

SEAFARERS MONEY PURCHASE PENSION PLAN

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Administrator

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Rm N-5655
U.S Department of Labor
200 Constitution Ave. N.W.
Washington, D.C. 20210

Attention: Pension Benefit Statements-Lifetime Income Illustrations

Re: Interim Final Rule on Pension Benefit Statements
RIN 1210-AB20

To Whom It May Concern:

These comments on the Interim Final Rule (IFR) on Pension Benefit Statements-Lifetime Income Illustrations recently issued by Employee Benefits Security Administration¹ are submitted on behalf of the Seafarers Money Purchase Pension Plan (SMPPP). SMPPP supports the Administration's goal of increasing participant voluntary contributions to improve retirement savings. However, the plan disagrees with mandating the assumptions upon which income illustrations must be based, and requests that the Agency reconsiders these assumptions or creates an exemption for jointly administered plans, like the SMPPP.

The Seafarers Money Purchase Pension Plan is a jointly administered defined contribution retirement plan sponsored by the Seafarers International Union of the Atlantic, Gulf, Lakes, and Inland Waters and contracted employers. Currently, the plan has 15,803 active participants. Unlike 401k's and IRA's discussed at length in the IFR, participant accounts are largely funded through employer contributions pursuant to collective bargaining agreements with the union. Approximately, two-to-three percent of participants make voluntary contributions even though the plan allows for such contributions up to 10 percent of a participant's compensation. For this reason, the plan supports EBSA's efforts to enhance participant savings.

As detailed in the IFR, many participants lack the financial expertise to determine how much to save now in order to replace a sufficient amount of their working income to continue to enjoy their lifestyle in retirement. Transparent disclosure of a participant's account balance and entitlements

¹ Pension Benefit Statements-Lifetime Income Illustrations, 85 Fed. Reg. 59132 (to be codified at 29 CFR § 2520)

under a retirement plan could aid the participant in determining how much to save. However, the proposed rule suffers from several defects.

Firstly, the rule neglects money purchase pension plans and jointly administered plans entirely. The omission was surprising where 16 percent of all private sector workers and 25 percent of all union workers in the private sector participate in a money purchase pension plan.² The focus on the needs of 401k recordkeepers is appropriate given that the overwhelming majority workers who participate in defined contribution plans participate in 401k or IRA type plans.³ However, a regulation is at risk of being arbitrary where it overlooks such a significant portion of the regulated community.⁴

Money purchase pension plans and jointly administered plans differ from 401k's and IRA's in multiple respects. Participants are not permitted to direct their own investments and the plan is funded almost entirely by employer contributions. These contributions are negotiated in collective bargaining agreements. Therefore, any new costs of administering the plan not foreseen at the time a collective bargaining agreement was negotiated cannot be easily defrayed without deducting the new expenses from the interest earned on participants' accounts.⁵ Although SMPPP is large when compared to certain other money purchase pension plans, it has much fewer participants than large 401k and IRA plans. Thus, the plan will likely have to charge each individual participant's account more than a large recordkeeper would to cover the expenses associated with producing lifetime income illustrations. Smaller money purchase plans will have to charge participants even more.

Furthermore, the SMPPP is a Taft-Hartley multiemployer employee benefit plan that is jointly administered by union and employer trustees. Changes to the plan require agreement among the trustees to adopt an amendment. Moreover, the plan is self-administered by a small staff who perform all tasks from ensuring legal compliance, to processing claims, and recordkeeping. Consequently, plan staff have intimate knowledge of the plan's rules, unlike large 401k recordkeepers with numerous plans and potentially millions of participants.

Given these distinctions between large 401k recordkeepers and the SMPPP, we urge the Administration to consider how this rule will impact money purchase pensions plans and jointly administered multiemployer plans.

Secondly, notwithstanding the limitation of liability provided by the SECURE Act,⁶ communicating with participants concerning their benefits remains a fiduciary act.⁷ As such, the

² BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY, Table 19 Defined Contribution Plans: Type of Plan, Private Industry Workers (2019),

<https://www.bls.gov/ncs/ebs/detailedprovisions/2019/ownership/private/table19a.pdf>

³ *Id.*

⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“an agency rule would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem.”)

⁵ The plan's actuary estimates that initial costs of developing software and generating statements could be anywhere from \$30,000-\$100,000 depending upon whether the Plan does this work “in-house” or outsources the task to its actuarial firm. Ongoing costs range from \$15,000-\$25,000 to conduct annual updates, compliance testing, etc. Generating an annual statement is likely to cost \$500 for each statement. However, if the Plan were able to generate statements based on plan assumptions, actuarial work would be limited to generating tables and plan staff could be used to prepare the statements which would result in savings.

⁶ 29 USC § 1025(a)(2)(D)(iv); proposed regulation 29 CFR §2520.105-3(f).

⁷ *Varity Corp. v. Howe*, 516 U.S. 498 (1996).

duty of loyalty compels fiduciaries to deal honestly with plan members.⁸ Therefore, fiduciaries cannot affirmatively miscommunicate or mislead participants concerning the benefits to which they are entitled.⁹ Indeed, a fiduciary must correct a participant's misunderstanding when the fiduciary knows or should know that the participant has a material misunderstanding of plan benefits.¹⁰ Cases suggest that affirmative misrepresentations and a pattern of errors on benefit statements violate this duty.¹¹

In the case of the SMPPP, providing lifetime income illustrations pursuant to the mandated assumptions in the proposed rule rather than in accordance with current plan terms will result in an affirmative misrepresentation of the benefits to which the participant is entitled. Unlike the rule, the plan's normal retirement age is 65, not 67. Plan calculations, assumptions and disclosures are predicated on this age. Furthermore, the default joint and survivor annuity is 50% and the highest, which must be selected by the participant, is 75%, not 100%. Additionally, the proposed rule requires the illustration to be based on a mortality table not used by the plan. Such significant distinctions between plan rules and the mandated assumptions can only result in income illustrations that are materially different from what participants are actually entitled to under the plan. Hence, lifetime income illustrations based on the proposed rule's assumptions can only work to confuse and mislead plan participants.

This risk of misleading participants is exacerbated by the mandated interest rate. The rule requires plans to use the 10-Year Constant Maturity Treasury Securities Yield Rate (10-Year CMT) rather than a conservative long-term rate of return developed by plan investment advisors and actuaries. The interest rate utilized impacts the other factors used in calculating QJSA's. The lower the rate, the lower the equivalent value of other QJSA factors. Similarly, the higher the rate, the higher the remaining QJSA factors. In either case, the illustration has a significant risk of misleading participants. Lower rates, especially the current 10-Year CMT,¹² would result in monthly annuity estimates that would likely be lower than what the participant is entitled to under the plan. Similarly, a higher rate could exceed the plan's rate of return and result in inflated lifetime income illustrations. Either scenario could have a detrimental impact on participant behavior. Lower monthly estimates are likely to cause a participant to work longer than he or she might need or want to. Higher estimates could cause a participant to retire, or attempt to retire, early resulting in lower annuities or the deflating realization that she or he needs to work longer.

If not for the limitation of liability, plan fiduciaries would risk violating the duty of loyalty by issuing these income illustrations. In the interest of protecting the fiduciary relationship with participants and to ensure that participants are armed with accurate knowledge of their benefits to make informed decisions, SMPPP urges the Administration to allow plans to base lifetime income illustrations on plan rules and a conservative rate-of-return developed in consultation with the plan's actuaries and investment advisors, or create an exemption for jointly administered Taft-Hartley plans, like the SMPPP, that allows such plans to use plan rules to generate illustrations. Providing illustrations based on plan terms and assumptions is the best means of furthering the

⁸ *Kalda v. Sioux Valley Physician, Inc.*, 481 F.3d 639, 648 (8th Cir. 2007).

⁹ *Id.*

¹⁰ *Griggs v. E.I. Dupont De Nemours & Co.*, 237 F.3d 371, 381 (4th Cir. 2001).

¹¹ See *Christensen v. Qwest Pension Plan*, 462 F.3d 913, 917 (8th Cir. 2006); *Shaffer v. Westinghouse Savannah River Co.*, 135 F.App'x 568, 573 (4th Cir. 2005).

¹² The 10-Year CMT is currently at its lowest rate in 30 years. *Daily Treasury Yield Curve Rates*, DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/data-chart-center/interest-rates/pages/textview.aspx?data=yield> (last visited Oct. 5, 2020).

Administration's goal of encouraging increased retirement savings while respecting the fiduciary relationship between plans and participants.

Finally, the rule allows plans that purchase annuities with third-party insurance companies to use some of the assumptions in the insurance contract when creating income illustrations.¹³ However, no such provision is made for in-plan annuities that are self-administered. SMPPP allows participants to choose whether they want a lump sum distribution or a monthly annuity which is issued by the plan. The Administration provides no explanation for why the rule discriminates in favor of annuities issued pursuant to contracts with third-parties. Nor is there any justification for why plans that self-administer annuities are disfavored. For this rule to be valid, the Agency must provide such explanation.¹⁴

In conclusion, the Seafarers Money Purchase Pension Plan supports measures to encourage participants in defined contribution plans to save more. Nonetheless, this rule is flawed. SMPPP urges the EBSA to consider the rule's impact on money purchase pension plans and plans jointly administered by union and employer trustees. Moreover, the Agency should reexamine the mandated assumptions in order to mitigate the risk of misleading participants and explain why plans that issue annuities in-house are not permitted to use plan rules in producing illustrations. These measures would protect the relationship between plan participants and fiduciaries and ensure that the rule is not arbitrary.

Submitted,



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Plan Administrator

¹³ Proposed regulation 29 CFR § 2520.105-3(e)(1)-(2), 85 Fed. Reg. at 59155-56

¹⁴ "[T]he Agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs., 463 U.S. at 43* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).