



Statement of the U.S. Chamber of Commerce

ON: **Approaches for Retirement Security in the United States**

TO: **The ERISA Advisory Council**

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96% of the Chamber's members are small businesses with 100 or fewer employees, 71% of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – numbers more than 10,000 members. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 101 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. Currently, some 1,800 business people participate in this process.

**Statement on
Approaches for Retirement Security in the United States
for the
ERISA Advisory Council
on behalf of the
U.S. Chamber of Commerce
September 29, 2009**

The U. S. Chamber of Commerce (the “Chamber”) would like to thank the ERISA Advisory Council for the opportunity to provide a statement for the record. Many employers voluntarily provide their employees with retirement benefits. Therefore, ensuring these benefits maximize a worker’s opportunity to have a secure retirement is important to employers. While the issue of retirement security has been an ongoing priority for the Chamber and its members, the current economic environment has presented new challenges. Thus, previous discussions of retirement security must be expanded to include these new, immediate challenges and incorporate the lessons that we are learning from them.

Retirement Security and the Current Economic Environment

On September 17, 2009, the Chamber testified on the issue of retirement security in the current economic environment and also submitted a written statement. Therefore, we will only briefly summarize those concerns here.

The current economic environment has created specific challenges for employers that want to maintain retirement plans. Maintaining a retirement plan has become more complicated requiring plan sponsors to hire professionals to help them manage the rules and regulations that they must attend to. Even with this, though, employers have continued their commitment to providing retirement benefits to their employees. However, the current economic situation has put an untenable strain on many plan sponsors. In addition to contemplating the normal rules and regulations, plan sponsors must make tough decisions about their retirement plans and their businesses based solely on economic motives. Therefore, the more certainty that plans sponsors have about the rules surrounding retirement plans, the better able they will be to make these important decisions. To this end, the Chamber recommends action in four specific areas – defined benefit funding relief, investment advice, plan fee disclosure, and decumulation strategies – to address the current economic environment.

Defined benefit funding relief is a direct result of the financial crisis and the issue that requires the most immediate attention. To meet unexpectedly high funding obligations resulting from the financial crisis, many employers will be forced to divert cash needed for current job retention and creation and investment in their organizations to their pension plans to fund long-term obligations. Because of the importance of this issue to workers’ retirement security and the overall U.S. economy, the Chamber continues to urge Congress to adopt follow-up, temporary provisions that will ease cash flow constraints and make contributions more predictable and manageable for 2009 and 2010.

While the Department of Labor (“DOL”) is not in a position to regulate on this directly, the Chamber believes it could be of tremendous value for the DOL to convey to Congress the need to address this issue immediately. Hearing from an agency in the Administration with an expertise on pension plan administration and funding could go a long way in persuading Congress to act before the end of this year.

The impact on defined benefit plan funding has been the most obvious result of the financial crisis but there are additional areas where the impact is not as obvious but is also important. The past year has been a wake up call for many and we have been reminded that the stock market is not a guaranteed win and that real estate values can fall. The result is that many people are taking a closer look at their financial portfolios, asking more questions, and making different decisions. This is no different for plan participants. They are also looking at their 401(k) accounts and questioning whether they are getting the best returns for their investments. There are two regulatory projects – investment advice and plan fee disclosure – that will further the goal of helping plan participants make better decisions about their 401(k) plan investments.

In light of the financial crisis of the past year, it is more important than ever for participants to have access to professional investment advice. The investment advice provisions in the Pension Protection Act of 2006 will allow plan sponsors to more easily provide employees access to investment advice from regulated professionals. The Chamber is aware of the intent by some in Congress to change the investment advice provisions in the PPA. For this reason, we believe that it is even more important for the DOL to issue final regulations. Without regulations, plan sponsors cannot follow the statute with any certainty of statutory interpretation. Even if the law is changed in the future, regulations from the DOL will provide plan sponsors with reliance that they were following the rules for the period of time that the statute was in place. Without this certainty, plan sponsors may reconsider if they should be offering investment advice at this time. Moreover, those who do not currently offer advice will be reluctant to add it to their retirement plans at this time. Thus fewer plan participants will receive investment advice not because plan sponsors don’t want to provide but because plan sponsors do not have rules to follow.

Along these same lines, we encourage the DOL to re-issue regulations on plan fee disclosure. The Chamber supports disclosure and transparency of information that allows participants to make informed decisions about their investments. For the past year and half, the Chamber has worked with both the Congress and the DOL to work toward implementing rules on plan fee disclosure that would be meaningful to participants and not overly-burdensome to plan sponsors.

In March of last year, the Chamber testified before EBSA on the proposed regulations under ERISA section 408(b)(2). The focus of our testimony then was that we believed that there were still several pieces of the regulation that needed further discussion from all interested parties before finalizing the regulation. We still believe this is true and, for this reason, we ask that the DOL re-issue both the 408(b)(2) regulations and the participant disclosure regulations with the ability for additional public comment. In

addition to having a chance to review issues previously raised, it will be helpful to comment on changes that have been made to the proposed regulations.

Finally, the decumulation of plan assets is of growing importance as the nation's demography shifts and more retirees are in danger of outliving their retirement assets if they are not managed properly. Until recently, retirement planning has focused on wealth accumulation. However, as more people are living longer in retirement, there is increased attention on deciding how such wealth should be managed to provide a steady stream of income in the postretirement period. While this issue does not invoke the same sense of urgency as the other issues discussed, it does represent an opportunity for the benefits community to get out ahead of this issue before it becomes a crisis. In particular, our members were worried about administrative burdens, unintended liability consequences, and maintaining the incentive to create innovative products and plans. As this area is just beginning to be explored, it is an area where the ERISA Advisory Committee could be particularly helpful in furthering conversations aimed at engaging all interested parties.

Increasing Retirement Savings

Any discussion of retirement security must include a conversation around increasing individual retirement savings. There has been ongoing concern that Americans are not saving enough for retirement. As people are living longer and health care expenses are growing, there is particular concern that current workers are underestimating their retirement needs.¹ Even if workers are aware of their retirement needs, they may not be saving enough. The number of Americans reporting that they or their spouse have saved money for retirement has dwindled. A survey by the Employee Benefit Research Institute ("EBRI") showed that 72% of respondents said that they had saved for retirement, down from 78% in 2000.² The Chamber encourages the enactment of proposals that could increase retirement savings but opposes proposals that would mandate participation by either employers or employees.

Enhancements to Qualified Plans

Qualified plans provide significant benefits to employers and employees by encouraging retirement savings through favorable tax treatment. Qualified plans allow employers to obtain a tax deduction for plan contributions and allow employees to delay paying taxes on this benefit until funds are distributed. Although qualified plans are good for both employers and employees, they could be even better.

¹ An EBRI survey reports that 41% of workers think they need to accumulate at least \$500,000 by the time they retire to live comfortably in retirement while 16% feel they need between \$250,000 and \$499,999, and 26% think they need to save less than \$250,000 for a comfortable retirement. EBRI, Fast Facts from EBRI, available at <http://www.ebri.org/pdf/publications/facts/fastfacts/fastfact07092008.pdf> (discussing the EBRI 2008 Retirement Confidence Survey).

² EBRI, 2008 Retirement Confidence Survey Fact Sheet Saving for Retirement in America, at 2, available at http://www.ebri.org/files/RCS08_FS2_Saving.pdf.

Rather than mandating participation by either employers or employees, the Chamber recommends pursuing the following enhancements to the qualified plan system:

- Distributions from qualified retirement plans should be taxed at the lower capital gains rate, instead of the income tax rate.
- Defined benefit plans should allow for unlimited prefunding up to the amount of projected future benefits in the plan.
- The IRS should eliminate the tax penalty for the reversion of assets in a pension plan after all promised benefits have been paid out to participants.
- The top-heavy rules should be eliminated.

Furthering incentives and streamlining administrative burdens in this way would encourage participation in the private system by both employers and employees.

Universal Pension Coverage and Automatic IRAs

To increase retirement savings, some have suggested the implementation of universal pension coverage in the form of Automatic Individual Retirement Accounts (“Auto IRAs”). In general, an Auto IRA would require employers to make payroll deduction IRAs available to their employees who are not eligible to participate in the employer’s retirement plan. Employees would be deemed to be part of this arrangement unless they opt out.

While the Chamber supports increasing savings, we have substantial concerns about these proposals. First, the requirement that all employers provide an opportunity for payroll deduction is a mandate. In general, the Chamber opposes mandates and, in this instance, believes that it would set an inappropriate precedent within the voluntary nature of the ERISA framework. Second, the Chamber is concerned about the investment of assets under this program. Any investments should be a gateway to investment in the private sector and not limited investments to government instruments. Finally, there is concern that employers would be exposed to potential liabilities resulting from participating in such a mandated plan.

State Law Governing Private Retirement Plans

As with health care, a number of states are trying to increase private retirement savings on the state level. In particular, some states have sought to enable small businesses to provide a 401(k) or other retirement savings plan for their employees through the state retirement system. Connecticut,³ Maryland,⁴ Vermont,⁵ and California⁶ have considered

³ Connecticut recently determined that 75 % of small businesses in the state did not offer a retirement savings plan for their employees. A bill was introduced earlier this year mandating the state comptroller to establish a tax-qualified defined contribution retirement program to provide retirement investment plans, including 401(k) plans, to (1) self-employed individuals, (2) businesses with 100 or fewer employees, and (3) certain nonprofit organizations. An Act Concerning Small Business Retirement Plans, S.B. No. 652, 2008 Sess. (Conn. 2008), *available at* <http://www.cga.ct.gov/2008/JFR/S/2008SB-00652-R00CE-JFR.htm> .

⁴ In Maryland, two bills, H.B. 1228 and S.B. 728, were introduced on February 8, 2008, and February 1, 2008, respectively. Both bills sought to establish a Voluntary Employee Accounts Program within the Maryland Supplemental Retirement Plans that would allow non-state employers to enroll in the program to offer tax-deferred defined contribution retirement plans to their employees. Both bills died in the House and Senate respectively. An Act Concerning Maryland Voluntary Accounts Program, H.B. 1228, 425th Sess. (Md. 2008), *available at* <http://mlis.state.md.us/2008rs/bills/hb/hb1228f.pdf>; An Act Concerning

bills aimed at increasing employee participation in some form of pension savings program.

Thus far, there is no ERISA issue with the state proposals because they have not mandated employers to participate in state systems. However, the Chamber believes that it is important to establish as a principle that states should encourage participation in the private retirement system by everyone, including owners and self-employed individuals. Moreover, the Chamber believes that the private sector should not have to compete with the government to provide retirement benefits.

Small Business Concerns

Small employers, like larger employers, offer benefits to their employees such as pension plans and health insurance. However, rising health care costs hit small businesses particularly hard. Many small businesses want to continue offering a variety of benefits but have their own unique issues with choosing to do so.

A 2002 survey reported that almost one-quarter of small employers offering health benefits think that their firms would change coverage and 3% think that they would drop coverage if costs were to increase an additional 5%.⁷ Moreover, a 2008 survey found that small firms with fewer than 200 employees were more likely than larger firms to consider dropping health coverage entirely.⁸ However, it is unlikely that small employers are simply unwilling to offer health benefits, given that in 2003, 11% of them were either extremely or very likely to start offering health benefits in the next two years, and 22% were somewhat likely to start offering health benefits.⁹ Rising costs have been identified

Maryland Voluntary Accounts Program, S.B. 728, 425th Sess. (Md. 2008), *available at* <http://mlis.state.md.us/2008rs/bills/sb/sb0728f.pdf>.

⁵ In Vermont, H. 710 was introduced on January 25, 2008. The bill sought to provide deferred compensation programs for state employees, and for the employees of other eligible entities that elect to participate in the state plan. The bill set up a state board to establish and administer a plan in which assets and income are held in trust in any funding vehicles permitted by the Internal Revenue Code. The Senate version of the bill, S.354, was passed, signed by the governor, and became law on May 20, 2008. An Act Relating to Public Agency Deferred Compensation Plans, H. 710, 2007-08 Sess. (Vt. 2008), *available at* <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/intro/H-710.HTM>; An Act Relating to Public Agency Deferred Compensation Plans. S.354, 2007-08 Sess. (Vt. 2008) *available at* <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT162.HTM>; VT. STAT. ANN. tit. 3, §§ 650-53 (2008).

⁶ In California, AB 2940 was introduced on February 22, 2008. The bill sought to establish a system of voluntary, universal, portable retirement accounts for California private employees administered by a state board. The board was expected to design programs that encourage the use of automatic features, including, but not limited to, automatic enrollment and appropriate selection of default investments. AB 2940 amended on July 10, 2008, 2008 Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2940_bill_20080710_amended_sen_v94.pdf.

⁷ Paul Fronstin, *Small Employers and Health Benefits: Findings from the 2002 Small Employer Health Benefits Survey*, EBRI ISSUE BRIEF #253, Jan. 2003, *available at* <http://www.ebri.org/pdf/briefspdf/0103ib.pdf>.

⁸ Employer Health Benefits Annual Survey 2008, *supra* note 8, at 186.

⁹ Fronstin, *supra* note 8, at 187.

as the key reason for a decline in coverage, and EBRI research reveals that the percentage of employers with fewer than 200 employees that offer benefits dropped from 68% in 2000 to 59% in 2007.¹⁰

The Chamber believes that small businesses play an important role in the debate over the effectiveness of the voluntary employer-provided system, and that it is important to increase small business representation in the debate. One way to do this is to have a designated position for a small business member on the ERISA Advisory Council.

Retiree Health Care

An increasingly important concern in retirement is health care costs. Unexpected medical costs can eliminate a families' retirement savings. Therefore, health care costs and coverage should be part of the discussion on retirement security.

A significant number of employers provide some form of health benefits to their retirees. A survey by the Kaiser Family Foundation and the Health Research and Educational Trust found that 31% of large firms provide retiree health benefits. Among these firms, 93% offer benefits to early retirees and 75% offer benefits to Medicare-age retirees.¹¹

Current law prohibits employers from reducing or terminating promised benefits unless: (1) an employer expressly reserves that right in a plan document, and (2) the employer fully discloses—in accordance with the requirements of ERISA—its right to reduce or terminate retiree health coverage. Due to rising costs in health care generally, many employers have found it necessary to change the type of retiree coverage they provide. Nonetheless, many employers remain committed to offering retiree health care coverage and continue to look for new and innovative ways to provide this benefit.

In general, the Chamber wants to simplify saving for retiree health care expenses. There are too many different kinds of accounts that can be used to save for retiree health. Instead of the current system composed of multiple, different types of accounts, there needs to be a simpler way to save. Additionally, the Chamber supports special treatment for plan distributions for health-related expenses in retirement.

Moreover, 401(k) plans provide a vehicle for employees to save for retirement expenses, but money cannot currently be withdrawn without penalty to pay for long-term care insurance premiums when they are still affordable. The Chamber recommends that employees be allowed earlier access to 401(k) money without penalty to start saving for long-term care.

¹⁰ John A. MacDonald, *The Future of Employment-Based Health Benefits: Will Employers Reach a Tipping Point?* EBRI NOTES, February 2008, at 6, available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_02a-2008.pdf.

¹¹ Employer Health Benefits Annual Survey 2008, *supra* note at 6.

Phased Retirement

One result of increased life expectancy is that people are able to work longer even as they age.¹² By 2012, nearly 20% of the total U.S. workforce will be age 55 or older, up from just under 13% in 2000.¹³ Even with the current economic crisis and job losses, the US faces an impending worker shortage. With 77 million baby boomers reaching retirement age, businesses could be faced with a shortage of highly skilled workers because there may not be enough adequately skilled young workers to replace retiring ones. In many companies, half of managers and key professionals will be eligible for retirement in the near future, and by 2015 that percentage will jump to 70%.¹⁴ To maintain a competitive advantage, employers will need to ensure that they are able to retain their most skilled and experienced workers—primarily their older workers.

The barriers to phased retirement are many and include legal, fiscal, policy, and practical issues. There are legal restrictions on when benefits can be paid out. There are fiscal concerns surrounding the costs associated with employing older workers, such as increased pension payments and higher health care coverage. Finally, there are policy and practical concerns about how accruals should be calculated during phased retirement or how to apportion the payout. These barriers have prevented many employers from implementing phased retirement programs.¹⁵

In general, the Chamber believes that phased retirement programs should be narrowly tailored to meet certain needs and that any rules, legislation, or proposals should be viewed with particular goals in mind. As such, the Chamber proposes the following goals as central to phased retirement programs:

- Keep experienced workers in place to ensure a transfer of knowledge to younger generations.
- Combat labor shortages in specific industries and job categories.
- Remain competitive.

To reach these goals, the Chamber believes that only tweaks to the current retirement system are necessary and does not favor a legislative scheme implementing a phased

¹² Life expectancy has increased from 70.8 in 1970 to 77.8 in 2004 and is projected to be 79.2 by 2015. U.S. Census Bureau, Expectation of Life at Birth, 1970 to 2004, *supra* note.

¹³ Toossi, *supra* note at 37.

¹⁴ William C. Byham, 70: *The New 50; Retirement Management: Retaining the Energy and Expertise of Experienced Workers*.

¹⁵ Nonetheless, Monsanto, a multinational agricultural biotechnology corporation headquartered in St. Louis, Missouri, has been successful with its phased retirement program. Monsanto established its Resource Reentry Center (RRC) in 1991. As of September 2006, the RRC had more than 300 active individuals, 175 of whom were on assignment in various departments, including Engineering, Finance, Law, IT, and Research and Development. Joanne Sammer, *Is Phased Retirement A Win-Win?*, BUS. FIN., September 2006, at 31, available at <http://businessfinancemag.com/article/phased-retirement-win-win-0901>. To be eligible, one must be a former Monsanto employee and must not have been terminated for poor performance. Monsanto Careers Resource Re-entry Center Questions and Answers, <http://www.monsanto.com/careers/opportunities/reentry/qa.asp> (last visited Dec. 17, 2008). The RRC offers managers and former workers a bridge to workforce changes and it allows retirees to continue an active and productive relationship with Monsanto. *Id.*

retirement regimen. Moreover, the Chamber does not believe that phased retirement should be allowed at ages earlier than the early retirement age under a company's retirement plan.

The Chamber has the following specific recommendations pertaining to phased retirement.

- Allow in-service distributions at the early retirement age as defined in the plan.
- Encourage employers to offer long-term care insurance, but guard against encouraging it through tax incentives that could tax participants on the benefit at a time when they are least likely to be able to afford it.
- Allow for access to assets in a 401(k) plan to purchase long-term care insurance under plan distribution rules.
- Make in-service distributions under the terms of the plan as if the person were retiring at that time.
- Encourage the IRS to remove restrictions against rehiring people who have recently retired.
- Encourage the IRS to clarify that phased retirement is not a protected benefit under Code Section 411(d)(6).
- Ensure that distributions under a phased retirement program do not have a negative impact on Social Security benefits.
- Oppose mandates on health care benefits for employees in phased retirement.
- Ensure that health care benefits are subject to the employer's practices as established for all workers generally.

Ensuring Proper Investment of Plan Assets

ERISA imposes on pension fiduciaries the highest duty of care to plan participants. It requires fiduciaries' actions to be for the exclusive purpose of providing benefits to participants and their beneficiaries, and to defray reasonable expenses of administering the plan (see 29 U.S.C. §1104). Simply put, plan trustees must act solely in the financial interest of the plan's participants and beneficiaries. Assets of ERISA-governed pension plans exist solely to secure the retirements of those who participate in the plan. In recent years, however, many pension funds associated with unions have become increasingly engaged in shareholder activism, using members' and employees' retirement assets to advance proxy resolutions on the environment, outsourcing, political contributions, health care, and a host of other socially and politically motivated proposals.

Last year, the Department of Labor issued two new Interpretive Bulletins (29 CFR § 2509.08-1 & 29 CFR § 2509.08-2) clarifying the proper scope of shareholder activism and investment by ERISA-governed pension plans. The first of these IBs states explicitly that:

[T]he responsible fiduciary shall consider only those factors that relate to the economic value of the plan's investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to

unrelated objectives. ... The use of pension plan assets by plan fiduciaries to further policy or political issues through proxy resolutions that have no connection to enhancing the economic value of the plan's investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of section 404(a)(1)(A) and (B).

Pension funds that engage extensively in shareholder activism should be required, as the DOL's IB envisions, to provide a clear accounting to the DOL as to how their proxy activities are directly and measurably enhancing the economic value of the plan's investments. If they cannot do so, the DOL should vigorously exercise its statutory responsibility to investigate whether such plans are fulfilling their fiduciary obligations to participants. In the current economic environment, it has become even more important for the DOL to exercise its enforcement powers to ensure that plan trustees are acting solely to protect the security of participants' retirement assets.

State and Local Retirement Programs

State and local governments provide benefit plans to their employees that include pension, health care, and retiree health care. Most of the retirement plans are defined benefit plans that are funded primarily by the government. Rising health care costs are causing an increase in the costs of benefit plans for state and local governments, and these plans need to do something to remain adequately funded and cover promised benefits.

The Government Accountability Office (GAO) has reported that state and local governments will likely face serious fiscal challenges, driven mainly by increasing health-related costs, such as Medicaid and health insurance for state and local employees.¹⁶ The GAO has concluded that given the initial estimates of the cost of future retiree health benefits, state and local governments will likely have to find new strategies for dealing with their unfunded liabilities.¹⁷ While state and local governments generally have strategies to manage future pension costs, they have not yet developed strategies to fund future health care costs for public sector retirees.¹⁸ Options to deal with unfunded liabilities include reducing pension benefits, raising contribution rates, increasing individual and business taxes, and cutting other services in order to keep providing benefits to state retirees.

The Chamber generally does not involve itself in state and local funding issues, but it is concerned about the increased burden on taxpayers and proposals that would give state and local governments an unfair advantage against private employers when competing for employees. The Chamber is concerned about the increased burden on taxpayers—

¹⁶ GAO, *GAO-07-1080S, STATE AND LOCAL GOVERNMENTS: PERSISTENT FISCAL CHALLENGES WILL LIKELY EMERGE WITHIN THE NEXT DECADE* 2 (2007).

¹⁷ *Id.* at 1-2.

¹⁸ *State and Local Government Pension Plans: Current Structure and Funded Status*, *supra* note, at 3, available at <http://www.gao.gov/new.items/d08983t.pdf>.

both individual and corporate. Moreover, the Chamber is concerned that these programs may give state and local governments an unfair advantage against private employers when competing for employees because employers are hit with a doubly whammy. First, the government provides higher benefits than the employer can afford. Second, the employer pays for the state-provided benefits through higher taxes.

Conclusion

While there are many steps that could be taken to improve retirement security in the US, a complete overhaul of the current employer-provided system is not necessary. Rather, we recommend targeted changes that will create incentives and streamline administration. Thank you for the opportunity to share our thoughts and concerns with you and we look forward to future discussion on these important issues.