



## CONSUMER AGENDA FOR RETIREMENT SECURITY

The U.S. private retirement system is unraveling. Hundreds of companies have frozen, terminated, or otherwise cut back on pensions for rank-and-file workers. The majority of workplace retirement plans have become savings accounts that unrealistically place the risk and responsibility for investing and managing retirement savings onto busy and often ill-prepared workers. And, even before the recent financial meltdown, the retirement savings rate of American workers had stagnated, despite incentives designed to increase participation.

Additionally:

- The courts have erected significant obstacles to the fair resolution of employee challenges to wrongful benefit denials.
- Women's work patterns continue to place them at a disadvantage in [private] retirement plans -- because they often live longer, spend less time in the workforce and earn less-- and too many widows and divorced women still lose their fair share of their husbands' pensions.
- The government agencies that regulate retirement plans have too often skewed decisions away from the interests of workers.

To address these and other issues, the Pension Rights Center has prepared this Consumer Agenda for Retirement Security, which includes five initiatives:

**Initiative #1: Promote a more adequate and secure private retirement income system.**

**Initiative #2: Empower workers to promote their own retirement security.**

**Initiative #3: Improve retirement savings plans.**

**Initiative #4: Improve traditional and hybrid pension plans.**

**Initiative #5: Make retirement plans fairer for workers and their spouses.**

## **CONSUMER AGENDA FOR RETIREMENT SECURITY**

### **Initiative #1: Promote a more adequate and secure private retirement income system by:**

- A. Establishing a cabinet-level committee or presidential commission to explore options for a new private retirement income system for the next generation of workers.
- B. Authorizing new plan designs that will appeal to both employers and employees, such as new approaches developed by the Conversation on Coverage.
- C. Expanding and improving existing Simplified Employee Pensions (SEPs).
- D. Collecting data critical for policy research and participants searching for “lost” plans.

### **Initiative #2: Empower workers to promote their own retirement security by:**

- A. Developing a package of legislative and regulatory proposals to level the playing field for participants in administrative and court proceedings.
- B. Creating a Participant Ombudsman Office within the Employee Benefits Security Administration.
- C. Assuring worker and retiree voices on government advisory councils.
- D. Expanding the Administration on Aging’s (AoA) Pension Counseling and Information Program.
- E. Coordinating efforts among Department of Labor field offices and AoA Pension Counseling Projects.
- F. Coordinating efforts between the Pension Benefit Guaranty Corporation (PBGC) and AoA Pension Counseling Projects.
- G. Establishing a clearinghouse for lost retirement plans and for orphan plans.
- H. Giving participants adequate explanations of benefit eligibility and calculations.
- I. Protecting employees from unfair “recoupment” actions.

### **Initiative # 3: Improve retirement savings plans by:**

- A. Requiring straightforward disclosure of all fees paid by 401(k) plan participants.
- B. Eliminating plan fees charged for approval of divorce court orders.

- C. Conducting a study on how to provide low-cost annuities for participants in 401(k) plans.
- D. Requiring timely distribution of benefits from 401(k) plans.
- E. Studying ways of placing limits on the amount of employer stock held in 401(k) plans.
- F. Barring potentially conflicted investment advice.
- G. Requiring spousal consent before cash-out of 401(k) accounts and IRAs.
- H. Extending and expanding the Saver's Credit to help lower-income workers.
- I. Allowing active duty military and National Guard members to contribute to their 401(k)s.
- J. Allowing caregivers on family and medical leave to contribute to their 401(k)s.

**Initiative #4: Improve traditional and hybrid pension plans by:**

- A. Protecting earned pension benefits when companies are bought and sold.
- B. Protecting earned pension benefits in bankruptcy proceedings.
- C. Protecting earned pension benefits when multiemployer plans become underfunded.
- D. Protecting promised future benefits when single-employer plans become underfunded.
- E. Rescinding new interpretive bulletins on economically targeted investments and voting proxies.
- F. Allowing former spouses to collect benefits when a worker is eligible, regardless of whether the worker actually retires.
- G. Restoring more realistic funding requirements for ongoing pension plans.
- H. Linking executive and rank-and-file employee retirement benefits.
- I. Extending insurance and anti-forfeiture protections to plans related to religious institutions.
- J. Fixing the rules that allow executives to use rank-and-file pension plans to enrich their own retirement.

**Initiative #5: Make retirement plans fairer for workers and their spouses by:**

- A. Requiring 100 percent coverage of all employees in a single line of business.
- B. Repealing Social Security integration.

- C. Fixing non-discrimination rules: end new comparability plans
- D. Ensuring that participants can rely on written benefit statements.
- E. Clarifying the effects of phased retirement on participant benefits.
- F. Overturning IRS regulations allowing for electronic waiver of important spousal benefits.
- G. Protecting former spouses of federal workers.
- H. Preserving pre-retirement death benefits for surviving former spouses.

## CONSUMER AGENDA FOR RETIREMENT SECURITY

### **Initiative #1: Promote a More Adequate and Secure Private Retirement System**

#### ***A. Establish a cabinet-level committee or presidential commission to explore options for a new private retirement income system for the next generation of workers.***

Our nation has come to rely on 401(k) plans as the anchor of our national private retirement income policy. The financial meltdown has starkly exposed how these do-it-yourself savings plans carry far too much risk to ensure retirement security, and a consensus is emerging that 401(k) plans will not provide an adequate supplement to Social Security to the majority of American workers. In part, this is because too many people fail to contribute or to contribute enough to these plans, but it is also because many participants often make poor investment allocation decisions, and investment options often have high investment management and administrative fees. Finally, too many people consume assets before retirement, and in retirement often outlive their assets.

While it is important to make every effort to improve 401(k) plans in order to make them work better for current workers, it is also important to recognize that 401(k) plans were designed to be supplemental savings plans, not vehicles to provide adequate retirement income. And even the best of reforms will not address their structural flaws.

The financial crisis has highlighted the importance of guaranteed pension plans that provide secure lifetime payouts. But many companies are moving away from these plans, which place all of the responsibility and risk of retirement savings on employers. While we should do everything possible to preserve and strengthen these traditional and hybrid defined benefit plans for employees now covered by these plans, there is also an urgent need to develop new plan types that incorporate the best elements of defined benefit plans and 401(k) plans for workers not now covered by private retirement plans. For future workers, it is time to begin constructing a new model for ensuring retirement security.

A new system should reflect the fact that all taxpayers effectively pay for private and public retirement plans. The federal tax subsidy for pensions and retirement savings plans is more than \$100 billion this year. This tax subsidy is meant to encourage retirement savings for all working people, but most of the subsidy benefits affluent employees who will save for retirement even without tax incentives. Thus, lower-paid workers are, in effect, asked to pay more taxes to help higher-paid employees and business owners save for their retirement.

A new system should be developed on top of Social Security that is universal. Retirement money should be preserved for retirement (or disability). It should be pooled and professionally invested, and, in combination with Social Security, should provide adequate, secure lifetime payouts to retirees and their surviving spouses. There are elements of other systems that could be drawn on for inspiration for a new system, including the TIAA-CREF program for college teachers in this country, collective defined contribution plans used by a growing number of employers in the Netherlands, and Superannuation Funds in Australia. A thoughtful and focused

debate on how to better provide for our children's retirement should be the heart of retirement policy for the new Administration and the next Congress.

The new Administration should appoint a cabinet-level committee or presidential commission to examine how the current system is working and create new retirement system options for the next generation of American workers.<sup>1</sup>

***B. Authorize new plan designs that will appeal to both employers and employees, such as new approaches developed by the Conversation on Coverage.***

The regulatory and design fundamentals of current retirement plans reflect legal rules and principles that were developed during the early part of the last century in a different legal climate, with a layering of additional rules that reflect the real-world problems that the original rules encountered in the intervening decades. As a result, we have a helter-skelter array of retirement plan vehicles, none of which were designed with the needs of the current workforce and current employers.

The new Administration and Congress should consider new plan types to increase pensions and savings for workers not covered by any type of employer savings plan. This consideration should begin by focusing on models created by the Conversation on Coverage. The Conversation, a seven-year dialogue process among employers, labor organizations, financial institutions, retiree groups, consumer organizations and think tanks, produced common-ground templates for four new plans designed to be attractive to small- and medium-sized businesses, and to increase savings among employees:

- The **POPP** and **GAP** are plans designed to provide employer-paid, guaranteed pensions to employees, while providing predictability and simplicity to employers.
- The **Retirement Investment Account** plan offers a new government-sponsored clearinghouse structure to administer portable savings accounts.
- The **Model T Plan** is a new efficient and simple savings plan administered by financial institutions and designed for small businesses.

Regulations and legislation should be developed and supported to make these plans available.

***C. Expand and improve existing Simplified Employee Pensions (SEPs).***

The Internal Revenue Code permits employers to establish Simplified Employee Pension plans, or SEPs. These employer-paid plans are fair to employees, and are flexible and easy to administer for employers. They are particularly popular among small firms and the self-employed. There are, however, changes that could make SEPs even simpler for employers and more attractive to employees. These include changes that would bring SEP participation rules into conformity with those of other plans, allow employees to make tax-deferred contributions on a "reverse match" basis, and add protections for surviving spouses.

In addition, the tax rules for SEPs should be revised to encourage SEPs among household workers. Currently, households that employ domestic workers do not usually offer retirement

plans for their employees, in part because they cannot deduct contributions from their own employment income. The Internal Revenue Code should be amended to permit employers to deduct contributions for such workers to SEPs.

***D. Collect data critical for policy research and participants searching for “lost” plans.***

The primary vehicle used by the Labor Department, the Internal Revenue Service and the Pension Benefit Guaranty Corporation to collect data on the effectiveness of various retirement policies is the Form 5500, which plans use to report financial information. The current form does not elicit important information that would help evaluate current retirement policy and the efficacy of the law. The Form also does not gather information that might help participants track down their plans when businesses have changed their names, moved, merged or been bought or sold.

In recent years, changes have been made to the Form 5500, reducing the type of information that is collected. For example, the elimination of data was given as the reason for a major change in the definition of “active participant” in the Labor Department’s most recent *Private Pension Plan Bulletin: Abstract of Form 5500 Annual Reports*. Starting this year, “active participants” are defined as including all employees offered the opportunity to participate in a private retirement plan, rather than employees who actually participate. Since this Bulletin is heavily used by the media and policy makers, the change will significantly overstate the number of people participating in plans.<sup>ii</sup>

The new Administration should seek input from researchers and consumer groups on data to be collected in the Form.

## CONSUMER AGENDA FOR RETIREMENT SECURITY

### **Initiative #2: Empower Workers to Promote Their Own Retirement Security**

Working men and women are frequently frustrated by their inability to effectively claim their earned retirement benefits or to be heard in the public policy process. Many are unable to understand plan rules or successfully navigate plan procedures. If they try to enforce their rights in court, they encounter innumerable obstacles, and when they identify problems that should be addressed at a policy level, they do not know where to go. The following measures are designed to empower workers by providing them with better information and assistance, and better tools for interacting with their plans and pursuing their rights in the courts, while also giving them a voice in identifying problems with the system and shaping the direction of national retirement income policy. Some of these proposals can be implemented by government regulations or advocacy by government agencies in the courts. Others will require legislation.

#### ***A. Develop a package of legislative and regulatory proposals to level the playing field for participants in administrative and court proceedings.***

When Congress enacted ERISA, the private pension law, 34 years ago, it intended to create a fair dispute resolution system under which employees denied retirement or health benefits would have fair and impartial judicial consideration of their benefit claims and could be compensated for any losses caused to them by negligent or fraudulent behavior. Unfortunately, the federal courts have distorted the law's dispute resolution framework so that it tilts in favor of the employer. An executive at a large insurance company wrote an almost gleeful memo about the disadvantages participants in ERISA plans face. He wrote that "State law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review." This unfair system urgently needs repair. Here are some of the components of a legislative package:

##### ***(i) Adopt a de novo standard of review for benefit denials.***

Under present case law, when a participant challenges a benefit denial in court, the participant must show not only that the denial violated the terms of the plan, but that the plan's denial was arbitrary and capricious. This is patently unfair and is different than the rules that apply to virtually all other types of contractual disputes. Courts should rule for the participant when the participant is entitled to benefits under the terms of the plan.

##### ***(ii) Provide adequate remedies when participants suffer damages.***

In a series of cases, the Supreme Court has said that participants in retirement plans cannot receive normal contractual damages when they are wrongfully denied benefits and often cannot receive monetary relief when a plan fiduciary negligently or even intentionally injures them. Moreover, although section 510 of ERISA prohibits an employer from terminating or discriminating against an employee for the purpose of defeating the employee's rights under ERISA or to retaliate against the employee for exercising his or her rights under federal law, there are often no effective remedies for individuals. Some courts have said that ERISA prohibits a court from awarding back pay

in such cases even though this may be the only remedy that can make the employee whole. Legislation is needed to ensure that injured participants -- in benefit and fiduciary and section 510 claims -- have access to the same range of remedies that injured people have in almost every other type of civil action.

***(iii) Clarify the scope of ERISA's attorney's fees provisions.***

ERISA includes a provision allowing courts to award attorney's fees in civil actions. In other statutes, similar attorney's fee provisions have been understood to provide that fees should be awarded to prevailing plaintiffs in the absence of extraordinary circumstances. Such an approach to fees is especially appropriate under ERISA, where the failure to award fees translates into an effective reduction of a participant's retirement income, since the benefits will be reduced by the amount of the fee.

For inexplicable reasons, most courts have often refused to award fees to participants who prevail in a civil action unless the participant can show that the defendant acted in bad faith. In addition, courts have refused to award fees for attorney time at the important administrative appeal stage of a case. The Department of Labor should take on these two issues by issuing regulations on fees, filing briefs *amicus curiae* and seeking clarifying legislation.

***(iv) Redefine who is a "participant" for purposes of filing a lawsuit.***

ERISA provides jurisdiction for a participant to bring a civil action to recover benefits or to remedy a fiduciary breach. Some courts have held that individuals, who received their benefits from plans as lump sums, even though incorrectly calculated or later determined not to include the entire benefit, are no longer participants and thus cannot bring lawsuits. The Department of Labor can take on this issue by amending its regulations, by filing briefs *amicus curiae* and, if necessary, seeking clarifying legislation.

***(v) Ensure that participants have a reasonable period in which to file a lawsuit.***

ERISA provides no statute of limitations for benefit disputes, and courts have generally looked to state contract law. However, plans have increasingly been creating their own, short-fuse statute of limitation as a contractual term. Moreover, courts have sometimes held that the statute of limitations begins running as soon as a participant has reason to believe that the plan would reject his or her claim if presented. The law should establish a statute of limitations that plans cannot shorten and that does not begin running until a plan actually denies a claim

***B. Create a Participant Ombudsman Office within the Department of Labor.***

There currently is no proactive government office that serves as a resource and advocate for participants in the private retirement system. Such an office could work to study and identify policy and legal issues affecting participants, and could be a central clearinghouse for providing pertinent information and educational resources for participants. The office could be located in the Employee Benefits Security Administration of the U.S. Department of Labor, but its advisory role should also include recommendations to other government agencies related to the protection of rights of participants.<sup>iii</sup>

***C. Assure worker and retiree voices on government advisory councils.***

The private pension law, ERISA, established an Advisory Council in the Department of Labor comprised of 15 experts in employee benefit plans appointed by the Secretary of Labor to three-year terms. Of the 15 members, the statute requires that three positions are reserved for employers, three for employee organizations, and three for “the general public,” including one who represents the interest of persons receiving benefits from a plan. The remaining six members are to represent professionals who advise retirement plans and manage their assets.

During the last eight years, all three “general public” positions were filled by representatives of employers and plans. Plan participants have not had any representation on the Council. This has affected the choice of issues studied and the conclusions reached. The new Administration should ensure that the three general public positions represent employees, retirees and their families.

There are also advisory committees at the Internal Revenue Service and the Pension Benefit Guaranty Corporation. They also do not include representatives of participants and this too should be corrected.

***D. Expand the Administration on Aging’s (AoA) Pension Counseling and Information Program.***

The Administration on Aging currently supports Pension Counseling and Information Projects, which provide assistance to workers, retirees and their families on their employer-sponsored retirement plans and help resolving pension disputes. There are currently six regional projects that serve individuals in 27 states. The projects have been successful, recovering millions of dollars in benefits for thousands of participants. The program should be extended to 12 projects that cover all 50 states, the District of Columbia, and U.S. territories.<sup>iv</sup>

***E. Coordinate efforts among Department of Labor (DOL) field offices and AoA Pension Counseling Projects.***

The AoA pension counseling projects are designed to complement and provide different services than the Labor Department’s EBSA Participant Assistance and Outreach Program. However, because both programs provide advice and assistance to individuals, there have occasionally been problems of coordination. The Administration should direct the DOL and AoA to enter into a memorandum of understanding to ensure the most efficient use of resources to assist participants.

***F. Coordinate efforts between the Pension Benefits Guaranty Corporation (PBGC) and AoA Pension Counseling Projects.***

The Pension Benefits Guaranty Corporation does not provide counsel or other formal assistance to participants appealing a denial of their PBGC benefits. The AoA Pension Counseling programs can provide assistance to such participants. The Administration should direct the

PBGC and the AoA to enter into a memorandum of understanding to ensure that individuals have access to assistance when appealing a PBGC benefit denial.

***G. Establish a clearinghouse for lost retirement plans and for orphan plans.***

Because companies often move, change their names, or are bought and sold, a great many people have difficulty locating their plans when it comes time to apply for their retirement benefits. In addition, some plans are abandoned, when an employer goes out of business, particularly small employers whose owner may have relocated or died. When plans are “orphaned,” there is typically no one with authority to pay benefits. The Department of Labor has creatively addressed this issue by allowing “adopted” trustees to pay benefits, but the solution is not perfect and can be expensive. Moreover, orphan plans sometimes raise tax and PBGC issues. Congress should enact legislation authorizing the Pension Benefit Guaranty Corporation to (i) create a clearinghouse for difficult-to-locate plans and (ii) take over administration of orphan plans to ensure that all benefits are paid.<sup>v</sup>

***H. Give participants adequate explanations of benefit eligibility and calculations.***

Department of Labor regulations do not require that a plan explain how it calculated a particular benefit, so a participant sometimes has no easy way to determine whether a benefit calculation is correct. Although the ERISA claims procedure does require that any benefit denial be accompanied by an adequate notice setting forth the specific reasons for the denial, there is no requirement that the plan provide the documents on which the denial is based. Moreover, there is no generally enforced penalty when a plan fails to provide the explanation. At the same time, participants have just 60 days to appeal a claim’s denial, which can be impossible to do when the plan fails to provide an adequate explanation and the underlying documents.

The Department of Labor can remedy these problems by revising its claims procedure regulations to require that plans provide benefit calculations, including any worksheets, to all claimants and to specify the information that the plan must include in its explanation of a claims denial. The regulation should also require that the plan provide all supporting documents, relevant work records, and any internal or legal memorandum discussing the benefit denial. The appeals process should be extended to 120 days, as it was for health care claims, and the period should not begin until the participant has received the explanation and all relevant documents.

***I. Protect employees from unfair “recoupment” actions.***

Sometimes retirement plans miscalculate benefits and overpay participants. When a plan determines that it made an overpayment, it will generally attempt to recoup the overpayment by offsetting a participant’s future benefit payments by the overpayment. There are no clear standards limiting a plan’s authority to recoup overpayments and, as a result, plan practices vary. But some plans reduce benefit payments to zero until all overpayments are fully recovered. This can create severe hardship for retirees who are living on a fixed income. In addition, plans sometimes err when they claim they made overpayments, yet some plans fail to offer retirees an opportunity to contest whether they have, in fact, been overpaid.

The Department of Labor should promulgate regulations that (1) prohibit a plan from recouping benefits until the participant has had an opportunity to contest the plan's action under the plan's internal appeals procedure and in court; and (2) protect participants by mandating that overpayments be recovered over a period of no less than 10 years, similar to the procedures adopted by the Pension Benefit Guaranty Corporation for recovering overpayments.

## CONSUMER AGENDA FOR RETIREMENT SECURITY

### **Initiative #3: Improve Retirement Savings Plans**

#### ***Overview:***

Despite creating attractive new personal tax incentives for owners and managers of business to adopt and expand retirement plans for employees, the level of plan participation has stagnated for the past quarter-century. There are measures that can be taken to create new retirement plans, increase the level of participation in existing plans, and increase the rate of return on investments.

#### ***A. Require straightforward disclosure of all fees paid by 401(k) plan participants.***

In today's world of "do-it-yourself" retirement plans, working men and women must make decisions about whether to participate in a 401(k) plan and how to allocate their savings among the investment options offered by their plan. In order to make the right decisions they need to receive understandable and adequate statements about the administrative and investment fees they are being charged, as well as information about the levels of risk and rate of return offered by each investment offered by the plan. It is also essential that plan officials who choose the financial institutions and initial investment offerings have even more detailed information. To these ends, it is imperative that administrative and investment fees be separately stated rather than bundled together. The Department of Labor has proposed regulations on these topics, but they are inadequate and more worker-centered rules should be developed. This can be done by either regulation or by legislation.<sup>vi</sup>

#### ***B. Eliminate plan fees charged for approval of divorce court orders.***

Reversing a long-standing position of both Democratic and Republican administrations, the Bush Department of Labor issued a "field assistance bulletin" that allows a plan to reduce an employee's account balance for the fees that the employer or plan would otherwise have to pay when a participant gets a divorce and the state court orders a division of the participant's account. This can reduce retirement savings by a significant percentage. It was also wrong that the Department of Labor took this action, not by regulation, which would have engendered adverse public comment, but rather by a bulletin to its field personnel. The Department of Labor should rescind this bulletin.

#### ***C. Conduct a study on how to provide low-cost annuities for participants in 401(k) plans.***

Participants in defined contribution plans do not generally take benefits in annuity form and then find it virtually impossible to both invest and systematically draw down their savings in retirement. As a result, many participants outlive their retirement savings, which is a form of retirement plan leakage.

There are three reasons that participants do not take some of their benefits in annuity form: (i) few defined contribution plans provide an annuity option; (ii) participants do not understand the

advantages of annuities; and (iii) the private annuity market is expensive, especially for small annuities. This is a problem that should be studied by the Department of Treasury and the PBGC. Congress should also authorize the PBGC to offer participants in defined contribution plans the option to purchase annuities from it.

***D. Require timely distribution of benefits from 401(k) plans.***

Under current law, plans must make distributions from section 401(k) plans within a reasonable length of time after the participant requests distribution. Some plans, however, take several months before a plan pays the initial benefit distribution. The Department of Labor can begin a regulatory project to address this issue.

***E. Study ways of placing limits on the amount of employer stock held in 401(k) plans.***

Portfolio diversification is a core element of modern portfolio theory, yet ERISA permits employees to invest up to 100 percent of their account balances in employer stock. This defies the diversification principle in a particularly unfortunate way, since the employee's investment capital and employment security are commonly invested. Defined benefit plans are not permitted to hold more than 10 percent of their assets in employer stock and there is a question as to why similar limits should not be imposed on defined contribution plans. While this issue is complex, the Department of Labor should make legislative recommendations on how to appropriately limit investments in employer stock.

***F. Bar potentially conflicted investment advice.***

Between its enactment in 1974 and 2006, ERISA absolutely barred the vendors of investment products (such as shares in mutual funds) from providing employees with investment advice. The potential conflicts of interest were simply too strong to trust investment advice that emanated from such vendors.

In 2006, after almost a decade of debate, Congress enacted two limited exceptions to this prohibition, which permitted conflicted vendors to provide investment advice, which were designed to limit the effect of conflicts. One of the exceptions allowed conflicted parties to give advice if fees were leveled, i.e., the fiduciary did not make extra fees by recommending a particular investment. The other exception required the use of a computer model to generate recommendations.

The Department of Labor issued proposed regulations that in some cases will limit the fee-leveling inquiry to the division or subsidiary of a mutual fund company that is providing the advice, even though the mutual fund company itself will earn more fees from particular investments. In addition, the Department of Labor issued a class exemption that will allow conflicted investment advisers to give any advice so long as the participant "requests" further advice after being furnished computer-generated advice.

The regulations and class exemption go beyond what Congress intended and do not offer participants adequate protection from conflicts. The class exemption should be withdrawn and

the Administration should proposed amendments to the law that would appropriately limit the provision of investment advice by conflicted parties.

***G. Require spousal consent before cash-out of 401(k) accounts and IRAs.***

Workers can cash out their 401(k)-type accounts when they leave the job without obtaining the permission of the spouse. The law should be changed so that defined contribution plans contain the same protections as pension plans, which require spousal consent for any rollover or cash-out.

***H. Extend and expand the Saver's Credit to help lower-income workers.***

Current law provides a credit for low- and low-moderate income workers who contribute to a 401(k) plan or an individual retirement credit. The credit, however, is non-refundable, which limits its effectiveness. Moreover, the credit, which starts at 50 percent of the amount contributed, but the credit declines to 10 percent for individuals whose income is between \$17,000 and \$26,000. The credit should be made refundable and the income limits for the most generous credit should be expanded.

***I. Allow active duty military and National Guard members to contribute to their 401(k)s.***

Under current law, military personnel who are called into active service are under certain circumstances given the right to return to employment and, if they return, they are provided with the benefits they would have attained but for their military service. This provision works reasonably well with defined benefit plans but many employees participate in 401(k) plans, where they have to make individual contributions.

In addition, military personnel can contribute to the federal thrift savings plan, but generally do not receive matching contributions.

The law should be amended to permit reserve and National Guardsmen called up to active duty to have a choice of making contributions to their 401(k) plans or the federal thrift savings plan while on active duty, with the military making matching contributions equal to the first three percent of pay.

***J. Allow caregivers on family and medical leave to contribute to their 401(k)s.***

Length of service determines when an employee can join a plan, when the individual becomes vested, and when benefits may be paid. On average, women have fewer years in the labor force than men, primarily because women are more likely than men to take time out under the Family Medical Leave Act for child-rearing and other care-giving responsibilities. This can impede women's ability to satisfy plan vesting and eligibility requirements. Workers who take time off under the FMLA should be allowed to count that time toward meeting vesting and service requirements. The availability of family leave and the mandate to credit service during that leave would better suit care-giving needs. In addition, plans should allow workers to purchase benefit accruals lost during the time away from employment.

## CONSUMER AGENDA FOR RETIREMENT SECURITY

### **Initiative #4: Improve Traditional and Hybrid Pension Plans**

**Overview:** The recent financial crisis has demonstrated the value of defined benefit plans, which provide participants with guaranteed benefits, typically paid in annuity form. While participants in defined benefit plans continue to enjoy the promise of their guaranteed benefits, participants in defined contribution plans have lost as much as a third of their retirement savings in the last few months. This is especially devastating to retirees and to working men and women close to retirement age.

However, there are too many gaps in the current law that permit employers to rescind promises or that fail to protect employees' reasonable expectations of benefits. There are also measures needed to encourage companies to preserve their defined benefit plans. Hence, we need to both preserve defined benefit plans and to protect workers' reasonable benefit expectations.

#### ***A. Protect earned pension benefits when companies are bought and sold.***

Older employees can lose valuable earned benefits, particularly subsidized early retirement benefits, when the company or division they work for is merged into or acquired by another entity, even though they are doing exactly the same work they did before, often at the very same desk in the very same location. This can reduce an employee's benefit by as much as 65 percent. The employee's benefits should be fully protected in such situations, so long as they continue to work for the new entity and satisfy the conditions for the benefit.

#### ***B. Protect earned pension benefits in bankruptcy proceedings.***

Companies that enter bankruptcy can escape their pension liabilities by terminating the plan. In such cases, those benefit liabilities that are guaranteed under Title IV of ERISA are transferred to the Pension Benefit Guaranty Corporation. The PBGC guarantees are subject to dollar limits and also do not cover certain types of plan benefits. Individuals should be permitted to bring claims in bankruptcy against their employer for unfunded benefits that are not guaranteed by the PBGC.

In addition, under the Pension Protection Act of 2006, a plan's termination date is the date an employer enters bankruptcy proceedings, even if the actual plan termination is not until much later. This PPA provision should be reversed.

#### ***C. Protect earned pension benefits when multiemployer plans become underfunded.***

ERISA and the Internal Revenue Code protect already-earned benefits, including subsidized early retirement benefits, which for many employees are a particularly valued and valuable benefit. The Pension Protection Act provides that a multi-employer plan is *prohibited* from paying these already-earned benefits if the plan falls below a statutory funding target. This is a departure from the philosophy that underlies ERISA, namely that once a benefit is earned, it cannot be taken away. The PPA should be amended to eliminate this unfair provision and restore the statute to one that protects rather than eliminates already-earned benefits.

***D. Protect promised future benefits when single employer plans become underfunded.***

The Pension Protection Act of 2006 provided for a benefit freeze for any plan whose funding level falls below 60 percent. This essentially rewards employers, and penalizes employees, for the employer's failure to fund the plan adequately, and is an effective freeze of the plan. Moreover, this provision does not necessarily help the plan, since the employer is required, in any event, to fully fund new benefit accruals in the year they are earned. Congress should repeal the PPA provision.

***E. Rescind new interpretive bulletins on economically targeted investments and voting proxies.***

The Labor Department recently rescinded and replaced two long-standing interpretive bulletins providing guidance on the responsibilities of fiduciaries when making economically targeted investments and voting proxies. While the new bulletins did not substantively change the interpretation of ERISA's requirements, their more negative tone could have a chilling effect on plans' activities in these areas. The new bulletins should be rescinded.

***F. Allow former spouses to collect benefits when the worker is eligible, regardless of whether the worker actually retires.***

Both the federal civil service retirement programs (CSRS and FERS) do not permit former spouses to commence distributions of their court-awarded shares of benefits until the worker actually retires. Workers may continue working past normal retirement age for a variety of reasons, but the former spouses should not be forced to wait without retirement income until the worker retires. Once the worker is eligible to retire and collect benefits, the former spouse should be eligible to collect her share, regardless of whether the worker actually retires.<sup>vii</sup>

***G. Restore more realistic funding requirements for ongoing pension plans.***

Congress amended the pension funding rules for defined benefit plans to impose more accelerated funding requirements on employers. More particularly, funding shortfalls now generally have to be amortized over a seven-year period. In effect, this can mean sudden and unpredictable funding obligations, which might lead some employers to decide to terminate or freeze their defined benefit plan. This burden on budgeting for cash flow can be eased by extending the amortization period to 10 years.

***H. Link executive and rank-and-file employee retirement benefits.***

Corporations have increasingly been putting management employees on a separate and superior retirement track than rank-and-file workers by providing such employees with non-qualified deferred compensation plans, which can provide executives and other favored, highly paid employees with benefits without providing similar benefits (as a percentage of pay) or sometimes any benefits for other employees. Employers should not be permitted to provide such

Cadillac non-qualified benefits for a few employees without providing at least some Ford and Chevy benefits for all employees.

Moreover, some businesses have terminated or frozen defined benefit plans for rank-and-file employees but continue to provide extraordinary benefits for their senior management. Congress should enact legislation to address these issues, including (i) a provision that freezes executive deferred compensation when a business freezes its defined benefit plan; and (ii) a provision that does not allow a business to use one benefit formula for rank-and-file employees and another for management employees.

***I. Extend insurance and anti-forfeiture protections to plans related to religious institutions.***

Congress exempted from ERISA “church” plans so that the government does not become entangled in the compensation arrangements between a church and its clergy. However, the Department of Labor has extended the church exemption to plans for employees of hospitals, educational institutions, and even tourist attractions that are affiliated with a church, even though these institutions primarily provide services that are provided by secular institutions. There is no reason that rank-and-file employees of such entities should not have the same protections as other employees.

***J. Fix the rules that allow executives to use rank-and-file pension plans to enrich their own retirement.***

Pension designers have also been able to exploit aspects of the 1992 nondiscrimination regulations to create separate, valuable benefits in defined benefit plans for a handful of key executives by using Q-SERPS, Qualified Supplemental Executive Retirement Plans. Sometimes these benefits are in otherwise frozen plans, where few other employees are earning any new benefits at all (and only managerial employees are earning more than trivial benefits). The Department of Treasury can again undertake a new regulatory project to end this abusive practice.

## CONSUMER AGENDA FOR RETIREMENT SECURITY

### **Initiative #5: Make retirement plans fairer for workers and their spouses**

#### ***Overview:***

Qualified retirement plans enjoy a tax subsidy, which is weighted to higher-earning employees. The purpose of the tax subsidy is to spur high-income people -- who are either the owners of a business, managerial employees, or others in a position to influence compensation policy -- to encourage their employers to sponsor retirement savings plans so that they can benefit from the tax subsidy. Once a plan is in place, however, there are rules to ensure that comparable benefits are provided to rank-and-file employees. These are called the non-discrimination rules. These rules are important both substantively, since they are the primary means of helping middle- and lower-income people prepare financially for retirement, and symbolically, by enforcing the policy that financial security in retirement is for everyone, not just the well-heeled. This idea has been seriously eroded over the last decade and needs restoration.

#### ***A. Require 100 percent coverage of all employees in a single line of business.***

Current law permits employers to exclude large swathes of employees from plan participation, for almost any reason. Congress should require 100 percent coverage of all employees in a single line of business who otherwise satisfy age and service requirements. This should include employees who work at least 500 hours per year.

#### ***B. Repeal Social Security integration.***

Employer-provided retirement plans often account for Social Security in their benefit formulas -- a practice known as integration -- thereby reducing pension benefits to account for employer contributions to Social Security. Pension benefit reductions due to integration make it more difficult for lower-income workers to attain retirement income security. The practice of Social Security integration whittles away the already precarious three-legged retirement stool by essentially melding Social Security with pension plans. The majority of the workers impacted by Social Security integration are lower-paid workers which are often women. Eliminating Social Security integration will strengthen the three-legged stool of retirement by ensuring that Social Security and employer sponsored retirement plans remain separate but important elements of an adequate retirement.

#### ***C. Fix non-discrimination rules: end new comparability plans.***

In 1992, the Department of Treasury promulgated comprehensive regulations on non-discrimination. Consultants to employers were able to apply the letter of these regulations while distorting their spirit to create retirement plans where the most affluent employees were able to earn benefits that were more than 500 percent larger as a percentage of pay than the benefits of most rank-and-file employees. The Department of Treasury promulgated regulations that whittled away at the edges of the most abusive practices, but the Department of Treasury should undertake a new regulatory project to create better benefit parity.

***D. Ensure that participants can rely on written benefit statements.***

Some courts have held that participants cannot rely on benefit statements prepared by a plan, even though the participant made important work and retirement decisions based on such benefit statements. The justification for these holdings is that benefit statements are not part of the plan and that plan officials have to follow the terms of the plan. Whether the benefit statements are part of the plan or not, participants should be able to rely on formal, written statements provided to them by the plan in making their decisions. Congress should enact legislation that holds plans to representations they make to participants who rely on those representations.

***E. Clarify the effects of phased retirement on participant benefits.***

Employees sometimes move from full-time to part-time work as they get older as a means of phasing into retirement. The move into part-time work, however, can result in a reduction of previously earned benefits in a plan that bases benefits on final pay. Congress should enact legislation to make clear that a participant's benefits cannot be reduced because of the decision to work part-time.<sup>viii</sup>

***F. Overturn IRS regulations allowing for electronic waiver of important spousal benefits.***

In 2006, the IRS issued regulations allowing for pension plan participants and their spouses to electronically consent and waive rights to survivor benefits and other benefit options. Under the regulation, a spouse may sign a waiver giving up all rights to a survivor benefit in the presence of a notary using electronic means such as an electronic pad to sign. The electronic pad may produce a signature that is not usable for a future independent authentication should the waiver be challenged. Furthermore, given the importance and long-lasting consequences of waiving rights to survivor benefits, such benefit decisions should only be made in a form that makes the document available for future independent authentication, such as the traditional pen to paper.

***G. Protect former spouses of federal workers.***

The Office of Personnel Management which administers the Civil Service and Federal Employees Retirement systems does not generally permit the resubmission of domestic relations orders that have been modified and will not accept court orders that are issued beyond certain time periods. The Administration should direct the Office of Personnel Management to accept domestic relations orders regardless of when they are issued and to accept modifications of such orders. Also, the unnecessary notice deadline should be removed for special survivor annuity benefits based on marriage prior to 1984 for spouses who otherwise meet the substantive requirements.

***H. Preserve pre-retirement death benefits for surviving former spouses.***

A Qualified Pre-Retirement Survivor Annuity (QPSA) pays a life benefit to a surviving spouse or former spouse in the event the worker dies before reaching retirement age. Currently plans refuse to provide a QPSA to a surviving former spouse if he or she is not a named beneficiary,

even if no other beneficiary was named by the worker and the money would otherwise revert to the plan. A surviving former spouse should be entitled to receive the QPSA if the worker never designated another individual as the beneficiary, the plan has no QDRO on file, and the employee never remarried.<sup>ix</sup>

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<sup>i</sup> A Cabinet-level committee appointed by President John F. Kennedy in 1962, called the Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, provided study of the issues which ultimately helped lay the groundwork for later passage of the private pension law, the Employee Retirement Income Security Act of 1974. The President's Commission on Pension Policy, created by President Jimmy Carter in 1978, laid the groundwork for major reforms enacted by Congress in 1982, 1984 and 1986.

<sup>ii</sup> See <http://www.dol.gov/ebsa/PDF/2005pensionplanbulletin.PDF>, p. 5 of the PDF

<sup>iii</sup> Senator Tom Harkin (D-IA) has introduced the Restoring Pension Promises to Workers Act of 2007 (S. 1725), which would set up an office of Pension Participant Advocacy. There have been past stand-alone bills on this as well.

<sup>iv</sup> The Older Americans Act (42 U.S.C.A. § 3020e-1) authorizes the AoA to award grants to create or continue a sufficient number of projects to assist, and inform "individuals in the United States." The language leaves open the possibility that with sufficient funding the program can be nationwide.

<sup>v</sup> Under the Pension Protection Act of 2006, the PBGC is charged with accepting transfers of accounts of participants that the plan cannot locate. But this provision does not fully address the problems of orphan plans and participants who cannot locate their plans.

<sup>vi</sup> The Department of Labor regulations, among other problems, allow disclosure to aggregate administrative and investment fees, which investment professionals reject as failing to provide necessary information. The regulations also have additional problems, including a presentation format and vocabulary that will reduce accessibility for many plan participants. Congressman George Miller has introduced the Fair Disclosure for Retirement Security Act (H.R. 3185), which would require unbundled disclosure of fees to participants in 401(k) plans. Critical comments on the Department of Labor's proposed regulations can be found at <http://www.dol.gov/ebsa/pdf/cmt-10170830-ex.pdf> (Congressmen George Miller and Rob Andrews); <http://www.dol.gov/ebsa/pdf/cmt-10170822-ex.pdf> (Pension Rights Center); <http://www.dol.gov/ebsa/pdf/cmt-10170820-ex.pdf> (AFL-CIO); <http://www.dol.gov/ebsa/pdf/cmt-10170818-ex.pdf> (AARP); <http://www.dol.gov/ebsa/pdf/cmt-10070818.pdf> (Cornell University School of Law Legal Clinic); <http://www.dol.gov/ebsa/pdf/cmt-10170810-ex.pdf> (Consumer Federation of America).

<sup>vii</sup> The Restoring Pension Promises to Workers Act of 2007 (S. 1724, sec. 202 introduced in the 110<sup>th</sup> Congress) included a provision allowing former spouses to collect court awarded benefits once the worker is eligible to retire, regardless of whether he actually retires.

<sup>viii</sup> For example, an employee might work in a plan that provides a benefit equal to one percent times years of service times final pay. Assume an employee who has worked 20 years and is earning \$50,000 annually. The employee's annual retirement benefit would be \$10,000. But if the employee takes part-time status and now earns half that amount, her benefit after one year would be 21 percent of 25,000, or \$5,250, an almost 50 percent benefit reduction because the employee changed to part-time work.

<sup>ix</sup> Treasury regulation 26 CFR Section 1.401(a)-20, Q&A 25 (b)(3) already provides this protection, but plans have taken the position that it does not mean what it clearly says. A provision clarifying the regulation's intent was included in the Women's Pension Protection Act of 2003 (S. 1617, sec. 202, introduced in the 108<sup>th</sup> Congress).