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Pension De-Risking

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PENSION DE-RISKING

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ABSTRACT

The United States is facing a retirement crisis, in significant part because defined benefit pension plans have been replaced by defined contribution retirement plans that, whatever their theoretical merit, have left significant numbers of workers unprepared for retirement. A troubling example of the continuing movement away from defined benefit plans is a new phenomenon euphemistically called "pension de-risking."

Recent years have been marked by high-profile companies engaging in various actions designed to reduce the company's exposure to pension funding risk (hence the term "pension de-risking"). Some de-risking strategies convert a federally-guaranteed pension into a riskier private annuity. Other approaches convert the pension into cash for the beneficiary, which may be insufficient to provide lasting retirement income. These strategies have raised many concerns that participants are being disadvantaged and that pension de-risking is undermining the statutory purpose of ERISA.

Regulators are only beginning to consider ways to appropriately police pension de-risking behavior. We propose that the government should take an aggressive stance in regulating such conduct. Participants as a class should not be made worse off by a pension de-risking transaction, and the relevant de-risking rules should so reflect. More specifically, regulators should: (1) encourage desirable forms of de-risking by establishing regulatory safe harbors; (2) require a battery of procedural safeguards for annuitization transactions; (3) require improved disclosures for cash buyouts; and (4) limit cash buyouts when beneficiaries are not likely to

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INTRODUCTION

Retirement planning is not only difficult, but also dangerous. It is dangerous for individuals because poor planning can mean post-employment penury. It is dangerous for companies because it is much easier to make promises than to keep them. It is dangerous for elected officials because they will take the blame if elderly poverty is widespread. We therefore are living in dangerous times: too many Americans are saving too little for retirement.[1]

1. *See* Hazel Bradford, *Study: Retirement Crisis Real and Getting Worse*, PENSIONS & INVESTMENTS (Jan. 26, 2015), http://www.pionline.com/article/20150126/ONLINE/150129904/study-retirement-crisis-real-and-getting-worse ("The most convincing estimates project that more than 50% of households will fall short, and even the most optimistic studies predict that nearly one-quarter of retirees will, [Center for American Progress] researchers found."). Low rates of personal savings are alarming and have a detrimental impact on retirement, serving only to "exacerbate[] the impact of looming shortfalls in Social Security and in employer-sponsored pension programs." Stephen F.

One reason for that is recent history. In the last thirty years, employers have transitioned away from "defined benefit" ("DB") plans (where a worker earns a monthly pension for a lifetime of work) to "defined contribution" ("DC") plans (where a worker builds up a retirement savings account, invests the principal, and then draws down the account in retirement).[2] Whatever the theoretical appeal of DC plans, the real world result has been disappointing. Workers have neither saved enough nor invested those savings wisely.[3]

Many large companies, interestingly, still have "legacy" DB plans: retirement plans applicable to older employees that were in place before the company transitioned into a DC plan for newer employees.[4] The burden of funding and maintaining those plans is substantial.[5] A growing number of firms are seeking to creatively manage those obligations in ways designed to reduce the company's exposure to funding risk.[6] The

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Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 961 (2007); *see also* Teresa Ghilarducci, *Retirement Security Worse on ERISA's 40th Anniversary*, 6 DREXEL L. REV. 453, 453 (2014) (discussing how about 48% of workers between the ages of fifty and sixty-four will be poor when they reach retirement).

2. Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331 (2007) (discussing the shift from defined benefit to defined contribution pension plans).

3. *See* Bradford, *supra* note 1 (quoting David Madland, managing director of the Center for American Progress's economic policy team) ("The biggest problems are that far too many people don't have access to a private-sector retirement plan, and secondly, the plans they do have access to aren't very good . . . ."); *see also* Shlomo Benartzi and Richard H. Thaler, *Behavioral Economics and the Retirement Savings Crisis*, 339 SCIENCE MAG. 1152 (2013), *available at* http://faculty.chicagobooth.edu/richard.thaler/research/pdf/Behavioral%20Economics%20and%20the%20Retirement%20Savings%20Crisis.pdf (discussing increased percentage of workers at risk of not having adequate funds in retirement). Furthermore, the Department of Labor has expressed concern over individuals' ability to understand investment principles in order to make well-informed decisions in the context of their defined contribution plans. *See* Matthew Venhorst, *Helping Individual Investors Do What They Know Is Right: The Save More for Retirement Act of 2005*, 13 CONN. INS. L.J. 113, 119 (2006).

4. Daniel Keating, *Why the Bankruptcy Reform Act Left Labor Legacy Costs Alone*, 71 MO. L. REV. 985, 986, 988–90 (2006) (explaining how underfunded defined benefit plans are a category of labor "legacy" costs for employers, and defining "legacy" as a type of "deferred maintenance" that employer owes employee).

5. *See, e.g.*, Janice Kay McClendon, *The Death Knell of Traditional Defined Benefit Plans: Avoiding a Race to the 401(k) Bottom*, 80 TEMP. L. REV. 809, 822–25 (2007) (discussing funding considerations as one of the factors contributing to the shift from defined benefit to defined contribution pension plans); *cf.* Press Release, Pension Benefit Guaranty Corp., PBGC Annual Report Shows Improvement in Single-Employer Program and Deterioration in Multiemployer Program (Nov. 17, 2014), *available at* http://www.pbgc.gov/news/press/releases/pr14-15.html (finding the "program's potential exposure to future pension losses from financially weak companies" to be about $167 billion); *see also infra* Part I (discussing funding risk in more detail).

6. *See* Letter from Senators Harkin and Wyden to Jacob Lew, U.S. Secretary of Treasury, Thomas E. Perez, U.S. Secretary of Labor, Richard Cordray, Director, Consumer Financial Protection Bureau, and Alice Maroni, Acting Director, Pension Benefit Guaranty Corporation (Oct. 22, 2014),

industry term for those risk-reducing strategies is "pension de-risking."[7]

Some "de-risking" strategies are internal, meaning that the pension obligation is retained by the company but managed differently.[8] Other solutions are external, meaning that the pension obligation is offloaded from the company to another party.[9] Observers are particularly worried about external de-risking, and rightly so. For example, the "annuitization" approach converts a federally-protected pension into a riskier private annuity;[10] and the "lump sum" approach converts the pension into cash for the beneficiary, which may be insufficient to provide lasting retirement income.[11] Neither approach prioritizes beneficiary welfare consistent with the dictates of the Employee Retirement Income Security Act of 1974 ("ERISA").[12]

Like many pension matters, de-risking sounds arcane but involves obscene amounts of money. In the last few years, for example, Verizon, General Motors, Ford, Motorola, and Bristol-Myers Squibb have all undertaken pension de-risking transactions. Together, these transactions were worth over $100 billion and affected hundreds of thousands of workers, retirees, and their beneficiaries.[13] More de-risking is sure to come, and the number of persons affected will continue to rise.

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http://www.finance.senate.gov/imo/media/doc/102214%20Derisking%20Letter.pdf ("Employers undertake de-risking transactions to mitigate future pension funding risks"). Funding risks will be discussed in more detail in Part I.

7. *See id.*

8. *See infra* Part I.B.

9. *See* Mary B. Andersen, *Understanding the Basics About Derisking Becomes First Step to Decisionmaking*, PENSION PLAN FIX-IT HANDBOOK NEWSLETTER (Thompson Info. Serv., Bethesda, Md.), Jan. 2014, at 2.

10. *See Private Sector Pension De-Risking and Participant Protections: Hearing Before the ERISA Advisory Council* 4–5 (June 5, 2013) (statement of Robert S. Newman, Covington & Burling LLP), *available at* http://www.dol.gov/ebsa/pdf/covingtonburling060513.pdf [hereinafter *Newman Testimony*] (discussing purchase of annuity certificates as external de-risking strategy companies use, resulting in a loss of ERISA protection of plan benefits).

11. *See Private Sector Pension De-risking and Participant Protections: Hearing Before the ERISA Advisory Council* 8–9 (Aug. 29, 2013) (statement of David Certner, Legislative Council and Legislative Policy Director, AARP), *available at* http://www.dol.gov/ebsa/pdf/AARP082913.pdf [hereinafter *Certner Testimony*] (observing that lump-sum offers are less secure and have a reduced value compared to an individual's pension annuity). Individuals who retain their defined benefit annuity "are far less likely to outlive their assets or fall into poverty." *Id.* at 8.

12. 29 U.S.C. § 1001 et seq. (2014).

13. *See, e.g.*, Lee v. Verizon Commc'ns Inc., 2012 WL 6089041 (N.D. Tex. Dec. 7, 2012) (holding Verizon pension de-risking transaction lawful under ERISA); Fred Meier, *Ford Offers Retirees Lump Sum to Buy Out Pensions*, USA TODAY (Apr. 29, 2012, 3:45 PM), http://content.usatoday.com/communities/driveon/post/2012/04/ford-will-offer-to-buy-out-its-retirees-pensions/1 (Ford); *GM Announces U.S. Salaried Pension Plan Actions: Offers Lump-Sums to Many Retirees; Prudential to Assume Monthly Benefits*, GM (June 1, 2012) http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2012/Jun/0601_pension.html (GM); Robert Newman,

This Article is the first treatment of pension de-risking in the legal literature. In Part I, we offer a succinct explanation of what pension de-risking is and why it will accelerate. In so doing, we clear away the complex regulatory brushwood that so often impairs mainstream consideration of pension issues and provide an accessible foundation for future de-risking discussions.

In Part II, we offer a policy frame that clarifies the problem pension de-risking poses. Pension regulation should promote retirement security. By converting federally-protected pensions into private annuities or cash, pension de-risking does the opposite. Regulators should keep that in mind.

In Part III, we offer a roadmap for reform. In many pension contexts, robust regulation may deter employers from offering voluntary retirement plans in the first place, so regulators need to balance protecting beneficiaries against employer flight.[14] No similar pressure exists here. No employer will be deterred from offering a DB plan on account of strict de-risking rules because virtually no employers are offering new DB plans in the first place.[15] Accordingly, regulators can realistically prioritize protecting beneficiaries.

After describing the legal framework for de-risking, we make four suggestions. The government should: (1) encourage internal de-risking by establishing regulatory safe harbors; (2) require a battery of procedural safeguards for annuitization transactions; (3) require improved disclosures for cash buyouts; and (4) limit cash buyouts when beneficiaries are not likely to meaningfully understand the potentially adverse consequences of trading a pension for cash.

I. CONCEPTUALIZING PENSION DE-RISKING

On its own, the term "pension de-risking" is too vague to do much useful work. Below, we develop a vocabulary that will make discussion of

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Motorola Solutions Announces Third-Largest Pension De-Risking Transaction, NAT'L L. REV. (Sept. 26, 2014), http://www.natlawreview.com/article/motorola-solutions-announces-third-largest-pension-de-risking-transaction (Motorola); Robert Steyer, *Bristol-Myers Squibb Announces $1.4 Billion Pension Buyout*, PENSIONS & INVESTMENTS (Sept. 30, 2014, 6:30 PM), http://www.pionline.com/article/20140930/ONLINE/140939971/bristol-myers-squibb-announces-14-billion-pension-buyout (Bristol-Myers Squibb).

14. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 42 (1987) (stating that ERISA's "civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"); *see also id.* at 54.

15. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 488 (2004) ("By the 1980s, the defined benefit system was stagnating. Virtually no new defined benefit plans were being created.").

the phenomenon, and potential reforms, intelligible. We also explain why pension de-risking demands immediate attention: because it is likely to accelerate.

A. ERISA & Pension Basics

ERISA, with narrow exceptions, governs retirement promises made incident to employment.[16] ERISA requires such pension promises to be effectuated under what the statute calls a "plan" that is created by the sponsoring employer.[17] Those plans, for our purposes, come in two varieties: the "defined benefit" plan and the "defined contribution" plan.

A defined benefit plan is where the retirement promise is defined in terms of what the employee can expect to receive upon retirement (e.g., a fixed, periodic payment based on the employee's years of service and average salary).[18] A DB entitlement is functionally an annuity earned through service and paid for by foregone wages. A DB benefit is what most people think of when they hear the word "pension." ERISA heavily regulates DB arrangements.[19]

A defined contribution plan, in contrast, is where the retirement entitlement is defined in terms of what the employee (and sometimes the employer) "contributes" to a retirement savings account, plus any investment appreciation on those contributions.[20] A DC arrangement is functionally a constrained savings account. A classic example of a DC arrangement is a 401(k) plan. ERISA regulates DC arrangements, but far less strictly than it does DB plans.[21]

Pension de-risking involves DB plans, and for all forms of de-risking, the underlying motivation is the same. An employer made a DB promise long ago. Afterward, it determines that its current strategy for keeping the pension promise is too costly or too afflicted with uncertainty.[22] So the company considers a number of alternate strategies to handle its pension

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16. *See* Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433, 445–46 (2010).

17. 29 U.S.C. § 1002(1)–(3) (2014).

18. Maher & Stris, *supra* note 16, at 446.

19. *See id.* at 451–56 (discussing ERISA regulation of defined benefit plans).

20. *Id.* at 448.

21. *See id.* at 456 (maintaining that ERISA does regulate defined contribution plans and subjects plans to some of the rules that govern defined benefit plans; however, "these plans were a relatively minor part of the pension landscape" when ERISA was enacted).

22. *See* Kenneth Glenn Dau-Schmidt, *Promises to Keep: Ensuring the Payment of Americans' Pension Benefits in the Wake of the Great Recession*, 52 WASHBURN L.J. 393, 393, 407 (2013) (observing that recessionary times make it difficult for defined benefit plan sponsors to pay promised pension benefits).

obligation. Thus, at the broadest level, pension de-risking refers to *any* strategy a company undertakes to mitigate the risk associated with carrying a DB pension obligation.[23]

As we discuss below, some de-risking strategies are "internal," meaning that the pension obligation is retained within the company, but the plan is managed differently.[24] Other solutions are "external," meaning that the pension obligation is offloaded to another party.[25] The focus of this Article is largely on external de-risking; external strategies particularly worry observers because they transfer risk to beneficiaries and are only partially subject to ERISA.[26] Internal strategies, in contrast, are less worrisome because they do not transfer any risk to beneficiaries and are entirely governed by ERISA.[27] To the extent, however, that regulatory uncertainty regarding the permissibility of internal de-risking strategies will motivate some employers to pursue external de-risking strategies instead, we pause to discuss internal de-risking.

B. Internal De-risking

An internal de-risking strategy is any strategy in which the plan retains the underlying DB obligation but adjusts its mix of assets to reduce funding volatility.[28] DB plans in effect promise annuities, which are due at specific times, in specific amounts, and are subject to ERISA-imposed funding requirements along the way.[29] The upshot is that an investment strategy for the plan assets underlying the collective pension promise—even if over the long run it meets or exceeds its obligations—can be a bad "match" for the pension obligations that are or will soon come due.

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23. *See Private Sector Pension De-risking and Participant Protections: Hearing Before the ERISA Advisory Council* 1 (Aug. 29, 2013) (statement of Brendan S. Maher, Law Professor, University of Connecticut School of Law), *available at* http://www.dol.gov/ebsa/pdf/UCLaw082913.pdf [hereinafter *Maher Testimony*].

24. *See infra* Part I.B.

25. *See infra* Part I.C.

26. *See Newman Testimony*, *supra* note 10, at 2 ("After an individual's pension benefits are settled, the individual ceases to be a participant in the plan, ERISA ceases to govern the benefit, and the PBGC no longer insures the benefit.").

27. *See id.* (discussing in-plan de-risking strategies and how they are subject to ERISA's fiduciary duties of prudence, loyalty, and prudent diversification of plan assets).

28. *See* Brendan McFarland & Erika Stoner, *2012 Asset Allocations in Fortune 1000 Pension Plans*, TOWERS WATSON (Nov. 12, 2013), http://www.towerswatson.com/en-US/Insights/Newsletters/Americas/insider/2013/2012-asset-allocations-in-fortune-1000-pension-plans ("Such a [glide path strategy] reduces funding volatility by shifting assets from equities to debt as funding levels improve, thereby safeguarding gains by reducing risk . . . .").

29. *See supra* notes 18–19 and accompanying text; *see also* Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 168 (2013).

Some internal de-risking strategies attempt to more closely match plan investments to plan benefit payouts.[30] A very simple internal de-risking strategy of this type would be for a plan to simply purchase and hold annuities that paid out to the plan as the plan's liabilities to pensioners came due. Other strategies attempt to reduce the volatility of the plan's investments, such as purchasing high-grade bonds or hedging against undesirable market fluctuations.[31]

C. External De-risking

An external de-risk occurs when an entity other than the plan becomes the bearer of the risk associated with providing retirement income to the beneficiary. In other words, the risk associated with the pension promise is "externalized" relative to the plan. As many observers have correctly noted, the term "de-risking" in this context is fairly misleading; meaningful risk still exists, it is just no longer borne by the plan.[32] A more precise articulation of how the risk is externalized, however, is necessary.

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30. This is sometimes referred to as "liability-driven investing," or "LDI." *See, e.g.*, EMP'T RET. INCOME SEC. ACT ADVISORY COUNCIL, U.S. DEP'T OF LABOR, PRIVATE SECTOR PENSION DE-RISKING AND PARTICIPANT PROTECTIONS 13 (2013), *available at* http://www.dol.gov/ebsa/pdf/2013ACreport2.pdf [hereinafter COUNCIL DE-RISKING REPORT] ("In-plan strategies include restricting participation or accruals, hedging and immunization (both considered liability-driven investing (LDI)), and buy-ins."); *see also* Paul M. Secunda, *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink*, 21 CORNELL J.L. & PUB. POL'Y 77, 94–95 (2011) (referring to same internal de-risking strategy as "liability-aware" investing).

31. *See Newman Testimony*, *supra* note 10, at 1 ("Hedging involves investing to offset some of the factors that drive funding volatility, such as changes in interest rates."); *Mercer Proposes 5 Ways for Pension Sponsors to Manage Funded Position, Risk in 2015*, PENSION PLAN FIX-IT HANDBOOK NEWSLETTER (Thompson Info. Serv., Bethesda, Md.), Feb. 2015, at 4 (explaining that building a portfolio of high-grade bonds can be a way to manage plan liabilities).

32. *See Private Sector Pension Derisking and Participant Protections: Hearing Before the ERISA Advisory Council* 3 (Aug. 29, 2013) (statement of Norman Stein, Professor, Drexel University Earle Mack School of Law), *available at* http://www.dol.gov/ebsa/pdf/DrexelU082913.pdf [hereinafter *Stein Testimony*] ("The term de-risking is not a statutory or technical term; rather, it is a generic term that refers to a variety of approaches that employers use to control the risks inherent in the promise to pay employees a set monthly payment for life after they retire."); *see also* Edited Transcript of VZ-Q4 2012 Verizon Earnings Conference Call 8 (Jan. 22, 2013, 1:30 PM), *available at* http://www.verizon.com/about/file/947/download/?token=0WOyrHdm. As Verizon CFO Francis J. Shammo observed, Verizon's annuity de-risking transaction reduced the company's exposure "to funding and income statement volatility caused by changes in investment returns, discount rates and longevity risks." *Id.* The company's investment and longevity risk does not just vanish, of course. It simply gets transferred to the retiree. *See also Motorola Launches Third-Largest U.S. Pension Buyout, Hopes to Shed $4.2 Billion in Obligations*, PENSION PLAN FIX-IT HANDBOOK NEWSLETTER (Thompson Info. Serv., Bethesda, Md.), Nov. 2014, at 4. Annuitization, for example, transfers the risk of pension promises to insurance companies and also to plan participants, who have no PBGC protection in the event the insurance company is unable to pay pension benefits. *Id.*

Consider the starting point of any external de-risk: the plan owes beneficiaries a DB pension it wishes to offload. Recall that a DB pension is essentially (1) an annuity (2) that is heavily regulated by ERISA. Thus, without spelling out any more details, we can say that any company considering de-risking starts out owing beneficiaries an "ERISA Annuity." From that perspective, external de-risking is the process by which a company converts a pension entitlement in the form of an ERISA Annuity into something else. The question: what is that something else?

There are two things a company may convert an ERISA Annuity into: (1) a Non-ERISA Annuity or (2) a Non-ERISA Lump Sum.[33] A Non-ERISA Annuity is exactly what it sounds like: an annuity promise regulated by some law other than ERISA. A Non-ERISA Lump Sum requires a little more explanation. As a matter of actuarial math, all annuities can be converted to lump sums based on certain assumptions about the lifetime of the beneficiary and the applicable discount rates.[34] A Non-ERISA Lump Sum is what results when an ERISA Annuity is converted into an actuarially equivalent lump sum (and then given to the beneficiary to use outside the confines of an ERISA-governed plan).

Thus, without having yet considered any specifics, we can conceive of "external de-risking" as referring to the set of processes by which a plan sponsor can permissibly convert an ERISA Annuity into either (1) a Non-ERISA Annuity or (2) a Non-ERISA Lump Sum. Of considerable interest to regulators and reformers is what the legal rules governing those processes should be. Some of those rules are fairly clear, but others are not. Yet discussion of possible reforms—whether to revise existing rules or promulgate new ones—can only sensibly proceed after a realistic

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33. *See Newman Testimony*, *supra* note 10, at 2 (describing lump-sum offers and annuity purchases from insurance companies as two "settlement strategies" designed to "discharge the plan's obligations to participants"). As for annuities, plans are not allowed to make annuity purchases unless they are at least 80% funded. *Id.* at 4 (citing I.R.C. § 436(d)). More recently, "[i]n Notice 2015-49, . . . the IRS has now concluded that . . . lump sum windows 'undermine the intent' of the minimum required distribution regulations to prohibit changes to annuity payments once they begin." Robert Newman, *Pension De-Risking Gets New Rules: IRS Shuts Down Lump Sum Offers to Retirees While Connecticut Increases Safety of Group Annuity Contracts*, COVINGTON (July 9, 2015), http://www.insidecompensation.com/2015/07/09/pension-de-risking-gets-new-rules-irs-shuts-down-lump-sum-offers-to-retirees-while-connecticut-increases-safety-of-group-annuity-contracts/.

34. *See* COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 115 (4th ed. 2015). A promise to pay money twenty years from now is worth less than the face value of the promise, both because there's a risk the promisor will not pay, and because money later is worth less than money today. *Id.* at 115–16. A promise to make periodic payments beginning at retirement and ending at death (which is what a simple pension is) is also worth some net-present-value-adjusted amount of money today ("lump sum"); that adjustment depends on interest rates and the expected lifetime of the recipient. *Id.* at 117.

appraisal of *why* employment-based retirement arrangements are regulated in the first place. We offer such an appraisal in Part II below. Before doing so, however, we explain why pension de-risking is a phenomenon likely to grow.

D. *Why Pension De-risking Will Accelerate*

For three reasons, the current environment favors pension de-risking transactions.[35] First, employers today face less organic resistance from the workforce when moving away from DB approaches than they would have in the past. Younger American employees are more likely to receive—and expect to receive—a DC plan than in the past.[36] Whereas older generations were used to a DB plan environment where the company was responsible for their pensions (backed by a PBGC guarantee),[37] younger workers have grown up in a different world. They have long known that they, rather than their employers or the government, are primarily responsible for their own retirement security.[38] Generally, only older workers and retirees are threatened when employers undertake pension de-risking strategies.[39] The

35. *Cf.* COUNCIL DE-RISKING REPORT, *supra* note 30, at 4 ("Commentators have proffered many reasons for this trend in de-risking ranging from plan sponsors' desires to reduce the impact of the volatility of their pension plan obligations on their financial statements and in their funding requirements; the revised mortality and interest rates in the Pension Protection Act and subsequent legislation providing for pension funding relief; the current interest rate environment; the desire to lower administrative costs, including reduction or elimination of rising PBGC premiums; the current and future funding status of the plan; and/or considerations unique to a specific plan sponsor or industry.").

36. *See* McClendon, *supra* note 5, at 820–21 (discussing the changing demographics in the American workplace, and the effects this has had on the shift from defined benefit to defined contribution plans). Today's workers tend to favor the 401(k) plan and its defined contribution counterparts because they "place[] less emphasis on retirement plans that reward long-term service and, instead, favor[] plans that provide more immediate, tangible retirement benefits, those that offer benefit front-loading, accessibility, and portability." *Id.* at 821 (footnote omitted).

37. *Id.* at 814. "The 1980s and 1990s evidence a mass exodus from defined benefit plan sponsorship." *Id.* Prior to then, the defined benefit plan was the primary means by which employers provided pension benefits to employees. Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 74 (2002). The term "PBGC" refers to the Pension Benefit Guaranty Corporation. *See infra* note 69.

38. Because of the shift from defined benefit to defined contribution plans, many American workers now rely on defined contribution plans, such as the 401(k) plan, as their primary source of "employer-provided retirement income." Stabile, *supra* note 37, at 74–75. 401(k) plans place many important plan decisions in the hands of the individual, such as whether to participate in the plan, how much to contribute, and how to invest those contributions, so individuals really are responsible for their own retirement security. *Id.* at 78.

39. *See Certner Testimony*, *supra* note 11, at 2 (stating that companies who are making the decision to de-risk are often "targeting retirees in pay status"). Offers of lump sums to retirees in pay status can be "greatly disruptive and distressing," and many retirees faced with lump-sum offers have reported increased levels of stress, anxiety, and sleeplessness. *Id.* at 9–10. The recent IRS ruling

only other employees impacted by these transactions are the so-called "vested terminated employees" who, even though they have vested pension rights, no longer work for the employer.[40] These vested terminated employees have even less of a voice in seeking to dissuade employers from undertaking these transactions because of their absence from the workplace and, in some cases, their unfamiliarity that they even have such benefits from a past job.[41] Indeed, some studies suggest that terminated vested employees prefer receiving a lump-sum payment than having to wait until retirement age to receive what might be a relatively small pension annuity.[42] So, far from fighting such pension de-risking moves, such workers might actually support them.

Second, financial forces support more pension de-risking behavior.[43] Of particular salience is that in recent years pension obligations have become relatively larger compared to company size.[44] This phenomenon is in turn related to two developments. On the one hand, financial accounting rules (including FAS 158)[45] have required companies to place their

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should limit lump-sum (but not annuitization) approaches targeted at employees in pay status. *See supra* note 33.

40. *See Glossary*, PENSION BENEFIT GUARANTY CORP., http://www.pbgc.gov/about/pg/header/glossary.html#27 (last visited June 16, 2014) (defining a terminated vested employee generally as "a former employee who worked long enough to earn 'Vested Benefits' in a pension plan, but who left the company sponsoring the plan without receiving a retirement benefit immediately" and noting that "[s]uch a participant can receive benefit payments from the plan once he or she reaches the plan's 'Normal Retirement Age' or, if the plan allows, the plan's 'Early Retirement Age'").

41. *See* EMP'T RET. INCOME SEC. ACT ADVISORY COUNCIL, U.S. DEP'T OF LABOR, LOCATING MISSING AND LOST PARTICIPANTS 11, 22 (2013), *available at* http://www.dol.gov/ebsa/pdf/2013ACreport3.pdf.

42. *See* COUNCIL DE-RISKING REPORT, *supra* note 30, at 16; *see also Private Sector Pension De-risking and Participant Protections: Hearing Before the ERISA Advisory Council* 6 (June 5, 2013) (statement of Craig Rosenthal, Partner, Mercer, American Benefits Council), *available at* http://www.dol.gov/ebsa/pdf/ABC060513.pdf [hereinafter *Rosenthal Testimony*] ("[I]n the case of one-time lump sum offers (including offers in connection with a plan termination), the election percentage for participants who have not yet commenced benefits tends to be lower, typically in the 40% to 60% range. It is important to note that in situations where there is a one-time offer of a lump sum, the lump sum election percentages are often correlated with the age of the participant.").

43. *See Rosenthal Testimony*, *supra* note 42, at 1–2 (describing all of the changes and developments in the law regarding pension plan funding, which have increased the cost of providing and maintaining defined benefit pension plans). Some of the financial forces motivating companies to de-risk include the "size of the pension plan liabilities relative to the overall size of the plan sponsor," administrative costs, higher PBGC premiums, and balance sheet volatility. *Id.* at 3.

44. *See id.* at 3.

45. FAS 158 refers to the Financial Accounting Standards Board's Statement No. 158: Employers' Accounting for Defined Benefit Pension and Other Postretirement Plans—An Amendment of FASB Statements No. 87, 88, 106, and 132(R). *See Summary of Statement No. 158*, FIN. ACCT. STABILITY BD., http://www.fasb.org/summary/stsum158.shtml (last visited Mar. 24, 2016).

pension liabilities in their public financial statements,[46] making more readily apparent the sheer size of the pension funding obligations that many companies currently have.[47] On the other hand, new funding rules under the Pension Protection Act of 2006,[48] and higher PBGC premiums, have forced companies to put aside larger and larger amounts of money to keep their pension plans fully funded and in compliance with ERISA obligations.[49] In addition, expected rising interest rates and improved funding ratios for many plans mean that it will be less expensive to transfer their pension liabilities to insurance companies.[50]

Third, employers no longer need DB plans to recruit and retain the best workers. Because virtually all private-sector employers are only offering DC plans to their newly-hired workers, there is no competitive pressure to offer or retain DB plans.[51] Of course, the decline of organized labor in the private sector also leads to a dynamic where workers as a whole have less of a voice in the American workplace to protest these types of de-risking

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46. *See Rosenthal Testimony*, *supra* note 42, at 2 ("[I]mplementation of FAS 158 required most sponsors to reflect the mark-to-market values of pension plan assets and liabilities directly on their balance sheets starting at year-end 2006.").

47. *See* Joe Lustig, *Plan Sponsor De-risking Likely to Continue Even With Higher Funding, Practitioners Say*, BLOOMBERG BNA (Jan. 30, 2014), http://www.bna.com/plan-sponsor-derisking-b17179881745/ (quoting Professor Norman Stein for the proposition that "plan sponsors should lobby Congress to change the funding rules so that funding is evaluated over a broader period of time rather than as a snapshot"); *see also Stein Testimony*, *supra* note 32, at 2.

48. *See* Pension Protection Act of 2006, Pub. L. 109–280, 120 Stat. 780 (2006), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-109publ280/html/PLAW-109publ280.htm.

49. *See* Lustig, *supra* note 47 ("Pension regulations on plan terminations could also mean that improved funding levels are a catalyst for such steps, while increases in pension insurance premiums might help push the de-risking tide as well . . . .").

50. *See* Rick Baert, *Pension Buyouts Expected to Surge—But Not Yet*, PENSIONS & INVESTMENTS (Oct. 14, 2013), http://www.pionline.com/article/20131014/PRINT/310149973/pension-buyouts-expected-to-surge-8212-but-not-yet. For example, in October 2013, the cost of purchasing annuities from an insurer decreased to 108.3% of the value of transferred liabilities. *See* Kevin Olsen, *Mercer: Buyout vs. Economic Cost of Pension Funds at Smallest Margin in 2013*, PENSIONS & INVESTMENTS (Nov. 27, 2013, 1:28 PM), http://www.pionline.com/article/20131127/ONLINE/131129884/mercer-buyout-vs-economic-cost-of-pension-funds-at-smallest-margin-in-2013 (based on Mercer's U.S. Pension Buyout Index). As of December 2014, the cost of purchasing annuities from an insurer further decreased to 105.3%. *See* Rob Kozlowski, *Mercer: Pension Annuity Buyout Premium Decreases Relative to Liability*, PENSIONS & INVESTMENTS (Jan. 30, 2015, 3:24 PM), http://www.pionline.com/article/20150130/ONLINE/150139987/mercer-pension-annuity-buyout-premium-decreases-relative-to-liability.

51. Brendan McFarland, *Retirement Plan Types of Fortune 100 Companies in 2012*, TOWERS WATSON (Oct. 2012), http://www.aztreasury.gov/wp-content/uploads/2013/1609_final_report/Towers_Waston_annual_survey_of_Fortune_100_companies.pdf. The number of Fortune 100 companies that have been offering only defined contribution plans has risen, and in 2012, only thirty Fortune 100 companies offered new hires some form of defined benefit plan. *Id.* "[O]nly [eleven] still offer[ed] a *traditional* [defined benefit] plan to new hires." *Id.* (emphasis added).

transactions by their employers.[52] Labor realities thus also favor a surge in pension de-risking activity.

Because of these demographic, financial, and labor factors, DB plans pose little upside and lots of risk to employers who still maintain them.[53] As a result, where feasible and cost-effective, companies will seek to offload these pension obligations through external pension de-risking transactions. The last several years show precisely that.

In 2012, Ford, General Motors ("GM"), and Verizon all engaged in external pension de-risking transactions. Ford Motor Company offered lump sums to approximately 90,000 retirees and former employees as a way to reduce its significant pension liabilities.[54] GM pursued a two-prong de-risking strategy, offering lump-sum buyouts to approximately 42,000 beneficiaries and purchasing an annuity contract through Prudential for another 110,000 beneficiaries.[55] And Verizon struck a $7.5 billion group annuity deal with Prudential by which Prudential assumed responsibility for approximately 41,000 Verizon pensioners.[56]

In 2013, SPX Corporation announced a lump-sum and annuity-buyout transaction worth some $800 million, with Massachusetts Mutual Life Insurance Company as the primary counterparty.[57] The SPX plan impacts both terminated vested employees and retirees, with the former being offered lump sums and the latter being forced to take the annuity buyout.[58]

In 2014, Motorola and Bristol-Myers Squibb joined the external de-risking club. Motorola transferred $3 billion of its pension liabilities to

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52. *See* Thomas I.M. Gottheil, *Not Part of the Bargain: Worker Centers and Labor Law in Sociohistorical Context*, 89 N.Y.U. L. REV. 2228, 2229 (2014) (footnotes omitted) ("From 1973 to 2013, union density declined from 24.0% to 11.2% of all employed workers and from 24.2% to 6.7% of private sector workers.").

53. *See* Alex Pekker & Meghan Elwell, *Pension Funds Should Derisk Now*, PENSIONS & INVESTMENTS (Mar. 11, 2014, 10:02 PM), http://www.pionline.com/article/20140311/ONLINE/140319974/pension-funds-should-derisk-now ("[E]ven plan sponsors that appear to be fully derisked with completely frozen, fully funded and fully hedged plans with respect to interest rate risk should be prepared to fund mortality improvements and actuarial experience risk.").

54. Meier, *supra* note 13. At the end of 2011, Ford had significant pension liabilities (approximately $74 billion globally) and an underfunded plan (an approximately $15.4 billion deficit). *Id.*

55. *See GM Announces U.S. Salaried Pension Plan Actions*, *supra* note 13.

56. Lee v. Verizon Commc'ns Inc., 2012 WL 6089041, at *1 (N.D. Tex. Dec. 7, 2012).

57. *See* Kevin Olsen, *SPX Offloads $800 Million in Pension Risk; MassMutual to Take Portion in Buyout*, PENSIONS & INVESTMENTS (Nov. 14, 2013, 3:50 PM), http://www.pionline.com/article/20131114/ONLINE/131119925.

58. *Id.* Industry press has described insurance companies jockeying for position in the growing de-risking space. *Id.*

Prudential.[59] Motorola also offered lump-sum buyouts to about 32,000 terminated vested plan participants.[60] Bristol-Myers Squibb engaged in a $1.4 billion annuitization transaction with Prudential, which affected about 8,000 plan participants in pay status.[61]

Indeed, external pension de-risking activity in the past few years has been so substantial that the Department of Labor's ("DOL") Advisory Council on Employee Welfare and Pension Benefit Plans ("ERISA Advisory Council") moved to investigate the phenomenon.[62] Given pension de-risking's increased prominence, both in government circles and in industry press, considered suggestions for regulatory action are particularly timely.

II. DE-RISKING & RETIREMENT SECURITY

A. *Performance & Delivery*

Central to pension regulation are two objectives: first, that pension promises made are actually *performed*, and second, that the pension promises that are performed actually *deliver* the socially desirable outcome they are supposed to: namely, retirement security. Neither of those rationales favors permissive pension de-risking.

On the question of performance: employment-based retirement promises can come in a variety of different forms. Whatever their form, however, society desires that retirement promises be *kept*, because workers

59. Newman, *supra* note 13. The transfer is third to GM and Verizon, whose pension liability transfers equaled $25 billion and $7.5 billion, respectively. *Id.* The annuity contract affects some 30,000 plan participants who are currently in pay status. *Id.*

60. Rob Kozlowski, *Motorola Wraps Up Pension Buyout at Light Speed*, PENSIONS & INVESTMENTS (Sept. 29, 2014), http://www.pionline.com/article/20140929/PRINT/309299976/motorola-wraps-up-pension-buyout-at-light-speed. At the end of the de-risking transactions, Motorola is hoping to have cut its pension liabilities in half. *Id.* Motorola's current pension plan liabilities total approximately $8.4 billion. *Id.*

61. Steyer, *supra* note 13. At the end of 2013, the Bristol-Myers Squibb plan was actually about 102.4% funded. *Id.* However, the company entered into the transaction with the hopes of being able to better manage the cost of maintaining the defined benefit plan. *Id.*

62. "Section 512 of ERISA provides for the establishment of an Advisory Council on Employee Welfare and Pension Benefit Plans, known as the ERISA Advisory Council," to advise the Secretary of Labor. *ERISA Advisory Council*, U.S. DEP'T OF LAB., http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html (last visited Feb. 8, 2015). The Council reported its findings and recommendations to the Secretary of Labor in November 2013. *See* COUNCIL DE-RISKING REPORT, *supra* note 30. The Council is revisiting the topic in 2015 with its report and recommendations on Model Notices and Disclosures on Pension Risk Transfers. *See ERISA Advisory Council*, *supra*. Professor Maher provided testimony to the Council in August 2013, see *Maher Testimony*, *supra* note 23, and Professor Secunda served as part of the Council's Issue Drafting Group on Pension De-Risking, see COUNCIL DE-RISKING REPORT, *supra* note 30.

are acutely vulnerable when they are not.[63] All else equal, legal rules should promote pension promise performance.

On the question of delivery: assuming a retirement promise is performed, society wants such retirement promises to be effective in yielding retirement security. Assuming both Retirement Promise A and Retirement Promise B will be performed, the more desirable promise is the one that leads to greater retirement security. All else equal, legal rules should disfavor pension promises that are comparatively less likely to promote retirement security.

None of the above is particularly controversial, although it is routinely forgotten as interest groups and litigants furiously battle over the meaning of obscure provisions of both ERISA and the Internal Revenue Code. This appears to be happening with respect to pension de-risking. If we take a step back, however, much of the pension de-risking debates can be concisely crystallized. If pension de-risking is permissively regulated, ERISA Annuities are likely to be converted into Non-ERISA Annuities or Non-ERISA Lump Sums; if pension de-risking is strictly regulated, they are unlikely to be converted. Most observers who favor strict regulation do so (1) because they believe converting ERISA Annuities into Non-ERISA Annuities is undesirable because the latter promise is less likely to be *performed* than an ERISA Annuity promise, or (2) because they believe that converting ERISA Annuities into Non-ERISA Lump Sums will *deliver* less retirement security than an ERISA Annuity promise.[64] In Parts II.B and II.C below, we explain why those beliefs are likely justified and should form the basis for regulatory action.

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63. *See* Paul M. Secunda, *An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States*, 41 FORDHAM URB. L.J. 867, 872 (2014) (discussing the vulnerability of employees and pensioners as unsecured creditors among other, more sophisticated creditors during employer insolvencies).

64. Proponents of permissive de-risking either (1) deny that de-risking leads to a degradation of promise performance or retirement security, see, e.g., *Private Sector Pension De-risking and Participant Protections: Hearing Before the ERISA Advisory Council* 1–2 (June 5, 2013) (statement of John G. Ferreira, Partner, Morgan, Lewis & Bockius LLP), *available at* http://www.dol.gov/ebsa/pdf /morganlewis060513.pdf (explaining that there is no need for further regulations and guidance of de-risking transactions, and that such transactions actually benefit plan participants in numerous ways), or (2) argue that such a degradation is acceptable because it is outweighed by some other value, see, e.g., *Newman Testimony*, *supra* note 10, at 6 (explaining that de-risking transactions should be permitted because they enable employers to reduce the financial volatility stemming from legacy plans in order to more effectively manage on-going plan costs, especially in light of the fact that these plans are voluntary to begin with).

B. Non-ERISA Annuities: An Under-performance Problem

A Non-ERISA Annuity promise is less likely to be performed than an ERISA Annuity promise because the former lacks regulatory features that make performance likely. Three features are particularly crucial. First, ERISA requires that DB plans meet minimum funding requirements.[65] A pension promise does not by its nature require that any money be set aside today, but ERISA requires that future pensions be funded in advance (at levels determined by statute and dependent upon certain actuarial assumptions).[66] Second, as a matter of federal law, ERISA imposes strict fiduciary duties upon plan fiduciaries, requiring that those who manage the plan act prudently and in the best interest of beneficiaries.[67] Third, through the Pension Benefit Guaranty Corporation, ERISA insures (up to a certain level of benefits) DB pensions.[68] All of these requirements obviously increase the likelihood that the ERISA Annuity promise will be performed.

When an ERISA Annuity is converted into a Non-ERISA Annuity, however, these safeguards vanish. They vanish because converting ERISA Annuities into Non-ERISA Annuities is achieved by effectively transacting beneficiaries out of ERISA (and the guarantees of the PBGC). If "[t]he entire benefit rights of the individual (1) [a]re fully guaranteed by an [insurer] licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the [insurer]; and (2) [a contract] describing the benefits to which the individual is entitled under the plan has been issued to the individual,"[69] the beneficiary is thereafter "not a participant covered under an employee pension plan."[70] Beneficiaries are thereafter protected by state, rather than federal, law.[71]

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65. 29 U.S.C. § 1083 (2014); Tucker, *supra* note 29, at 167.

66. *See* Tucker, *supra* note 29, at 168–69 (explaining that employers fund defined benefit plans through annual contributions that are recommended by actuaries based on the number of employees, the age of the plan participants, and the benefits that are to be paid to plan participants).

67. 29 U.S.C. § 1104(a) (2014); Tucker, *supra* note 29, at 195.

68. *Guaranteed Benefits*, PENSION BENEFIT GUARANTY CORP., http://www.pbgc.gov/wr/benefits/guaranteed-benefits.html (last visited Oct. 23, 2015). "The 2016 maximum monthly guarantee for a 65-year-old retiree is $5,011.36 which amounts to about $60,136 per year." *Id.* The PBGC is funded by premiums paid by DB plans.

69. 29 C.F.R. § 2510.3-3(d)(2)(ii) (2016).

70. *Id.*

71. As Justice Scalia observed, when terminating a plan through the purchase of annuities, "[t]he assets of the plan are wholly removed from the ERISA system, and plan participants and beneficiaries must rely primarily (if not exclusively) on state contract remedies if they do not receive proper payments or are otherwise denied access to their funds." Beck v. PACE Int'l Union, 551 U.S. 96, 106 (2007).

Although state law varies, in the main, state rules designed to ensure the full payment of annuity contracts are less protective than ERISA:[72] (1) the funding requirements for annuities are less demanding than ERISA;[73] (2) the legal obligations governing those who manage the assets funding the annuity contracts are more permissive than ERISA;[74] and (3) the backstop guarantees offered by state guaranty associations may be, at least in some circumstances, not as robust as those offered by the PBGC.[75] This is not to say that in every case converting an ERISA Annuity into a Non-ERISA Annuity will have an appreciably negative effect on the likelihood of performance, but in general, it will reduce the likelihood of full performance.

C. Non-ERISA Lump Sums: An Under-delivery Problem

In pure mathematical terms, any annuity can be converted to an actuarially equivalent lump sum.[76] Of course, if one uses unrealistic actuarial assumptions to convert an annuity into a lump sum, then one can rob the beneficiary of value. Obviously, these conversions need to be properly regulated.

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72. Not everyone agrees that state protections for annuities are significantly worse than the federal protections of ERISA and the PBGC. *See Private Sector Pension De-Risking and Participant Protections: Hearing Before the ERISA Advisory Council* 12–13 (Aug. 29, 2013) (statement of Peter Gallanis, President, NOLHGA), *available at* http://www.dol.gov/ebsa/pdf/NOLHGA082913.pdf [hereinafter *Gallanis Testimony*] (testifying that both DB plans—through ERISA rules and PBGC protections—and insurer annuities—through insurance regulation and the protections provided by insurance receivers and guaranty associations—offer robust protection to participants, though the systems for providing such protections are quite different and somewhat difficult to compare on an apples-to-apples basis). Obviously, state law varies. In our view, although it is possible for a state's protections (and its guaranty body) to be as robust or nearly as robust as ERISA and the PBGC, the ERISA DB regime generally is more protective of beneficiaries than State X's annuity regime. That is why our annuitization proposals call for an independent and impartial analysis of the latter. *See infra* Part III.C.2.

73. *See Private Sector Pension De-Risking and Participant Protections: Hearing Before the ERISA Advisory Council* 2 (Aug. 29, 2013) (statement of William Kadereit, President, National Retiree Legislative Network), *available at* http://www.dol.gov/ebsa/pdf/NRLN082913.pdf (discussing how the annuity contracts cause participants to lose the minimum funding protections under ERISA for qualified plans).

74. *See id.* (discussing how the fiduciary and disclosure requirements under ERISA do not apply to annuity contracts that are purchased in plan de-risking transactions).

75. *But see Gallanis Testimony*, *supra* note 72, at 12–13 (testifying that while the *floor* level of guaranty association guaranteed benefits may, for some retirees, be lower than the PBGC's comparable "hard cap," that floor level is invariably augmented by significant assets from an insurer's insolvency estate; in many cases, the combination will result in a higher level of protection for an annuity owner than for a similarly situated participant in a failed DB plan).

76. *See supra* note 34 and accompanying text (explaining actuarial equivalence between lump sums and annuities).

But let us assume for the sake of argument that the conversions will be actuarially fair.[77] Should regulators be indifferent between a beneficiary holding an ERISA Annuity or an actuarially equivalent Non-ERISA Lump Sum? The weight of the evidence—as well as behavioral economic theory—suggests not. In terms of delivering retirement security, annuities are vastly preferable to lump sums.

Consider first the traditional definition of retirement security: that an individual will receive, for the balance of her retirement, income equal to approximately 70% of her income while employed.[78] An ERISA Annuity naturally throws off income, is calculated based on the beneficiary's working salary, and lasts for the duration of the beneficiary's life.[79] The beneficiary need do no more than, upon retirement, cash their monthly check until death.

In contrast, for a lump sum to provide retirement security, matters are more complicated for the beneficiary. A lump sum received mid-career can be thought of as a conversion to a DC plan, where the initial contribution is the lump-sum actuarial equivalent of the ERISA Annuity earned to date. To understand the problem of de-risking an ERISA Annuity into a Non-ERISA Lump Sum, let us briefly review the problems associated with DC arrangements in general.

For DC plans to "work" from a societal perspective, participants must habitually *save* at the appropriate rate, they must earn an appropriate *investment return* on those savings, and they must *consume* that balance, post-employment, at an appropriate rate. Put more concretely, for a DC participant to have assets sufficient to fund retirement income equal to some W% of this career wage, that worker must (1) annually save X% of this compensation, (2) earn Y% in investment appreciation on those savings, and (3) draw down those savings at Z% a year in retirement. Many workers have proved unable to do those things.[80] Put differently,

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77. This is not to imply that all actuarial conversions undertaken in the real world are actuarially fair. To the contrary, much litigation on precisely this issue occurs. We are simply assuming actuarially fair conversions for the sake of argument. Put differently, *even if* all conversions were actuarially fair, there would still be a problem.

78. *Top 10 Ways to Prepare for Retirement*, U.S. DEP'T OF LAB., http://www.dol.gov/ebsa/publications/10_ways_to_prepare.html (last visited Feb. 12, 2015).

79. *See supra* notes 18–19 and accompanying text; *see also* Befort, *supra* note 1, at 946 ("Traditional defined benefit plans provide a predetermined, specified retirement benefit, usually in the form of a life annuity, linked to pre-retirement earnings.").

80. *See generally* Stabile, *supra* note 37; *see also* Colleen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 329–31 (2007) (describing how many Americans are financially illiterate and have psychological biases that may adversely affect the numerous and complex decisions they have to make in the context of defined contribution plans).

DC participants: (1) do not save enough of their current income; (2) do not optimally invest their savings; and (3) do not properly manage post-employment longevity risk, that is, they spend their DC savings too quickly.[81] For many workers, then, the stark reality is that DC plans have under-delivered retirement security.[82]

Precisely why DC plans have under-delivered is subject to intense scholarly debate.[83] We do not resolve that debate here, although we side with the majority of scholars to have considered the issue. We believe, as do most observers, that DC plans have failed because they transferred to unsophisticated and unprepared individuals the responsibility for making saving, investment, and longevity decisions. And those individuals have made poor choices.[84]

There is no longer any serious doubt that human beings—even educated human beings—are naturally inclined to, and systematically do, behave sub-optimally.[85] (By sub-optimally, we mean that, given some plausible assumptions about what most people prefer, individuals make choices that fail to maximize those preferences.) The rich literature of behavioral economics has identified and categorized the many ways in which individuals' choices are afflicted with "cognitive biases" that result in poor decision making.[86]

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81. For example, it is estimated that participants in defined contribution plans, such as 401(k)s, who expect to maintain their standard of living will need to save approximately 17% of the income they earn from age twenty-five to sixty-six. Ghilarducci, *supra* note 1, at 454. Yet plan participants in 401(k) plans are only contributing approximately 7.5 to 8% of their income. Amy B. Monahan, *Employers as Risks*, 89 CHI.-KENT L. REV. 751, 757 (2014); *see also 4 Disastrous Retirement Mistakes and How to Avoid Them*, MONEY.COM, http://time.com/money/3546592/ira-rollover-mistakes-retirement/ (last visited Oct. 23, 2015) (providing an example of how employees go through retirement money too fast).

82. *See* Bradford, *supra* note 1 ("Roughly 31% of Americans have no retirement savings and no access to defined benefit plans, according to Federal Reserve data, including 19% of people ages 55 to 64. Of the 65% of private-sector workers with access to workplace retirement plans, only 48% participated in one in 2014.").

83. *Compare* Bradford, *supra* note 1 (discussing how many people do not have access to private-sector retirement plans, and those plans that people do have access to are not that beneficial), *with* McClendon, *supra* note 5, at 828 (discussing how defined contribution plans do not provide for a set benefit at retirement, and do not guarantee plan participants "significant benefit accruals"), *and* Stabile, *supra* note 37, at 88–89 (discussing how many plan participants lack the financial knowledge and literacy needed to make important investment decisions that are required by defined contribution plans).

84. *See* sources cited *supra* note 82.

85. Admittedly, this question can become contentious on the specifics: what do most people prefer, and how do we know what that is? We do not here attempt to resolve that question; instead, we merely assert a largely but not entirely uncontroversial point: most people wish to have retirement income equal to some reasonable percentage, say 70%, of their employment income, for the duration of their retired lives. *See supra* note 78 and accompanying text.

86. *See generally, e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (discussing and

Many of those cognitive biases threaten wise retirement planning. For example, individuals generally value the present more than they should and are overly optimistic about the future.[87] These individuals are prone to spend too much today and save too little for retirement.[88] Second, there is a tendency to procrastinate, which means that individuals tend to put off saving for retirement or making difficult choices regarding retirement planning.[89] Many people, without a nudge, will fail to enroll in a retirement savings program at all. Even if they are automatically enrolled, they tend to stick with plan default options and contribution levels.[90]

Compounding such cognitive biases are more traditional obstacles to making rational retirement decisions, such as lack of financial literacy. An oft-cited survey of financial literacy revealed that only 14% of Americans could answer five extremely simple questions about interest rates and diversification.[91] Even when financially literate, DC participants face high information costs compared to their DB plan counterparts. A DC plan participant needs to gather and evaluate a significant amount of information in order to make informed decisions; a DB participant does not.[92] In order to combat the high information costs associated with DC plan decision making, plan participants end up using "mental shortcuts" or "heuristics" which lead to poor investment decisions.[93]

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cataloguing cognitive biases).

87. *See* Kelli A. Alces & Brian D. Galle, *The False Promise of Risk-Reducing Incentive Pay: Evidence from Executive Pensions and Deferred Compensation*, 38 J. CORP. L. 53, 75 (2012) ("There is extensive evidence . . . that humans tend to excessively weigh costs and benefits in the present and very near future at the expense of those that are more distant.").

88. *Id.* at 75–76 ("[T]he time and mental effort of choosing a retirement plan looms much larger than the budget crunch one will face at retirement from choosing the wrong plan.").

89. *See* Brian Galle, *Federal Fairness to State Taxpayers: Irrationality, Unfunded Mandates, and the "SALT" Deduction*, 106 MICH. L. REV. 805, 819–23 (2008).

90. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 74–102 (rev. ed. 2009); Brendan S. Maher, *Some Thoughts on Health Care Exchanges: Choice, Defaults, and the Unconnected*, 44 CONN. L. REV. 1099, 1112 (2012) ("A regulator can choose a default such that a person can 'one-click' for default coverage of a specified quality and price, and make the default option a prominent option of the exchange website."); Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV 1155, 1161–73 (2013) (explaining why individuals are reluctant to depart from certain default rules).

91. MEDILL, *supra* note 34, at 570–71 (citing 2012 findings from United States Department of the Treasury's National Financial Capability Study of 25,000 American adults, available at http://www.usfinancialcapability.org/about.php).

92. *See* Medill, *supra* note 80, at 327 (explaining how defined contribution plans, such as 401(k) plans, "make[] the individual worker primarily responsible for funding his or her own retirement benefits and investing his or her retirement plan assets").

93. *Id.* at 333–34. Some of the negative impacts of plan participants' mental shortcuts include overinvesting in company stock, relying on their own aversion to risk and investing too conservatively, and allocating their plan assets proportionately. *Id.* at 334–35.

In the past thirty years, occupational pensions have shifted from DB-dominated to DC-dominated. Private sector worker participation in DB plans dropped from 62% in 1975 to 7% in 2009.[94] Conversely, worker participation in DC plans rose from 16% in 1975 to 67% in 2009.[95] In that same time frame, retirement security has eroded. For example, the percentage of workers who were "at risk of having inadequate funds to maintain their lifestyle through retirement" increased from 31% in 1983 to roughly 53% in 2010.[96] Indeed, a wealth of data shows how DC plans have failed to deliver retirement security.[97]

The same problems that afflict DC plans generally will afflict beneficiaries who receive Non-ERISA Lump Sums instead of ERISA Annuities: they will have problems in optimally saving, managing, and spending the lump sum over the course of their lifetimes.[98] Indeed, the de-risking problem is worse. Traditional DC plans, first, are governed by ERISA, which means that the plan sponsor may retain some residual responsibility for providing a sensible menu of investment options for monies contained within the plan.[99] Non-ERISA Lump Sums, in contrast, can be used imprudently by beneficiaries much more easily. Second, to the

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94. EMP. BENEFIT RES. INST., EBRI DATABOOK ON EMPLOYEE BENEFITS 4 (2011), *available at* http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2001.pdf. Other statistics show that in 1975, defined benefit plans accounted for one-third of all pension plans in the nation. Estreicher & Gold, *supra* note 2, at 331. By 1998, defined benefit plans accounted for only one-twelfth of all pension plans. *Id.* at 331–32. In 2011, that number dropped further to about one-sixteenth. *See* MEDILL, *supra* note 34, at 131.

95. EMP. BENEFIT RES. INST., *supra* note 94, at 4. In 2011, the number of defined contribution plans outnumbered defined benefit plans fourteen to one. *See* MEDILL, *supra* note 34, at 131.

96. Benartzi & Thaler, *supra* note 3, at 1152.

97. According to a 2014 Employee Benefit Research Institute ("EBRI") retirement confidence survey, about a quarter of Americans are not at all confident in their retirement savings, and an additional 37% are only somewhat confident. Press Release, Emp. Benefit Research Inst., EBRI's 2014 Retirement Confidence Survey: Confidence Rebounds—for Those with Retirement Plans 1 (Mar. 18, 2014), *available at* http://www.ebri.org/pdf/surveys/rcs/2014/PR1066.RCS.18Mar14.pdf. Worker retirement savings remain low, according to the survey, and not many Americans are taking even basic steps towards preparing for retirement. *Id.* While many American workers realize that they need to bolster their retirement savings, many have not even tried to estimate the savings that they will need in order to live comfortably during retirement, and only about one in five workers have obtained financial advice to assist in retirement planning. *Id.* at 2. However, of those workers who have sought out and obtained financial advice, only 27% of those workers admitted to completely following the advice of the financial planner, while the rest have only followed some or most of the advice. *Id.*

98. For already retired beneficiaries who receive lump sums, then there will be no "saving" problem, but investment and consumption problems will remain.

99. *See* 29 U.S.C. § 1104(c) (2014); *see also* ERISA ADVISORY COUNCIL, U.S. DEP'T OF LAB., OUTSOURCING EMPLOYEE BENEFIT PLAN SERVICES 10 (2014), *available at* http://www.dol.gov/ebsa/pdf/2014ACreport3.pdf ("Lou Campagna of the Department's Employee Benefit Security Administration ('EBSA') testified that he did not believe that the Department has ever addressed this particular question, but provided his personal view that the designation of the named fiduciary in the plan document may itself be a fiduciary act.").

extent a de-risked beneficiary is not simultaneously enrolled in the employer's DC plan, the beneficiary loses a key advantage of most workplace plans: default savings.[100]

III. THINKING ABOUT REFORM

A. *The Comparative Strength of Regulators*

ERISA does not require that employers offer retirement benefits; it merely regulates retirement benefit promises that are made.[101] Because of the voluntary nature of retirement promises, regulators are often faced with a difficult choice: if the legal rules are too protective of beneficiaries or too burdensome to employers, fewer retirement promises will be made in the first place. Thus, regulators—even if they have great discretion to act—must generally be quite cognizant of ensuring that promulgating protective rules for beneficiaries will not significantly undermine plan creation.[102]

In the pension de-risking context, however, that pressure barely exists. De-risking applies only to DB promises already made; those promises cannot be abandoned because sponsors believe de-risking rules are too protective of beneficiaries. Nor will strong rules undermine the creation of new DB plans; as we have emphasized, other forces have contributed to the steady decline of such plans.[103] No employer will be deterred from offering a DB plan because of strict rules against de-risking because virtually no employers are offering new DB plans in the first place.[104]

Accordingly, there is little pressure on regulators to balance the objective of "DB plan creation" against the goal of "promulgating rules protecting DB beneficiaries from de-risking." The former will continue to deteriorate irrespective of the latter.

In considering reform, regulators should be guided by a single principle: de-risking should make pension plan beneficiaries no worse off than if the transaction never occurred. That principle, incidentally, is not

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100. *See* MEDILL, *supra* note 34, at 124 ("In a traditional *401(k) plan*, . . . the plan participants individually direct the employer to contribute part of their current compensation to their plan accounts rather than receiving this amount as present compensation.").

101. *See* Regina T. Jefferson, *Increasing Coverage in Today's Private Retirement System*, 6 DREXEL L. REV. 463, 464 (2014) (noting voluntary nature of retirement promises).

102. Tucker, *supra* note 29, at 225 ("ERISA's objective of protecting the rights and benefits of plan participants also includes avoiding undue administrative burdens on employers and preserving employers' right to customize plans.").

103. *See supra* Part I.D.

104. *See supra* note 51 and accompanying text.

foreign to pension regulation. For example, in the merger context, ERISA requires that a "pension plan may not merge . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger . . . which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger."[105] So, at the outset, we propose that the DOL adopt a similar "no worse off" mindset in regulating de-risking transactions.

B. Legal Framework for De-risking

As we explained in Part II, external de-risking processes can be conceived of as either "annuitization" or "lump-sum" transactions. In this section we consider the legal rules that govern both forms of external de-risking and also briefly consider the law governing internal de-risking.

Annuitization. Annuitization refers to a plan transferring its liabilities to an annuity provider; former plan beneficiaries become claimants on the annuity provider.[106] In external annuitizations, the new risk-bearers are the annuity provider and the beneficiaries, to the extent any failure by the annuity provider is not covered by a state guarantee.[107]

ERISA itself has long contemplated that terminated DB plans will convert their outstanding liabilities to Non-ERISA Annuities.[108] More recently, annuitization has been used by plan sponsors in non-termination settings. Either way, external annuitization transacts beneficiaries out of ERISA (and the guarantees of the PBGC).[109] Beneficiaries are thereafter protected by state, rather than federal, law.[110]

The legal framework for annuitization is informed by ERISA itself and the judge-made "settlor" doctrine. Regrettably, neither the settlor doctrine's boundaries, nor how de-risking maps onto it, are perfectly clear.

It is well known that ERISA was inspired by and draws heavily upon the law of trusts.[111] Indeed, ERISA's drafters conceived of ERISA plans as

105. 29 U.S.C. § 1058 (2014).

106. Such describes "external" annuitization. *See supra* Part I.C. "Internal" annuitization, in contrast, is when the plan simply uses annuities as a plan asset that will help match plan cash flows to plan benefit liabilities. *See supra* Part I.B.

107. *See Newman Testimony*, *supra* note 10, at 2, 4.

108. *See id.* at 2 (discussing how Non-ERISA annuity purchases are made when plan terminates).

109. *See* 29 C.F.R. § 2510.3-3 (2016).

110. *See supra* notes 72–75 and accompanying text.

111. *See* Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) ("[T]rust law may offer a 'starting point' for analysis in some situations . . . ."); Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996); *see also* Michael J. Collins, *It's Common, but Is it Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW. 391, 391 (2001) ("The common law of trusts served as the basis for ERISA's

statutory cousins of common-law trusts.[112] A common-law trust is created by a settlor, and trust law contains specific rules respecting the prerogative and judicial treatment of settlors.

Whether ERISA plans—which, unlike most trusts, are not donative—may appropriately be thought of as having a true "settlor" has long been debated by scholars.[113] Nonetheless, the Supreme Court has been persuaded that certain acts by plan sponsors are best conceived of as "settlor" actions akin to those that would have been taken by the "settlor" of a trust. Settlor actions, by command of the Supreme Court, are *not* subject to ERISA's fiduciary duties, although they are subject to explicitly enumerated ERISA requirements.[114] Importantly, a plan amendment is an act that falls within the settlor exception,[115] and annuitizations are done via plan amendment.[116]

While the choice to annuitize is a protected settlor function, *implementing* that choice is not. All ERISA fiduciaries are obligated to follow a plan's terms (unless such terms conflict with ERISA), and are likewise obligated to act with the care a prudent person would display in carrying out those terms.[117] Furthermore, all fiduciaries must act loyally—they must act "solely" for the interests of beneficiaries and for the "exclusive purpose" of providing benefits to participants.[118] Although these duties are explicitly set forth in ERISA, the content of those duties has been defined by both regulation and judicial opinion; agency officials and judges, however, do not always concur.

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fiduciary duty provisions, and courts have often applied the common law of trusts in interpreting ERISA's fiduciary rules.").

112. *See* Collins, *supra* note 111, at 395 (quoting H.R. REP. NO. 93-1280, at 295 (1974)) ("ERISA's legislative history makes clear that Title I is intended to 'apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries.'").

113. *See generally* Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459 (2015) (providing overview of long-running debate over meaning of settlor/fiduciary distinction under ERISA).

114. *See Varity Corp.*, 516 U.S. at 530–32; *Hughes Aircraft Co.*, 525 U.S. at 444; Lockheed Corp. v. Spink, 517 U.S. 882, 890–91 (1996).

115. *See Hughes Aircraft Co.*, 525 U.S. at 444 (describing how the fiduciary duty requirements under ERISA are not implicated where the plan sponsor made an amendment to the plan); *Lockheed Corp.*, 517 U.S. at 891 (describing how the plan sponsor was acting "not as a fiduciary but as a settlor when it amended the terms of the Plan" to include a specific provision).

116. *See Private Sector Pension De-Risking and Participant Protections: Hearing Before the ERISA Advisory Council* 2 (June 5, 2013) (statement of Stephen A. Keating, Co-Founder and Principal, Penbridge Advisors, LLC), *available at* http://www.dol.gov/ebsa/pdf/penbridge advisors060513.pdf ("[T]he decision to amend a plan to distribute benefits as annuity contracts is a settlor decision, not governed by ERISA's fiduciary obligations and not subject to fiduciary review.").

117. 29 U.S.C. § 1104(a) (2014).

118. *Id.*

In 1995, the DOL issued an Interpretative Bulletin explaining that "[t]he selection of an annuity provider for purposes of a pension benefit distribution . . . is a fiduciary decision governed by the provisions of part 4 of title I of ERISA."[119] Fiduciaries must select the "safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise."[120] A fiduciary must not solely rely "on ratings provided by insurance rating services"; the entire mix of relevant circumstances need be objectively and thoroughly considered, including such factors as "the quality and diversification of the annuity provider's investment portfolio, . . . the size of the insurer relative to the proposed contract, . . . [and] the availability of additional protection through state guaranty associations and the extent of their guarantees."[121]

At least one federal court of appeals has rejected the Department's view that fiduciaries are presumptively obligated to select the safest annuity available. The Fifth Circuit has held that fiduciaries, in selecting annuities, are simply obligated to follow the exclusive benefit rule (i.e., to select annuity providers "with an eye single to the interests of the participants and beneficiaries").[122] The implication of the Fifth Circuit's view is that fiduciaries need afford less weight to choosing "safe" annuities than the Department of Labor believes is presumptively appropriate.

For its part, Congress was specifically concerned about annuitizations leaving beneficiaries worse off than they were under the plan. In 1994, Congress amended ERISA to provide a special cause of action to police improper behavior in annuitization transactions.[123] Should a fiduciary violate his duties in connection with an annuitization, section 1132(a)(9) specifically provides a federal cause of action to beneficiaries to "assure receipt by the participant or beneficiary of the amounts" promised by the annuity issuer.[124] While the scope of this provision is far from certain, it reveals Congressional intent that beneficiaries "may sue and recover money damages from their employers or other fiduciaries so that they can *at least* receive the amounts that were promised by the insurance contract or annuity, plus reasonable interest."[125]

119. 29 C.F.R. § 2509.95-1(c) (1995).

120. *Id.*

121. *Id.*

122. Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 298 (5th Cir. 2000) (quoting Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982)).

123. *See* 29 U.S.C. § 1132(a)(9) (2014).

124. *Id.*

125. H.R. REP. NO. 103-872, at 43 (1994) (emphasis added).

Lump Sums. As we explained above, lump-sum de-risking refers to when the plan offers beneficiaries the right to receive, in lieu of their promised pension annuity, a lump sum that is equivalent to the net present value of their defined benefit.[126] Lump-sum de-risking is thus commonly described as a "lump-sum buyout."

Lump-sum buyouts are limited by both ERISA and the tax rules governing qualified plans.[127] First, the permissible assumptions for converting the pension into a lump sum are regulated to promote actuarially fair conversions.[128] Second, except for small entitlements, a beneficiary cannot be forced to take a lump sum—the beneficiary, and his or her spouse, must consent to receiving the pension in the form of a lump sum.[129] Third, Treasury regulations constrain lump-sum payouts depending on whether the beneficiary is currently receiving benefits.[130] Fourth, lump-sum buyouts are only permissible if the plan is funded above a certain level.[131] Fifth, a plan must provide a participant with certain information before a lump-sum election can be made.[132] None of these regulations squarely address the concerns observers have about beneficiaries making poor choices when choosing a lump sum over the lifetime income stream a pension promises.

Internal de-risking. The legal framework for internal de-risking strategies is largely the same as that governing the investment of plan

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126. *See supra* Part II.C.

127. A plan is qualified, and thus entitled to favorable tax treatment, if it complies with the Internal Revenue Code and Treasury regulations. Edward W. Brankey & Frank P. Darr, *Debtor Interests in Pension Plans as Property of the Debtor's Estate*, 28 AM. BUS. L.J. 275, 279 (1990) (footnote omitted) ("Section 401(a) of the Internal Revenue Code sets forth the rules for qualification of a plan."). Only some plan qualification requirements are also required by ERISA. *Id.*

128. I.R.C. § 417(e) regulates the valuation of lump-sum payments. *See, e.g.*, Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 367 (5th Cir. 2004) ("§ 417(e) [is] the statute which controls the valuation of lump sum plan benefit payments."); Esden v. Bank of Bos., 229 F.3d 154, 164 n.13 (2d Cir. 2000) (noting that the 1994 amendments to § 417(e) "added a statutory requirement that the Secretary prescribe an 'applicable mortality table' for converting annuities into lump-sums"); Kiefer v. Ceridian Corp., 976 F. Supp. 829, 833 (D. Minn. 1997) ("Section 417(e) of the Internal Revenue Code governs the interest rates plans can use to calculate lump sum benefits.").

129. 29 U.S.C. § 1053(e) (2014) (beneficiary consent necessary for present value distribution); *id.* § 1055(g) (2014) (spousal consent necessary for 1053(c) distribution).

130. Treas. Reg. § 1.401(a)(9)-6 (2014) (lump-sum buyout prohibited for beneficiaries in pay status unless an exception applies); *see also supra* note 33 (IRS Notice 2015-49 generally prohibits lump-sum offers to those in paid status).

131. *See* I.R.C. § 436(c)(1) (2014).

132. Treas. Reg. § 1.417(a)(3)-1 (2014). The disclosure requirements are tax regulations promulgated by Treasury that relate to qualified plans, and they have no direct counterpart under ERISA. ERISA's fiduciary duties, however, require that administrators make any disclosures that a prudent person in like circumstances would make to beneficiaries. *See* 29 U.S.C. § 1104(a)(1)(B) (2014) (noting ERISA's fiduciary duty of prudence).

assets generally: fiduciaries need to observe duties of loyalty, prudence, diversification, and otherwise comply with the plan and ERISA.[133] Unclear, however—and therefore likely to give pause to fiduciaries considering engaging in internal de-risking transactions—is the likelihood of successful suits by plaintiffs unhappy about investment choices fiduciaries make (or do not make) in connection with pursuing internal de-risking strategies. Consider, by way of example, a fiduciary who chooses to pursue an internal de-risking strategy by purchasing annuities that are held by the plan, for example, an internal annuitization. The premium associated with purchasing such annuities will be significant. Such a fiduciary might face claims from plaintiffs alleging that such a purchase violated, among other things, the fiduciary's duty of prudence (i.e., by paying too high a price for the annuities, which are plan investments).[134]

C. Proposals

Regulators are not unconstrained. Both statutory language and existing regulations cabin, formally or practically, what reform-minded regulators may plausibly accomplish. There is, nonetheless, room for regulators to act. We offer four suggestions below.

1. Promote Internal De-risking

As we have emphasized, there are significant differences between "internal" and "external" de-risking. Internal de-risking is far less worrisome, because it can accomplish the goal of reducing a sponsor's pension risk without undermining promise performance or the delivery of retirement security to beneficiaries. Where possible, then, regulators should promote internal de-risking strategies.

When thinking about how to incentivize plan sponsors to try internal strategies, a "safe harbor" approach might make the most sense.[135] Although the law governing internal de-risking is generally settled,[136] how it applies to particular de-risking choices is not. Fiduciaries uncertain about the permissibility of otherwise desirable internal de-risking strategies may choose to engage in otherwise undesirable external de-

133. 29 U.S.C. § 1104(a)(1)(A)-(D) (2014).

134. *See, e.g.*, Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 299 (5th Cir. 2000) (finding that under these circumstances, "the only open course of action may be to appoint an independent fiduciary").

135. *See* COUNCIL DE-RISKING REPORT, *supra* note 30, at 25 (referring to a safe harbor proposal advanced by Professor Maher).

136. *See supra* Part I.B.

risking instead. One uncontroversial way to promote internal de-risking is to reduce litigation uncertainty associated with pursuing internal strategies. Accordingly, we suggest that if plans looking to de-risk were to pursue "internal" approaches that satisfy publicly available DOL guidelines, the Secretary should not pursue civil litigation against them and should oppose private plaintiffs who do.[137] Alternatively, the DOL could urge Congress to amend ERISA to create a statutory safe harbor for particular internal de-risking approaches, like for appropriate LDI or hedging strategies.

Although we believe safe harbors (or other regulatory encouragement) for internal de-risking is an appealing reform, we do not want to overstate the case. Candidly, it is wishful thinking to believe that encouraging internal de-risking alone will curb external de-risking. The temptation to externally de-risk is high; only external de-risks offload the pension obligation from the company's books for good.[138] Because external de-risks will occur regardless of the regulatory inducements to internally de-risk, serious reform must also directly regulate external de-risking strategies.

2. *Procedural Safeguards for Annuitization*

A primary concern with annuitization is that the participants holding Non-ERISA Annuities are less likely to receive the pension amounts they worked for years to obtain.[139] More rigorous regulation of the annuitization process, however, could substantially reduce the risk that the resulting Non-ERISA Annuity will be under-performing.

Current DOL regulations on selecting the annuity provider require the fiduciary implementing an annuitization strategy to select the "safest possible annuity" unless the interests of the beneficiaries would be served by not doing so.[140] Although fiduciaries are charged by ERISA to act solely in the interest of beneficiaries, the reality is otherwise. It has long been recognized that many ERISA fiduciaries are, in practice, conflicted because they are employed, controlled, or beholden to the plan sponsor.[141]

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137. *See Maher Testimony*, *supra* note 23, at 6.

138. *See* COUNCIL DE-RISKING REPORT, *supra* note 30, at 13 (observing that only external de-risking "permanently discharg[es] the employer's obligations").

139. *See* discussion *supra* Part II.B.

140. *See* Interpretive Bulletin Relating to the Fiduciary Standards Under ERISA When Selecting an Annuity Provider for a Defined Benefit Pension Plan, 29 C.F.R. § 2509.95-1 (2014).

141. *See* Beverly Cohen, *Divided Loyalties: How the* Metlife v. Glenn *Standard Discounts ERISA Fiduciaries' Conflicts of Interest*, 2009 UTAH L. REV. 955, 974 ("[V]irtually all ERISA plan benefit

In the de-risking setting, the conflict is particularly acute because plan assets above those needed to purchase an annuity that covers obligations to beneficiaries revert to the plan sponsor. The temptation is for the fiduciary to select an annuity that facially guarantees the proper amount of benefits to retirees, but saves the plan money by being riskier. Fiduciaries are also unlikely to competently scrutinize the health and applicability of the relevant state insurance guarantee fund, which is the backstop should the annuity provider fail. As the Great Recession taught us, even sophisticated players are inclined to inappropriately plan for catastrophic default when it is in their interest to do otherwise.[142]

Problems with fiduciary decision-making can be reduced by the use of procedural safeguards.[143] First, annuitizations should be subject to a bidding process in which at least three annuity providers are invited to submit proposals. Second, plan fiduciaries should be obligated to retain an independent state expert to prepare a written report on the fitness of the individual state guarantee funds that back each bidder. Third, once a winning bid has been chosen, an enrolled actuary should certify that the annuity chosen by the plan is—as compared to the annuity offered in the other bids and those available in the market generally—the "most protective annuity." If the enrolled actuary is unable to so certify, then the plan should spell out in writing and make available to participants why, given these circumstances, it did not choose the "most protective annuity." DOL regulations should provide that, absent unusual circumstances, compliance with these steps is the minimum requirement of a fiduciary's discharge of its duties of loyalty and prudence.

3. *Disclosure Safeguards for Lump Sums*

Although the law currently requires that lump-sum offers to beneficiaries be actuarially equivalent to the promised ERISA Annuity, it does not require that the two forms of benefit be *practically* equivalent. Beneficiaries should be informed of the latter.

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claims are decided by fiduciaries that are conflicted to some extent (including employers, third-party administrators, and insurance companies providing the coverage) . . . ."); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 120 (2008) (discussing how there is a conflict of interest in most ERISA cases).

142. *See, e.g.*, Ian Salisbury & Paul J. Lim, *6 Years Later, 7 Lessons from Lehman's Collapse*, MONEY.COM (Sept. 15, 2014), http://www.time.com/money/3330793/lessons-from-lehman-brothers-collapse (discussing how a "venerable investment bank" filed for bankruptcy during the Great Recession in 2008).

143. Because the selection of an annuity provider is a fiduciary function (as opposed to a settlor function), the DOL has considerable freedom to promulgate regulations. *See supra* Part III.B.

First, while in theory a lump sum can be invested and drawn down periodically in such a way as to mimic an annuity, for a lump-sum distribution to replicate what an ERISA Annuity provides, the lump sum would have to be worth *more* than the net present value of the ERISA Annuity. Benefits are merely foregone wages, and a retiring worker entitled to an ERISA Annuity of $X per year has given up sufficient wages to pay for both (1) the right to receive $X until death *and* (2) the investment services of the plan to manage the assets underlying that promise. The latter is not costless, and converting an ERISA Annuity into a lump sum immediately deprives the beneficiary of the value of those already-paid-for investment services—services that she will have to replace using her own resources. Beneficiaries should be advised that investment services formerly provided by the plan (and already paid for by the employee) will now have to be borne by the employee.

Second, beneficiaries should be advised of the dangers of investment and longevity risk. Individual money management is costly and risky, and poor management could leave a beneficiary without sufficient income in the later stages of old age. Clear, plain-English examples of longevity risk should be required to be provided to all beneficiaries presented with a lump-sum option. Beneficiaries should also specifically be informed that—because of the modest adverse selection that afflicts annuity markets—they might not be able to use their lump sum to later purchase an annuity on as favorable terms as they can get from the plan. In addition, although lump-sum elections require spousal consent,[144] lump-sum disclosures should make clear that the investment and longevity risks facing the retiree apply with additional force to the retiree's spouse.

Because lump sums must be consented to by beneficiaries to be permissible, at the time of the election, the beneficiary is still owed fiduciary duties of loyalty and prudence by the plan. The above disclosures should constitute the minimum necessary to satisfy such duties, and they should be codified by the Department of Labor. Tax regulations, which already provide for some disclosures—including disclosing the "financial effect" of electing an optional form of benefit—should be likewise updated.[145]

144. 29 U.S.C. § 1055(g) (2014).

145. 26 C.F.R. § 1.417(a)(3)-1(c)(1)(iii) requires disclosure of the "financial effect" of electing an optional form of benefit, including a lump sum. Those regulations, however, are too narrow. They arguably limit "financial effect" to mean "the amounts and timing of payments to the participant under the form of benefit during the participant's lifetime, and the amounts and timing of payments after the death of the participant." More information than that is needed to make a lump-sum disclosure meaningful.

4. *Restricting Lump-Sum Distributions to Retirees*

Although improved disclosure is likely to reduce the number of lump-sum elections, there is reason to fear that improved disclosures will be insufficient to prevent lump-sum elections that hurt beneficiaries. Because people generally overestimate their ability to invest wisely and overly discount their future needs, the temptation to irrationally favor the present, and thus a lump sum, is strong.[146] And other individual factors might exacerbate the difficulty of making an optimal choice—beneficiaries making these choices could be operating at diminished capacity, for example.[147] Yet, however high the likelihood that choosing a lump sum will, for many beneficiaries, be the "wrong" choice, political opposition to restricting that choice by regulation will likely be strong.

There is good reason to believe, however, that ERISA and the Internal Revenue Code contemplate, if not require, government action to head off poor choices. ERISA itself requires that a lump sum occur as the result of the "consent" of the participant.[148] Professor Norman Stein has suggested that "consent" implies more than simply a choice made after being presented with technically adequate disclosures; it implies a choice made only where the beneficiary actually understands the meaning and consequences of the options.[149] Thus, in circumstances where the DOL has reason to believe the average plan participant is unlikely to truly understand the meaning of lump-sum disclosures, it could and should promulgate regulations that limit or even prohibit lump-sum buyouts absent some indication that "meaningful understanding" preceded the decision.[150] One possibility for doing so is "performance-based" regulation, in which the governing regulation requires that the company's disclosures lead to a specified level of consumer comprehension.[151]

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146. *See supra* notes 87–88 and accompanying text.

147. *See* COUNCIL DE-RISKING REPORT, *supra* note 30, at 21 (maintaining that offering lump sums to seniors with diminished capacity amounts to "corporate elder abuse"). Stein "testified that, everyone besides those who are terminally ill, or almost everyone else who selects a lump sum, will be forfeiting a substantial portion of their retirement savings." *Id.*

148. 29 U.S.C. § 1053(e) (2014) ("consent" required for lump-sum distributions over $5000); *see also id.* § 1055(g) (2014) ("consent in writing" required for 1053(e) election).

149. *See generally* Norman P. Stein, Pension Plan De-risking: Is It Bad, Is It Legal, Can It Be Stopped, Slowed or Moderated? (Mar. 2015) (unpublished manuscript), *archived at* http://perma.cc/NRH7-TBP9.

150. *See infra* note 152 (explaining how suitability standard will help police lump-sum offers made to beneficiaries not in paid status).

151. *See generally* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015).

A related approach would be to adopt a suitability or "know your customer rule" that the Securities & Exchange Commission, for example, used in the past to regulate broker-customer relationships. Although now rescinded, that suitability rule required:

> Every nonmember broker or dealer and every associated person who recommends to a customer the purchase, sale or exchange of any security shall have reasonable grounds to believe that the recommendation is not unsuitable for such customer on the basis of information furnished by such customer after reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other information known by such broker or dealer or associated person.[152]

The DOL could establish by regulation that plan fiduciaries consider whether a lump sum is not suitable for retirees in paid status because of that person's "investment objectives, financial situation and needs, and any other information known" to the fiduciary.[153] The fiduciary would not need to be prescient in such matters; only make a reasonable inquiry before offering the lump sum to the retiree. Such a rule would help many retirees avoid making a monumental mistake with their retirement savings.

CONCLUSION

Because previously-promised DB pensions have been an expensive and uncertain proposition for many employers, it is not surprising that they have responded by seeking to offload their pension obligations to insurance companies or individuals. That such employer maneuvering is understandable, however, does not mean it advances the social goal of retirement security. To the contrary: it undermines it.

Sensible regulation of pension de-risking can substantially reduce its dangers. A modest step that we propose is to incentivize employers to undertake internal de-risking strategies. Internal de-risking is preferable because it preserves ERISA's protections and PBGC termination insurance (which protects pension plan participants in case the plan fails).

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152. 17 C.F.R. § 240.15b10–3 (titled "Suitability of recommendations") (rescinded 1983).

153. *See* Bieganek v. Wilson, 642 F. Supp. 768, 772 (N.D. Ill. 1986) (stating that the SEC suitability standard "provided a basis for relief against certain broker dealers who made trades not reasonably suited to the customer's financial objectives"). This DOL suitability standard would add protection to IRS Notice 2015-49, under which "employers will have to limit lump sum offers to participants who are not yet receiving annuity payments." *See* Newman, *supra* note 33.

Encouraging internal de-risking, however, will likely be insufficient. External de-risking will still occur, and additional regulatory steps will need to meet that challenge—of which we suggest three here. First, annuitizations should be regulated so as to increase the likelihood that the private annuity that replaces the beneficiary's pension is equally likely to be paid. Second, lump-sum elections should be accompanied by meaningful disclosures that effectively inform the beneficiary of the consequences of choosing cash today over a lifetime of income. Third, regulators should be aggressive in construing the language of ERISA to limit lump-sum buyouts where there is reason to believe the beneficiary does not understand the consequences of trading a pension for cash. These steps will significantly reduce the chance that external pension de-risking will imperil the retirement security of millions of elderly workers and retirees.