about our concerns regarding these transactions, particularly the offers of lump sum payments to retirees. In addition, the AFL-CIO submitted comments to the Pension Benefit Guaranty Corporation (“PBGC”) in response to its proposed reportable event rule in June 2013,¹ urging the agency to include risk transfer transactions as reportable events despite the initial decision to exclude them.² In November 2014 and February 2015, the AFL-CIO supported the decision of the PBGC to include questions about risk transfers as part of the premium payment form and

¹ Proposed Rule on Reportable Events and Certain Other Notification Requirements, 78 Fed. Reg. 20039 available at <http://www.gpo.gov/fdsys/pkg/FR-2013-04-03/pdf/2013-07664.pdf>.

² The comments of the AFL-CIO are one of the 13 comments available at <http://pbgc.gov/Documents/Comments-04-03-13.pdf>.

instructions.³

Developing model notices and disclosures for pension risk transfers that offer useful information in an even-handed manner to affected workers and retirees is a task worth doing, and the AFL-CIO supports the Council's endeavor. We hope our comments and suggestions prove helpful, and we look forward to discussing the two draft notices with the Council.

Lump Sum Notice

Perhaps the most important development with respect to lump sum payments was last month's issuance of Notice 2015-49 ("Notice") by the Department of Treasury and the Internal Revenue Service.⁴ The Notice puts an end to offers of lump sum payments to retirees in pay status during a window period, and the forthcoming proposed rules may also limit offers when a standard termination of defined benefit plan occurs. In any event, from our perspective, the Notice makes the Council's task somewhat easier as any model notice and disclosures with respect to lump sum payments may be more tailored and focus on those participants entitled to deferred vested pensions.

As noted in our comments on the DoL's proposed conflict of interest rule,⁵

For many individuals, deciding what to do with an accrued pension benefit available as a lump sum or an accumulated 401(k) or IRA account is one of the most consequential financial decisions they will make in their lifetime. ...

Even—and perhaps especially—for workers covered by defined benefit plans, deciding what form of benefit to take can be critical. These are one-time, irrevocable decisions, often involving large dollar amounts.⁶

In light of the importance of this decision, the AFL-CIO supports the proposal to treat a recommendation to take a distribution of benefits as investment advice.

³ The Proposed Submission of Information; Collection for OMB Review; Comment Request; Payment of Premiums, 79 Fed. Reg. 56831 (September 23, 2014) *is available at* <http://pbgc.gov/documents/2014-56831.pdf> and our comments are available at <http://pbgc.gov/documents/11-24-2014-AFL-CIO-Comments-Premium-Instructions-Risk-Transfer.pdf>. The February 2015 comments submitted by the AFL-CIO in response to the PBGC's Submission of Information Collection for OMB Review; Comment Request; Payment of Premiums, 80 Fed. Reg. 1517 (January 12, 2015) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-01-12/pdf/2015-00253.pdf> are attached.

⁴ The Notice is available at <http://www.irs.gov/pub/irs-drop/n-15-49.pdf>.

⁵ A copy of the comments submitted by the AFL-CIO ("AFL-CIO Comments") on July 21, 2015 is attached. The proposed rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf>.

⁶ AFL-CIO Comments at p. 11.

The critical nature of the decision also supports requiring plan sponsors and administrators to provide comprehensive, useful information in an even-handed manner to participants being offered a limited opportunity to elect a lump sum payment. In some instances, affiliates tell us the material and descriptions provided to eligible participants are written and presented in a way that clearly conveys the message that the “right” decision is election of a lump sum payment. We hope the availability of model notices and disclosures by the DoL will help put an end to such presentations.

The July 25 draft of the Lump Sum Notice (“Draft LS Notice”) contains a wealth of relevant information for participants to consider in making a decision about whether or not to accept a lump sum payment offer. But, because it does not include key personal information about the participant and the benefit earned under the pension plan, as well as instructions on how to make an election, we assume the Draft LS Notice is intended to be part of a larger package of information provided to eligible participants.

The missing personal information includes, but is not limited to, the participant’s date of birth, service dates, marital status, the accrued benefit under the plan, and the types of retirement and optional forms of benefit for which the participant is eligible. We note that it is possible this information would be included in response to Questions B-1 and B-2, but if that is the case, we suggest that it not be buried so far back in the notice. With respect to the personal information used to calculate the benefit, the participant should also be given the opportunity to correct any errors as doing so could affect the amount of the accrued benefit and any lump sum payment. The PBGC regulations on the content of the notice of plan benefits to be provided to participants when a standard termination occurs⁷ offer a comprehensive list of what information to include for participants in different categories, and we suggest the Council use these listings as a guide though we recognize not all of the categories may apply to lump sum offers to deferred vested participants.⁸

Our primary suggestion is to simplify the language of the Draft LS Notice, and to the greatest extent possible, avoid technical language and large blocks of text which may be daunting for the average reader to understand or read through. We also think it might be helpful to include the “Differences Between Lifetime Payments and a Lump Sum” at the beginning, together with an expanded version of the specific circumstances discussion.⁹ The goal would be

⁷ 29 CFR §4041.24(a)-(e).

⁸ The Draft Transfer Notice should also, as we note later, include the personal information used to calculate the participant’s benefit as well as the type of retirement benefit and any survivor benefit payable.

⁹ For example, instead of saying “sufficient additional retirement benefits outside of this Plan,” it might be more helpful to use the list of retirement income sources included in the response to question A-6 as it is broader and the specific items listed may be easier to understand. We also suggest that some explanation of what might be “sufficient” should be included. It would also, in our view, be helpful to consider substitutes for “longevity expectations” and “the Plan’s assumptions,” as the terms are used before they are explained and are also fairly technical.

to offer an overview of the key factors and personal circumstances to take into account at the outset and follow with the more detailed discussion.

Question A-2 best illustrates the concern about dense blocks of text and an overload of information, not all of it necessary. One possibility is to break the question and response into its component parts. For example, after the “two things” the participant would have to do are explained, another question and response could be inserted discussing the ability to achieve returns better than those earned by the plan. A subsequent question could deal with taking withdrawals into account. We also suggest, despite our agreement with the concern that participants may be provided inappropriate or conflicted advice by a financial advisor or plan service provider and our support for the proposed conflict of interest rule, that the reference to the proposed rule be deleted. It is only a proposed rule and should the Draft LS Notice ultimately be published by the DoL, the rule may be final. Moreover, the usefulness of the proposed rule to a participant is not at all apparent.

Questions A-5 and A-6 address possible advantages to electing a lump sum payment. The information provided is helpful, but additional explanations of what, for example is “adequate” income from other sources would make the response even more useful. We are also puzzled by the suggestions that a lump sum payment might be rolled over to a *prior* employer’s plan. That seems like an unlikely possibility.

We also suggest clarifying the response in Question A-7 as the wording is awkward in its explanation of the loss of protection in bankruptcy and the meaning of “other welfare benefits” is also vague.

The Questions in Part B of the Draft LS Notice address the benefit available under the plan if a lump sum is not elected. The Council might want to consider whether these questions should come before those Part A detailing the impact of electing a lump sum payment. It seems like a more logical flow to tell someone what their benefit is under the plan and how that benefit is then converted to a lump sum payment before explaining the impact of choosing one alternative or the other. With respect to Question B-2, the term “subsidy” should not be used until it is explained which does not really occur until the last sentence. We also suggest that the phrase “incent early retirement” be replaced as many types and forms of subsidized early retirement benefits were not intended to provide incentives but to reward long service or offer protection in the event of job loss.

We are also concerned about the accuracy and brevity of the response to Question B-4. Given the discussion in the GAO Report that participants seemed unaware of PBGC protections,¹⁰ a more complete response might be appropriate. One example is the description of

¹⁰ Government Accountability Office, *Participants Need Better Information When Offered Lump Sums That Replace Their Lifetime Benefits*, GAO-15-74 (January 2015) available at <http://www.gao.gov/assets/670/668106.pdf> at pp. 46-47.

the benefits guaranteed by PBGC in the Single Employer Plans Model Annual Funding Notice prepared by DoL.¹¹ We also note that PBGC may become responsible for the payment of guaranteed benefits even if the plan sponsor has not filed a bankruptcy petition although the most common type of distress termination does occur during a bankruptcy reorganization under Chapter 11 of the Bankruptcy Code. In light of the complexities of the PBGC guarantee, we do not recommend that the Draft LS Notice simply refer participants to the PBGC website for more detailed information. Instead, as we suggest, additional discussion should be integrated into the Draft LS Notice.

We also urge the Council to consider the recommendation made by Professor Madrian in her May testimony that marketing experts as well as lawyers should be involved in designing communications.¹² Based on my own experiences in drafting explanations of proposed collective bargaining agreements, included complex pension and health benefits, for workers, it can be extraordinarily helpful to include trained communications professionals to assist in making complicated benefits issues easily understandable.

Pension Transfer Notice

With respect to the July 25 draft of the Pension Transfer Notice (“Draft Transfer Notice”), we appreciate that the language used is less legalistic and dense than that in the Draft LS Notice which will, in our view, make it easier for participants to understand. However, we have concerns about some of the questions and responses and the absence of any instructions for participants to verify the information used to calculate their benefit under the pension plan before the transfer to the insurance company. This gap is particularly important for those deferred vested participants who never began receiving benefits payments.

As we suggested with respect to the Draft LS Notice, the personal information required under PBGC’s regulations on the notice of plan benefits should be included in the Draft Transfer Notice, together with information about the type of retirement benefit and any survivor benefit selected or available in the future for those who have not yet retired. We believe this approach is more helpful than the Draft Transfer Notice’s direction that participants make sure the information that the employer and insurance company have is accurate and that they retain their most recent individual benefit statement. The responsibility for providing the personal information and benefit belong with the plan administrator and plan sponsor, not the participant.

¹¹ The Model Notice is included as Appendix A in Annual Funding Notice for Defined Benefit Plans; Final Rule, 80 Fed. Reg. 5626 (February 2, 2015) available at <http://www.gpo.gov/fdsys/pkg/FR-2015-02-02/pdf/2015-01884.pdf>.

¹² Model Notices and Plan Sponsor Education on Lifetime Plan Participation, Testimony by Brigitte C. Madrian (May 27, 2015).

And, as provided in the PBGC rules, participants, including those in pay status,¹³ should have an opportunity to correct any errors in the information provided to them.

We have some concerns with the responses to the first two questions on the Draft Transfer Notice. First, the purchase of a group annuity to provide benefits under the plan is not, technically, a conversion. Instead of the plan making the promised payments, the insurance company becomes responsible for those payments. And, while it is generally correct that the “benefit will remain the same,” the response is, at best, incomplete as under the terms of the plan, future changes might be required. For example, a retiree might be receiving a temporary supplement that ends when Social Security benefits begin or a future survivor benefit payable following the pensioner’s death is likely to be a different amount. Other changes in the benefit amount could result from modifications in tax withholding or retiree health premium contributions, assuming those deductions are made by the insurance company.

It might also be helpful to include information about what a participant should do if the benefit received from the insurance company is not what they received from plan before the transfer or what was expected to be paid based on the information provided by the plan at the time of the transfer. Explaining how to address disputes when the procedure is likely to be different than what is was under the plan would be useful information.

The AFL-CIO recognizes that notices will inevitably refer to other material or direct participants to seek information or advice from experts. But, in our view, some of the responses in the Draft Transfer Notice send participants to sites that may not have direct answers or provide what we consider to be inappropriate responses.

For example, assessing the health of an insurance company should take into account more than the ratings but other factors, as provided under current DoL guidance, are also important when plan fiduciaries make a selection.¹⁴ And, the ratings themselves may mean little to an individual inexperienced in dealing with these matters. Yet, the response does nothing more than direct the readers to rating offered by various companies. Moreover, while we understand participants may be concerned about the financial health of the insurance company, unless the selection of the company violated ERISA, this information does not help the participant. It may be more useful to describe the process used to select the particular company although in circumstances where workers and retirees don’t trust the employer or former employer, this description may not allay concerns.

Both the Draft Transfer Notice and the PBGC-prescribed Model Notice of State Guaranty

¹³ We note that PBGC does not require the personal data used to calculate the benefit to be provided to those participants who have been in pay status for more than one year before the proposed plan termination date; however, we think a better practice would be to include such information for all participants in pay status no matter when benefit payments began. 29 CFR § 4041.24(b)(4).

¹⁴ Interpretive Bulletin 95-1, 29 CFR §2509.95-1 available at <http://www.gpo.gov/fdsys/pkg/CFR-2014-title29-vol9/pdf/CFR-2014-title29-vol9-sec2509-95-1.pdf>.

Association Coverage of Annuities¹⁵ ultimately send participants to the National Organization of Life and Health Insurance Guaranty Associations (“NOLHGA”) website to learn certain information. Needless to say, the NOLHGA website is not a model of clarity, and if the explanations are not clear to benefits professionals, then they are likely to be even more baffling to participants. It might be more helpful to give some examples of how the guarantee limits work with those examples constructed based on input from the professionals who best understand the guarantees provided through the state guaranty associations. We also suggest that if NOLHGA experts can explain whether there are any potential gaps in guaranty coverage that might impact pension plan participants, including a clear and concise explanation of those gaps could be useful information.

It is not clear to us why participants need to know “the present value of an annuity” if the insurance company will replicate the basic monthly benefits payable under the plan. The explanation in the response relates the calculation to the potential future failure of the insurance company and the ceiling on the state guaranty. But, we see two possible flaws with the response which undermine the value of the suggested calculation. While insurance companies take into account gender when pricing individual annuities, by law, doing so for an employer-sponsored plan would be prohibited under Title VII of the Civil Rights Act of 1964, and the group annuities funding any pension transfer will not be based on sex-segregated mortality tables. Moreover, it’s not clear that the present value in the event of an insurer insolvency would use assumptions comparable to what is used on the suggested site. And, second, the present value of the annuity today does not reflect what the value might be at the time of any future failure of the insurance company.

Conclusion

The AFL-CIO appreciates the Council’s efforts in preparing the two draft notices for discussion and review. In our view, the Draft Lump Sum Notice addresses the key factors outlined by GAO. Both drafts, however, are missing the personal information used to calculate the plan benefit, and we recommend that this critical information be included in both notices. In addition, we suggest the Council consider including examples or other illustrations rather than just descriptions of the assumptions used in calculating the lump sum payments. Lastly, both drafts, but particularly the Draft Lump Sum Notice, could be revised to be more clear and less complex.

¹⁵ Appendix C to Standard Termination Filing Instructions available at <http://pbgc.gov/documents/500-instructions.pdf>.