Modernizing the DC/401(k) Plan System

ERIC

THE ERISA INDUSTRY COMMITTEE

Shaping benefit policies before they shape you.

MODERNIZING THE DC/401(k) PLAN SYSTEM

Introduction

Retirement savings from defined contribution plans are important to the economic, work, and financial security of the nation. As these environments change—revealing more diverse employer and worker circumstances and needs—it is important to review and update the applicable rules so that these plans can continue to drive financial innovation, improve retirement security, and provide continued support to employers, workers, and their families.

The ERISA Industry Committee (ERIC) has developed a series of proposals to modernize defined contribution plans. ERIC's member companies have reflected on the emerging and diverse range of 21st century changes confronting employers and workers. The ideas included in this paper build and improve upon measures that were under consideration in previous Congresses, but importantly, the paper also includes many new proposals designed to improve defined contribution plans to make them more predictable, less complicated, and ultimately more beneficial for employers and workers alike.

Representing companies that voluntarily offer retirement and other benefits to workers and families across the country, ERIC is committed to the retirement security and financial well-being of the nation's workforce. ERIC is the only national association that advocates exclusively for the country's largest employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC member companies are leaders in every sector of the economy, with employees in every state and locality. These companies offer employee benefits to millions of workers and families across the country, and promote retirement savings, financial wellness, and health care value improvements and cost savings. ERIC develops and advocates for public policies that support the ability of large employers to offer benefits effectively and efficiently under the federal regulatory framework of the Employee Retirement Income Security Act of 1974 (ERISA).

Voluntary employer-provided retirement plans play a critical role in allowing American workers and their families to achieve their financial security and retirement savings goals. ERIC applauds this as well as the tremendous success of defined contribution plans, especially 401(k) plans, in providing access to retirement savings and security for millions of workers across the country. As of 2018, 64% of private industry employees are covered by defined contribution plans compared to 17% covered by defined benefit plans.[1] Defined contribution plans make up 28% of all US retirement assets and represent over $8.2 trillion in savings for American workers.[2]

The last major overhaul of the private retirement system was over a decade ago in the Pension Protection Act of 2006 (PPA). Even that legislation law focused primarily on funding rules for defined benefit pension plans and clarifying the legality of cash balance plans. Some defined

---

[1] Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, 51 percent of private industry workers had access to only defined contribution retirement plans. (2018). Washington DC.

[2] Holden, Sarah, and Daniel Schrass. 2019. "Defined Contribution Plan Participants' Activities, First Quarter 2019." ICI Research Report (August). Available at www.ici.org/pdf/19_rpt_recsurveyq1.pdf.

contribution measures were included, such as extending contribution limits that were about to sunset for defined contribution plans and adding automatic enrollment and escalation provisions to confirm practices in which employers were already engaged. While useful in creating certainty, these rules addressed actions that were already taking place and did not constitute an update or overhaul of the defined contribution plan system.

Congress has not made significant changes to the rules governing defined contribution plans or 401(k) plans since the 1980s. Today, the workplace is in many respects a very different place, with new industries and corporate structures. Current laws and rules need to be overhauled to ensure that employees in all industries and situations can maximize their retirement savings opportunities. Whereas business models used to be more monolithic in design with multiple layers of employees at different pay gradations and long-service employees, many business models have changed to focus on core activities and products with fewer layers of workers. These changes have created more mobile employees and increased the need for businesses to be more competitive and creative in compensation and benefit design. In addition, there has been a significant move in the benefit space from defined benefit to defined contribution plans so that defined contribution plans are often the only employer-provided retirement plan available to workers. Furthermore, there is a recognition of the negative impact on work productivity caused by financial stress, including student loan debt, and the lack of financial education. Therefore, it is time to review, update, and overhaul the current defined contribution plan system to keep pace with changes occurring in the workforce and ensure that more workers can save for a secure retirement.

This paper details proposed legislative and regulatory changes for defined contribution plans to:

- Reflect Changes in Workforce Demographics and Plan Designs
- Promote Retirement Savings Through Comprehensive Financial Well-being
- Improve Plan Management and Administration
- Enhance Retirement Outcomes by Modernizing Distributions Options

Following this introduction are a summary of proposals and then a detailed explanation of each. ERIC will be advocating for the legislative and regulatory changes called for in these proposals, working with our large employer member companies to ensure that policymakers appreciate that now is the time to modernize defined contribution plans.

MODERNIZING THE DC/401(k) PLAN SYSTEM

Summary of Proposals

Part A: Reflect Changes in Workforce Demographics and Plan Designs

1. **Modify Highly Compensated Employee (HCE) Definition.** Provide additional flexibility in the HCE definition so that it can better adapt to the increasing diversity of employers' workforces without undercutting important coverage and nondiscrimination policies.

2. **Expand Safe Harbor Auto-Enrollment/Auto-Escalation Designs.** Expand the 401(k) rules to allow for additional designs that will increase savings opportunities and flexibility – as well as contributions and retirement outcomes.

3. **Allow Plans to Cover Less-Than-Half-Time Employees Without Testing Burdens.** Encourage employers to make their defined contribution plans available to employees who work fewer than 1,000 hours a year by allowing for their participation without increasing the burden of nondiscrimination testing.

Part B: Promote Retirement Savings Through Comprehensive Financial Well-Being

4. **Coordinate Short-Term Financial Well-Being and Retirement Savings.** Allow defined contribution plans to permit participants to withdraw or use limited, pre-tax elective deferrals for critical short-term financial needs (such as emergency savings funds) without imposing an early distribution tax penalty.

5. **Allow Employer Contributions that Match Student Loan Payments.** Allow employers to make matching contributions to a 401(k) plan based on participants' student loan repayments and, for testing purposes, treat those matching contributions the same way as standard matching contributions.

6. **Provide Greater Flexibility in the Elective Deferral Limits for Older Employees and Those on Unpaid Leave.** Increase the limits on the elective deferrals that older employees are permitted to make to defined contribution plans. Also, allow persons taking unpaid leave to make-up missed contributions and be able to receive the missed matching contributions.

7. **Expand Access to Key Benefits in Cafeteria Plans.** Expand the definition of "qualified benefits" in cafeteria plans to include student loan repayments and emergency savings.

8. **Expand Portability Among Employer-Provided Plans.** Direct the Department of Labor (DOL) and the Department of the Treasury (Treasury) to issue regulations allowing participants to rollover amounts (including assets, investments, annuities) among any tax-favored individual account plan maintained by employers (e.g., defined contribution and 401(k) plans, 403(b) plans).

9. **Allow Employees Additional Opportunities to Repay Unpaid Plan Loans after Pre-Retirement Separations from Service.** Extend repayment of unpaid plan loans to the end of the year in which a participant terminates or, if later, the end of the first calendar quarter after the quarter in which the participant terminates.

Part C: Improve Plan Management and Administration

10. **Promote Electronic Delivery of Plan Communications.** Implement a comprehensive electronic delivery regime under ERISA to allow employers to provide electronic delivery as the default method of issuing notices and disclosures.

11. **Simplify Notices and Disclosures.** Direct the DOL, Treasury, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) to issue regulations simplifying and modifying the current required notices and disclosures to employees to help employees be more aware of their rights, benefits, and risks associated with their benefits, and to reduce unnecessary costs and burdens in providing participants with important information.

12. **Clarify Fiduciary Rules Applicable to Environmental, Social, and Governance (ESG) Investments.** Clarify how the general ERISA prudence rule applies to ESG investments to provide employers and fiduciaries with greater certainty about whether and under what circumstances such investments may be provided under a plan.

13. **Expand the Ability of Plans to Self-Correct Plan Errors.** Expand the extent to which employers and fiduciaries can correct plan errors under the IRS's Employee Plans Compliance Resolution System (EPCRS) and the DOL's Voluntary Fiduciary Correction Program (VFCP), including increasing the opportunities for self-correction of common, routine errors without the costs and burdens of seeking IRS or DOL approval.

Part D: Enhance Retirement Outcomes by Modernizing Distributions Options

14. **Provide Lifetime Income/Annuity Provider Selection Fiduciary Safe Harbor.** Direct the DOL to issue regulations, in consultation with Treasury and the IRS, providing for one or more safe harbors relieving fiduciaries of liability for annuity provider selection and contract terms (including fees).

15. **Relax Required Minimum Distribution (RMD) Rules.** Modify the RMD rules to improve the retirement income distribution options that can be provided under defined contribution plans, including delaying the required beginning date to recognize improved mortality, exempting smaller account balances from the RMD rules entirely, and making sure that the RMD rules don't interfere with reasonably managed, annuity-like, spend-down options (including longevity annuity-type options).

MODERNIZING THE DC/401(k) PLAN SYSTEM

Proposals

Part A: Reflect Changes in Workforce Demographics and Plan Designs

Many of the current rules governing plan eligibility, coverage, and nondiscrimination are understandably based on the typical workers, workforces and plan designs that existed years ago. As the economy has evolved, it is time to make changes to better reflect current worker categories and workforce structures.

1. Better Target the Coverage and Nondiscrimination Rules

A key policy objective of the tax rules governing defined contribution and other qualified plans is to ensure that a plan benefits an appropriate portion of the employer's non-highly compensated employees (NHCEs) at an appropriate contribution or benefit level, in both cases relative to what the plan provides for the employer's highly compensated employees (HCEs).

A key component of these nondiscrimination rules is the definition of an employer's HCEs. It is important that this definition achieve an appropriate policy balance—enough of the employer's leadership/management employees should be HCEs so that the employer will have a strong incentive to maintain a qualified plan that also benefits significant NHCEs, but not too many of the employer's employees should be HCEs or else too many of them will be inappropriately limited in the contributions they can make or receive under the plan, particularly in a 401(k) plan.

Not surprisingly, employers' workforces reflect the economic, business, geographic, and labor contexts within which they operate. The current coverage and nondiscrimination rules were initially developed based primarily on what is perhaps the most common, straightforward employer and workforce structure – a single organization operating in a single business line with a workforce characterized from a compensation distribution perspective by a pyramid image (i.e., small group of employees at the "high-paid top" of the pyramid with increasingly larger groups of employees as compensation decreases from the "high-paid top" toward the "lowest-paid base" of the pyramid). However, many companies have moved away from this pyramid model and, instead, the workforce structure is flatter with a significant number of highly paid employees at the base with only another layer or two of decision-makers above the base.

In 1996, Congress adopted a modification to the HCE definition aimed at better recognizing employers with a high proportion of highly paid employees without undercutting the important coverage and nondiscrimination policies. The change allows an employer to limit the employees treated as HCEs because they had compensation above the statutory compensation threshold ($125,000 for 2019) to those employees who were also in the top-paid 20% of all the employer's employees by compensation.[1] While this change is helpful, it requires another update to keep pace with changing workforce structures.

Proposal:

- **Modify the HCE Definition:** For some employers with certain workforce structures, in certain high-compensation industries (e.g., technology or financial services), and in certain high cost-of-living locations, even the top-paid 20% HCE option will result in a larger HCE group than is appropriate. To further improve the HCE definition to address these situations, we propose that an employer be permitted to limit the employees earning over the annual compensation HCE threshold who are treated as HCEs for the current year to the top-paid 10% group of employees by compensation.

There may also be other ways to address this issue that provide greater flexibility for employers while maintaining the goals of the nondiscrimination tests.

2. Expand the Auto-Enrollment/Auto-Escalation Safe Harbor Designs

The current nondiscrimination rules for 401(k) plans with appropriate auto-enrollment, auto-escalation, and other design features will achieve and even exceed the desired nondiscrimination goals. Accordingly, a 401(k) plan that meets the requirements of one of the safe harbor designs is not required to take on the administrative burden and compliance risks associated with the statutory actual deferral percentage (ADP) and actual contribution percentage (ACP) tests. Removing the testing requirements provides an incentive for employers to implement safe harbor features. Given the success of the safe harbor model, it makes sense to expand the availability of the safe harbor to provide for increased retirement savings.

Proposals: Adopt additional safe harbor flexibility to further facilitate employers in maintaining and designing their 401(k) plans in ways that support the current nondiscrimination policy goals:

- **Expand the flexibility allowed under the automatic contribution safe harbor** (Section 401(k)(13) of the Internal Revenue Code (Code)):
  - Increase the maximum elective deferral permitted from 10% to 15% of pay
  - Direct Treasury to adopt regulations that would allow these provisions as part of the automatic contribution safe harbor –
    - To use higher "qualified percentages" for employees starting contributions at older ages
    - To provide matching contribution at higher elective deferral levels (not in excess of 10%)

[1] The Small Business Job Protection Act of 1996, Pub. Law 104–188, Section 1431.

    - To automatically re-enroll eligible participants contributing less than the contribution in the safe harbor design otherwise applicable for a similarly-situated participant not more frequently than once every two years

- **Provide additional safe harbor designs to satisfy the 401(k) ADP/ACP nondiscrimination tests**:

  - Treat a 401(k) plan as satisfying the ADP/ACP tests if the plan precludes every HCE from having an individual actual deferral percentage that is greater than 150% of the calculated ADP for NHCEs.

  - Treat a 401(k) plan as satisfying the ADP/ACP tests if the plan:

    - Requires that auto-contribution rates start at 6% and increase 1 percentage point for the next four years (to 10%)
    - Caps all contributions at $15,000
    - Re-defaults all participants below the applicable auto-contribution rate every three years

  - Treat a 401(k) plan as satisfying the ADP/ACP tests if the plan satisfies the "secure deferral arrangements" requirements: the plan requires that auto-contribution rates start at 6% and increase 1 percentage point for the next four years (to 10%) and that matching contributions be (at least) 100% on the first 1%, 50% on 2%-6%, and 25% on 7%-10%.

- **Direct Treasury to simplify the current auto-enrollment and auto-escalation rules** (including notice rules), both for plans using one of the various safe harbor designs and for plans doing the ADP/ACP tests, including recognizing that some employers (particularly those with multiple payroll and administrative systems and with different lines of business) have difficulty meeting nondiscrimination requirements for different employees in the same plan with the same employer.

- **Expand the ability of large employers with diversified operations to test sub-groups of employees separately**. The current qualified separate line of business (QSLOB) rules are complicated, unwieldy, and do not reflect the realities of the modern workplace. The rules should be expanded and made more user-friendly to better allow employers with legitimate, nondiscriminatory business reasons to provide different types and levels of benefits to different sub-groups of employees. For example, the requirement that a line of business have at least 50 employees to be a QSLOB should be eliminated, to recognize that a large company may acquire a small, fully separate business that has fewer than 50 employees, but intends to expand over time, and may wish to have those employees continue to have their own separate benefits. Employers ought also to be able to do separate testing of lines of business that may be engaged in similar businesses, but under circumstances that make providing different benefits appropriate (e.g., because they do business in significantly different employment markets, or under government contracts with materially different terms).

3. Allow Qualified Plans to Cover Less-Than-Half-Time Employees

Some employers want to allow more employees who perform fewer than 1,000 hours a year to participate in their defined contribution plans, particularly where the employees have worked for the employers for an extended period. However, including these employees often negatively impacts nondiscrimination testing. Part-time employees, particularly at lower wage levels, generally participate in 401(k) plans at a much lower rate than full-time employees, because of their lower disposable income. If they are not eligible for matching contributions (which most would not), that tends to reduce their level of participation even further. The current testing rules create a perverse disincentive for employers to exclude less than half-time employees altogether from plan participation rather than allowing those who wish to save for retirement the opportunity to do so.

Proposal:

- **Allow employers to include employees with less than 1,000 hours of service without including them in coverage and other nondiscrimination testing**.

Part B: Promote Retirement Savings Through Comprehensive Financial Well-Being

Many Americans face financial challenges that threaten their short- and long-term well-being and that of their families. Not only do they have to deal with educational expenses and student loan debt, home purchase and rental costs, and health and other emergency expenses, but also financial risks associated with unemployment, death, disability, long-term care, and longevity. These shorter-term needs and risks are often major barriers to meaningful long-term retirement savings. Defined contribution and 401(k) plans can be better designed to integrate savings for important, short-term financial needs and risks with savings for more successful retirement outcomes.

4. Coordinate Short-Term Financial Well-Being and Retirement Savings

Employers and employees report that short-term financial needs and risks create significant financial stress for employees, undermine their productivity, and interfere with their retirement savings. ERIC believes that it is important to recognize the holistic and lifetime nature of financial well-being (i.e., including retirement) and thus to strengthen the connections between short-term financial concerns and adequate savings for retirement.

Some have proposed savings funds for emergency, rainy day, education, disability, and other short-term financial needs that are separate from retirement plans. Some proposals would provide for a separate savings approach for each separate possible need. All would require that the short-term needs be justified with substantiation, requiring a significant compliance and administrative effort.

In our view, a preferable approach – one that better serves short-term financial needs and also results in improved retirement outcomes – is to integrate the short-term and long-term savings funds in ways that will be beneficial to both sets of needs.

Proposal:

- **Allow 401(k) plans to permit participants to withdraw or use pre-tax elective deferrals without the early distribution tax penalty** to take care of short-term financial needs of any type, subject to reasonable limits on the amounts available for this purpose (to ensure that the primary usage of the employee's savings continues to be the provision of retirement income).

    - Amounts withdrawn under this provision would not cause the plan to violate any applicable ADP/ACP test safe harbor but would offset elective deferrals for the current plan year for purposes of the ADP/ACP tests. The plan should be required to provide participants with notice describing the possible retirement outcome impacts of pre-retirement distributions.

- Under this proposal, it would not be necessary for the plan to maintain separate accounts for hardship, financial well-being, student loans, emergency or rainy-day funds, birth or adoption of a child, long-term care, or other needs. Also, because these withdrawals would not be conditioned on the showing of a "qualified need or expense," it would not be necessary for the participant to provide or for the plan to request or evaluate information relating to the intended use of the amounts withdrawn. We would also suggest allowing participants who take short-term need withdrawals to be able to replace the money withdrawn within a specified, limited period of time (e.g., five years), without regard to standard annual limits on contributions.

- Current provisions allowing penalty-free hardship or financial need distributions based on "qualified needs or expenses" would be repealed in three years, with section 411(d)(6) relief contingent on at least one-year advance notice to participants (conforming changes to the 401(k) hardship distribution rules would be needed as well). The current rules for purchase of a principal residence would not be repealed but could continue to operate separately of the new rules.

5. Allow Employer Contributions That Match Student Loan Payments

Employers and employees report that student debt creates significant financial stress for employees and undermines their productivity. Also, this short-term financial stress impairs the ability of many employees to save for retirement. As a result, employees who cannot contribute, or are limited in their ability to contribute, to a 401(k) plan are missing out on matching contributions early in their working lives, leading to a significant reduction in their retirement savings many years later.

Proposal:

- **Allow employers to make employer contributions to 401(k) plans that match a participant's qualified student loan payments**, which are repayments of "qualified education loans" as defined under Code section 221(d)(1).

  - A participant's student loan payments would be treated as "qualified" only to the extent that such payments, plus the participant's elective deferrals to the plan, do not exceed the applicable annual limit on a participant's elective deferrals. The employer contributions must be provided on terms under the plan that are the same as the terms applicable to matching contributions under the plan.

  - Also, the employer contributions will be treated as matching contributions and the "qualified student loan payments" will be treated as elective deferrals for purposes of Code sections 401(k), 401(m), 402(g), 414, 415, and other relevant provisions.

6. Provide Greater Flexibility in Elective Deferral Limits for Older Workers and Those on Unpaid Leave

In balancing short-term and long-term financial needs, it is important to give workers greater flexibility about exactly which year they make elective deferrals. For example, older workers should have the opportunity to make higher elective deferrals to 401(k) plans than is possible under current law in recognition that (i) in some earlier years they and their families may have had important financial needs they reasonably prioritized ahead of elective deferrals and (ii) a dollar contributed at a younger age will generate a larger retirement benefit at retirement age than a dollar contributed at a later age. Also, workers at all ages should be provided with some flexibility in making elective deferrals to 401(k) plans during times of unpaid leave.

Proposals:

- **Increase the annual dollar limit on "catch up" elective deferrals for age 50+** employees from $5,000 (indexed) to $7,500 (indexed). For age 60+ employees, the "catch up" limit should be increased to $10,000 (indexed).

- **Allow a "catch- up" contributions for a 401(k) participant who takes unpaid leave**. The catch-up contributions would be in the amount that would have been allowed if payments were continued during that time. Furthermore, upon making the catch-up contribution, the participant should be able to receive all matching contributions that would have been otherwise made.

7. Expand Access to Key Benefits in Cafeteria Plans

As an adjunct to the proposals improving the balance between short-term financial needs and risks and long-term retirement savings, we believe that cafeteria plans can be effective vehicles for employers to offer and employees to address key short-term financial needs and risks and to purchase key insurance benefits.

Proposal:

- **Allow cafeteria plans to offer participants additional pre-tax benefit options**, including student loan repayment, disability insurance, long-term care insurance, longevity insurance, and retirement planning services. These benefits and coverages could be purchased under the cafeteria plan on a pre-tax basis. The proposal recognizes that it may be necessary or appropriate to put a dollar limit on the total amount that may be used under the cafeteria plan for these additional benefits (in the aggregate) on a pre-tax basis.

8. Facilitate Portability Among Pre-Tax, Individual Accounts

Many employees who leave employers before retirement fail to move their retirement savings to plans maintained by their new employers. Many either leave their savings in their prior employers' plans or take the savings out of the retirement system. Both results can adversely affect retirement outcomes.

Proposal:

- **Expand rollover and transfer opportunities among all tax-favored individual account plans and arrangements maintained by employers**.

    - Direct the DOL and Treasury to issue regulations allowing – and simplifying the rules allowing – participants to rollover or transfer amounts (including assets, annuity contracts, lifetime income, and managed account investments) among all tax-favored individual account plans and arrangements maintained by employers (e.g., defined contribution and 401(k) plans, 403(b) plans). The regulations should include "auto-rollover" programs providing that participants who do not elect otherwise will have their plan balances rolled out of a prior employer's plan and into a new employer's plan.

9. Allow Employees Additional Opportunities to Repay Unpaid Plan Loans after Pre-Retirement Separations from Service

A key source of retirement savings "leakage" involves the failure of employees to repay outstanding defined contribution plan loans as of or upon their separation from service.

Proposal:

- **Allow former employees until the end of the year in which they terminate, or if later, the end of the first calendar quarter after the quarter in which they terminate to repay any outstanding plan loans.**

Part C: Improve Plan Management and Administration

Ensuring adequate retirement savings has become increasingly challenging for American workers. While major difficulties can and do stem from current policy structures, retirement savings issues can also be traced to issues of inefficient administration, ineffective communication, and unnecessary administrative burdens. We believe that rethinking the ways in which employers administer retirement savings programs, as well as streamlining the way workers interact with their savings programs, will ultimately allow for a far more efficient and effective retirement savings process.

10. Allow Electronic Delivery of Plan Communications

ERIC's member companies invest considerable time and expense providing and improving communications to participants, beneficiaries, and others and have found that electronic communications offer significant advantages to plan sponsors, administrators, participants, and beneficiaries. These advantages include:

- Time-efficiency. Electronic communications get to recipients faster than paper communications. The time difference ranges from a few days to more than two weeks.

- Interactive capability. Interactive features make many electronic communications more user-friendly than paper communications. For example, most electronic documents have search features and can include hyperlinks to relevant background information.

- Privacy. A secure electronic system offers more privacy protection than paper communications. For example, when a document is delivered by mail, there is no way to control who reads it. Usernames and passwords protect against unauthorized access.

- Keeping track of updates. A well-managed website can alleviate the burden of saving paper documents and keeping personal files up to date. A website can provide immediate access to the most up-to-date relevant documents.

- Cost-efficiency. Providing communications electronically reduces the cost of preparation and distribution.

- Environment. Use of electronic media saves paper.

Access to electronic media has become significantly more widespread and there has been a corresponding increase in the use of electronic communication. As a result of these changes, participants, consumers, and others have grown accustomed to receiving important information electronically. In addition, those who are unable or unwilling to receive information electronically have grown accustomed to requesting a paper version.

The responsibilities for participants under a default electronic disclosure regime, with the ability to request paper, is no more significant than other participant responsibilities. For example, in participant-directed individual account plans, participants are responsible for making investment decisions. Participants and beneficiaries who are defaulted into a qualified default investment arrangement (QDIA) bear the risk of loss even though the default might not be appropriate for their circumstances.[2] Another example is automatic enrollment. Individuals who do not want the default enrollment level must make affirmative elections. Those who fail to act are enrolled in accordance with the default instructions, even though the default might not be consistent with their preferences. In these cases, plans rely on participants to make important decisions. These decisions are no less important or burdensome that what would be required under a default electronic disclosure regime.

Proposal:

- **Implement a comprehensive electronic delivery regime under ERISA to allow employers to provide electronic delivery as the default method of issuing notices and disclosures**.

    - The default will require an opt-out notice to provide an effective opportunity for anyone who prefers paper to request paper. The opt-out notice would be distributed in the same manner as other important disclosures have traditionally been distributed and would be short and simple enough to get the reader's attention. Providing the opt-out notice annually would protect individuals who later decide that they prefer paper disclosures.

    - Rules under this regime should recognize that, as electronic media continue to develop, plan sponsors must have the flexibility to adapt to these changes.

11. Simplify Notices and Disclosures

The Tax Code and ERISA include many rules requiring and governing the reports, disclosures, and notices that employers and qualified plans must and may provide to employees and participants. We believe that these communications are complex, burdensome and costly and, therefore, are less effective for employees and participants than they should be.

Proposals:

- **Direct the DOL, Treasury, and the PBGC to issue regulations to consolidate and simplify the existing ERISA and tax reports, notices, disclosures, and other information relating to deferred compensation, pension, profit-sharing, and other retirement plans**. In developing these regulations, the agencies should consult with the appropriate stakeholders and organizations (including sponsors, plans,

[2] See, e.g., DOL & SEC Joint Investor Bulletin on Target Date Retirement Funds (May 6, 2010), available at http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf ("Target date funds do not eliminate the need for you to decide, before investing and from time to time thereafter, whether the fund fits your financial situation.").

administrators, recordkeepers, communication experts, and others) to identify problems, areas of possible improvement, and approaches to improvement.

- The agencies should address summary plan descriptions, summary annual reports, summary of material modifications, single employer annual funding notices, fee disclosures, QDIA/safe harbor notices, Section 402(f) rollover notices, participant account statements, securities-related disclosures, distribution options (including lifetime annuity estimate disclosures, choices around risk transfer transactions), and other communications to employees and participants.

- **Lifetime Income Disclosure requirements should be tailored so that it would be most relevant to the employer's retirement plan and most informative to plan participants**. More specifically, any requirements should provide flexibility to plan sponsors on how they communicate to participants on the importance of saving for a lifetime of needs and should give participants the ability to model retirement income options – including annuity options – based on their individual circumstance (e.g., expected working lifetime, expected contributions, personal financial goals, etc.). This detail can be achieved by allowing links to appropriate modeling tools and calculators rather than dictating disclosures based on a single arbitrarily chosen set of assumptions.

12. Clarify Fiduciary Rules Applicable to Environmental, Social, and Governance (ESG) Investments

Some employers, fiduciaries, and plans would like to offer investment options that consider so-called environmental, social, and government (ESG) factors in making investments, but they are uncertain about the rules governing determinations about offering such choices. The DOL has issued varying pieces of guidance on this issue over the years, but that guidance has not alleviated the uncertainty in the marketplace regarding the risks of offering ESG investment options.

Proposal:

- **Clarify that a fiduciary does not fail to satisfy the general fiduciary requirements of ERISA solely by reason of taking into account economic, social, and governance factors in connection with an investment or investment strategy**, but only if the fiduciary determines the investment is prudent based solely on economic considerations, including those derived from such factors.

13. Expand the Ability of Plans to Self- Correct Plan Errors

Plan sponsors and administrators should be permitted to play a greater role in identifying and correcting plan errors, including excess, insufficient, and missed contributions, compensation and service, accrued benefit, and other determinations and calculations. In particular, employers should be allowed greater opportunities to self-correct routine, common operational and plan document mistakes without the need for the incurrence of fees and federal agency oversight and approval. To this end, expanding the Employee Plans Compliance Resolution System (EPCRS) and the Voluntary Fiduciary Correction Program (VFCP) would increase compliance and reduce the cost of plan administration, without adversely affecting participants' benefits.

Proposal:

- **Direct the DOL and Treasury to significantly expand the ability of sponsors to correct errors generally and to self-correct inadvertent operational and plan document errors specifically under EPCRS and VFCP**, including excess elective deferrals and the safe harbor corrections available with respect to failures. Also, Treasury should allow self-correction of certain required minimum distribution (RMD) errors and elective deferral failures without penalty.

Part D: Enhance Retirement Outcomes by Modernizing Distribution Options

The overarching goal of retirement savings initiatives is to ensure that American workers have a means to achieve financial security as they age and be able to sustain themselves after retirement. However, the modern medical and labor landscape has changed the conventional timelines by which workers plan for retirement. As average American lifespans continue to increase[3], workers must face the reality that their retirement savings will have to carry them further than previously planned. As such, new policies must be enacted in order to give those saving for retirement the flexibility that they need to ensure their savings will carry them throughout their full retirement.

14. Provide Lifetime Income/Annuity Provider Selection Fiduciary Safe Harbor

Many employers and fiduciaries are reluctant to offer defined contribution plan participants annuity and similar lifetime income distribution options because of the risks associated with selecting the provider of annuities and similar lifetime income options and with entering into contract terms and fee arrangements with such providers.

Proposal:

- **Direct the DOL to write regulations, in consultation with Treasury, providing for one or more safe harbors relieving fiduciaries of liability for annuity provider selection and for contract terms** (including fees). The DOL should consider a range of options, including establishing or identifying an independent entity(ies) to act as fiduciaries that identify particular providers, contract terms, and fees that sponsors can rely on without fiduciary risk.

15. Relax Required Minimum Distribution Rules

The required minimum distribution (RMD) rules are aimed at preventing individuals from using their qualified plans and IRAs to accumulate significant assets for future generations. However, the current RMD rules too rigidly affect smaller account balances and the flexibility needed to provide effective annuity-like, income distribution options that support more successful retirement outcomes.

Proposals: Modify the current RMD rules for plans (and IRAs) to support additional flexibility and distribution options that are better tailored to meet participants' retirement income needs:

- **Increase the required beginning date from 70-1/2 to age 72** (indexed to life expectancy changes annually, thereafter, beginning in 2022).

[3] Arias E, Xu JQ, Kochanek KD. United States life tables, 2016. National Vital Statistics Reports; vol 68 no 4. Hyattsville, MD: National Center for Health Statistics. 2019.

- **Exempt a participant in a plan from the RMD rules if the participant's total accrued benefit in the plan (or IRA) is less than $200,000**, with a $20,000 phase out and appropriate aggregation rules to prevent abuse.

- **Direct Treasury to eliminate the (current) limitation on qualified longevity annuity contracts (QLACs) to 25 percent of an individual's account balance and to increase the dollar limit on QLACs from $125,000 to $200,000**.

Conclusion

Defined contribution plans provide significant retirement benefits for covered participants through tax deferred contributions, investments managed by fiduciaries, and portability of funds. These plans, along with Social Security retirement income benefits, are the primary source of federally regulated financial support for retired American workers; therefore, it is critical that our national tax and regulatory policies support the continued growth and success of these plans, in order to ensure that those retirees can enjoy a dignified and comfortable retirement.

WWW.ERIC.ORG
PRINTED 2019