



SUBMITTED ELECTRONICALLY

November 17, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S Department of Labor
Room N-5655
200 Constitution Avenue NW
Washington, DC 20210

Re: Pension Benefit Statements – Lifetime Income Illustrations, RIN 1210–AB20

Ladies and Gentlemen:

Fidelity Investments¹ (“Fidelity”) appreciates the opportunity to comment on the interim final rule under 29 C.F.R. § 2520.105-3 (“IFR”) issued by the Department of Labor (“Department”) regarding the lifetime income stream disclosures that must be included in defined contribution benefit statements pursuant to § 105(d) of ERISA.² The IFR was issued in response to § 203 of the SECURE Act, which obligated the Department to prescribe assumptions (“Assumptions”) which administrators of individual account plans may use in converting total accrued benefits into lifetime income stream equivalents (“Lifetime Income Illustrations”) and issue a model lifetime income disclosure that explains the Lifetime Income Illustrations.

EXECUTIVE SUMMARY

Fidelity agrees that there is a need to help defined contribution plan participants better understand their retirement readiness, including how much income their accounts may generate in their retirement years. The Lifetime Income Illustrations may help increase this understanding as well as encourage participants to use available tools to plan for a more successful retirement.

¹ Fidelity was founded in 1946 and is one of the world’s largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Internal Revenue Code section 401(k), 403(b) and other retirement plans covering approximately thirty million participants and beneficiaries. Fidelity is the nation’s largest provider of services to individual retirement accounts with more than nine million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

² 85 Fed. Reg. 59132 (Sep. 18, 2020).

Fidelity currently provides benefit statements on behalf of plan administrators to approximately 22 million participants in ERISA-covered defined contribution retirement plans and is preparing to include the Lifetime Income Illustrations with statements on behalf of our plan sponsor clients. We have also been an active participant in conversations with the Department regarding participant benefit statements, including commenting on the Advance Notice of Proposed Rulemaking – Lifetime Income Illustrations on Participant Statements in 2013 (<https://www.Department.gov/sites/Departmentgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB20/00073.pdf>) (“2013 Letter”). Most recently, Fidelity participated in a roundtable discussion on various approaches to retirement income with the Department and other industry representatives on August 5, 2020, in advance of the Department’s release of the IFR.

Fidelity supports the framework of the IFR and the Department’s premium on uniformity and consistency, but we also recommend the following modifications to improve the Lifetime Income Illustrations, as described in more detail below:

- I. Fiduciary liability relief should not be unnecessarily limited. The limitation on fiduciary liability provided under the SECURE Act should be available to all plan fiduciaries, plan sponsors and other persons if the required explanations are written in a manner calculated to be understood by the average plan participant.
- II. The Department should provide flexibility regarding how Lifetime Income Illustrations may be furnished in the context of electronic delivery of benefit statements.
- III. Plan administrators should be permitted to provide Lifetime Income Illustrations to participants based on the account balance shown on the relevant benefit statement, and should be permitted, but not required, to consolidate account balances across accounts or vendors to generate aggregated plan-level Lifetime Income Illustrations.
- IV. The disclosure requirements set forth in 29 C.F.R. § 2520.105-3(e)(2) for investments in deferred annuities should be optional, not mandatory. Plan administrators should be permitted to use the Assumptions and disclosures described in 29 C.F.R. § 2520.105-3(c) and -3(d) to satisfy the lifetime income disclosure obligation under ERISA § 105(a)(2)(D), regardless of the types of investments held in participants’ accounts.
- V. The Department should coordinate with FINRA and other regulators with jurisdiction over participant account statements and guaranteed income statements to ensure that the Lifetime Income Illustrations, related explanations and the disclosure requirements set forth in 29 C.F.R. § 2520.105-3(e)(2) for investments in deferred annuities are consistent with other applicable regulatory guidance.
- VI. The Department should reaffirm that retirement income illustrations, whether included on benefit statements or otherwise provided to participants, constitute investment education, not fiduciary investment advice under ERISA.

- VII. The Department should clarify that, for purposes of determining a participant's account balance, a participant is in default of repayment of a loan when the loan is deemed distributed under the Code.
- VIII. The Department should confirm that the first annual Lifetime Income Illustrations will be required no later than September 17, 2022, one year after publication of the IFR in the Federal Register.
- IX. The final rule under 29 C.F.R. § 2520.105-3 issued by the Department should not impose significant new obligations on plan administrators without also providing compliance flexibility, such as grandfathering the IFR requirements and/or providing relief through an extended transition period.

I. FIDUCIARY LIABILITY RELIEF SHOULD NOT BE UNNECESSARILY LIMITED

The IFR requires plan administrators to use language that is “substantially similar in all material respects”³ to the model language in 29 C.F.R. § 2520.105-3(d)(1)(ii) through (d)(11)(ii) or the Model Benefit Statement Supplement set forth in Appendix I to the IFR⁴ to obtain the relief from fiduciary liability described in ERISA § 105(a)(2)(D)(iv). However, the term “substantially similar in all material respects” is neither defined in the IFR nor does the SECURE Act impose that requirement.⁵ It is unclear if this standard applies to the substance of the explanations, the words in the model language themselves; the use of bullet points; the ordering of the bullet points; etc. While the preamble to the IFR indicates that “word-for-word adoption of the model language is not required,” the examples provided (which include changing “this statement” to “your statement”) suggest that permitted modifications are limited.

Benefit statements for individual account plans are currently required to be written in a manner calculated to be understood by the average plan participant under ERISA § 105(a)(2)(iii), as are the model lifetime income disclosures required under ERISA § 105(a)(2)(D)(ii). ERISA § 105(a)(2)(D)(iv) grants liability relief to any Lifetime Income Illustrations which “include the explanations contained in the model lifetime income disclosure.” Therefore, Fidelity respectfully requests that the Department clarify that the “substantially similar” standard will be satisfied if the disclosure provides the required explanations set forth in 29 C.F.R. § 2520.105-3(d)(1)(i) through -3(d)(11)(i), 29 C.F.R. § 2520.105-3(e)(1)(iii)(A)(1) through -3(e)(1)(iii)(K)(1) and/or 29 C.F.R. § 2520.105-3(e)(2)(i), as applicable, written in a manner calculated to be understood by the average plan participant (“Disclosure Language”).

³ 29 C.F.R. § 2520.105-3(f)(2).

⁴ Similarly, 29 C.F.R. § 2520.105-3(f)(2)(ii) permits plan administrators to use the disclosure language in paragraphs 29 C.F.R. § 2520.105-3(e)(1)(iii)(A)(2) through -3(e)(1)(iii)(K)(2) or the Model Benefit Statement Supplement set forth in Appendix II if the plan offers certain distribution annuities.

⁵ ERISA § 105(a)(2)(D)(ii).

In addition, the Department should explicitly state that the relief from fiduciary liability will not be affected by the provision of additional information designed to supplement the Disclosure Language, provided that the additional information is not misleading. In other words, the Department should clarify that the explanations contained in the model lifetime income disclosure need not be the exclusive and only explanations provided to obtain relief from fiduciary liability and that additional, supplemental explanations may be provided so long as they are not misleading.

Notwithstanding the foregoing, Fidelity suggests that the Department could consider deeming the disclosure language set forth in paragraphs of 29 C.F.R. § 2520.105-3(d)(1)(ii) through -3(d)(11)(ii), 29 C.F.R. § 2520.105-3(e)(1)(iii)(A)(2) through -3(e)(1)(iii)(K)(2), and the Model Benefit Statement Supplements set forth in Appendices I and II to the IFR as a safe harbor method of obtaining liability relief under 29 C.F.R. § 2520.105-3(f). However, using the foregoing disclosure language and/or the Model Benefit Statement Supplements should not be the only way to obtain relief from fiduciary liability, as discussed above.⁶

Finally, Fidelity requests that the Department extend the limitation on fiduciary liability for plan fiduciaries, plan sponsors or other persons to cover disclosures related to deferred annuities, provided that such entity reasonably and in good faith relied on information received from or provided by the issuer of such deferred annuity investment or investment manager of the investment that includes an annuity component. This approach is consistent with other situations in which plan administrators are required to rely on third party information for disclosure purposes.⁷ We anticipate that plan administrators and others will be required to rely on annuity providers (or investment managers) to provide the annuity-related content to satisfy the requirements of 29 C.F.R. § 2520.105-3(e)(2)(ii), as it may be virtually impossible for plan administrators or others to validate the annuity-related content if the annuity provider (or investment manager) is the only entity with this information.

⁶ Fidelity agrees with the Department's assumption, stated in the preamble to IFR, that the Lifetime Income Illustrations will likely increase participant call volume in the first year and potentially subsequent years. We have been working with our participant communications usability experts to review the IFR's disclosure language to determine how to maximize participants' understanding and thus minimize call volume. Among other things, for example, we found that the word "annuity" would be most likely to cause participant confusion and increased call volume because (1) the most common definition of annuity in the retirement plan financial context is a commercial annuity issued by an insurance company (which is not being offered here) and (2) the majority of defined contribution plans do not offer an annuity form of distribution. Our usability experts also recommended changes to the layout of the disclosures.

⁷ See, e.g., 29 CFR § 2550.404a-5(b)(1), describing the fiduciary requirements for disclosure in participant-directed individual account plans: "A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment option."

II. THE DEPARTMENT SHOULD CLARIFY HOW LIFETIME INCOME ILLUSTRATIONS MAY BE PROVIDED IN THE CONTEXT OF ELECTRONIC BENEFIT STATEMENTS

There are multiple possible ways for plan administrators to furnish Lifetime Income Illustrations through online and mobile-based technology and communications. Although the preamble to the IFR contemplates an “integrated” benefit statement or the use of the Model Benefit Statement Supplement as a “unified insert into benefit statements,” for a better participant experience, the Lifetime Income Illustrations may be presented in an electronic environment without necessarily embedding the Lifetime Income Illustrations with the “four corners” of a PDF of the benefit statement or otherwise directly appending it to a benefit statement that is presented online.

For example, a website address (or hyperlink) could be electronically delivered to the participant that, upon access and login, presents a page that displays prominent links that are sufficiently specific to provide ready access to the quarterly benefit statement and the annual Lifetime Income Illustration (the “Webpage Approach”). The Webpage Approach would be the technological equivalent of a paper benefit statement to which the Department’s two-page Model Benefit Statement Supplement has been appended. The Webpage Approach is also consistent with the long-standing position of the Department that “good faith compliance with the pension benefit statement provisions does not preclude the use of multiple documents or sources for benefit statement information.”⁸ The Webpage Approach is only one possible way to furnish the Lifetime Income Illustrations with benefit statements; additional approaches, including those made possible by future technological innovations, may be considered by plan administrators and their service providers. In any case, the Lifetime Income Illustrations would be presented in an electronic manner equivalent to an addendum or supplement to a paper benefit statement. Therefore, Fidelity respectfully requests that the Department confirm that Lifetime Income Illustrations will be considered furnished to participants and eligible for the relief from fiduciary liability described in ERISA § 105(a)(2)(D)(iv) if presented with the benefit statement or otherwise integrated into the delivery of the benefit statement, even if the Lifetime Income Illustration and benefit statement are accessible through unique links or their equivalents.

III. PLAN ADMINISTRATORS SHOULD NOT BE REQUIRED TO CONSOLIDATE LIFETIME INCOME ILLUSTRATIONS

The Department has long recognized that multiple documents or sources may be used for benefit statement information.⁹ For example, Fidelity provides recordkeeping services for hundreds of multivendor retirement plans in which participants’ accounts may be held by multiple vendors or investment providers (such as insurance companies or investment managers) on separate recordkeeping platforms (“Multivendor Plans”). Many Multivendor Plans are funded with annuities which are recordkept by each annuity issuer on its own platform and/or with custodial accounts that may hold shares of affiliated and unaffiliated mutual fund investment providers. Alternatively, Multivendor Plans may be recordkept by one entity but only the insurance

⁸ Department of Labor Field Assistance Bulletin No. 2006-03 (Dec. 20, 2006) (“FAB 2006-03”).

⁹ *Id.*

company or investment manager offering the deferred annuity investment may have the specific information about the anticipated lifetime income payments to be paid out under the deferred annuity, if required to be provided under 29 C.F.R. § 2520.105(e)(2). The IFR does not address the provision of Lifetime Income Illustrations in the Multivendor Plan context.

Fidelity strongly encourages the Department to explicitly permit multiple Lifetime Income Illustrations to be provided, each based on the portion of the participant's account that is reflected on the benefit statement. In other words, if a participant in a Multivendor Plan has an account at more than one vendor and the benefit statement from each vendor shows only the participant's plan account held by such vendor, the Lifetime Income Illustration provided by each vendor should be based only on the balance in the account for which the vendor provides services and produces a benefit statement. Similarly, if a participant must be provided with the disclosures required under 29 C.F.R. § 2520.105(e)(2) for his or her deferred annuity investment, the plan administrator should be able to direct the annuity provider to provide such disclosures separately to each affected participant with respect to such participant's investment in such deferred annuity investment.

The Department has provided guidance to administrators of Multivendor Plans requiring the consolidation of materials provided by the plan's various service providers or investment issuers before disseminating such information to participants.¹⁰ However, Lifetime Income Illustrations, which are projections intended to help participants understand how the amount of money they have saved so far converts into an estimated monthly payment for the rest of their lives based on a uniform set of Assumptions, are substantially different from the comparative charts required under the "participant-level disclosure regulation" codified at 29 C.F.R. § 2550.404a-5 and which generally must be provided at the same time in a single mailing or transmission in order to facilitate a comparison of the core investment information regarding designated investment alternatives available under the plan. Under the IFR, the Lifetime Income Illustrations will be based on uniform Assumptions required by the Department and the participant should be able to easily aggregate his or her hypothetical monthly income amounts from multiple sources. Requiring administrators of Multivendor Plans to consolidate statements at the individual account level, which may require a manual consolidation of participant-specific disclosures from multiple insurance companies, on an annual basis would be a costly requirement with very little incremental value to participants.

IV. SPECIAL DISCLOSURE REQUIREMENTS FOR ANNUITIES SHOULD NOT BE MANDATORY

In Fidelity's 2013 Letter to the Department, we recommended that

any mandated illustrations [should] not be required to incorporate information based on annuity forms of distribution or in-plan annuity products offered by a plan. As a general concept, it may seem reasonable to use actual annuity purchase rates if the illustration must be made in a life annuity format and the plan in fact buys annuity contracts for benefit distributions. In our experience, however, the variety of plan designs which may

¹⁰ Department of Labor Field Assistance Bulletin No. 2012-02R (July 30, 2012).

include annuity forms of distribution and of the types of annuity products currently used as plan investments pose serious challenges to meaningful participant disclosure and education.¹¹

Our position remains the same in 2020. In the context of the IFR, Fidelity strongly recommends that the Department should permit administrators to use the Assumptions in 29 C.F.R. § 2520.105-3(c) and the explanations set forth in 29 C.F.R. § 2520.105-3(d) to create the Lifetime Income Illustrations for the participant's entire plan account, regardless of whether all or part of the participant's account is invested in a distribution annuity, deferred annuity and/or any "lifetime income investment" as defined in Code § 401(a)(38)(B)(ii). This approach is simple to implement, straightforward and will not reduce the utility of the Lifetime Income Illustrations for participants.

Fidelity agrees with the Department's decision to permit the administrators of plans that offer distribution annuities as described in 29 C.F.R. § 2520.105-3(e)(1) to choose whether or not to use actual contract terms to calculate the monthly payment amounts described in 29 C.F.R. 2520.105-3(b)(3) and -3(b)(4), because in our experience, very few such plans have annuity contracts in force which could be used to satisfy a participant's potential request for an annuity distribution. Accordingly, we do not anticipate that the disclosure approach described in 29 C.F.R. § 2520.105-3(e)(1) will be used very often, if at all. Annuities requested by participants in such plans are typically purchased on an as-needed basis.¹² A participant who wishes to understand the potential monthly payments from an annuity contract available under the plan would work with the plan administrator to obtain an accurate calculation from the annuity provider at the time of distribution based on the participant's account balance, age, spouse's age, rate of return, the type of annuity being purchased and other features of the available annuity contract(s).

The disclosures required by 29 C.F.R. § 2520.105-3(e)(2) for amounts invested in a deferred annuity should be recharacterized as optional. Administrators of plans that permit participants to purchase deferred annuities as described in 29 C.F.R. § 2520.105-3(e)(2) should be permitted to use the Assumptions in 29 C.F.R. § 2520.105-3(c) and the explanations set forth in 29 C.F.R. § 2520.105-3(d) to create the Lifetime Income Illustrations for the participant's entire plan account, including the portion invested in a deferred annuity. The Department could consider requiring additional disclosures (if and as relevant) informing participants how to obtain their specific accrued annuity benefit amounts from time to time (for example, from the issuer of any annuity contract or lifetime income investment).

¹¹ 2013 Fidelity Letter at 5.

¹² For participants in plans which offer an annuity form of distribution as described in 29 C.F.R. § 2520.105-3(e)(1), it may be more financially advantageous for a participant to purchase an annuity outside of the plan by rolling all or part of their account balance to an individual retirement annuity, which further lessens the frequency of in-force annuity contracts solely for distributions from defined contribution plans.

The benefits of using the general the Assumptions in 29 C.F.R. § 2520.105-3(c) and the explanations set forth in 29 C.F.R. § 2520.105-3(d) for participants' entire account balances regardless of investment also include but are not limited to:

1. Consistency with 29 C.F.R. § 2520.105-3(e)(1) (“Plans that offer distribution annuities”), which sets forth a special optional Lifetime Income Illustration rule for plans that offer annuities as distribution options pursuant to a contract with an issuer licensed under applicable state insurance law.
2. Adherence to the language of ERISA § 105(a)(2)(D)(i)(II), which defines the term “lifetime income stream equivalent of the total benefits accrued” as the amount of monthly payments that a participant would receive if the total accrued benefits of such participant were used to provide lifetime income streams described in subclause (III) of such section. There is no statutory requirement to segregate participants' account balances based on the underlying investments for purposes of providing Lifetime Income Illustrations and separately disclose the participant's actual lifetime income stream promised by “deferred annuities” on statements.
3. Recognition of the growing diversity of lifetime income investments which defy a one-size-fits-all approach to disclosure. The term “deferred annuities” apparently includes annuities used to fund “lifetime income investments” as defined in Code § 401(a)(38)(B)(ii), a term which includes investment products that promise guaranteed lifetime income benefits but may not be wholly funded by one or more annuity contracts. It may be very difficult, if not impossible, for the investment managers of lifetime income investments to separate the “deferred annuity” from the other components of a lifetime income investment and accurately provide the disclosures required 29 C.F.R. § 2520.105-3(e)(2).
4. Minimization of potential participant confusion. Plan participants who have invested in deferred annuities often have access to their annuity payout information directly from the insurer. Requiring a portion of the same information to be provided on benefit statements would not provide any new information to participants and may potentially cause confusion if different in any way from the information provided by the insurer. In addition, for participants in Multivendor Plans and other plans which offer investments other than deferred annuity investments, including annuity-specific payout information may lead these participants to assume that the Lifetime Income Illustrations for non-annuity investments (which are based on the Assumptions and intended to be hypothetical) are as valid as the expected future payouts from deferred annuity investments. The comparisons may also be misleading because the Assumptions do not reflect future earnings but annuity-specific payout information may reflect future earnings on the amounts currently invested in the annuity.

V. DEPARTMENT SHOULD COORDINATE WITH FINRA AND OTHER REGULATORS

Broker-dealers are subject to the rules regulating communications with the public issued by the Financial Industry Regulatory Authority (“FINRA”). The Lifetime Income Illustrations and Disclosure Language are mandated by ERISA but are not exempt from FINRA’s Communications with the Public Rule 2210. FINRA Rule 2210(d)(1)(F) prohibits predictions and projections of performance in member-firms’ communications with the public unless certain requirements are met.¹³

Fidelity encourages the Department to coordinate with FINRA to proactively ensure that broker-dealers will be in compliance with FINRA Rule 2210(d)(1)(F) when providing Lifetime Income Illustrations based on the Assumptions which include the Disclosure Language or explanations required by the Department and encourage FINRA to communicate their position to member-firms prior to the effective date of the IFR through appropriate guidance (*e.g.*, a Notice to Members or other FINRA Rule 2210 Interpretive Guidance about Advertising Regulation). The Department has successfully taken this approach in the past with other participant disclosures required under ERISA to ensure consistency with other applicable regulatory guidance.¹⁴

In addition, Fidelity provides benefit statements to participants in retirement plans that are not subject to ERISA (*e.g.*, single-participant plans, plans sponsored by governmental entities and religious organizations, and certain Code § 403(b) plans). We anticipate that some plan administrators may request that Fidelity provide Lifetime Income Illustrations to participants in such plans. Therefore, we encourage the Department to share this fact pattern with FINRA, so that FINRA’s guidance will apply to and provide relief for member-firms providing Lifetime Income Illustrations on brokerage statements issued to participants in retirement plans which are not subject to ERISA.¹⁵

In the event that any portion of a participant’s accrued benefit currently includes an annuity investment which must be disclosed as described in 29 C.F.R. § 2520.105-3(e)(2), disclosure of the participant’s guaranteed payments will be subject to oversight by state insurance regulator(s). Fidelity similarly encourages the Department to coordinate with the relevant insurance regulators to proactively ensure that plan administrators and their service providers will be in compliance

¹³ Under FINRA Rule 2210(d)(1)(F), in relevant part, communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that paragraph (d)(1)(F) does not prohibit: i. A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy; or ii. An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214.

¹⁴ *See, e.g.*, the “no-action” letter dated October 26, 2011 issued by the Division of Investment Management of the U.S. Securities and Exchange Commission (“SEC”) to the Department, taking the position that disclosures required by 29 CFR § 2550.404a-5 would be treated as satisfying the rules on mutual fund advertising under Rule 482 of the Securities Act of 1933.

¹⁵ The SEC issued a “no-action” letter dated February 18, 2015, which extended the relief provided in their 2011 letter to the Department (*see id*) to plans that are exempt from ERISA. The over-3 ½-year gap was challenging to explain to plan sponsors who wanted to provide similar disclosures to their participants in plans not subject to ERISA.

with applicable insurance laws when providing the information required by 29 C.F.R. § 2520.105-3(e)(2)(ii) to participants in plans subject to ERISA and not subject to ERISA, which may necessitate the provision of any additional disclosures mandated by applicable insurance law.

VI. LIFETIME INCOME ILLUSTRATIONS CONSTITUTE PARTICIPANT EDUCATION, WHETHER PROVIDED ON BENEFIT STATEMENTS OR OTHERWISE

The Department acknowledged in the preamble to the IFR that many lifetime income illustrations or retirement income tools¹⁶ are currently provided or available to participants. Many of these illustrations are “interactive, stochastic, and tailored to the individual plan and plan participant.” The value of these illustrations and tools is considerable given that many permit customization to reflect the unique circumstances of the participant including the existence of other retirement accounts, Social Security benefits and anticipated future contributions. Given the goal of consistent and uniform illustrations under the IFR, as well as scalability, these factors cannot be accounted for in the required Lifetime Income Illustrations. However, as the Department recognized, current illustrations and retirement income tools have offered considerable value to participants and should continue to be offered on benefit statements as well as through other channels. We applaud the Department for permitting additional illustrations to be included on benefit statements.¹⁷

The Department has requested comments on whether it should issue guidance clarifying the circumstances under which the provision of additional illustrations on statements may constitute the rendering of fiduciary investment advice or investment education. Given that protection from fiduciary liability under ERISA § 105(a)(2)(D)(iv) and the IFR does not extend to additional illustrations, Fidelity urges the Department to reaffirm that illustrations, whether included on benefit statements or otherwise provided to participants, do not constitute fiduciary investment advice. This will allow the continued availability of valuable tools and illustrations that have assisted participants for years.

Treating retirement income tools and illustrations as educational material has not been controversial in our experience and is consistent with the five-part test regarding fiduciary investment advice and Interpretive Bulletin 96-1 (“IB 96-1”).¹⁸ Such tools and illustrations were contemplated in IB 96-1, but the focus was on how asset allocation could impact retirement income needs. Fidelity believes it would helpful for the Department to reiterate in the final rule that tools and illustrations designed to provide lifetime income projections are educational materials under ERISA and not investment advice, whether included on a benefit statement or

¹⁶ Retirement income tools may generate hypothetical retirement income estimates based on specific assumptions (such as those set forth in the IFR) or through interactive experiences that incorporate the participant’s potential income and potential expenses in retirement, thereby helping the participant identify gaps between their projected income needs and projected income in retirement.

¹⁷ 29 C.F.R. § 2520.105-3(g) permits plan administrators to provide additional lifetime income illustrations on account benefit statements, provided that “such additional illustrations are clearly explained, presented in a manner that is designed to avoid confusing or misleading participants, and ...based on reasonable assumptions.”

¹⁸ 61 Fed. Reg. 29586 (June 11, 1996).

otherwise made available to participants. Any future guidelines provided by the Department describing the tools and illustrations which constitute education under ERISA should be broad and flexible rather than prescriptive to encourage innovation. The Department could include in its guidance the factors that may be included in such educational tools and illustrations, such as projected future contribution rates, projected earnings, other retirement income sources including spousal accounts, salary, retirement age, retirement expenses, life expectancy and Social Security benefits. The Department may also consider requiring disclosures regarding the assumptions and methodology utilized. In addition, Fidelity suggests that the Department include in its guidance the portions of amended 96-1 that were invalidated in 2016, but which specifically included as “investment education” certain information and interactive investment materials related to the impact of distributions on retirement income and needs.¹⁹

Fidelity believes that the Department’s reaffirmation that retirement income tools and illustrations constitute investment education will benefit plan sponsors, participants and service providers significantly by providing regulatory certainty, given the IFR and the Department’s attention to retirement income and the value of education in this area.

VII. THE DEPARTMENT SHOULD CLARIFY TREATMENT OF OUTSTANDING LOANS FOR PURPOSES OF DETERMINING TOTAL ACCOUNT BALANCE

The Lifetime Income Illustrations must be based on the participant’s total benefits accrued, excluding the value of certain annuity investments, under 29 C.F.R. § 2520.105-3(b). 29 C.F.R. § 2520.105-3(d)(11)(i) requires an explanation “that the account balance includes the outstanding balance of any participant loan, unless the participant is in default of repayment on such loan.”

The Treasury regulations under Code § 72(p) describe “deemed distributions” which may occur when a participant fails to make loan repayments on a timely basis:

Q-10: If a participant fails to make the installment payments required under the terms of a loan that satisfied the requirements of Q&A-3 of this section when made, when does a deemed distribution occur and what is the amount of the deemed distribution?

A-10: (a) *Timing of deemed distribution.* Failure to make any installment payment when due in accordance with the terms of the loan violates [Code] section 72(p)(2)(C) and, accordingly, results in a deemed distribution at the time of such failure. However, the

¹⁹ “Information and materials that . . . describe . . . the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses of investment alternatives available under the plan or IRA.” 29 C.F.R. § 2509.96-1(d)(2)(iv), as finalized in 81 Fed. Reg. 20946, 20998 (Apr. 8, 2016) and subsequently vacated through *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360 (5th Cir. 2018).

plan administrator may allow a cure period and [Code] section 72(p)(2)(C) will not be considered to have been violated if the installment payment is made not later than the end of the cure period, which period cannot continue beyond the last day of the calendar quarter following the calendar quarter in which the required installment payment was due.

(b) *Amount of deemed distribution.* If a loan satisfies Q&A-3 of this section when made, but there is a failure to pay the installment payments required under the terms of the loan (taking into account any cure period allowed under paragraph (a) of this Q&A-10), then the amount of the deemed distribution equals the entire outstanding balance of the loan (including accrued interest) at the time of such failure.²⁰

Other situations may occur which result in a deemed distribution of all or part of the outstanding loan amount (*e.g.*, violation of the amount limitations of Code § 72(p)(2)(A), the repayment term requirement of Code § 72(p)(2)(B), the level amortization requirement of section 72(p)(2)(C), or the enforceable agreement requirement of paragraph (b) of 26 CFR 1.72(p)-1, Q&A 3(b)). In addition to the cure period described above, repayment suspensions are permitted in additional situations, such as with respect to participants who are on a leave of absence, performing military service or who are qualified individuals as defined in § 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act.

To avoid any potential confusion, we encourage the Department to clarify that until an outstanding loan has been deemed distributed as defined by Treasury guidance (and must be reported for tax purposes to the participant as a deemed distribution from the plan), the outstanding balance of the loan should be included in the participant's total benefits accrued for purposes of the Lifetime Income Illustrations.

VIII. THE DEPARTMENT SHOULD CONFIRM THAT THE FIRST LIFETIME INCOME ILLUSTRATIONS ARE REQUIRED TO BE PROVIDED NO LATER THAN SEPTEMBER 17, 2022

The effective date of the IFR is September 17, 2021, which is one year after the IFR was published in the Federal Register on September 18, 2020 and applies to benefit statements furnished thereafter. Lifetime Income Illustrations must be “included in only one pension benefit statement during any one 12-month period” under ERISA § 105(a)(2)(B) (flush language).

Fidelity respectfully requests that the Department confirm that the first annual Lifetime Income Illustrations must be provided on a quarterly benefit statement no later than September 17, 2022, the date which is one year after publication of the IFR in the Federal Register.

²⁰ 26 CFR 1.72(p)-1, Q&A 10.

IX. FINAL RULE SHOULD NOT IMPOSE SIGNIFICANT NEW OBLIGATIONS ON PLAN ADMINISTRATORS WITHOUT TRANSITION RELIEF

Fidelity acknowledges and appreciates that the Department issued the IFR well before the deadline established by § 203 of the SECURE Act (that is, December 20, 2020), so that plan administrators and service providers on their behalf would have as much time as possible to build the systems needed to generate and distribute the Lifetime Income Illustrations. We understand that the Department may revise the Assumptions, disclosure language and other requirements set forth in the IFR when it issues the final rule under 29 CFR 2520.105-3, whether issuance occurs before or after the effective date of the IFR. However, plan administrators, service providers and others may have already begun extensive technology projects based on the Assumptions, disclosure language and other requirements described in the IFR. Significant changes to the Assumptions, disclosure language and/or other requirements may require additional development time and cost, depending upon the specific change.

The impact of modifications to the Assumptions, disclosure language and other requirements is not predictable without knowing what the modifications will be. For example, our developers anticipate that our requests above (*e.g.*, elimination of the mandatory disclosure requirements for annuities) will not have a significant impact on the development of Fidelity’s new system to generate Lifetime Income Illustrations.

On the other hand, some commentators have suggested that the Department consider how future contributions and investment earnings could be incorporated into the Lifetime Income Illustrations. We believe that any new requirements to reflect future contributions and investment earnings in the Lifetime Income Illustrations would require significant development time and resources, especially if it involves future contributions based on participants’ personal contribution history, of which recordkeepers may or may not have records.

Accordingly, if the Department modifies the Assumptions, disclosure language and/or other requirements in the final rule under 29 CFR 2520.105-3, Fidelity respectfully requests that plan administrators be permitted to continue to rely (as an alternative) on the Assumptions, disclosure language and other requirements set forth in the IFR notwithstanding the final rule (a “grandfathering” approach). Fidelity also respectfully requests that the Department provide an extended transition period to implement any new Assumptions, disclosure language and/or other requirements of the final rule in good faith.

Office of Regulations and Interpretations,
EBSA/DOL, Lifetime Income RIN 1210-AB20
November 17, 2020

Fidelity would be pleased to provide further information or respond to questions the Department may have about our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Barr Haines". The signature is fluid and cursive, with the first name "James" being the most prominent.

James Barr Haines

SVP & Deputy General Counsel