Testimony of
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Subcommittee on Health, Employment, Labor, and Pensions
Hearing on “Enhancing Retirement Security:
Examining Proposals to Simplify and Modernize Retirement Plan Administration”

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Chairman Walberg, Ranking Member Sablan, and Members of the Subcommittee, I appreciate the invitation to appear before you today to discuss the important topic of enhancing retirement security,[1] and applaud the bipartisan spirit in which the Subcommittee is approaching its work on this traditionally bipartisan issue.

As requested, I am pleased to assist the Subcommittee in examining four specific legislative proposals to enhance retirement security by simplifying and modernizing retirement plan administration. Accordingly, my testimony today will consider each of those proposals in turn. The first two proposals discussed here (open multiple employer plans and the fiduciary safe harbor for selection of lifetime income providers) are included in the Retirement Enhancement and Savings Act of 2018 (“RESA”), introduced in the House by Mr. Kelly and Mr. Kind as H.R. 5282, and in the Senate by Senate Finance Committee Chairman Hatch and Ranking Member Wyden as S. 2526.

H.R. 854, “Retirement Security for American Workers Act” -- Multiple Employer Plans (“MEPs”) With Pooled Plan Providers

H.R. 854, sponsored by Mr. Buchanan and by Mr. Neal, Mr. Renacci, and Mr. Kind, would amend the Internal Revenue Code (“Code”) and the Employee Retirement Income Security Act of 1974 (“ERISA”) to expand coverage. The bill would amend ERISA to eliminate the current prohibition on establishment of a single multiple employer defined contribution plan by employers that have no prior common interest or nexus unrelated to the provision of benefits (often referred to as “open MEPs”). The bill would permit such open MEPs that meet certain conditions to be treated as a single plan under ERISA rather than as multiple plans. The bill also would amend the Code to protect open MEPs as well as closed MEPs (plans in which the participating employers do have a common bond) from the risk that one employer’s failure to comply with the plan qualification rules would taint the qualified status of the entire multiple employer plan.

[1] The author is testifying only on his own behalf, not on behalf of any organization or other person. Accordingly, the views expressed in this testimony are solely those of the author and should not be attributed to any organization or other person.

By removing these two barriers to the adoption and use of MEPs, and by seeking to improve the quality of MEP service providers, the bill is intended to make it easier for unaffiliated smaller employers to adopt a plan by joining together to do so. This should provide the opportunity to realize greater efficiencies and economies of scale in investment, plan management, and administration, potentially including lower costs and more attractive plan designs. As a result, smaller employers unprepared to adopt a retirement plan on their own might be encouraged to do so in cooperation with others and with the assistance of a professional administrator that assumes many ERISA and Code compliance responsibilities.

The bill would require open MEPs to adhere to a variety of appropriate safeguards. The organizing and administering third-party entities ("pooled plan providers") would be required to register with the Departments of Labor and the Treasury and would be treated as plan administrator and named fiduciary. Participating employers generally would not have fiduciary responsibilities except to appoint and monitor the pooled plan provider and any other plan fiduciaries. They could avoid fiduciary responsibility for investment of plan assets for their employees by delegating that investment management responsibility to the pooled provider or another fiduciary. In addition, as an alternative to a qualified defined contribution plan, a MEP could consist of a group of IRAs.

From a policy standpoint, if the Subcommittee wishes to consider possible improvements to the bill, I would raise several possibilities – but only if adding them to the bill during the legislative process would not have the effect of jeopardizing or unduly delaying potential passage of the RESA legislation that includes this bill.

The bill's ERISA and Code provisions mirror one another to a considerable extent. They provide for registration of pooled providers with both the Labor Department and the Treasury Department and provide for both Departments to have authority to issue guidance, conduct investigations, and manage the process of dealing with possible compliance failures by individual employers. It would be helpful for the legislation to better coordinate and allocate the two Departments' responsibilities and activities, requiring them to maintain consistency in order that the regulatory arrangements be workable and not unnecessarily burdensome for participants, employers, and providers.

Another potential improvement would be language making clear that the open MEPs could include not only multiple IRAs but also multiple unaffiliated self-employed individuals sponsoring qualified plans that might be exempt from ERISA if no employees were covered and that might require the Treasury Department to clarify how the tax qualification rules would apply in such a case.

Additional provisions also might be considered to target the open MEP provisions to encouraging new coverage among small employers that do not sponsor a plan rather than replacing current plans. If desired, such provisions could include a condition that participating employers not have maintained a qualified plan within the previous three years and could include limitations on the size of participating employers at the time they join the open MEP.

I raise these possibilities in response to the Subcommittee's request for assistance in examining this and three other bills at this hearing. However, in my view, the current proposed open MEP legislation is important and sound policy. Accordingly, as noted, I believe it would be advisable to avoid consideration of any additional provisions such as those referred to here (or in the next section regarding the ERISA fiduciary safe harbor) if the result of that process would be to jeopardize or unduly delay passage of the RESA legislation.

H.R. 4604, "Increasing Access to a Secure Retirement Act of 2017" (Fiduciary Safe Harbor for Selection of Lifetime Income Provider)

H.R. 4604, sponsored by Chairman Walberg and Ms. Blunt Rochester, would amend ERISA to provide ERISA-governed defined contribution plans a fiduciary safe harbor for the selection of a lifetime income (annuity) provider. As included in the proposed RESA legislation, this provision is intended to remove what is perhaps the single most frequently cited impediment to the inclusion of lifetime income options in defined contribution plans – the fear of fiduciary liability for selection of the provider.

The inclusion of lifetime income options in defined contribution plans is an important objective. Fortunately, life expectancy in the United States generally has been increasing over the years; but the blessings of a long life present financial challenges. Some underestimate how long they will live, focus on average life expectancy without sufficiently taking into account their even chance of outliving it, or otherwise neglect to plan for the prospect of many years in retirement. Many find it difficult to devise and adhere to a methodical plan for managing retirement assets over an uncertain, and potentially long, time horizon. Others, fearful of exhausting their savings, may unnecessarily restrict their spending and standard of living in retirement. The problem of managing longevity risk is particularly salient for women, who generally have longer live expectancies than men.[2]

Traditionally, the most complete solution to the problem of managing savings to ensure a lifetime stream of income has been to protect retirees from outliving their assets through the use of guaranteed lifetime income, such as a defined benefit pension.

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[2] Most of the material in this paragraph and the following paragraph is drawn verbatim (or nearly so) from the author's June 16, 2010 testimony (then representing the U.S. Treasury Department) before the Senate Special Committee on Aging iregarding "Lifetime Income Options for Retirement". During the period 2010-2016, the author, as Senior Advisor to the Secretary of the Treasury, helped to lead a joint effort by the Department of the Treasury and the Department of Labor to encourage more lifetime income options in the nation's private retirement system. In this context, the author directed an effort at the Treasury Department during that period to reduce or eliminate impediments to offering and selecting lifetime income options, such as annuities, in 401(k) and other defined contribution retirement plans, as well as defined benefit plans and IRAs. Among other guidance, this work included regulations permitting qualified longevity annuity contracts ("QLACs") in retirement plans and IRAs; guidance facilitating the inclusion of deferred annuities in 401(k) plans, including within target date funds that are offered as a QDIA default investment in a 401(k), and guidance encouraging the offering of partial annuities in defined benefit pension plans.

Another option has been a commercial annuity provided through a defined contribution plan, an IRA, or otherwise. Annuities and other lifetime income arrangements are designed to make predictable payments for as long as annuitants are alive. Yet over the years the use of lifetime income streams in retirement plans has declined, in part because of the shift away from defined benefit pensions and the increased incidence of lump sum distributions from plans of all types. More recently, with roughly 11,000 baby boomers retiring every day and the accumulation of considerable assets in our private pension system, the question of how to manage savings during retirement (the "decumulation" phase) and how to manage longevity risk has taken on an increasingly high priority.

For years, plan sponsors and others have asked for a fiduciary safe harbor to give them greater confidence that they can protect themselves from fiduciary liability for an ERISA prudence violation in selecting lifetime income providers for defined contribution plans. This is not the only barrier to the expanded offering and use of retirement income in 401(k) plans, but it is the most salient. Accordingly, it is important that Congress enact an effective and appropriate ERISA fiduciary safe harbor for lifetime income.

I believe there is broad agreement that an ERISA fiduciary annuity safe harbor provision, such as the one included in RESA (S. 2526 and H.R. 5282) and in H.R. 4604, is intended to provide fiduciary relief and a measure of certainty for defined contribution plan sponsors with respect to the selection of the lifetime income (annuity) provider. It is intended to be limited to the selection of the annuity provider (insurer), not to apply to the selection of annuity contracts or their terms (such as the type, design, or features of the annuities or their cost).

Reflecting this intent, the lead-in language of the RESA safe harbor provision (section 204 of RESA adding ERISA section 404(e)) begins with the words "With respect to the selection of an insurer *for* a guaranteed retirement income contract, . . .". (Emphasis added.) By contrast, the corresponding provision of H.R. 4604 reads, "With respect to the selection of an insurer *and* a guaranteed retirement income contract, . . .". (Emphasis added.) The change from "and" to "for" was recently made in RESA to clear up what I understand was an unintended ambiguity, and the same change should be made in H.R. 4604. (In addition, a helpful conforming change in both RESA and H.R. 4604 would be to revise the heading of new ERISA section 404(e) (which currently reads "Safe Harbor for Annuity Selection") to conform to the heading above it ("Fiduciary Safe Harbor for Selection of Lifetime Income Provider") by revising the heading of new ERISA section 404(e) to read "Safe Harbor for Selection of Lifetime Income Provider" or "Safe Harbor for Selection of Insurer".)

H.R. 4610, "Receiving Electronic Statements to Improve Retiree Earnings Act"

H. R. 4610, sponsored by Mr. Polis and cosponsored by a number of other Members, would amend ERISA and the Code to expand electronic delivery of pension plan information to participants with a view to improving many participants' access to more timely information, investment advice, and online tools, reducing administrative costs, and taking advantage of the various opportunities provided by electronic communication media.

Under the bill, a document, report, statement, notice, or other information that a retirement plan is required to provide to participants, beneficiaries, or other individuals may be provided electronically if certain conditions are satisfied. One set of conditions requires that the plan's system for providing the information be "designed to result in effective access" to the information by the individual through electronic means. This includes

- the direct delivery of information to an electronic address of the individual,
- the posting of information to a website or other electronic repository to which the individual has been granted access, provided that proper notice of the posting has been provided (and this can include notice provided by other electronic means if the notice conveys the need to take action to access the posted information), and
- other electronic means "reasonably calculated to ensure actual receipt" of the information by the individual.

The system for providing the information also needs to permit the individual to select among the specific electronic means made available for providing the information and to modify that selection at any time, or to elect at any time to start receiving the information on paper at no additional direct cost to the individual.

The system for providing the information also needs to protect the confidentiality of personal information relating to the individual's accounts and benefits.

A second set of conditions requires the plan to provide each individual with an annual paper notice that describes the individual's selection of the specific electronic means for providing the information in effect at the time the notice is provided, the right to modify that selection at any time or to elect at any time to receive information on paper at no additional direct cost, and how to make such an election.

A final set of conditions requires the electronically provided information to be prepared and provided in a manner consistent with the style, format and content requirements that apply to the particular information, and to include a notice informing the individual of the significance of the document when not otherwise reasonably evident.

The bill provides that it is not intended to prohibit the provision of information electronically under any pre-enactment law or regulations or guidance or to prohibit the Departments of Labor or the Treasury from prescribing other methods for furnishing documents that they deem necessary or appropriate.

A variety of potential improvements to proposed legislation relating to electronic delivery have been suggested, discussed, and debated within the retirement community. These ongoing discussions have sought to balance the advantages of expanded availability of electronic communications with the importance of protecting, consistent with ERISA, the many participants, beneficiaries, and other individuals who prefer paper disclosures, often because they lack sufficient access to or facility with electronic information delivery systems.[3]

While there is considerable common ground, various challenging issues and tradeoffs remain to be resolved. These include how best to structure default arrangements and participant "choice architecture" so as to achieve legitimate and important competing goals relating to consumer protection, compliance with ERISA and plan qualification rules, cost savings (including the possibility that some of the savings will accrue to participants), efficiency, innovation and enhanced communication features, simplicity, timeliness, convenience, and user-friendliness. User-friendly arrangements encouraging and supporting thoughtful decision processes for participants present particular challenges given diverse populations: many plan participants have strong preferences for paper communications, for electronic communications, or for both.

Among various electronic-disclosure issues that will be important to work out in the legislative process are the following:

- Can a system that would automatically enroll participants into electronic disclosure (like H.R. 4610) provide sufficient practical safeguards to protect those who do not typically work with computers and who need or prefer paper disclosure instead of or in addition to E-disclosure? Given the importance of plan communications, how to frame specific statutory provisions that would ensure that those who have not opted out have in fact exercised meaningful, informed consent?

- Are participant preferences for paper too widespread and deep-seated, and is the need to protect each participant in this regard too important, to justify the use of automatic enrollment into E-disclosure even if most participants in a given plan prefer electronic disclosure?

- The bill does not require that plans use email addresses provided by participants to ensure that participants are in fact aware of the email addresses and would find them sufficiently convenient. If participants consenting to electronic disclosure are not asked to provide their own email address to the plan, concerns have been raised about how participants can be adequately protected when email addresses are assigned to them by the plan, given the risks that participants will not know about or keep those or will not find it convenient to use them. Can a sufficiently protective and workable system be devised?

[3] See, e.g., Written Statement of AARP Before the ERISA Advisory Council on Mandated Disclosure for Retirement Plans: Enhancing Effectiveness for Participants and Sponsors (June 6, 2017) reporting on surveys of consumers indicating that substantial majorities expressed preferences for paper over electronic disclosures and stated that they were more likely to read and save paper documents.

- Consistent with appropriate security, how can a statutory scheme ensure that participants will be adequately protected from practical barriers to accessing websites or other E-repositories where there are sufficiently many steps, clicks, passwords, security questions, etc. to frustrate their efforts to connect (or to opt into paper disclosure)?

- The bill provides for annual paper disclosure of participants' elections regarding paper or electronic disclosure. What are the reasons for not combining this information in the annual paper statement with the most crucial information about the participant's benefits and status under the plan?

- Do mobile smart phones or other small, hand-held devices present special concerns, and are any special safeguards or backup arrangements needed, if the plan is aware that those are the only means by which participants are receiving or sending plan and benefit information, given the kinds of complex analyses, comparisons, and financial decisions that participants might wish to make at various times?

- Where important plan information is maintained on websites, arrangements still need to be worked out to provide for meaningful compliance, in an electronic plan environment, with ERISA's recordkeeping retention requirements and with participants' long-term need for plan and benefit information. This includes measures to address the risk that important plan and benefit information will no longer be readily accessible to participants as time passes and employers are acquired, go out of business, change their names, locations, or website arrangements, or as employees change jobs, lose user names and passwords, etc. Electronic retention of information presents new challenges in such circumstances, and solutions will need to be developed (perhaps including archiving of information under the supervision of the Labor Department or in some other secure central retirement "lost and found" or other repository).

With further work and dialogue among Members of this Subcommittee and Committee, other Members of Congress, the Executive Branch, and participant and stakeholder representatives, I believe that the necessary progress can be made to reach a reasonable, appropriate, and bipartisan resolution of the outstanding issues in this area.

H.R. 4158, "Retirement Plan Modernization Act"

H.R. 4158, cosponsored by Chairman Walberg and Ranking Member Sablan, would amend ERISA and the Code to increase, from $5,000 to $7,600 (indexed for inflation), the amount of vested benefit a pension plan may distribute without the consent of the participant. Under current law, if participants in a retirement plan governed by ERISA or tax-qualified under the Code leave employment with the plan sponsor and do not specify how they wish their benefits to be distributed, the plan generally is required to retain the benefits for the participant. If the value of the benefit does not exceed $5,000, the plan may distribute the benefits without participant consent, but, in the case of a qualified plan, only by rolling the benefits over to an IRA established for the benefit of the participant and informing the participant of the ability to transfer the benefits to another IRA. (As an exception, if the vested benefit does not exceed $1,000, the plan may cash out the benefit to the participant instead of being required to roll it over to an IRA.)

The bill would increase the $5,000 limit to $7,600 and index it for inflation.

In examining this proposed legislation, it is worth noting that current law is generally intended to help preserve retirement benefits in plans and discourage pre-retirement cashouts and consumption. When I served as the U.S. Treasury Department's Benefits Tax Counsel in 1995-2001, my staff and I developed the automatic rollover legislative proposal (a concept originally suggested by the ERISA Advisory Council), which was included in the then administration's budget proposals and was enacted by Congress in 2001. The automatic rollover provision makes it more likely that terminating participants' benefits will be rolled over to IRAs, and thus preserved to continue accumulating in tax-favored retirement vehicles, instead of being cashed out and consumed. In many cases, though, terminated vested participants will be better off keeping their benefits in an employer-sponsored plan (with ERISA fiduciary oversight, economies of scale that often result in lower expenses, and professional investment guidance) than in an IRA, although this depends on the specific circumstances, including the relative level of expenses. In addition, terminated vested participants might also be more inclined to withdraw and spend benefits from an IRA than from an employer plan, although this too is not necessarily the case. In some instances, expenses in plans can exceed expenses in IRAs, and in some cases, participants may be better able to keep track of their benefits in an IRA than in a former employer's plan.

Raising the $5,000 limit to $7,600 would reduce participants' range of choices: a plan sponsor would be able for the first time to preclude terminated vested participants who have benefits in that dollar range from keeping their benefits in the plan. A related issue is that automatic rollover IRAs generally are invested, in accordance with Department of Labor safe harbor regulations for automatic rollovers, in principal preservation assets. Because earnings on these investments often fail to cover the administrative costs of maintaining the IRA, many of these IRAs are shrinking in value,[4] and additional automatic rollovers would increase the number of these accounts.

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[4] Government Accountability Office, *401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts* (November 2014)(GAO-15-73) (online at http://www.gao.gov/assets/670/667151.pdf). The GAO Report also noted the possibility of addressing this problem by investing the automatic rollovers in myRAs (Roth IRAs that were invested in an updated U.S. Savings Bond with no fees, no minimum balance or contribution, and no risk of loss, specially designed to encourage nonsavers to acquire a lifetime habit of saving, with subsequent transfers to private-sector IRAs). This idea is reflected also in H.R. 5805 and S. 2474, as noted later in this testimony. However, under the current Administration, the Department of the Treasury last year decided to terminate the myRA.

From the plan sponsor's standpoint, the bill would save plans the administrative costs of retaining benefits in cases in which the plan sponsor prefers to avoid keeping benefits for participants who no longer are their employees. Many plan sponsors would be interested in this administrative simplification, although others are willing to retain benefits for their terminated vested participants as part of the process of plan sponsorship.

One approach the Subcommittee could consider is to take this opportunity to also help address the broader systemic challenges of benefit "leakage" (pre-retirement consumption of benefits intended to be preserved for retirement) and dwindling automatic IRA balances. In our mobile economy, multiple small benefits accumulated in different employer plans over the course of a career can add up to meaningful totals if preserved for retirement and allowed to continue growing on a tax-favored basis. To achieve this goal by minimizing leakage and lost benefits, consolidation of benefits in a single vehicle can be beneficial to participants.[5]

Representative Messer, with Representatives Bonamici and Neal, have introduced proposed bipartisan legislation designed to reduce leakage by promoting consolidation and addressing the dwindling automatic IRA problem: H.R. 5805, "The Retirement Savings Lost and Found Act." This bill would also provide for some increase in the $5,000 automatic rollover limit, but only to $6,000, without provision for inflation adjustment, and only in conjunction with substantial reforms designed to address the leakage and portability challenges.[6] H.R. 5805 would create a national, on-line retirement savings lost and found facility. Among other things, it would direct the Department of Labor to expand its automatic rollover investment safe harbor to include target date and life cycle funds, and would require plans that cash out benefits of $1,000 or less to transfer them either to an IRA established at the U.S. Treasury Department and invested in U.S. Treasury securities (similar to the myRA) or to the national retirement savings lost and found, also to be invested in Treasury securities.

Finally, as noted earlier, H.R. 4158 would provide for inflation adjustment of the proposed new $7,600 automatic rollover limit (in contrast to H.R. 5805). It would be worth considering whether the advantages of inflation indexing outweigh the disadvantages. If the drawbacks for participants of raising the limit outweigh the benefits (cost savings to plans that might or might not ultimately benefit participants), inflation indexing would exacerbate that effect. Omitting the inflation adjustment would provide an opportunity to assess the impact of the initial increase before expanding it.

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[5] One means of doing so would be through current efforts to use a retirement clearinghouse to facilitate rollover of benefits from former employers' plans to later employers' plans by working collaboratively with plan recordkeepers to keep track of participants for this purpose. With appropriate consumer protections, participants could benefit from arrangements to make such rollovers automatically unless participants opt out ("automatic portability").

[6] See section 3(b)(1). This is a companion bill to bipartisan Senate legislation S. 2474, introduced by Senators Warren and Daines.

Apart from this, inflation indexing in these circumstances could work against simplification. If the limits change annually and plans continually adjust their procedures to the new limits, there is an increased risk of administrative errors and possibly additional transition issues.

Mr. Chairman, Ranking Member Sablan, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I will be happy to respond to any questions.