



November 17, 2020

Ms. Jeanne Klinefelter Wilson
Acting Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave., NW
Room N-5655
Washington, DC 20210

**Re: Proposed Regulation on Lifetime Income Illustrations
RIN 1210-AB20**

Dear Acting Assistant Secretary Wilson:

Alliance Bernstein (“AB”) is writing to provide comments on the U.S. Department of Labor’s (“DOL” or the “Department”) interim final rule with requests for comments for *Pension Benefit Statements - Lifetime Income Illustrations*, 85 Fed. Reg. 59132 (Sept. 19, 2020) (the “IFR”).

AB is a leading global investment management firm that is a major provider of defined contribution plan savings, investment and retirement income options some of which include variable annuity products. Those options include a guaranteed lifetime withdrawal benefit (“GLWB”), which provides liquidity while still guaranteeing lifetime income. GLWBs insure a portion or all of a participant’s account balance. The insurance allows the participant to withdraw a specified amount during his or her retirement years, even if the participant’s account has been exhausted due to poor investment returns or a participant’s longevity. These products are distinct from traditional fixed annuities; however, because while a participant’s balance in a fixed annuity will grow a fixed (and small) amount during the accumulation phase, GLWBs are merely an add-on to the participant’s other account investments. Thus, a GLWB allows the participant to withdraw increased amounts from his or her account if the investments perform well. The AB Lifetime Income Strategy (“LIS”)¹ is an example of a program that includes a GLWB.

As a preliminary matter, we are supportive of Department’s efforts in developing the IFR and believe the LII disclosures have the potential to improve participants’ understanding of the value of their retirement savings. We commend DOL for incorporating the requirements of

¹ LIS is an in-plan qualified default investment alternative that combines a personalized lifecycle investment portfolio with guaranteed retirement income contracts to generate a guaranteed income stream for participants in retirement while preserving daily liquidity and transferability. Plans with LIS as the default option have ~168,000 active participants, of which ~1/2 participate in LIS representing ~\$5 billion in assets. Additionally, over 35,000 participants have secured more than \$1.5B in assets through LIS’ GLWB feature.



Section 203 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”) into a comprehensive rule that plan administrators will be able to comply with.

That said, we believe that there are several changes that could be made that would improve the IFR and make the final rule less burdensome for plan administrators and their service providers and more beneficial to plan participants and beneficiaries. Primarily, we would like the Department to:

- address how GLWBs should be incorporated into a lifetime income illustration (“LII”) disclosure;
- reconsider the factors that DOL requires a plan administrator to use to when calculating the LII disclosure;
- extend the limitation of fiduciary liability to cover LII disclosures where the plan offers a GLWB product; and,
- retain the electronic disclosure method described Field Assistance Bulletin 2006-03 (“FAB 2006-03”) for pension benefit statement information including the LII disclosures.

Each of these comments are discussed in more detail below.

I. Allow GLWB Specific Disclosures.

As noted in the preamble of the IFR, a number of annuity features and products exist in the retirement plan market, the treatment of which currently is not reflected in the IFR, for example GLWBs. DOL noted that it requested feedback from interested parties on the role of these features in LIIs when it issued the advance notice of proposed rulemaking (“ANPRM”) regarding the pension benefit statement requirements under section 105 of ERISA.² However, according to the IFR’s preamble discussion, commenters on the ANPRM, as a general matter, did not provide the Department with sufficiently detailed or consistent proposals on whether or how these features should be treated on pension benefit statements. Therefore, the Department requested comments in response to the IFR as to whether, and how, to incorporate such features into the IFR’s framework for LII disclosures.³

We believe that GLWB and similar products have a significant presence in the retirement plan marketplace and that their presence is a positive for plan participants. AB found a 20% improvement when analyzing the savings rates of plan participants in LIS who have started securing income in LIS when compared to those who have not (8.9% versus 7.4%). In other words, participants who have assets in the “Secure Income Portfolio”—those who are closer to retirement and securing lifetime income—generally save at higher rates than other participants

² 78 Fed. Reg. 26727 (May 8, 2013).

³ See 85 FR 59132, 59136-37 (Sept. 19, 2020).



do. AB suspects that the biggest reason for this savings disparity is perspective—the shift from viewing savings not as a lump sum but as a guaranteed income stream at retirement.

Despite the benefits of GLWBs for defined contribution plan participants, the Department has not addressed certain fiduciary issues related to offering them. Consequently, GLWBs and other lifetime income investments are still not widely available to defined contribution plan participants. According to a recent survey, less than 15% of defined contribution plans offered participants annuities as a distribution option or an in-plan lifetime income option.⁴ Among the chief reasons for not offering such options was confusion and lack of comfort regarding the fiduciary implications of doing so.⁵

Without addressing GLWBs in the final rule, DOL will create regulatory uncertainty that could negatively impact plans' willingness to offer GLWBs to participants, depriving participants of a widely used lifetime income strategy. We are seeking clear and descriptive guidance on GLWBs generally and specifically how they should be incorporated into the LII calculation.

GLWB features can be quite complex, so incorporating those features into the standard LII disclosure calculation may be difficult. Therefore, we believe that it would be appropriate to separate the GLWB into two calculations. First, the portion of a participant's account that may, but has not yet been secured by a GLWB, should be included as part of the participant's accrued benefit that is converted to the standard LII disclosure. Second, where a participant has secured some or all of his or her account through a GLWB, a second disclosure regarding that portion of the participant's accrued benefit should be furnished as part of the benefit statement or separately either by the plan administrator, or more likely the GLWB provider, at the direction of a plan administrator. This additional information would be similar to the information required for deferred income annuities:

- the frequency and amounts guaranteed under the GLWB;
- the date payments are scheduled to commence;
- a description of any survivor benefits, period certain commitments or similar features of the GLWB; and
- whether and how the GLWB payments may be adjusted.

II. Factors used to calculate the LII.

⁴ Callan, 20 I8 Defined Contribution Trends, 41, *available at* <https://www.callan.com/wpcontent/uploads/20 I8/0 1/Callan-20 I8-DC-Survey.pdf>.

⁵ *Id.* at 42.



As written, the IFR provides specific factors that must be used in order to calculate an LII and for a plan to avail itself of the IFR's limitation of fiduciary liability. Specifically, the IFR requires the use of the 10-year Constant Maturity Treasury ("CMT") rate for the interest rate assumption and the unisex mortality tables provided by the IRS in Internal Revenue Code of 186, as amended ("Code") section 417.

We are concerned about the potential that these factors could prove difficult for recordkeepers to utilize and expensive to build systems around. Specifically, the CMT updates daily and the Code section 417 mortality tables are updated on an annual basis. Therefore, recordkeepers will need to build systems that can pull this data from outside sources or will need to rely on human interaction to load the correct information. We also note that GLWBs are fundamentally different from other annuity products in that the mortality does not play a role when the participant acquires a benefit. Therefore, we request that the final rule permit the exclusion of the mortality factor for GLWBs.

Additionally, the system would need to be able to ascertain a participant's age and, if the participant is older than 67, incorporate the participant's actual age into the LII calculation, a separate calculation for a small subset of the participant population. Rather than a stated retirement age of 67, we suggest permitting plan administrators to use the plan's normal retirement age and that DOL should encourage plan fiduciaries to review their plan's experience when establishing the plan's normal retirement age.

Rather than requiring the factors delineated in the IFR, We encourage the Department to consider requiring or permitting the use of factors selected by the plan administrator, including stated or static factors, particularly with regard to the interest rate. We believe that this could reduce the cost to build the systems necessary to calculate the LII and would allow the LII to better isolate how a participant's account balance influences potential retirement income over time, rather than incorporating changes based on the variability of the required factors, for example, a significant but temporary drop in the CMT could overwhelm a more permanent increase in the size of the participant's account balance used in the LII calculation, which would be an odd outcome for this type of disclosure. A plan administrator should have the ability to recognize that a CMT below 1%, as it currently is, is an unreasonable assumption for calculating the LII and should be permitted to use a more realistic factor instead; provided that it discloses what factor was used.

The IFR requires the plan administrator to use the participant's current account balance to calculate the LII and does not require or permit the projection of account values into the future. As a result, a participant is likely to see an LII disclosure that is significantly lower than what is likely to be achieved if reasonable projected account growth, including reasonable investment gains, were included in the disclosure. For example, a 27 year old with a \$25,000 account balance would see an LII of approximately \$125, based on the interest and mortality assumptions that were used to create the Department's example. However, projecting that account balance 40 years into the future to 67, using a mere 4% real rate of return, would instead show an LII of \$600.



We believe that by not projecting account balances, the LII disclosure may potentially discourage savings, particularly among younger workers, and increase leakage from retirement accounts. We understand that Section 203 of the Secure Act used the term “total accrued benefits,” so the Department may have felt constrained in its rulemaking regarding this point. However, we believe that Congress, by delegating to the Department the task of determining the assumption that will be used to determine the lifetime income streams, granted the Department sufficient authority to include a market return factor in the proscribed LII calculation. Alternatively, the Department should make it clear that the plan administrator may include additional LII disclosures on a participant’s pension benefit statement and, assuming that the factors used to create those disclosures are reasonable, that such plan fiduciaries are protected by a limitation on liability similar to the limitation provided by Section 203.

III. Expand the scope of the IFR’s limitation of fiduciary liability.

The IFR provides a limitation of fiduciary liability if the IFR’s factors and model language are used. The fact that Section 203 of the SECURE Act provides a fiduciary safe harbor for the provision of an LII disclosure has been interpreted by some as implying that providing LIIs is a fiduciary act. That is not the case, and DOL has previously taken the position that providing LII disclosures is education, not investment advice.⁶ We strongly encourage DOL to clarify its position and affirm that LIIs that assume reasonable investment returns and contribution rates are still educational and not fiduciary recommendations or guarantees

Despite stating that the Department does not want to disrupt current practices, the limitation of fiduciary liability is not extended to preexisting or separate retirement income disclosures that are commonly provided by plan administrators (i.e., those which are not based on the IFR’s factors). We are concerned that the by limiting the scope of the limitation of fiduciary liability, DOL will end up disrupting current practices, stifling potential services and models that could be more customizable and helpful to plan participants and beneficiaries and encouraging a “race to the bottom” that leads to many participants losing access to LIIs and other projections that are custom tailored to their plans, by moving plan administrators to rely exclusively on the factors specified by the regulation and to discontinue using other disclosures and modeling tools. This is not what Congress intended when they passed the Secure Act. We strongly encourages DOL, as part of the final regulation, to provide fiduciary liability protection similar to what was provided in Section 203 of the Secure Act to any LII disclosure that uses reasonable factors and to explicitly state that any past LIIs disclosures were clearly education and not guarantees or investment advice.

As part of the IFR’s preamble DOL stated that “[c]omments, however, are solicited on whether the Department, either separately or in conjunction with the adoption of a final rule, should issue guidance clarifying the circumstances under which the provision of additional illustrations described in this paragraph may constitute the rendering of “investment advice” or

⁶ See, e.g., 2015 Fiduciary Rule.



may, instead, constitute the rendering of “investment education” under ERISA.”⁷ We strongly encourage the Department to issue such guidance as part of the final regulation.

Finally, we are concerned about the Department’s inclusion of footnote 20 in the IFR.⁸ This footnote 20 is particularly unhelpful to the continued inclusion of benefits guaranteed by an insurance company in retirement plans. While likely not intending to call into question whether the plan faces any additional fiduciary liability for including an insured guaranteed benefits in the investment line-up or in making the disclosures required by the IFR, the inclusion of an explicit statement that puts these products outside of the limitation of fiduciary liability provided to other annuity products and other disclosures may result in fewer plans adding such insured guaranteed benefits into their line-up and additional plans questioning whether to retain them. We strongly encourages the Department remove footnote 20 from the final rule, and to explain why it is doing so.

IV. Retain Field Assistance Bulletin 2006-03 for pension benefit statement information including the LII disclosures.

As part of its recent electronic disclosure rulemaking, DOL announced that the new electronic disclosure safe harbor would supersede the special rule memorialized in FAB 2006-03 permitting pension benefit statement information to be delivered through a secure continuous access website. This rule allows pension benefit statement information to be provided on such a website subject to the requirements to provide an initial notice describing the delivery method and rights to request and receive paper copies, and an annual notice thereafter. We believe that eliminating the current website delivery rule for section 105 benefit statement information will, particularly in light of the new LII disclosure requirements, result in excessive administrative costs, is inconsistent with ERISA, and is contrary to the Trump Administration Executive Order 13847 *Strengthening Retirement Security in America* directive to expand the use of electronic disclosure as much as possible.

Since FAB 2006-03 was issued, the use of continuous access websites has become a very common method of delivery of pension benefit statement information for 401(k) plans in particular. Very few participants opt out of website delivery, and the method of delivery is successful and widely utilized by participants.

FAB 2006-03 saves plan sponsors and plans millions of dollars that would otherwise be spent on printing and mailing quarterly statements. The elimination of this method of delivery

⁷ See 85 FR 59132, 59141

⁸ *Id.* at 59140 (September 18, 2020). The footnote reads as follows: “[a]s a result, and as discussed further below in section B(6) of this preamble, Limitation on Liability, plan administrators and other parties will not be able to avail themselves of the liability relief provided in paragraph (f) of the IFR. The SECURE Act amended ERISA to provide such relief when both specified annuity assumptions and model language provided by the Department are used; neither applies with respect to disclosure concerning deferred income streams.”



will result in plan administrators being required to mail hard copies of quarterly benefit statements, made longer and more complex by the inclusion of the LII disclosure and accompanying required language, to plan participants for whom the employer does not have (or does not provide) an electronic address. Thus, the transition from the FAB 2006-03 delivery method to the new safe harbor will result in a substantial new expense for plans. Moreover, many plan participants have been receiving pension benefit statement information through a website ever since the Pension Protection Act of 2006 (“PPA”) first began to require plans to automatically furnish that information. To transition these participants away from the method they have clearly become accustomed to, at the same time the Department increases the amount of information that needs to be included on the pension benefit statement, would be an unnecessary increase in plan costs and may result in the new disclosures being overlooked when received in the mail.

We urge the DOL to reverse its earlier rulemaking and leave in place the existing rule established by FAB 2006-03 solely for purposes of delivering pension benefit statements under section 105 of ERISA, and to codify the “continuous access website” rule within the final rule. In this regard, there is a separate statutory authorization for the use of electronic delivery in connection with section 105 pension benefit statements. Under section 105(a)(2)(A)(iv) of ERISA, pension benefit statements under section 105 “may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.” This provision of ERISA, added by the PPA, is a broad authorization from Congress to deliver pension benefit statements in electronic form that is separate from and more flexible than the more general requirement to deliver ERISA disclosures through a method “reasonably calculated to ensure actual receipt” under 29 C.F.R. 2520.104b-1(b). We believe that this statutory authorization to use electronic delivery under section 105(a)(2)(A)(iv) authorizes the DOL to articulate a separate and more flexible website delivery standard specifically for section 105 benefit statement information within the final rule.

As currently written, the IFR permits the administrator of a plan that includes annuity distribution forms to calculate the LII disclosures using the actual terms of the plan’s annuity contract. Given that relatively low number, some recordkeepers may be reluctant to build systems flexible enough to allow eligible plan administrators to take advantage of this optional LII calculation. For that reason, we believe that plans and participants may be better served if this alternative LII disclosure, and all LII disclosures, were allowed to be separately provided. We believe that DOL should affirm its past statement that a plan administrator can satisfy its pension benefit statement furnishing obligation through multiple documents⁹ and that plan administrators could rely upon the plan’s annuity provider to satisfy the LII disclosure requirement on their behalf in a document that is separate from a participant’s pension benefit statement. Alternatively, DOL could state that the inclusion of an LII disclosure that is furnished along with, though not as part of, a pension benefit statement would satisfy the requirement to furnish the LII.

⁹ See FAB 2006-03 (Dec. 20, 2006).



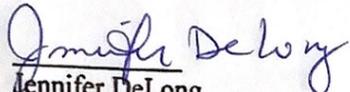
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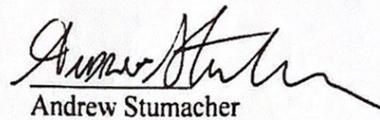
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We thank the DOL for all of its work in developing and finalizing the IFR and for the opportunity to submit these comments. We hope our comments are helpful. We would be pleased to discuss these comments with members of the DOL in person or by telephone.

Very truly yours,


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