Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities

LAWRENCE A. FROLIK*

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I. INTRODUCTION

America's retirees are faced with a potential financial disaster. Economic security in retirement has long depended on Social Security, private savings, and employer-provided retirement plans.[1] Although

* Professor of Law, University of Pittsburgh School of Law, frolik@pitt.edu.

1. Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 939 (2007).

much attention has been paid to the financial problems of Social Security[2] and the lack of private saving for retirement,[3] little attention has been paid to an alarming development in employer-provided retirement plans: the likely inability of retirees during the long years of their retirement to manage successfully their retirement funds accumulated in 401(k) and similar accounts. Asking individuals to husband a lump-sum payout from a 401(k) retirement account for the 20 to 30 years of retirement as they physically and mentally decline is a recipe for disaster. Unless we provide a more secure way to stretch retirement dollars into the twilight of retiree lives, we can expect to see more and more elderly retirees slide into poverty.[4] The solution is to create federally guaranteed lifetime annuities that retirees can purchase with the funds accumulated in their 401(k) retirement accounts.

We as a society have set up a funding system for retirement that assumes retirees will be able to successfully manage their IRAs for the 20 or 30 years of retirement. We know, however, that most retirees will not be able to perform this task. Some will lack the basic intelligence to do so. Others, although generally smart enough, will lack the knowledge to manage finances. Some will lack the emotional temperament to take on the risk, oversight, and planning needed to stretch out the payments from an Individual Retirement Account (IRA) over their lives. Some will be fine managing an IRA at age 65 but will lose the ability due to physical decline. Finally, millions of aging IRA owners will slip away mentally into the land of dementia. We can do better. But first we must recognize the impending failure of the current world of 401(k) accounts.

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2. *See, e.g.*, DANIEL SHAVIRO, MAKING SENSE OF SOCIAL SECURITY REFORM (2000); Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons from Private Pensions*, 92 CORNELL L. REV. 297 (2007).

3. Befort, *supra* note 1, at 962.

4. Currently about 10% of those age 65 and older have incomes below the official poverty line. David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091, 1135 (2008). However, 22% have incomes under 150% of the poverty line, indicating how precarious their finances are. *Id.* If future retirees have less retirement income, the percentage who will have income below the poverty line could rise dramatically.

II. THE DECLINE OF THE DEFINED BENEFIT PLAN

The last decade has seen a sea change in the nature of employee retirement plans. In the past, defined benefit plans predominated.[5] The details of such plans varied, but the critical feature was a guaranteed pension for life. Typically the amount of the pension was determined by a formula: number of years worked, times some fixed percent, times the average earnings in the year or two before retirement.[6] An employee, let us call him Alex, upon retirement would receive a fixed pension for life. Assume that pursuant to the formula used by his employer, Acme Inc., Alex was due a pension of $36,000 per year. In actuality, Alex would likely not receive $36,000 each year for life.[7] First, if he was married, his wife, Aliya, would have a right to have Alex's pension paid until the second to die of Alex and Aliya.[8] Because a two-life annuity can be expected to pay out longer than a single-life annuity, the plan likely

5. The decline of the defined benefit plan has been well documented. Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 469 (2004); *see also* Henry H. Drummonds, *The Aging of the Boomers and the Coming Crisis in America's Changing Retirement and Elder Care Systems*, 11 LEWIS & CLARK L. REV. 267, 276–77 (2007); ALICIA H. MUNNELL ET AL., CTR. FOR RET. RESEARCH AT BOSTON COLL., AN UPDATE ON 401(K) PLANS: INSIGHTS FROM THE 2007 SCF 1–2 (2009), http://crr.bc.edu/images/stories/Briefs/ib_9_5.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-291, DEFINED BENEFIT PENSIONS: SURVEY RESULTS OF THE NATION'S LARGEST PRIVATE DEFINED BENEFIT PLAN SPONSORS (2009), *available at* http://www.gao.gov/new.items/d09291.pdf [hereinafter GAO REPORT].

6. Zelinsky, *supra* note 5, at 457.

7. Assume that in 1960, at age 25, Alex started work for Acme, Inc. and worked continuously there for the next 40 years, until he turned 65—the retirement age under Acme's defined benefit retirement plan. That plan promised an employee a pension equal to the number of years worked, times 1.5% per year, times the employee's last year's income. Alex earned $60,000 in his last year at Acme. His retirement pension is calculated: 40 (years of employment) x 1.5% = 60% x $60,000 (final year's wages) = a $36,000 pension each year for life. Note that the typical defined benefit plan formula is back loaded because the final year's compensation is a significant determinate of the value of the pension. Workers who switch employment and participate in a defined benefit plan in each job have their pensions calculated on their earnings at a combination of ages when their compensation was lower. Daniel Halperin, *Employer-Based Retirement Income—The Ideal, the Possible, and the Reality*, 11 ELDER L.J. 37, 54–55 & n.56 (2003).

8. 29 U.S.C. § 1055(a) (2006). Aliya could waive that right. *Id.* § 1055(c) (2006).

would reduce the annual payment to reflect the probability that a joint annuity would be paid for more years.[9] Second, Acme could, and almost certainly would, have "integrated" the plan with Social Security.[10] Integration permits an employer to reduce the amount of a pension to reflect the employer's annual payroll tax paid to Social Security on behalf of the employee.[11]

With his pension from Acme and his Social Security benefits, assume Alex has an annual income for life of around $40,000. Not a princely sum, but this is enough to place Alex in the top quarter of income for those people age 65 or older.[12] More importantly, he has the comfort that his income is secure. First, his Social Security benefits will be paid regardless of any financial problems the program might face. No one has suggested that current retirees should expect to have their benefits cut. Some advocate lower benefits for future retirees, but even the Cassandras who predict doom and gloom for Social Security concede that the program can—or at least should—meet its obligations to those currently retired.[13]

Employees, like our fictional Alex, can also be confident that they will receive their pensions for the remainder of their lives.[14] Because the obligation to pay the pension rests with the employer who sponsored the

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9. *See id.* § 1055(d)(1) (2006).

10. I.R.C. § 401(a)(5)(D) (2006).

11. As Alex's employer, Acme was required to pay an amount equal to 6.2% of his compensation up to the maximum wage tax amount, which in 2009 was $106,800. U.S. SOC. SEC. ADMIN., SSA PUB. NO. 05-10003, ELECTRONIC FACT SHEET: UPDATE 2010, at 1 (2010), *available at* http://www.ssa.gov/pubs/10003.pdf.

12. PATRICK PURCELL, CONG. RESEARCH SERV., RL32697, INCOME AND POVERTY AMONG OLDER AMERICANS IN 2007, at 7 (2008), *available at* http://aging.senate.gov/crs/pension35.pdf.

13. Befort, *supra* note 1, at 965; Jeffrey N. Gordon, *The "Prudent Retiree Rule": What To Do when Retirement Security Is Impossible?*, 11 LEWIS & CLARK L. REV. 481, 488 (2007).

14. A defined benefit pension plan is not necessarily secure prior to retirement. Even though the employee may be vested—have nonforfeitable benefits—absent collective bargaining agreements, the employer retains the right to terminate or freeze the plan. David Madland, *The Politics of Pension Cuts*, *in* EMPLOYEE PENSIONS: POLICIES, PROBLEMS, AND POSSIBILITIES 187, 191 (Teresa Ghilarducci & Christian E. Weller eds., 2007). This is not an idle threat. According to Pension Benefit Guaranty Corporation data, 700,000 employees had their fully funded defined benefit plans terminated between 2000 and 2005. *Id.* Although the vested benefits of the participants in a terminated or frozen plan are secure, they do not accumulate additional benefits unless the employer sponsors a new retirement plan or unfreezes the existing plan. *Id.*

defined benefit plan, the employer plan sponsors are obligated annually to fund the plan at a rate actuarially calculated to be sufficient to pay the future pension obligations.[15] Of course, because an employer may not have put enough money in its defined benefit pension plan, it might be underfunded with the result that it cannot pay all the promised benefits. Even if the plan is adequately funded when an employee retires, it is possible that over the 20 or 30 years of an employee's retirement the plan might become so underfunded that it is unable to pay the obligated pensions. Still most retirees need not fear for the loss of their pensions because defined benefit plans must buy insurance from the federally operated Pension Benefit Guaranty Corporation (PBGC).[16] The PBGC, in turn, uses these premiums to pay pensions to defined benefit plan pensioners in the event the plan lacks the financial wherewithal to do so. To be sure, there are limits on the amount of pension benefits that the PBGC will pay,[17] but most retirees can expect the PBGC to pay them their full pensions.[18]

Though the pension is essentially guaranteed, protection against its erosion by inflation is not. Almost no pension provided by a private sector employer increases over time to account for the inflation that occurs over the 15, 20, or even 30 years of an individual's retirement. For example, if our retiree, Alex, lives 20 years after he retires and inflation averages 2.5% per year, by the time he dies, the purchasing power of his pension will have declined by 50% because of inflation.[19] There is nothing a retiree can do about this other than hold back some of

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15. 29 U.S.C. §§ 1082–1083 (2006).

16. *Id.* § 1322 (2006).

17. *Id.* § 1322(b)(1). In 2009 the maximum protected pension was $54,000 for an employee who retired at age 65. Press Release, Pension Benefit Guaranty Corporation, PBGC Announces Maximum Insurance Benefit for 2009 (Nov. 3, 2008), http://www.pbgc.gov/media/news-archive/news-releases/2008/pr09-03.html. The amount is higher for those who retire at a later age and less for those who retire when younger. *Id.*

18. Whether the PBGC will have sufficient assets to pay off all future claims is not certain. *See* Adam E. Cearley, Comment, *The PBGC: Why the Retiree's Traditional Life Raft Is Sinking and How To Bail It Out*, 23 EMORY BANKR. DEV. J. 181, 183 (2006).

19. *See* Kathleen H. Czarney, Note, *The Future of Americans' Pensions: Revamping Pension Plan Asset Allocation To Combat the Pension Benefit Guaranty Corporation's Deficit*, 51 CLEV. ST. L. REV. 153, 162 (2004).

the pension dollars received in early retirement years, invest them, and use them to augment the inflation devalued benefits received in the later years of retirement.

Offsetting that bit of bad news is that Social Security benefits are indexed to inflation—the consumer price index to be exact—and so do not diminish in value over an individual's life.[20] The increases in Social Security benefits can go far in alleviating the impact of inflation on a retiree's income. If, for example, a retiree receives $30,000 per year from a pension and $15,000 per year in Social Security benefits, a third of the income is protected from loss in value due to inflation.

Unfortunately, the number of employees participating in defined benefit plans is rapidly receding; an ever shrinking number of employees are currently enrolled in defined benefit plans as fewer and fewer employers sponsor such plans.[21] The number of employees participating in defined benefit plans fell from 27 million in 1985 to 19.5 million in 2008.[22] In 1983, 62% of employees with a retirement plan participated in a defined benefit plan; by 2007 only 17% did.[23] In 1990, about 92,000 defined benefit plans existed.[24] By 2009, the number had shrunk to just under 29,000.[25] Almost no employer is starting a defined benefit plan, and many of those that have them are freezing them, meaning that employees get the benefits they have earned but are not earning additional benefits.[26] The retreat from defined benefit plans reflects in part many employers' concerns about the unpredictability and volatility of a defined benefit plan's funding requirements.[27] An employer's annual funding requirement to a defined benefit plan depends in part upon investment return on the funds in the plan. Because those returns fluctuate, the employer's annual funding obligation is neither predictable nor consistent. As pension costs vary from year to year, so do the

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20. *See* 42 U.S.C. § 415(i) (2006).

21. GAO REPORT, *supra* note 5, at 23; TERESA GHILARDUCCI, WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM 34 (2008).

22. PATRICK PURCELL, CONG. RESEARCH SERV., RL30122, PENSION SPONSORSHIP AND PARTICIPATION: SUMMARY OF RECENT TRENDS 4 (2009), *available at* http://assets.opencrs.com/rpts/RL30122_20090911.pdf.

23. MUNNELL ET AL., *supra* note 5, at 2.

24. GAO REPORT, *supra* note 5, at 1.

25. *Id.*

26. Madland, *supra* note 14, at 191.

27. Gordon T. Butler, *American Paternalism and the One Fund Solution*, 9 WYO. L. REV. 485, 509 (2009); Drummonds, *supra* note 5, at 296.

employer's reported profits, thereby causing the business to appear to be more volatile than it actually is. Competitive market pressure is another reason for the decline of defined benefit plans, as employers seek to lower the cost of labor.[28] Even the administrative costs of operating a defined benefit plan are cited as a reason for their disfavor with employers.[29]

Defined benefit plans are being replaced by defined contribution plans,[30] in particular, 401(k) plans in the private sector, 403(b) plans by tax-exempt organizations or public schools, and 457(b) plans for some state and local governmental employees.[31] For brevity, this Article will refer to 401(k) plans, but the discussion is equally applicable to 403(b) and 457(b) plans. In 2006, almost 53% of private sector employees had the opportunity to participate in a defined contribution plan, though only 43.2% chose to participate.[32]

As the name suggests, a defined contribution plan guarantees that the employer will contribute a defined amount to a retirement plan for the employee. For example, each year the employer might be obligated to contribute an amount equal to 5% of the employee's annual compensation to a retirement fund to be credited for the benefit of the employee. The traditional defined contribution plan operated as a single investment portfolio under the direction of the plan trustees with each employee having a subaccount that reflected the employee's proportionate share of the total fund. Upon retirement the employee was paid whatever was in that account, which consisted of the employer contributions, any employee contributions, and the investment earnings accumulated over the years that the plan was in effect.[33]

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28. GHILARDUCCI, *supra* note 21, at 37. "The simplest explanation for why firms prefer 401(k) pension plans is the plain fact that they reduce pension costs. By providing 401(k) pension plans—and calling them pensions—firms can reduce their pension funding expenses considerably." *Id.* at 92.

29. William Handley Woolston, *Whose Money Is It Anyway? The Case for a Mortality Discount for Cash Balance Plan Early Termination Lump Sum Distributions*, 10 U. PA. J. BUS. & EMP. L. 383, 430 (2008).

30. MUNNELL ET AL., *supra* note 5, at 1–2.

31. The plans take their names from the Internal Revenue Code sections that govern them. *See* I.R.C. §§ 401(k), 403(b), 457(b) (2006).

32. PURCELL, *supra* note 22, at 6.

33. I.R.C. § 401.

The traditional defined contribution plan has all but disappeared. Today, the 401(k) plan reigns supreme. Created by Congress in 1978, it was conceived as a means of supplementing other forms of pension plans, particularly defined benefit plans.[34] The 401(k) model soon proved to be so popular that it began to replace other forms of defined contribution plans and even caused some employers to abandon their defined benefit plans. Employers found that they much preferred the predictable funding requirements of 401(k) plans and even more appreciated the shift of the investment risk to their employees. Meanwhile, many employees liked the idea of taking charge of investing their retirement funds. The result was that by 2007, 401(k) plans had come to represent over two-thirds of all employer-sponsored retirement plans.[35]

A 401(k) plan is a cash or deferred arrangement (CODA) plan that permits participating employees to choose between either receiving a cash payment or having a contribution made to a qualified retirement plan and held in an account on their behalf.[36] If the employee accepts the cash, then the employee realizes income and is taxed on it in the year it was received. If the employee chooses the contribution to the plan, then the employee is not taxed on either the value of the contribution or the investment returns earned by the contribution held in an account in the employee's name.[37] The employer may, but need not, match some amount of the employee's contribution, or the employer can make an unmatched contribution to the employee's account.

A defined contribution plan does not guarantee employees that they will receive any particular benefit. Rather, the plan only guarantees that employees will receive the value of whatever is in their accounts because the risk of the investment return rests with the employees. Moreover, in almost all 401(k) plans, employees direct the investment of their accounts. The employer, as plan sponsor, selects a limited number

34. *See id.* § 401(k); Ellen M. Doyle & Stephen M. Pincus, *Restoring Retirement Nest Eggs*, TRIAL, Apr. 2009, at 46, 46.

35. MUNNELL ET AL., *supra* note 5, at 2 fig.2.

36. *See* I.R.C. § 401(k).

37. *See id*. Section 402(g) of the Internal Revenue Code limits the dollar amount that an employee may contribute to a 401(k) account. The limit is annually adjusted for inflation in $500 increments as measured by the cost-of-living index. *Id.* § 402(g)(4) (2006). In 2009, the limit was $16,500. Press Release, Internal Revenue Serv., IRS Announces Pension Plan Limitations for 2009 (Oct. 16, 2008), http://www.irs.gov/newsroom/article/0,,id=187833,00.html.

of investment alternatives, and subject to those limitations employees have the ongoing responsibility to manage their 401(k) accounts.[38] Although employees bear the investment risk of a 401(k) account—the amount of their retirement fund depends heavily on the investment return on their account—they also have some control over that risk by virtue of their managing the investments in the account.[39]

Upon retirement, employees have the option of leaving their accounts in the 401(k) plan or rolling it over, tax-free, into an IRA.[40] Whichever option they choose, they face two formidable financial planning problems that will continue for the rest of their lives.

First, they must successfully invest the accounts for what is likely to be 20 or more years of their remaining lives.[41] To maintain the value of their retirement funds they must successfully invest them—not lose capital—with the hope that the investment return will at least equal the rate of inflation. As the financial collapse of the markets in 2008 has demonstrated, however, even the modest goal of creating earnings equal

38. *See* 29 U.S.C. § 1104(c) (2006). A good deal of criticism has been leveled at the concept of employees directing the investments in their 401(k) accounts, most of it justified. *E.g.*, Yves Stevens, *European and American Issues in Employee Benefits Law Compared*, 41 J. MARSHALL L. REV. 1189, 1231 (2008) (compiling excerpts from Burke & McCouch, *supra* note 2, at 307–08; Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 334–35 (2007); Susan J. Stabile, *Is It Time To Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 312–13 (2007)).

39. Many employees make poor investment decisions—such as excessive investment in the stock of their employer or failing to sufficiently diversify—that expose them to unnecessary risks. James M. Poterba, *Individual Decision Making and Risk in Defined Contribution Plans*, 13 ELDER L.J. 285, 297 (2005).

40. *See* I.R.C. §§ 401(a)(31), 402(c)(8) (2006); Rev. Proc. 2003-16, 2003-1 C.B. 359. For the rollover to be tax-free, it must occur within 60 days of the date of the separation from service of the employer that sponsored the 401(k) plan. I.R.C. § 402(c) (2006).

41. In 2005, at age 65 the average life expectancy was 18.7 years; 20.0 years for women and 17.2 years for men. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., DHHS PUB. NO. 2009-1232, HEALTH, UNITED STATES, 2008, at 203 tbl.26 (2009), *available at* http://www.cdc.gov/nchs/data/hus/hus08.pdf#026.

to the rise in the cost of living may be difficult to achieve.[42] Second, they must spend their retirement funds at a rate that will not exhaust them before they die, yet at an amount sufficient so that they will have enough on which to live. This is even trickier than being a successful investor. Although the two goals, investment returns that at a minimum keep pace with inflation and taking distributions at a rate that neither exhausts the fund nor leaves the retiree in poverty, can support each other—good investing means more to spend while tempered withdrawals maintain capital—the two goals are also in conflict. The more the retiree withdraws to live on, the less there is to invest and so the smaller the investment return.

Of course, almost all retirees who own a 401(k) account will also receive Social Security retirement benefits. In some cases, those benefits might very well exceed what they withdraw from their retirement accounts. Even so, if during retirement they do not invest their retirement funds wisely or spend them too freely, their later years will find them with diminished income and a lower standard of living.

Whether retirees leave their money in their 401(k) accounts or roll it over tax-free to IRAs, the investment returns on the funds are tax-free until distributed. In return for this tax advantage, after retirement from the employer who sponsored the 401(k) and after reaching age 70 1/2, the retiree is required to take out an annual minimum distribution, which is expressed as a percentage of the value of the 401(k) account or the IRA.[43] There is no requirement that mandated distributions be spent, however. The retiree can take a distribution, pay the applicable income tax, and save the remainder. One suspects, however, that many of those taking out the minimum required annual distribution spend it because they think of it as what they can "afford" to spend without risking exhausting the fund, absent untoward investment losses.

III. POSTRETIREMENT FLAWS OF 401(K) PLANS

The drawbacks of 401(k) plans are many, including lack of employee participation, poor investment choices by employees, borrowing from the 401(k) account, and cashing out the account when leaving a job

42. From January 4, 2008, to March 4, 2009, the Dow Jones Industrial Average declined from 12,800 to 6876, or by 46%. Dow Jones Industrial Average Closing Prices, http://dowjonesclose.com/index.html (last visited Apr. 17, 2010).

43. *See* I.R.C. § 401(a)(9) (2006).

before retirement.[44] What happens to these accounts after retirement has attracted much less attention.[45] First, note that *retirement* is not quite the right term because an employee does not have to retire—leave the workforce—to access a 401(k) account. All distributions from a 401(k) represent taxable income, but early distributions incur an additional 10% excise tax.[46] To avoid this penalty the employee must merely be age 59 1/2 or older and separate from service with the employer who sponsored the 401(k) plan.[47] For example, Betty, age 62, quits her job with Acme. She takes a lump-sum distribution from her 401(k) account, rolls it over tax-free into an IRA, and goes to work for Beta Co. Though still employed, she is free to take distributions from her IRA without incurring an income tax penalty, but she will be taxed on the distributions.

The right to take funds from a 401(k) account after retirement creates potential temptations not to save the funds but to spend them or to use them to pay off existing debts.[48] Imagine an employee, Cathy, single, age 66, who retires with a 401(k) worth $400,000. She never earned more than $60,000 per year during her 45 years of employment. For the first time in her life, Cathy has access to a significant wealth, $400,000, which, although in absolute terms may not seem like all that much, to Cathy is a very significant sum. The temptation is great to spend some of it, to reward herself after 45 years of daily toil. Perhaps after a lifetime of used cars, she is eying that new $30,000 car. Or she may want to fulfill her dream of owning a little condo in Florida at a cost of $60,000. Even if Cathy desires nothing for herself, she may be tempted

44. Stabile, *supra* note 38, at 310–16. For a more far-ranging critique of 401(k) plans, see WILLIAM WOLMAN & ANNE COLAMOSCA, THE GREAT 401(K) HOAX (2002).

45. *See, e.g.*, *Strengthening Worker Retirement Security: Hearing Before the H. Comm. on Education & Labor*, 111th Cong. 77–82 (2009) (prepared statement of Matthew D. Hutcheson, Independent Pension Fiduciary). Mr. Hutcheson has not a word to say about the postretirement investment and management hurdles faced by retirees. *Id.* One exception is Pratt, *supra* note 4, at 1137–42.

46. I.R.C. § 72(t) (2006).

47. *Id.*

48. Colleen E. Medill, *The Retirement Distribution Decision Ten Years Later: Results from an Empirical Study*, 16 ELDER L.J. 295, 316 & tbl.5.1 (2009).

to help her 88-year-old mother pay for the entry fee into a continuing care retirement community at a cost to Cathy of $100,000.

The possibilities are endless, but Cathy's funds are limited. Any substantial use of them will severely affect her future financial well-being. The $400,000 that seems so bountiful to her is not going to buy her a lavish or even very comfortable lifestyle. An investor can take 4% annually from a fund with about a 90% certainty of being able to withdraw that percentage for the remainder of the investor's life.[49] For Cathy, this means she can withdraw about $16,000 per year. The amount will modestly rise or fall depending on the investment return on the $400,000, but if she takes out even 5% or 6% she significantly increases the risk of exhausting the fund.[50] If Cathy succumbs to temptation and spends $30,000 on a new car, her annual income is cut by $1200, or $30,000 times 4%. If she spends $60,000 on a condo she loses $2400, and if she gives her mother $100,000 her annual income drops by $4000.

Do recently retired employees often make large expenditures from their 401(k) accounts? We do not know. But commonsense tells us that many may buy a boat, a car, or pay for a special vacation. In short, they "reward" themselves and celebrate their retirement. Some undoubtedly spend a significant percentage of their 401(k) accounts by "investing" in a better house or vacation home. Others will have debts that they will need to pay off.[51] Regardless of how much money is spent or what it is spent on, however, the result is a diminution in future disposable income.

Upon their retirement, former employees who resist the temptation to spend part of their 401(k) accounts face the choice of whether to let their

49. Rande Spiegelman, *Spending Confidently in Retirement*, SCHWAB CTR. FOR FINANCIAL RESEARCH, Nov. 10, 2008, http://www.schwab.com/public/schwab/research_strategies/market_insight/retirement_strategies/planning/spending_confidently_in_retirement.html (last visited Apr. 17, 2010).

50. *Id.* Not everyone agrees that large initial withdrawals at the time of retirement are necessarily unwise. "For some participants with high discount rates, large initial withdrawals and a declining consumption profile as they age may be more attractive than deferring consumption . . . ." Poterba, *supra* note 39, at 303–04. Another view is that high discount rates reflect the emotional inability of the brain to reliably value the future because "life is short and we want pleasure *now*." JONAH LEHRER, HOW WE DECIDE 91 (2009).

51. Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 168 (2007).

funds remain in their 401(k) accounts or roll them over into an IRA.[52] Many undoubtedly elect the rollover option to move their 401(k) funds into an IRA, which makes sense because it frees them from the employer-designated investment limits of their 401(k) plan. Even if the employee were content to invest in the same manner as in the 401(k), there is no reason not to at least create the possibility of new investment choices by rolling over the funds into an IRA. Retirees who keep their funds in their 401(k) accounts continue to have the right to roll them over into an IRA at any time. All they have to do is request a distribution of all the funds in their 401(k) accounts and place those funds into an IRA within 60 days to avoid current taxation on the distribution.[53] The IRA, like the 401(k) account, will continue to enjoy tax-free status with only distributions from the IRA being subject to the federal income tax.[54]

A decision by a retiree to roll over a 401(k) account into an IRA raises the question of where to roll over the funds. There is no shortage of choices—mutual funds, banks, investment advisers, and investment companies all compete for 401(k) account dollars. This is hardly a surprise given the opportunity for fees and commissions for the investment company or bank that holds the IRA. We know very little as to how employees choose the repository of a 401(k) rollover. We do not know whether they compare costs in the form of fees and commissions; whether they are looking for financial advice, for convenience and ease of access, for safety from fraud or embezzlement; or whether they respond to advertisements, merely follow word-of-mouth advice, or investigate and compare the choices. The motivations and reasons as to where they roll over the accounts are unknown.

We do know that the choice of where to roll over the funds can be crucial in terms of investment returns. Retirees who choose poorly and obtain subpar investment returns suffer diminished incomes in their 20 or 30 years of retirement. We also know that the choice is not "one and done." Hopefully, the retiree gains in investment sophistication during retirement and as time passes invests the account more wisely and with

52. *See* I.R.C. § 402(c) (2006).
53. *Id.* § 402(c)(3).
54. *Id.* § 408 (2006).

greater insight than at the time of the rollover. Unfortunately, inertia usually wins out over wisdom—assuming that retirees gain in investment skill as they age—so that the initial investment decisions are unlikely to be changed.[55]

Regardless of whether the employee retains the 401(k) account or rolls it into an IRA, the individual must decide how best to invest the funds to obtain high investment returns at an acceptable level of risk throughout the years of retirement.[56] Of course, the need to make successful investment choices is not new because the employee faced the same decisions when working. What is new is that the retired employee will be withdrawing funds from the account. The annual minimum distribution that is required after age 70 1/2[57] reflects the congressional view that the tax deferral was intended to assist the replacement of income during retirement and not merely create an indefinite deferral of taxation.[58] The income tax regulations provide a schedule of how much must be distributed each year—by percentage of the value of the IRA—based on the age of the IRA owner.[59] Absent investment losses, IRA owners who only make the required annual minimum distribution will not zero out the account before they die.[60]

The required minimum distribution rules create a number of decisions for the IRA owner. The owner must choose which assets should be distributed to meet the required distribution. There are several options, including distributing the most risky assets first, distributing assets proportionally by asset class, taking an in-kind distribution, and either liquidating equities or fixed-income investments first. The number and

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55. Jeffrey Zwiebel, *Corporate Conservatism and Relative Compensation*, 103 J. POL. ECON. 1, 1 (1995).

56. Because most retirees roll over their 401(k) account into an IRA, this Article will refer to the retiree's IRA, but the discussion is equally applicable to a 401(k) account retained by a retiree.

57. I.R.C. § 401(a)(9) (2006); Treas. Reg. § 1.401(a)(9)-9, Q&A (2) (2002) (Uniform Lifetime Table).

58. STAFF OF J. COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 710 (J. Comm. Print 1987).

59. Treas. Reg. § 1.401(a)(9)-9, Q&A (2). The annual required distribution is not large enough to zero out the account, but it is taxable and does modestly reduce the dollar amount in the account. The Uniform Lifetime Table lists the distribution period for ages up to 115. *Id.* As a result, if the owner takes only the minimum distribution, much if not most of the distribution will occur after the death of the owner.

60. *Id.* NATALIE B. CHOATE, LIFE AND DEATH PLANNING FOR RETIREMENT BENEFITS 41 (6th ed. 2006).

complexity of the choices raised by the need to make annual distributions strongly suggests that many older retirees will not be up to the task.

Yet even more distribution issues await. For example, do retirees understand that IRA dollars should be spent only after they have spent other savings in order to prolong the tax-free advantages of the IRA funds? Although neither sophisticated nor arcane knowledge, it seems probable that many retirees either do not know about it or do not follow it. A retiree who owns appreciated securities outside the IRA may hesitate to sell them because the sale will incur the capital gains tax even though the rate in 2009 was capped at 15% for long-term capital gains.[61] If, instead, the retiree takes out dollars from the IRA above the required minimum, those dollars are ordinary income and so may be taxed at a higher rate, and even worse, they no longer grow tax-free inside the IRA. The habit of not selling stocks in order to defer taxation on unrealized gain, although often a sound rule, may be the wrong choice under these circumstances. Unfortunately, an aging retiree may not be aware of this strategy.

A retiree who owns an IRA faces other choices that are difficult because the "right" answer is often dependent on uncertain variables, including future interest rates, future anticipated stock prices, the rate of inflation, future income needs, and the life expectancies of the retiree and the retiree's spouse. For example, in making the minimum distribution, or any distribution, the retiree may have to decide whether to cash in a corporate bond that pays 6% interest or distribute cash held by the IRA. If the retiree believes that future interest rates are going up, selling the bond makes sense because rising interest rates will lower the value of the bond. If the retiree sells the bond but was wrong about future interest rates, selling the bond was a mistake; instead the cash held by the IRA should have been distributed. Of course, investors of any age can guess wrong as to the direction of future interest rates, but a wrong choice by a retiree results in a loss of capital—a nonreversible choice with long-term financial consequences.

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61. An asset owned for at least one year qualifies for long-term capital gains. I.R.C. § 1222(3) (2006). In 2009, long-term capital gains were taxed at a maximum rate of 15%. *See id.* § 1(h)(1)(C) (2006).

Given the number of variables that impact retirees' choices as to how to manage their rollover IRAs, it is unlikely that most are making optimum choices. Even if they make a wise decision, it is rarely final. Each year offers retirees another chance to make critical investment and distribution choices that may improve their financial positions or worsen them. Each year retirees can correct the mistakes of the past, make fresh mistakes, reverse wise decisions previously made, or make better choices. And this repeated need to choose continues throughout the retiree's life—those 20 or 30 years stretching from retirement at age 65 to age 85, 95, or even 100.

IV. MANAGING AN IRA WITH DIMINISHED PHYSICAL CAPACITY

Many retirees will live to age 85 and beyond.[62] Unfortunately life for those age 85 and older is not always a golden age; many suffer from the loss of physical and mental capacity.[63] It is estimated, for example, that up to half of those age 85 or older suffer from dementia.[64] Because of declines in mental and physical capacity, many very old retirees are not capable of effectively managing their financial affairs. In particular, many will find themselves unable to make wise or even rational choices about their finances.

In the coming years, millions of IRA owners—or 401(k) account holders—will be age 85 or older and incur significant declines in their mental and physical well-beings. The degree of decline will vary greatly. Some will experience only physical declines, such as diminished eyesight or a loss of physical strength. For these, the lucky elderly, managing an IRA will not be much more difficult than when they were younger. Many, however, will suffer serious declines in short-term memory, vision, or hearing. Even so, they may still be mentally alert. Short-term memory loss is a normal part of aging and does not signify a loss of mental capacity or cognition.[65] Still, the loss of short-term

62. In 2004, about 45% of those people age 65 were expected to survive until age 85. ELIZABETH ARIAS, U.S. DEP'T OF HEALTH & HUMAN SERVS., UNITED STATES LIFE TABLES, 2004, at 3 tbl.B, 5 & fig.2 (2007), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf.

63. LEWIS R. AIKEN, AGING: AN INTRODUCTION TO GERONTOLOGY 32–61, 78–83 (1995).

64. THE MERCK MANUAL OF GERIATRICS 357 (Mark H. Beers & Robert Berkow eds., 3d ed. 2000).

65. AIKEN, *supra* note 63, at 115–16.

memory can impair the ability to manage an IRA as it becomes more difficult to remember advice or to recall previous decisions. For example, after a wide-ranging discussion with a financial adviser about possible investment strategies, at the end of the meeting an older retiree may not be able to remember what was decided or why it was thought to be the best course of action. Even specific instructions, such as "sell stocks x and y and buy bond z," may become muddled for those with poor memories.

Declining vision is a common aspect of aging, but it is generally correctable with glasses. Many elderly, however, experience macular degeneration, a progressive nontreatable loss of core vision.[66] Some afflicted by it can read with the help of technology, but many cannot.[67] Those who cannot read often find it very difficult to make intelligent decisions about their investments. If coupled with a loss of short-term memory, many elderly with vision problems find it impossible to manage effectively their complex financial affairs. The loss of hearing is another typical consequence of aging. Even with a hearing aid—too often shunned for reasons of vanity—many elderly cannot hear well enough to participate in multiparticipant conversations or may have difficulty understanding more complicated topics because they fail to hear critical terms.

Imagine an IRA owner, age 90, who cannot see well enough to read, who has a hard time hearing even with a hearing aid, and who cannot seem to remember things so that she forgets by the end of an hour meeting what she was told at the beginning. Now imagine her engaging in strategic decisions about her investments. The reality is that such an individual is simply not up to the task of effectively managing her IRA. Some elderly IRA owners who cannot hear or see well may be reluctant to engage in meetings with financial advisers and other professionals for fear that they will be unable to hear what is said, read what is presented to them, or remember what was decided. Some likely conclude that it is

66. *Id.* at 44.

67. *See* DANIEL L. ROBERTS, THE FIRST YEAR: AGE-RELATED MACULAR DEGENERATION: AN ESSENTIAL GUIDE FOR THE NEWLY DIAGNOSED 64–70 (2006) (describing the advantages and disadvantages of various low vision devices that assist people with macular degeneration).

better to stick with the status quo than to endure the embarrassment of appearing unable to comprehend what is being discussed.

Many other very old IRA owners are very frail. They suffer from a general physical decline in energy, mobility, flexibility, and strength. Some suffer from a particular ailment, such as arthritis, but most are just victims of old age and its inevitable physical decline.[68] That loss of vigor and energy can sharply reduce the physical abilities of older persons so that they literally do not have the energy necessary to manage their investments. For a very old person, sleeping, resting, dressing, eating, and personal grooming can take up most of the day.

Chronic illness is the fate of many elderly.[69] They suffer from conditions such as diabetes, rheumatoid arthritis, and congestive heart failure that rob them of the energy and concentration needed to be sophisticated investors. Imagine an 84-year-old woman on dialysis. She devotes three days per week to traveling to the dialysis center, enduring the dialysis, and recovering from the effects.[70] On the other days of the week, is she really going to devote her limited time and energy to her financial affairs? Will she have the concentration and energy to do so? Similarly, someone with life-threatening emphysema is unlikely to be focused on managing IRA investments. Given the prevalence of chronic illness among the elderly, there are almost certainly thousands of IRA owners with significantly chronic conditions that undercut their ability to manage their IRAs.

Some elderly will have an acute illness, such as cancer, that will leave them in pain, disoriented by drugs or other therapies, and much more concerned about whether they will live than whether their IRAs are overloaded with equities or which assets should be sold to provide cash for the annual required minimum distributions. Of course, having an acute illness is not necessarily a sign that an individual's ability to handle an IRA is compromised or that, even if compromised, her ability will not ebb and flow over time. Yet, as with other physical ailments and conditions, acute illness may undercut financial planning capabilities and result in lost opportunities or investment losses. In short, the variety of possible physical declines that await aging IRA owners suggests that

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68. LEWIS R. AIKEN, AGING AND LATER LIFE: GROWING OLD IN MODERN SOCIETY 27–51 (2001).

69. *Id.* at 55.

70. Robert Steinbuch, *Kidneys, Cash, and Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 45 HOUS. L. REV. 1529, 1535 (2009).

this model for funding retirement is fraught with the risk that in their later years many IRA owners may not be up to the task of successfully managing their retirement nest egg.

V. MANAGING AN IRA WITH DIMINISHED MENTAL CAPACITY

Millions of individuals suffer from dementia, most of it likely progressive Alzheimer's disease.[71] Other elderly have loss of mental capacity from mental illness with clinical depression being the most prevalent form.[72] Some have temporary loss of mental capacity from delirium or from reactions to prescription drugs.[73] Finally, a few are terminally ill and either the illness or the treatment for the alleviation of pain significantly impairs their mental capacity.

The prevalence of dementia and other related ailments among the elderly suggests a significant incidence of the loss of mental capacity among retirees with IRAs. That raises the question of why we as a society have constructed a retirement finance system—401(k) accounts and rollover IRAs—that assumes the ability of retirees to manage those accounts, when we know that inevitably many will be unable to do so because of the loss of mental capacity. We ask individuals to manage their retirement funds as they enter their 80s and 90s even though statistics tell us that many people age 85 or older suffer from a loss of mental capacity and many others experience significant physical decline.

Millions of individuals suffer from dementia; the Alzheimer's Association reports that over 5 million Americans suffer from Alzheimer's dementia.[74] Among those ages 75 to 79, approximately 6% have dementia.[75] For those ages 80 to 84, roughly 12% have dementia.[76] Dementia also affects over

71. JOHN C. CAVANAUGH & FREDDA BLANCHARD-FIELDS, ADULT DEVELOPMENT AND AGING 123, 125 (4th ed. 2002).

72. *Id.* at 116.

73. *Id.* at 123.

74. Alzheimer's Association, What is Alzheimer's, http://www.alz.org/alzheimers_disease_what_is_alzheimers.asp (last visited Apr. 17, 2010).

75. A. Scott Henderson & Anthony F. Jorm, *Definition and Epidemiology of Dementia: A Review*, *in* 3 DEMENTIA 1, 11 tbl.1.2 (Mario Maj & Norman Sartorius eds., 2000).

76. *Id.*

20% of those ages 85 to 89.[77] The percentages rise with age—over 30% of those ages 90 to 94 have dementia.[78] A mental disease, dementia is defined as declines in memory, thinking, and planning to the extent that it makes independent living impossible.[79] Even at the early stages, dementia erodes the executive functioning that is the source of financial acumen.[80] Inattentiveness to finances, such as not paying bills or depositing dividend checks, is often an earlier indicator of dementia.[81] As memory and judgment decline, an individual is likely to make investment mistakes either by action or inaction. If older individuals suffering from dementia cannot remember to pay an electricity bill, then how are they to manage an IRA account?

Unfortunately, by the time the family or spouse understands that the individual has dementia and takes appropriate action, an older individual with reduced mental capacity may have already made ill-advised financial decisions. Individuals with impaired mental capacities are susceptible to bad advice from friends and acquaintances, can be persuaded to change their financial advisers, may respond to Internet frauds and scams, and are susceptible to the advice of television "financial experts."[82] Though past age 80, some buy ten-year deferred annuities—the monthly payment does not begin for ten years—that have punishing early withdrawal penalties.[83] Others may lock their funds into bank certificates of deposit (CDs) that pay low interest and have high

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77. *Id.*

78. *Id.*

79. *Id.* at 2.

80. *See* CAVANAUGH & BLANCHARD-FIELDS, *supra* note 71, at 125–26.

81. *See id.*

82. *See* Matthew A. Christiansen, *Unconscionable: Financial Exploitation of Elderly Persons with Dementia*, 9 MARQ. ELDER'S ADVISOR 383 (2008) (describing the financial exploitation of an 86-year-old woman with dementia and suggesting steps to avoid this abuse).

83. For a discussion of abuses in annuity sales to elders and a description of regulations governing those sales, see Joseph H. Aughtman, *The Annuity Conundrum: Responding to the Abuse of Elderly Investors*, BRIEF, Fall 2008, at 38; Sally Balch Hurme, *Who's in the Batter's Box?: Regulating and Litigating Unsuitable Sales of Variable Annuities*, 1 PHOENIX L. REV. 365 (2008); *see also* Daniel J. Morrissey, *The Securities Act at Its Diamond Jubilee: Renewing the Case for a Robust Registration Requirement*, 11 U. PA. J. BUS. L. 749, 785 (2009).

withdrawal penalties or may purchase exotic investments that return only losses.[84]

While undergoing a decline in investment acumen because of dementia, an IRA owner still faces the difficult annual, mandatory distribution decisions—how much to withdraw beyond the minimum and what assets to sell or distribute. If the minimum distribution is not sufficient for living expenses, other savings must be spent, but which ones? And how much capital can be spent without risking outliving one's capital? These are difficult questions for anyone but are almost impossible for an individual with declining mental capacity.

The caregivers of those with dementia, often the spouses, may be so distracted by their caregiving obligations that they may not be able to deal effectively with their own financial affairs. Some may experience mental decline when they are overwhelmed by the demands of caring for another. For many elderly, the death of a spouse or life partner causes severe emotional wounds that can have profound ramifications. In the days and months before the death of a spouse, the survivor may be deeply engaged in caregiving for the dying spouse. The physical and emotional demands of a dying spouse can be so demanding that they may distract the healthy spouse from other obligations, such as monitoring investments. An owner of an IRA may find it difficult to focus on asset allocation while simultaneously being asked to respond to questions about end-of-life health care for a dying spouse.

Asking very old individuals who are stressed by personal health problems, by spousal health issues, or by the death of a close friend or loved one, to manage successfully an IRA is asking a great deal; in some instances, too much. For some, the problem is compounded if the dying spouse was the primary financial planner. Imagine an 88-year-old woman, Edith, whose 90-year-old husband, Eric, is dying from cancer. Edith and Eric, like many of their age cohort, divided up the household responsibilities, with Edith paying the bills and Eric managing his IRA. He read the *Wall Street Journal*, watched cable news financial shows,

84. *See* Peter V. Rabins, *Issues Raised by Research Using Persons Suffering from Dementia Who Have Impaired Decisional Capacity*, 1 J. HEALTH CARE L. & POL'Y 22, 25 (1998) (discussing the characteristics of dementia and how it can result in impaired decisional capacity).

and enjoyed talking to his broker. Edith was certainly capable of being involved in investment decisions, but she knew how much Eric enjoyed doing it and so stayed out of his way. Now Eric is very ill and no longer capable of making those decisions. Their broker calls and suggests that they sell some stocks and buy bonds. Edith, who has never paid much attention to how the IRA was invested, must make a decision at a time when she is worried and distracted by her husband's health. It is not a good time for her to try to come up to speed on how to invest an IRA.

As a result of the need to take over the investment and management of an IRA, surviving spouses often seek out advice and support. They consult with adult children, siblings, nieces and nephews, and other family members whom they trust, whether or not that trust is well placed. It is simply in our nature to turn to family members for advice. Investing is not for amateurs. Unfortunately, those whom an older person may ask for advice too often lack the ability or knowledge to provide good advice. Beyond mere ignorance is the possibility that the adviser will succumb to greed, fraud, and conflicts of interest. Advice from relatives can be colored by an expectation of inheritance. Some will take advantage of or even defraud the IRA owner.[85] A few who are asked for assistance may have a conflict of interest, such as an adult son who advises his widowed mother to invest the IRA in a mutual fund managed by his wife. Or a daughter who insists that her son, the grandson of the IRA owner, is a crackerjack investment adviser and so urges her father to rely on his advice. In reality, the son has been fired from his last two positions in investment firms for giving poor advice. In short, family advisers and counselors may be very wise and helpful or they can be ignorant, impulsive, foolish, fraudulent, and conflicted.[86]

85. Financial abuse of the elderly has been much written about by authors and judges. For a recent example that cites a number of articles and cases, see Jane A. Black, Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289 (2008). Ingrid M. Evans & David L. Cheng, *Protecting Seniors from Financial Abuse*, TRIAL, July 2009, at 54, 57 n.4, cites a source claiming that 90% of financial abuse of the elderly is perpetrated by family members. For a general discussion of the financial abuse of the elderly, see Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 516–21 (2004).

86. *E.g.*, Gonzalez v. Gonzalez, 887 P.2d 562 (Ariz. Ct. App. 1994) (affirming a jury verdict in favor of an elderly mother who brought a fraud action alleging that her son and daughter-in-law purchased her house for far less than the lowest appraised value).

Reliance on professional advisers is not necessarily a better choice. They vary greatly in quality; some are knowledgeable, others are not. Some lack ethics and churn funds, advise the purchase of investments that they know little about, engage in self-dealing, and sell dubious products; some even commit outright fraud and financial exploitation.[87]

Beyond family and professional advisers, there is the wasteland of advice in magazines, on the web, on television, at investment seminars—often along with a "free" lunch—and in the form of tips from friends, golf partners, and casual acquaintances. The world is full of those offering advice without any particular knowledge. Others willing to "assist" an older owner of an IRA range from the ignorant, to the conflicted, to the outright crooked.[88]

Of course, some IRA owners receive good advice and profit from it, but as those owners age, so do their advisers. The broker who assisted the IRA owner for so many years retires and is replaced by the "new associate," lacking in both knowledge and experience. The bank manager who provided such good counsel dies and is replaced by an eager young banker who is more interested in pedaling investment products sold by the bank than protecting the aging client's capital.[89] As retirees age, many get out less and spend more time online at their computers where they find advice, for example, that tells them to buy gold and platinum. So they start trading in commodities. Their e-mail often contains pleas from strange men in Nigeria who suggest novel ways of making them both rich. Many elderly are suspicious, but others succumb and send a check drawn on their IRA because the rates on bank CDs are so low that it seems that partnering with a Nigerian general might just be a smart move. In short, retirees are vulnerable and at risk

87. *See* Errold F. Moody, Jr., *Elder Investments: A Critique of Professional and Consumer Mediocrity*, 10 MARQ. ELDER'S ADVISOR 135 (2008).

88. Johnny Parker, *Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client*, 2007 MICH. ST. L. REV. 683.

89. The repeal of the Glass-Steagall Act in 1999 permitted commercial banks to engage in formerly prohibited investment activity. James A. Fanto, *Subtle Hazards Revisited: The Corruption of a Financial Holding Company by a Corporate Client's Inner Circle*, 70 BROOK. L. REV. 7, 13–14 (2004). As a result, banks now offer investment products in which that they urge their customers to invest. *See id.*

for financial fraud or risky speculations when it comes to their investments.[90]

Many IRA holders are likely much more financially conservative and stay with what they know by simply rolling over their 401(k) account into an IRA that they place in custody of the same financial institution that handled their 401(k) account. Some do so because they receive a letter, about the time that they are retiring, from the 401(k) account holder informing them that they have the right to a tax-free rollover into an IRA for which the financial institution would be happy to act as custodian. What the retiring employees do not know is that the letter informing them of the rollover opportunity is required by federal law.[91] An employer can make the notification or can delegate it to a third party, such as a financial entity that also acts as a repository for IRAs. The notification right is often bestowed upon the financial institution that held the 401(k) accounts. Financial institutions that act as custodians for 401(k) accounts do so to collect the fees that can be obtained from acting as a custodian. They also seek that status, however, because they hope to continue to act as the custodian of the retirees' rollover IRAs.[92]

That notification right is valuable because a rollover IRA can be expected to last the life of the retiree, which on average will be 15 to 25 years. Many IRAs continue much longer, however. A popular estate planning technique is the "stretch IRA" that lasts until the death of the last grandchild, which can extend the IRA for another 60 or 70 years.[93] With the prospect of acting as a custodian of an account for 90 or 100 years, it is easy to understand why financial institutions desire to be selected to act as custodians of rollover IRAs.[94] Unfortunately the desire to act may not be matched by the competence to give wise investment advice.

90. Eric L. Carlson, *Phishing for Elderly Victims: As the Elderly Migrate to the Internet Fraudulent Schemes Targeting Them Follow*, 14 ELDER L.J. 423, 424 (2006).

91. *See* I.R.C. § 402(f) (2006).

92. An example of a notification of the right to roll over a 401(k) account can be seen at Fidelity Investments, Welcome to 401k.com, https://401k.fidelity.com/static/dcl/shared/documents/MKTG_Special_Tax_Notice.pdf (last visited Apr. 17, 2010).

93. The stretch IRA is promoted in books aimed at IRA owners. *See, e.g.*, JAMES LANGE, RETIRE SECURE! (2d ed. 2009); *see also* ED SLOTT, PARLAY YOUR IRA INTO A FAMILY FORTUNE (rev. ed. 2008).

94. In an attempt to obtain fees associated with IRAs, banks and financial institutions aggressively advertise their willingness and expertise in managing them.

VI. "SOLUTIONS" THAT SOLVE NOTHING

A retiree, who is confused about how to best invest a rollover IRA, is likely to be advised to consult a financial adviser. But where does that lead? Because of the many available choices, it can be daunting for an older individual to select a trustworthy, knowledgeable, and wise and prudent adviser. Consider the descriptive adjectives in the previous sentence: *trustworthy*, *knowledgeable*, and *wise* and *prudent*. These terms are not susceptible to quantitative measurement. Begin with *trustworthy*. Surely it means at a minimum that the financial adviser will not steal from the client, but how much more does it imply? It at least implies that the adviser will not be guilty of practices that violate the Investment Advisers Act of 1940, which governs those who provide money management.[95] Among other misdeeds, the Act prohibits advisers from taking for their own benefit investment opportunities that should be offered to clients, failing to achieve best execution in purchasing or selling securities for the client, and inappropriately allocating securities transactions among clients.[96]

Does a trustworthy adviser sell a product for which the adviser receives a commission? Some advisers sell only their advice. Others recommend products, such as mutual funds, that they sell. Their advice may be well grounded, but still the conflict of interest is disturbing. Imagine, for example, a stockbroker, Fiona, who advises an older client looking for more income to purchase the Beta Mutual Fund. What Fiona says is true, but it is also true that she will earn a commission on that purchase. The law requires her to disclose the conflict,[97] but what is the client to do with that information? Is Fiona's advice less trustworthy because of that potential commission? Indeed she has a conflict of interest, but is it harmful to the client only if it corrupts the advice she gives? If Fiona would recommend the Beta Mutual Fund even if she did not earn a commission when the client bought it, the conflict is harmless. Yet we will never know if the prospect of a commission influenced

95. 15 U.S.C. § 80b (2006).
96. Barry P. Barbash & Jai Massari, *The Investment Advisers Act of 1940: Regulation by Accretion*, 39 RUTGERS L.J. 627, 631 (2008).
97. 15 U.S.C. §§ 80b-6, 80b-7.

Fiona's advice. Perhaps even she was not aware of its subtle but real influence on her analysis and the advice she gave to her elderly client.

If Gerald, a financial adviser, tells his client to buy mutual funds from Phi Funds because Phi Funds pays him a finder's fee for every client steered its way, we would say that Gerald is not trustworthy. Now suppose Gerald tells the client that he might want to invest in The Gerald Fund, a new mutual fund that Gerald opened last month. The fund has no history, being brand new, but Gerald correctly tells the client that The Gerald Fund will "seek out stocks of midsized corporations that appear undervalued in light of the long-term prospects of the company." Of course, Gerald is the one who decides what is an undervalued corporation. Unfortunately, he is a one-man show and his "research" consists of spending a lot of time on the Internet reading the advice of others. Gerald sincerely believes that he can pick winners, and the fee for his fund is on the low side. Is he trustworthy despite his possibly misplaced confidence in his abilities?

The older investor may eschew the hometown "Geralds" as investment advisers and instead seek out a more sophisticated investment opportunity, such as a hedge fund.[98] Unfortunately for the investor, hedge funds are replete with conflicts of interest, beginning with a performance fee that creates incentives for the managers to make risky investments. The greater the performance the higher the fee, but if the fund sustains losses, then the manager is still paid a fee based on a percentage of the assets under management.[99] Because the gains and losses are not identical for the investor and the manager, an investor faces the classic agency problem that the agent will act in a manner that promotes the interests of the agent rather than those of the principal.[100] Other conflicts that arise in the hedge fund world include the hedge fund manager's overseeing of

98. The term *hedge fund* has no precise definition, but it is generally used "to refer to an entity that holds a pool of securities and perhaps other assets, whose interests are not sold in a registered public offering and which is not registered as an investment company under the Investment Company Act." U.S. SEC. & EXCH. COMM'N, STAFF REPORT: IMPLICATIONS OF THE GROWTH OF HEDGE FUNDS 3 (2003), *available at* http://sec.gov/news/studies/hedgefunds0903.pdf.

99. Ryan Sklar, Note, *Hedges or Thickets: Protecting Investors from Hedge Fund Managers' Conflicts of Interest*, 77 FORDHAM L. REV. 3251, 3265 (2009).

100. Agency costs have received extensive scholarly attention. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

multiple funds and the desire of the hedge fund to favor its prime broker at the expense of its investors.[101]

Beyond conflicts of interest is the potential for outright fraud and exploitation. Unfortunately there is simply no reliable test of who is trustworthy. Most older investors probably equate an honest face, a sincere manner, and most importantly, advice that seems to lead to success as the *sine qua non* of trustworthiness. In short, an older investor has no good way to know whom to trust and whom to suspect. The sad tale of those who trusted the investment adviser Bernie Madoff is only one example of a fraudulent financial adviser who had the complete trust of his defrauded clients.[102]

As for determining whether a financial adviser is knowledgeable, absent giving a financial adviser a written test, the older investor has to rely on word of mouth—not a wise method—or something more objective such as the license held by the adviser. In most professions, one basic license identifies at least a modicum of capability. A lawyer must have a J.D. and pass the state bar, and a physician will have an M.D. and may be board certified. With financial advisers it is not so simple. There are many licenses and a variety of letters that financial advisers can put behind their names, but what those licenses and letters mean is usually not known to a prospective older client looking for postretirement assistance with an IRA.

An IRA owner will likely first come in contact with a broker, most likely registered with the New York Stock Exchange. To be a general securities registered representative, as most stockbrokers are, requires passing an examination, usually the "Series 7," designed to test knowledge regarding federal securities law, securities products, how markets operate, basic economic and portfolio theory, taxes on investments, and

101. Sklar, *supra* note 99, at 3262.
102. *Id.* at 3253–55. Madoff defrauded his clients out of millions of dollars. *Id.* While pretending to invest their funds in stable, high-yield investments, he was essentially operating a Ponzi scheme; he paid the earlier investors with the funds from the later investors. *Id.*

what constitutes fair sales practices.[103] Though it is a six-hour examination, the material tested covers less than one college finance course does.[104] Even so, brokers who pass the examination are permitted to offer investment advice to their clients.[105]

The most common financial adviser designation is the Certified Financial Planner (CFP) bestowed by the Certified Financial Planner Board of Standards, Inc., a private entity. To qualify, the applicant must take seven courses in various aspects of financial planning that are about the equivalent of a semester of college study.[106] As of March 1, 2007, new licensees were required to pass a ten-hour examination and hold a college degree in any course of study.[107] Licensees also had to have three years of experience before they could provide financial advice to customers.[108] A proprietary, copyrighted term, the CFP seems to declare that the holder knows a great deal about investment, but it is not clear whether that is the case. Absent a neutral third party's overseeing of the certification, there is no objective determination that passing the examination demonstrates competency to be a financial adviser.

Higher up the ladder of expertise is a Chartered Financial Analyst (CFA). Membership is limited to those sponsored by current members and who meet educational and experience requirements: a Bachelor's degree and at least four years of acceptable work experience in the "investment decision-making process."[109] Eventually the applicant must pass three levels of examinations based on materials supplied by the CFA Institute. Samples of the test questions are available online and seem to indicate that a CFA will be reasonably conversant about investing. Because advising most retirees with IRAs created by 401(k) rollovers should not require a great deal of expertise, anyone with a CFA

103. Craig A. Cunningham, Note, *Mind the Gap: A Legal and Economic Analysis of Stockbroker Overtime Eligibility Under the Fair Labor Standards Act*, 2009 U. ILL. L. REV. 1243, 1254.

104. Moody, Jr., *supra* note 87, at 138.

105. Cunningham, *supra* note 103, at 1254.

106. Moody, Jr., *supra* note 87, at 142–43.

107. Certified Financial Planner Board of Standards, Inc., Steps to Initial CFP® Certification, http://www.cfp.net/become/Steps.asp (last visited Apr. 17, 2010).

108. *Id.*

109. CFA Institute, Membership Types and Requirements, http://www.cfainstitute.org/cfaprog/charterholder/membership/member_types.html (last visited Apr. 17, 2010).

certification is likely to be able to give knowledgeable advice.[110] Yet knowledgeable advice is not the same as good advice, that is, advice that leads to successful investments. Many knowledgeable investment advisers have given heartfelt advice that proved to be unwise. Retirees who seek professional investment advice have no certainty that they will even "beat the market" over the 20 or 30 years that their IRAs must last.[111]

Rather than depending on individualized financial advice, an IRA owner can follow the lead of funds designed for retirement investment portfolios. If the IRA's balance is less than $300,000, an amount that would encompass the great majority of these IRAs,[112] the investment plan is rather simple, as illustrated by targeted mutual funds that determine the mix of fixed-income securities and equities by the age of the investor. At the age of the individual's retirement, for example, the Fidelity Freedom 2010 Fund is invested about 50% in equities, 40% in bonds, and 10% in cash or cash equivalents.[113] For those age 85 or older, Fidelity recommends a portfolio of 20% in equities, 35% in bonds, 40% in short-term funds, and 5% in cash.[114] The Vanguard

110. Other titles are available, but the same point applies. There is no objective indicia that acquiring a designation as a financial planner translates into being a knowledgeable, wise adviser.

111. PETER J. WALLISON & ROBERT E. LITAN, COMPETITIVE EQUITY: A BETTER WAY TO ORGANIZE MUTUAL FUNDS 3 (2007) (observing that "no investor, no matter how skilled, can consistently 'beat the market' in picking individual securities").

112. *See* MUNNELL ET AL., *supra* note 5, at 8 & fig.12. It was estimated that in 2008 the average 401(k) or IRA balance of the household heads who were approaching retirement was $56,000. *Id.* This is down from $78,000 in 2007 due to the severe decline in the stock market. *Id.* If these amounts represent anywhere close to the total retirement savings of current retirees, their economic futures are bleak indeed. Assuming a 6% rate of return postretirement, one author has declared that anyone facing 30 years of retirement who wants an annual income of $50,000 per year should have $866,000 of retirement funds at the time of retirement. TAMARA ERICKSON, RETIRE RETIREMENT 83 fig.3-5 (2008). For an income of only $25,000, they still need $344,000 at the time of retirement. *Id.*

113. Fidelity Investments, Fidelity Freedom 2010 Fund, http://personal.fidelity.com/products/funds/mfl_frame.shtml?31617R506 ("Composition" tab) (last visited Apr. 18, 2010).

114. *See id.*

Target Retirement Income Fund, designed for those age 66 and older, is invested 65% in bonds, 30% in stocks, and 5% in short-term reserves.[115]

Based on those allocations, an older IRA owner should:

(1) Allocate the fund between fixed-income assets—primarily bonds—and equities. The percentage should be 50% to 60% in bonds and 40% to 50% in equities with a gradual shift to a higher percentage of bonds as the owner ages. By age 80, equities would be down to 20% to 30% of the total. The IRA owner should buy and sell equities as necessary to maintain the target allocation.

(2) For equities, buy mutual funds, particularly indexed funds. Diversify investments across large, middle, and small capitalized funds and invest 15% of the portfolio in mutual funds holding international equities. Avoid drift in allocation by selling when a mutual fund exceeds its percentage allocation and buy funds that are below their allocation.

(3) Either buy bond funds or "ladder" bond purchases by purchasing bonds that mature at regular fixed intervals.[116]

For IRAs of greater value, the same rules could apply, but more sophisticated or individualized planning techniques might be in order.

For the IRA owner, the problem is the surfeit of encouragement or advice to move away from the "vanilla" form of investing described above. Put simply, there are many more bad ways to invest than there are sound ways. For example, the wrong adviser can urge a client to overinvest in one sector of the market, to buy individual stocks rather than mutual funds, to try to "beat" the market by excessive trading, or to purchase individual bonds that pay higher interest but come with greater risk.

Although older investors should have enough sense to avoid such pitfalls, the reality is that when urged to do so by a credentialed financial adviser, many older investors will follow the advice to their later regret.

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115. Vanguard, Vanguard Target Retirement Income Fund, https://personal.vanguard.com/us/funds/snapshot?FundId=0308&FundIntExt=INT ("Portfolio & Management" tab) (last visited Apr. 19, 2010).

116. A retiree looking for investment advice would find similar recommendations in popular literature such as SUZE ORMAN, SUZE ORMAN'S 2009 ACTION PLAN (2008); RAMIT SETHI, I WILL TEACH YOU TO BE RICH, 172–74 (2009); PETER J. TANOUS, BUILDING A WINNING PORTFOLIO (2008).

Consequently, even retirees with sufficient mental capacity may misinvest an IRA and put their retirement funds at risk. For those with diminished mental capacity, the likelihood of investing their IRA in a way that diminishes their retirement income is almost certain to occur. Even with good investment advice, mentally incapacitated IRA owners cannot and should not go it alone. They need help.

VII. THE LIMITATIONS OF POWERS OF ATTORNEY AND GUARDIANSHIP

The loss of ability of older individuals to handle financial affairs due to mental incapacity or physical decline is nothing new; the need for an alternative decisionmaker for incapacitated adults has long confronted society.[117] The original legal response was guardianship[118] with the durable power of attorney as the more recent solution.[119] Both, however, have serious drawbacks.

Guardianship is a judicial determination that an individual is legally incapacitated as defined by the applicable state statute.[120] Every state has a guardianship statute, and although they vary in detail, the typical test of legal incapacity is an inability to make reasonable decisions.[121] Courts are empowered to appoint a guardian to act as a substitute decisionmaker for the incapacitated individual.[122]

Because guardianship is a judicial proceeding it can be time-consuming, expensive, and potentially a public affair.[123] If an older person lacks

117. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 600–02 (1981).

118. Some states use the term *conservatorship* when referring to judicially appointed substitute decisionmakers for asset and financial management. Patricia C. McManus, *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 SETON HALL L. REV. 591, 600 (2006). The description here of guardians and guardianship also describes conservators and conservatorships.

119. The first durable power of attorney was created in 1954 by Virginia. 1954 Va. Acts ch.486 (codified as amended at VA. CODE ANN. § 11-9.1 (2008)).

120. McManus, *supra* note 118, at 599–600.

121. *E.g.*, UNIF. PROBATE CODE § 5-102(4), 8 U.L.A. pt. 2, at 414 (Supp. 2009).

122. *See generally* Frolik, *supra* note 117 (analyzing guardianship powers and models and evaluating statutory reform proposals).

123. *See* Susan N. Gary, *Mediation and the Elderly: Using Mediation To Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 423–31

mental capacity, someone has to notice and care enough to petition the court to find the individual incapacitated and appoint a guardian. Typically the spouse or the children of the individual will petition; if not, then friends, neighbors, medical providers, and even financial advisers may petition. Some elderly are so isolated that their conditions are not brought to the attention of the court. Those with IRAs or other assets, however, almost surely will be known by someone willing to petition for a guardianship. Money attracts attention.

Assuming a petition is filed and assuming that a responsible party is willing to act as guardian, the proceedings take time because of notice requirements and the need to set hearing dates.[124] If an emergency exists, such as potential fraud or financial exploitation, a temporary guardian can often be appointed in quick order, but in most instances the loss of mental capacity that requires a guardian of the estate does not rise to an emergency as defined in the state's guardianship statute.[125] During the time needed to process a nonemergency guardianship petition, the alleged incapacitated person continues to control the IRA with possibly unfortunate consequences from ill-considered investments or withdrawals. If the alleged incapacitated person will not act, potentially valuable investment opportunities may slip away during the period that the guardianship is being sought. Guardianship is also costly. The lawyer for the petitioner must be paid; an expert witness, usually a physician, must be deposed or testify; there may be court costs; and depending on state law, there may be a lawyer for the alleged incapacitated person who will be paid from that person's assets. Absent a court order to the contrary, the hearing on the guardianship petition will be open to the public and could cause embarrassment to the alleged incapacitated person.[126] Once appointed, the guardian may be required to make regular

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(1997) (comparing the legal issues that arise in guardianship proceedings to those that arise in probate and discussing the advantages of undergoing mediation in these contexts).

124. *E.g.*, UNIF. PROBATE CODE §§ 5-301, -303 to -309, 8 U.L.A. pt. 2, at 142–53 (Supp. 2009).

125. For example, Pennsylvania permits the appointment of an emergency guardian only if there is clear and convincing evidence of possible "irreparable harm to the person or estate of the alleged incapacitated person." 20 PA. CONS. STAT. ANN. § 5513 (West 2005).

126. Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 348 (1998).

reports to the court.[127] The filing of the reports and other expenses incurred by the guardian will also be charged to the funds of the incapacitated person.

Though in theory guardianship would seem to solve the problem of the incapacitated IRA owner, in reality it does not. The imposition of a guardianship may not be possible, however, because although an individual has a lowered level of capacity the appointment of a guardian can only occur if the individual meets the state's statutory test of incapacity. The statutes vary, but in essence they require that the individual be unable to take care of his or her affairs to an extent that the individual's health and finances are at risk.[128] Courts are supposed to focus on what functions the individual can undertake rather than on the cause of the mental disability.[129] A mere decline in the IRA owner's mental acuity or judgment would not justify the appointment of a guardian even if the result was diminished investment success. The management of an IRA requires the capacity to enter into a contract and that is defined as "whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act."[130] By the time the individual has lost enough capacity to justify a guardianship, the individual may have already done significant harm to

127. Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 148–49 (2007).

128. For example, Pennsylvania defines "incapacitated person" as "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety." 20 PA. CONS. STAT. ANN. § 5501 (West 2005). The Uniform Guardianship and Protective Proceedings Act of 1997 defines incapacitated person as an individual who "is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." § 102(5), 8A U.L.A. 312–13 (2003).

129. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 102 cmt., 8A U.L.A. 314 (2003).

130. 17A C.J.S. *Contracts* § 143 (1999); *see also* N.Y. PUB. HEALTH LAW § 2980 (McKinney 2007). For a discussion about contract capacity, see Lawrence A. Frolik & Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAT'L ACAD. ELDER L. ATT'YS J. 303, 315 (2006).

the value of the IRA. This is because it would be the poor investment decisions and the resulting losses in the IRA that would support a finding of mental incapacity and the appointment of a guardian.[131]

Even if the court finds the requisite incapacity and approves a guardianship, the individual appointed as guardian may lack the knowledge to be an effective manager of an IRA. Typically, the court appoints as guardian whomever the guardianship petition suggests. That individual's ability to manage wisely a retirement IRA will vary greatly. Often those nominated as proposed guardians are selected for their willingness and availability to act as guardians rather than because they have any special financial acumen.[132] Worse, the individuals who agree to act as guardians may agree to do so from a desire to profit from the assets of the older person rather than from a desire to use the IRA to promote the interests of the incapacitated person.[133] And although guardians are ostensibly under the control of the appointing court, in reality court supervision of guardians is minimal and largely ineffective.[134] In a word, guardianship may be a poor substitute for a mentally alert IRA owner.

In part because of the costs, complexities, and delay of guardianship, every state has a statute that authorizes the power of attorney. The power of attorney permits an individual—the principal—to appoint an agent to handle the principal's financial affairs in the event the principal should be unable to do so.[135] The authority granted to the agent is

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131. In theory in states that permit limited guardianship—and almost all do—it might be possible to have a limited guardian appointed to manage the IRA at the first sign of diminished capacity. The claim would be that the individual had a specific, not global, incapacity that justified the appointment of a guardian whose authority was limited to overseeing the IRA. In reality, limited guardianships are seldom used, and a court might be reluctant to impose a guardianship for such a narrow purpose. *See* Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 753–55 (2002).

132. Daniel Leinung, Comment, *Reforming New York State's Guardianship System: It's Time for a Change (Again)*, 2 ALB. GOV'T L. REV. 677, 679 (2009).

133. Family members who typically serve as guardians, such as spouses or adult children, may expect to inherit the IRA and so manage it more with an eye to their own prospects than in the interest of the incapacitated owner. Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 956 (2002).

134. Karp & Wood, *supra* note 127, at 185.

135. The statutes vary from state to state, but are similar in most respects to the Uniform Power of Attorney Act. 8B U.L.A. 29 (Supp. 2009). The power of attorney is durable, meaning that it does not terminate in the event that the principal loses capacity.

governed by the terms of the power of attorney document, but the usual practice is to grant the agent powers that are coterminous with those of the principal. Although a few powers of attorney do not take effect until the principal is incapacitated—known as "springing durable powers of attorney"[136]—most take effect upon the execution of the power by the principal and, if necessary under state law, when witnessed, notarized, or attested to by the agent.[137]

The use of power of attorney seems to be the sensible and efficient solution to an older retiree losing the ability to handle a retirement IRA. It is inexpensive because most powers of attorney are based on a form or a standard document created by the attorney and both the existence and the contents of the power of attorney are private. The durable power of attorney is akin to a private guardianship arrangement with the agent granted powers comparable to those of a guardian. However, no court involvement or supervision is necessary. Even the reluctance of third parties to accept the agent's authority has been overcome or minimized in many states because of statutes that penalize a third party who refuses to accept the authority of an agent if the durable power of attorney is valid on its face.[138] Given the frequency of the execution of durable powers of attorney and the number of incapacitated elderly, many IRAs are likely being managed by agents.

Despite the popular use of the durable power of attorney, no state has succeeded in preventing the misuse of the power by the agent. Absent requirements in the power that mandate oversight or preapproval of agents' actions, agents are essentially on their own.[139] Granted, agents

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Id. § 104, 8B U.L.A. 39 (Supp. 2009). For a discussion of the relative merits of guardianship and powers of attorney, see Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7 (2007).

136. Springing powers of attorney have fallen into disfavor because of the attendant uncertainty and cost in proving the incapacity of the principal. Lawrence A. Frolik, *Keep Powers of Attorney in Check*, TRIAL, Apr. 2009, at 42, 42.

137. *See* Black, *supra* note 85, at 296 & n.54.

138. Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 352 (2008).

139. The lack of supervision and communication can easily lead to abusive use of the power. *See* Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 18 (2006).

may have to account for their actions, either formally or informally, but until that day, assuming it ever comes, an agent does what the agent thinks is best. Armed with fiduciary powers and responsibilities, the agent manages and promotes the financial affairs of the principal as the agent sees fit. Of course, that is the point of a power of attorney—to create powers in the agent that are very similar to the rights of the principal. Unfortunately, that wide grant of authority makes it easy for an agent to misuse the principal's assets. In the past, agents have made inappropriate gifts to third parties, made inappropriate gifts to themselves, made gifts to charities not favored by the principals, defeated estate plans by creating joint accounts with survivorship interests, changed beneficiaries named in life insurance contracts, revoked trusts, engaged in self-dealing, and used their powers to benefit their spouses, friends, or relatives.[140] In short, agents routinely violate their fiduciary obligations and use their authorities to advance their own interests at the expense of the principals.[141]

An elderly IRA owner who appoints an agent with authority to manage that IRA—and the principal's other assets—is taking a significant risk that the agent will misuse the power and so dissipate the assets held by the IRA. If the agent dissipates the assets, the elderly IRA owner will not only be incapacitated but also broke. Of course, an elderly IRA owner will try to select a trustworthy person to act as agent. Probably most succeed in doing so. Spouses can almost always be trusted, children often trusted, but after that, the odds increase that the agent will act in a way that the principal would not approve of had the principal retained capacity.

Agent incompetence is yet another risk created by a durable power of attorney. Again, though the principal will try to name an agent capable of managing finances, not all will be up to the task. If an 85-year-old IRA owner names his 84-year-old wife his agent, will she be sharp enough in the coming years to successfully manage his account? What about the 90-year-old incapacitated woman who names her 67-year-old daughter as agent? The daughter subsequently has a minor stroke that impairs her executive functioning but continues to act as agent with

140. *See* Whitton, *supra* note 138, at 355–64.

141. *See* Frolik, *supra* note 136; Jennifer L. Rhein, Note, *No One in Charge: Durable Powers of Attorney and the Failure To Protect Incapacitated Principals*, 17 ELDER L.J. 165 (2009).

predictably poor results. Finally, imagine an 80-year-old single woman who names her nephew as her agent. She trusts him because he is a church deacon. Her faith in his trustworthiness is well placed, but he directs that her IRA be managed by a stockbroker, a member of his congregation, who unfortunately is a compulsive gambler. The broker churns the aunt's stock account in order to produce high commissions. The result is a steady loss in capital for the aunt.

An elderly IRA owner can take steps to reduce the risk of agent misuse of assets or incompetence by building safeguards into the power of attorney. The principal can name a "monitor" to review the agent's acts or the agent can be required to regularly report to a third party. For example, if one child is selected to act as the agent because of living near the principal, that child-agent could be required to report to the other children the actions taken pursuant to the power of attorney. Nothing keeps one honest like having to explain one's actions. If there are no other children, perhaps the agent could report to the lawyer who drafted the durable power of attorney. Regardless of to whom the agent reports, the point is to have someone who monitors the acts of the agent. The monitor should examine the investment decisions and spending of the principal's assets by the agent to prevent losses either due to inept investments or self-dealing, and to discourage unnecessary, ill-advised, or fraudulent spending.

Although nominally a solution, the appointment of a monitor to oversee the agent has several drawbacks. The initial problem is finding someone qualified and willing to act as a monitor of an agent. Many older persons find it difficult enough to identify someone to act as agent. Absent a competent spouse, a child is often considered. But not all children are up to the task. Some live too far away to be a practical choice, others lack the judgment or intelligence to perform well, and some are not trustworthy, perhaps because of financial problems or drug or alcohol dependency. Finding a second competent, trustworthy individual in addition to the agent may prove difficult if not impossible. Even if an appropriate person is available and willing to act as monitor, there is no guarantee that the monitor will be capable of fulfilling that function when the time comes to do so. The power of attorney may not be needed for many years after it is signed. By then the monitor may no longer have any interest in serving as a monitor, may have moved too far away to be effective, may have lost too much physical or mental capacity to function successfully as a monitor, may have personal problems that make it difficult to perform effectively, or may have died. Because of these possibilities, the principal should name a successor monitor, but naming a successor monitor brings up the same problem—who to name—that arose in the selection of the initial monitor.

If a volunteer monitor is not available, the principal could name a professional, such as an attorney. Doing so, however, could be expensive and defeats one advantage of a power of attorney—its lack of cost. Moreover, some individuals may not be willing to serve as agents if their acts are to be overseen by a lawyer or other professional. And if a professional is to be used, why not just use the professional as the agent and thereby obviate the need for a monitor?[142]

An aging owner of a retirement IRA, who is losing the ability to manage it, faces the alternative of either accepting guardianship or appointing an agent under a durable power of attorney. This is the world that our nation's retirement system has created for its elderly. The reliance on 401(k) plans has been rightly criticized for leaving retirees with inadequate savings for their retirement.[143] Many have attacked 401(k) accounts for putting the investment risk on employees who generally are not up to the burden.[144] But even those few employees who arrive at retirement having adequately managed their accounts and who have accounts with enough money to create a financially secure retirement must still navigate the perilous years of their retirement. Like a modern Odysseus, they have long and difficult voyages to navigate.

We could ease that journey if we replace 401(k) accounts with defined benefit plans that create lifetime pensions. That is not going to happen; the era of defined benefit plans is over.[145] Many commentators have

142. To be sure, a professional can misuse a power of attorney, but that seems less likely. And if the professional does misuse the power, at least it is likely that there will be malpractice insurance available to pay for the resulting damages.

143. PATRICK PURCELL & JOHN J. TOPOLESKI, CONG. RESEARCH SERV., R40707, 401(K) PLANS AND RETIREMENT SAVINGS: ISSUES FOR CONGRESS 1 (2009), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1637&context=key_workplace; Stabile, *supra* note 38, at 310–16.

144. Stabile, *supra* note 38, at 312; *see also* Debra A. Davis, *Do-It-Yourself Retirement: Allowing Employees To Direct the Investment of Their Retirement Savings*, 8 U. PA. J. LAB. & EMP. L. 353, 365 (2006) ("Numerous studies indicate that many participants are not adequately prepared to manage the investment of their retirement accounts.").

145. GAO REPORT, *supra* note 5, at 1; Stabile, *supra* note 38, at 307.

made suggestions on how to deal with the weakness of 401(k) plans, from modest proposals such as encouraging employees to invest in mutual funds that adjust the asset allocation as the employee nears retirement, to more drastic ideas such as making individual retirement accounts mandatory.[146] Although these proposals may create more and better-funded 401(k) accounts, few of the proposals deal with the problem of managing a postretirement, rollover IRA.

VIII. WHY ANNUITIES HAVE NOT BEEN THE SOLUTION

The realistic solution for postretirement management of a rollover IRA is to recreate the advantages of the defined benefit pension by converting some or all of the 401(k) account at retirement into an immediate pay, lifetime annuity. This would address the two significant risks created for retirees by 401(k) accounts, the financial investment risk and the longevity risk. Although the monthly payout by the annuity would depend upon the amount in the 401(k) account—the higher the value of the account, the greater the monthly annuity payout—at least the retiree would have the assurance of lifetime income and not be faced with the difficulty of investing the 401(k) account proceeds.[147] In short, a defined contribution plan can capture some of the advantages of a defined benefit plan by converting the lump-sum value of the 401(k) account into an annuity. It is not necessary to invest all of the IRA into an immediate pay annuity. Merely investing half of the account can dramatically increase the probability that the retiree will not outlive the IRA.[148]

Unfortunately only 20% of defined contribution plans offer retirees the option of converting their accounts into an annuity, and only about 10% of the employees of those plans choose the annuity option.[149] Even

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146. Stabile, *supra* note 38, at 317–21.

147. For the advantages of converting a 401(k) account into an immediate pay, lifetime annuity, see PURCELL & TOPOLESKI, *supra* note 143, at 24–26.

148. Walter Updegrave, *Make Your Dough Last and Last . . . and Last*, MONEY, Oct. 2009, at 92, 94.

149. PURCELL & TOPOLESKI, *supra* note 143, at 25; Mark Bruno, *Radical Retirement Initiative from Brookings in the Works*, INVESTMENT NEWS, May 3, 2009. If a 401(k) plan offers an alternative of an annuity instead of a lump-sum distribution, the selection by the

if an annuity is available as part of the 401(k) plan, retirees typically prefer a lump-sum distribution to an annuity.[150] Some undoubtedly buy annuities, but they have to purchase them as individuals so they do not get the better price offered to groups. Even the task of finding the best "deal" while still buying the annuity from a financially sound company may be too daunting a task for many. Perhaps they reject annuities because they are not gamblers, for an annuity is in a sense a bet with the annuity providers by the purchasers that they will outlive their actuarial predicted life spans. For example, for a 65-year-old, the predicted life expectancy is about 18 years.[151] The amount of the monthly payout is a function of the cost of the annuity, the projected future rate of return for the company selling the annuity, and the purchaser's life expectancy. A purchaser of an annuity, who dies 18 years after the purchase of the annuity, will have received payments that equal the cost of the annuity, plus the projected investment return on that investment, minus the transaction costs and profit for the seller of the annuity. Every year that the purchaser outlives those projected 18 years will result in a bonus payment to the purchaser. The purchaser has in a way won the bet with the issuer of the annuity. A purchaser, however, who dies before the end of the eighteenth year has "lost" the bet because the purchaser will have paid more to the issuer than the issuer paid back.[152] Research indicates that if the potential purchaser of an annuity thinks of it as an investment, an annuity seems riskier than a bond because the total return on the annuity depends on how long the annuitant lives.[153]

plan administrator of the annuity provider is a fiduciary decision with the attendant possible liability if the annuity provider defaults on its obligations. In late 2008, the Employee Benefits Security Administration under the Department of Labor issued final regulations designed to create a safe harbor to protect the plan administrator from liability based upon its selection of the annuity provider. Selection of Annuity Providers—Safe Harbor for Individual Account Plans, 73 Fed. Reg. 58,447, 58,447–50 (Oct. 7, 2008). The hope was to encourage more 401(k) plans to offer an annuity option. *Id.*

150. Steven D. Cohen, *Autoenrollment and Annuitization: Enabling 401(k) "DB-ation,"* 5 N.Y.U. J. L. & BUS. 281, 317 (2009).

151. The life expectancy is slightly greater for a woman and somewhat less for a man. *See supra* note 41.

152. Purchasers may get back the cost of the annuity, but if they die before their actuarial life expectancy, they will not be paid back the time value of their investment in the annuity.

153. Conversely, if the potential purchaser thinks in terms of consumption, the higher rate of disposable income provided by an annuity—investment income plus return of capital—compared to a safe investment such as a bond, makes the annuity very

True, betting against an annuity issuer is not the point of buying an annuity. Rather for the purchaser, an annuity is a contractual guarantee of a set monthly income for life. Because an annuity is a way of spending principal without the danger of living longer than the principal lasts, the purchase of an annuity is more of a hedge than a bet. Living beyond one's life expectancy is the bonus. The annuity ensures that the good news of a long life is not accompanied by the bad news of running out of money before death. Still, there is that business of dying before getting back all the money that one paid for the annuity. The thought or fear of buying an annuity and then dying soon after appears to chill the sale of the product. The issuer's response is to sell annuities that pay benefits for a guaranteed minimum number of years, such as ten years. If the purchaser dies during that period, the payments continue for the duration of the minimum payout period to a beneficiary designated by the purchaser. The minimum payout period is designed to overcome the fear in potential purchasers that they will buy an annuity and die a week later, a bad bet indeed. Of course, a minimum payout period lowers the monthly benefit, but that trade-off is either acceptable to purchasers of annuities or not appreciated. Another way to address potential purchasers' fear of their early deaths has been to sell a survivor or two-life annuity, which provides that the annuity continues to pay out—perhaps a reduced amount—to a spouse or other beneficiary after the death of the purchaser of the annuity.

Yet another response to prospective purchasers' fear of premature death has been the creation of new products designed to distribute the assets in monthly increments and also return any undistributed capital. Fidelity, the seller of mutual funds, has introduced a product known as an "income replacement fund." The funds, based on the three-year average asset value, distribute monthly distributions that ideally increase enough

attractive. JEFFREY R. BROWN ET AL., TIAA-CREF INST., TRENDS & ISSUES: FRAMING AND ANNUITIES 2 (2009), *available at* http://www.tiaa-crefinstitute.org/pdf/research/trends_issues/ti_framingannuities_0109.pdf. The secret to successful marketing of annuities is presenting the product as providing more consumption. *Id.* Known as the practice of "framing," purchasers respond differently to a choice depending on how the outcome is presented; in this case whether it is a choice between different investments or a choice about how to capture the greatest possible consumption at the lowest risk. *Id.*

to at least keep pace with inflation. Unlike an annuity, the funds do not guarantee a set monthly payment for life, but they are less costly and, even more important, the individual can redeem the investment at any time. An example of a projected payout, as advertised in March 2010, by a Fidelity fund with an investment of $100,000, was $474 per month or $5688 per year for 25 years. The payments were expected to rise and keep pace with inflation. At the end of the 25 years, the account was expected to be exhausted.[154] If the investor dies before the fund is completely spent, the remainder of the account passes to those identified as the account beneficiaries. Although the funds are attracting investors, it is unclear whether they are attracting IRA funds. The projected exhaustion of the funds prior to death may be a significant deterrence in their sale to individuals looking for the assurance of lifetime income.

For many, annuities are unattractive because they limit the ability to leave a financial legacy. To a remarkable degree, the elderly are willing to forego consumption in order to preserve their assets so that they can pass them on, usually to their children.[155] Although the children and their financial advisers may urge the older person to spend more money and enjoy retirement, to "live a little," that advice is often not heeded. Many elderly are determined to preserve their capital for their heirs. The reason for that compelling desire to leave a legacy is not clear. Some may feel a continuing obligation to take care of their children despite those children being adults.[156] Certainly some adult children have special financial needs, perhaps because of a disability, a divorce, or drug or alcohol dependency. Yet the desire for a legacy goes beyond obvious financial needs of the heirs. For some elderly, leaving a legacy may be a final attempt to have themselves remembered with affection and respect by their heirs. For other elderly, leaving a legacy may be an attempt at self-respect by making their lives appear to have value. They can say to

154. Fidelity Investments, Fidelity Income Replacement Funds, http://personal. fidelity. com/products/funds/content/WhatYouCanBuy/income_replacement_funds_overview.shtml. cvsr?imm_pid=1&immid=00109&imm_eid=e2770792&buf=999999 (last visited Apr. 24, 2010).

155. Perhaps that desire is a reflection of the view that, "'I am what survives of me.'" ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 141 (1968).

156. A 70-year-old retiree is likely to have children who are age 40 to 50 and who should be capable of caring for themselves by that age. Yet the moral and cultural norms that underpin the desire to leave a legacy to children are very strong. *See* Sarah-Vaughan Brakman, *Do Parents Owe Their Children a Legacy?*, GENERATIONS, Fall 1996, at 21.

themselves, "Though I was not famous or financially successful, still I was thrifty and sacrificed enough to be able to pass on wealth to my children." Whatever the motivation, the desire to leave a legacy impedes the purchase of an annuity because the potential buyer focuses on the loss of capital and the diminished legacy rather than the guaranteed income.[157]

Financially sophisticated retirees who understand the advantages of purchasing annuities may still be reluctant to buy them for several other reasons. Some may fear the ability of the insurer to make good on the contract to pay the annuity. The last few years have seen many financial institutions in peril, which has likely frightened off some potential purchasers who fear that the company selling the annuity may not be in business for the 30 or more years that it may be obligated to make monthly payments.

Some potential purchasers may be willing to bear the modest risk of possible nonpayment but may still be reluctant to buy annuities because of the fear of rising interest rates. The seller of the annuity relies on life expectancy probability to ensure that enough purchasers of the annuity will die soon enough to create a pool of funds sufficient to pay benefits to those who live past their life expectancy. The benefits to the long-lived are paid not just out of the funds paid by the short-lived, however, but also by the investment income earned by the issuer on the funds paid to it by the purchasers of the annuities. The greater the rate of investment return earned on the purchase funds, the higher the monthly benefits that can be paid to the annuitants.[158]

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157. Potential purchasers of annuities may not appreciate that they could buy an annuity and save the monthly payments. By their actuarial age they would have saved back the cost of the annuity plus some percentage return on their "investment," which in a way is what an annuity is. Of course, they assume the risk of dying before they recapture the annuity cost, but that risk is counterbalanced by the opportunity to live long enough to save much more than they paid for the annuity.

158. For example, assume an annuity has a 30-year payout and costs $100,000. If the investment rate of return over the life of the annuity is estimated at 4%, the monthly benefit is about $472. If the investment rate of return is estimated at 6%, the monthly benefit is $587—an almost 25% higher monthly benefit. *See* Dinkytown.net, Financial Calculators, http://www.dinkytown.net/java/InvestmentDistribution2.html (last visited Apr. 19, 2010).

A fixed rate annuity represents a "bet" on future rates of investment return by both the issuer of the annuity and the individual who buys it. One reasonable fear of the annuity purchaser is that interest rates—as well as investment returns in general—will rise after the annuity has been purchased. Though the buyer of the annuity will not know the rate of return anticipated by the issuer of the annuity, if interest rates are very low, the projected rate of return for the issuer of the annuity will be correspondingly low. That in turn will lower the amount of the monthly benefit.[159]

Many retirees simply do not want to tie up or invest their capital in long-term, irrevocable investments, such as annuities, particularly in times of low interest rates or low yields on investments. Of course, what is a "time of low interest rates" is never clear. What seems low today may seem better tomorrow if rates decline even further. Even if rates are not particularly low, however, the potential buyer of an annuity can always imagine that after buying an annuity, in a few months or years interest rates will rise. It is this fear of rising interest rates and higher future investment returns that makes some reluctant to purchase an annuity.[160]

IX. THE PUBLIC ANNUITY SOLUTION

Whatever the reason for the reluctance of retirees to buy annuities, the reality is that it is unlikely to change. Yet the purchase of an annuity

159. If interest rates are high and the insurance company anticipates a relatively robust investment return on the funds it acquires from the sale of annuities, the promised monthly payout will be higher. In that case, it is the issuer of the annuity who is likely to suffer as a result of the investment risk inherent in an annuity, for if the issuer does not obtain those projected returns, it will find itself paying out more to annuitants than it is realizing from its investments.

160. One approach to potential upward movements in interest rates is to purchase smaller annuities every six months for three or four years. Incremental purchasing of annuities smoothes out the variance in interest rates. For example, instead of paying $300,000 for an annuity, the retiree would buy six annuities, each for $50,000, one every six months. If interest rates rose during the three-year period, the purchaser would receive greater monthly benefits from the later purchased annuities. Of course, deferred purchases carry the risk that interest rates might decrease, meaning that the monthly benefits from the later purchases would be lower. Another solution is the purchase of short-term annuities that pay benefits for only three to five years. At the end of the term, the annuitant has the option of purchasing another annuity and thus to take advantage of rising interest rates and improving rates of return on investments.

with at least part of the 401(k) account is a wise answer to investment and longevity risks. To overcome the reluctance of retirees to purchase annuities requires an annuity product that addresses their concerns—risk of payment, loss of an estate, fear of dying before receiving the value of the annuity, and fear of rising interest rates after the purchase of the annuity. The private sector is not going to create such a product. If it could, it would have done so by now. In the absence of a private solution, the government must create, sell, and likely subsidize new forms of annuities that retirees will purchase.

The justification for a government-subsidized annuity is the public interest in assisting retirees to use their 401(k) savings to create lifetime, assured streams of income. For years the nation has promoted employer-provided retirement plans. The federal income tax grants favored status to employer-provided pensions by permitting both employers and employees to take current deductions for contributions to such plans, and by not taxing employees even on vested benefits until actual receipt of the pension.[161] The cost of these tax advantages is significant. As pointed out, "tax expenditures support the creation of private pensions at considerable cost to the government in lost tax revenues."[162] For 2009, it was estimated that employer-provided retirement plans, including 401(k) plans, resulted in a loss of tax revenue of $125 billion.[163] The national concern that these tax deferrals actually result in improved retirement benefits for employees was part of the reason for the enactment of the Employee Retirement Income Security Act of 1974 (ERISA)[164] and the creation of the Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor, which ensures that defined benefit

161. The tax deductibility of employer contributions is found in I.R.C. § 404(a) (2006). Tax deferral for the employee arises from § 402(a). *Id.* § 402(a) (2006). The pension trust itself is exempt from taxation. *Id.* § 501(a) (2006).

162. Lorraine A. Schmall with Nathan Ihnes, *Failure of Equity: Discriminatory Plant Closing as an Irremediable Injury Under ERISA*, 55 CATH. U. L. REV. 81, 87 (2005).

163. STAFF OF J. COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 38–39 tbl.1 (J. Comm. Print 2005).

164. 29 U.S.C. §§ 1001–1461 (2006).

pension benefits will be paid even if the employer can no longer afford to fund the plan.[165]

ERISA states that employee benefit plans are "affected with a national public interest" that is served by strengthening the operation of the plans and safeguarding their "financial soundness."[166] Protecting an employee's retirement funds is so important that the employee is not allowed to alienate or assign the funds.[167] Protection of employees' retirement plans during their working years, however, is of little avail if the retirement assets are at risk during the long years of retirement. Just as ERISA protects retirement benefits during working years, and the PBGC protects defined benefit plan benefits after retirement, what is required is federal legislation that offers retirees with 401(k) plans a protected stream of income during their retirement.[168]

How an annuity can create retirement security can be seen from the following example.[169] Assume a retiree at age 65 purchases an immediate pay, single-life annuity at a cost of $200,000. The annual payout would be $14,480, or $1206 per month.[170] If the individual self-annuitized, that is, left the money in the IRA and drew down $14,480 per year, assuming the investment return on the IRA was the same as the projected investment return on the annuity, the individual would exhaust the IRA

165. *Id.* § 1302(a).

166. *Id.* § 1001(a).

167. *Id.* § 1056(d)(1).

168. One proposal is the "Universal 401(k) Plan" suggested by Michael Calabrese, who advocates an automatic employment-based 401(k)-type account for every worker who does not choose to opt out. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-642, PRIVATE PENSIONS: ALTERNATIVE APPROACHES COULD ADDRESS RETIREMENT RISKS FACED BY WORKERS BUT POSE TRADE-OFFS 42 (2009), *available at* http://www.gao.gov/new.items/d09642.pdf. Upon retirement, an individual's account balance would be automatically converted into an annuity purchased though the federal government at group rates. *Id.* at 43. Retirees would have the option to opt out of the annuity and take a lump-sum distribution. *Id.* A proposal to supplement Social Security mandatory retirement savings accounts also proposes benefit packages where "[p]resumably, a life annuity (and for couples, perhaps a double life annuity) should be at least a major part of the package." SHAVIRO, *supra* note 2, at 155.

169. This example is adapted from JEFFERY R. BROWN ET AL., TIAA-CREF INST., TRENDS & ISSUES: A PAYCHECK FOR LIFE: THE ROLE OF ANNUITIES IN YOUR RETIREMENT PORTFOLIO 3–4 (2008), *available at* http://www.tiaa-crefinstitute.org/pdf/research/trends_issues/TrendsIssues_0608Brown_01.pdf.

170. This assumes the annuity was purchased in January 2008 and the payout was equal to that of a TIAA Traditional annuity. *Id.* at 3.

around age 85. Of course, no retiree would continue to draw down an IRA to zero. In reality the retiree would have to reduce the annual distribution from the IRA as the retiree aged. More realistically, the retiree could invest the IRA and, based on current investment rates of return, calculate equal annual distributions that would last for 35 years or until the retiree reached age 100 when the IRA would be exhausted. However, this strategy would yield an annual income about 28% lower, or $4136 less per year, than provided by an annuity whose benefit calculations were based on the same projected investment return.[171] And of course there is still the risk of living past age 100 with no more income from the IRA account. Any distribution scheme other than an annuity will yield either lower income for life or higher income for a period less than life.

By law, defined benefit pension plans must offer retirees a joint and survivor annuity as the default form of benefit.[172] Upon retirement, owners of 401(k) accounts should be permitted to convert tax-free part or all of their 401(k) accounts into immediate pay annuities that would recreate the advantages of defined benefit plans, including lifetime income and freedom from making investment decisions during a time of declining physical and mental capabilities. Like the joint survivor annuities offered by defined benefit plans, the governmental annuity would be a two-life annuity—terminate at the later to die of the husband or wife—unless the spouse of the retiring employee agreed to permit the employee to purchase a single-life annuity.[173] No one would be required to purchase an annuity from the government, but if the annuity were attractive enough, hopefully many retirees would invest all or part of their 401(k) assets in annuities. To entice retirees to purchase a government-backed annuity would require that the annuity be structured

171. *Id.* at 4. However, if the investment return over the 35 years is greater than originally anticipated, the retiree could take out more annual income. Conversely, if the rate of return was less than anticipated, the retiree would have to reduce the annual income distributed from the IRA.

172. 29 U.S.C. § 1055 (2006).

173. This is similar to the spousal waiver provisions of 29 U.S.C. § 1055(c)(2). *See id.* § 1055(c)(2).

in a manner that meets the objections to private annuities, which currently discourage their purchase by retirees.

A public entity that sold annuities fully backed by the federal government would overcome retiree fears about the financial solvency of the issuer of the annuity.[174] So that the government would not compete generally with issuers of annuities, the entity, which might be named the Federal Annuity and Insurance Corporation (FAIC), should be limited to selling annuities to retirees who pay for them with funds from their 401(k) or a rollover IRA.

As with any issuer of annuities, FAIC would sell annuities that were actuarially sound—the cost of the annuity being sufficient to support the projected monthly payout. FAIC should be able to sell a more attractively priced annuity in part because it will realize some savings in the form of lower administrative costs, the lack of the need to advertise, and savings from not paying commissions to sellers of the annuities as well as not being burdened with the need to create profit.[175]

The FAIC annuity would be attractive not only because of the income protection offered to purchasers, but also because it would offer enhanced features, some of which might have to be subsidized for the cost of the annuity to be competitive. The annuity sold by FAIC would be backed by the federal government thereby alleviating any concern by purchasers as to whether they will be paid all the monthly benefits promised to them. To meet the concern of annuity purchasers that they might be buying the annuity when interest rates are too low, FAIC could offer annuities that are not tied to current interest rates but rather calculate monthly benefits based on a fixed, minimum projected rate of return, such as 5%. The FAIC annuity should pay a predictable monthly benefit unlike private annuities, whose payouts vary at the time of sale depending on interest rates and anticipated returns on the investment of the purchase price. The use of a minimum benefit rate would permit employees who are nearing retirement to calculate what they might expect as a monthly annuity payment if they were to buy an FAIC annuity. A fixed, minimum rate of return would also protect those who

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174. The Retirement Security Project has suggested a federal guarantee program to back annuities, much like the support that the Federal Deposit Insurance Corporation provides to bank deposits. Bruno, *supra* note 149.

175. For a discussion of the costs associated with the sale of private annuities, see Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 86 (2004).

retire during times of low interest rates and low expected rates of investment return. An individual's retirement income should not be held captive to the vagaries of projected investment return that prevail at the time of retirement. The pensions paid to those who participate in defined benefit plans are not dependent on how robust the economy is on the date of their retirement. Similarly, employees who participate in 401(k) plans should have the opportunity to convert their 401(k) accounts into streams of income that do not vary widely with the economic circumstances that happen to prevail at the time of their retirement.[176]

To guarantee a minimum monthly payout might require in times of low interest rates and low expected rates of return that the government subsidize the annuity benefits. The subsidy would not have to be great. For example, if the retiree paid $200,000 for an annuity that was calculated to pay monthly benefits for 25 years, if the projected rate of return is 5% then the monthly payment would be approximately $1170. If the actual rate of return for the 25 years was only 3%, then the monthly rate of return would have to be reduced to $950 per month, meaning that to pay at a rate of 5% return would require a subsidy of about $220 per month.[177] Of course, over a 25-year period interest rates will vary, with some years having a yield in excess of 5% and some years below so that it is unlikely that the subsidy would be necessary for many months. Moreover, during periods when the projected investment rate of return exceeded the minimum interest rate, the investments for some annuities would produce excess revenues, which would help support those annuities that over their lives did not produce investment returns sufficient to pay monthly benefits based on a projected 5% rate of return.

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176. Note that the pension paid to a retiree with a defined benefit plan is affected by neither the interest rate nor the expected rate of investment return prevailing at the time of the commencement of the pension. This is consistent with the fundamental feature of a defined benefit plan—the investment risk is borne by the plan rather than the participant. Maria O'Brien Hylton, *Together We Can: Imagining the Future of Employee Pensions*, 12 EMP. RTS. & EMP. POL'Y J. 383, 386 (2008).

177. Calculations as reported by Free Annuity Rates at www.freeannuityrates.com (last visited Apr. 19, 2010).

If FAIC were to sell annuities with a standard, minimum payout prior to their retirement, employees could project how much their 401(k) accounts would translate into for a monthly annuity payment. For example, those anticipating retirement at age 65 would know long before that date what they could expect as a minimum annuity benefit based on what they estimate the value of their 401(k) to be when they reach age 65. Knowing the monthly annuity payout that their 401(k) could translate into might cause them to save more, delay retirement, or might encourage some to retire earlier. A fixed, minimum benefit could be expected to become well-known, for example that a $100,000 annuity would pay about $585 per month or $7020 per year. Some younger employees, once they realize how little in retirement an income of $100,000 actually is, might contribute more to their 401(k) accounts or save additional amounts for retirement by, for example, contributing the maximum allowed to Roth IRAs.[178]

In times of interest rates and projected investment returns that are higher than the projected guaranteed minimum, FAIC might offer annuities that reflect some but not necessarily all of its ability to earn greater returns on the investment proceeds from its sales of annuities. By only offering modest increases in the amount of monthly benefits, FAIC would be better able to subsidize annuities sold when the projected rate of return was less than the amount needed to support the minimum benefit. FAIC would also in essence step aside and allow private annuity issuers to reclaim the market—by paying higher monthly benefits—for those buyers who are willing to give up the security of a federally backed annuity benefit and the other benefits that might be offered to those who purchase FAIC-issued annuities.

FAIC might also offer modest inflation protection for purchasers of its annuities. The monthly payout could be increased by a certain percentage in the event that the increase in the consumer price index exceeded a predetermined trigger level. For example, if the index rose over 6% over a one-year period, the FAIC monthly annuity benefit would rise by 4% with the benefit increase continuing in a two-to-three ratio if the rate of

178. Unlike contributions to a 401(k) account, amounts contributed to a Roth IRA are not deductible, but all distributions from a Roth IRA are tax-free, including the investment income earned on the contributions to the account. I.R.C. § 408A (2006). To be eligible to contribute to a Roth IRA, the individual must have countable income below a prescribed dollar amount. *Id.* The annual contribution to an IRA in 2009 was limited to $5000 for taxpayers below age 50 and $6000 for those age 50 and above. *Id.* §§ 219, 408A (2006).

inflation continued to grow.[179] Although not offering the complete inflation protection enjoyed by Social Security recipients, whose annual benefits rise with inflation,[180] the partial protection would encourage the purchase of annuities by those wary of locking their capital into what is essentially a fixed-income investment.

The combination of absolute security that the annuity will be paid, a guaranteed rate of projected investment return used to calculate the benefit amount, and some inflation protection should overcome the reluctance of many retirees to purchase an annuity with the rolled over funds of their 401(k) plan.

Even with these inducements, many retirees might still not purchase an annuity because they do not want to transmute capital—their retirement IRAs—into a stream of income and so have nothing to leave their heirs. The FAIC annuity, however, could be designed to address this concern. As discussed, many annuities pay for either the longer of the life of the annuitant—two lives in the case of a two-life annuity—or for a minimum number of years, commonly ten. The FAIC annuity could offer the same options. The guarantee, for example, of at least ten years of payments would make the annuity more attractive to some potential purchasers. More imaginatively, purchasers could have the option to buy an annuity that would return a declining percentage of the cost of the annuity upon the death of the annuitant. For example, FAIC could agree to refund an amount equal to 50% of the purchase price if the purchaser died within five years or 20% if the annuitant died within ten years.[181] The declining death benefit would result in the annuity

179. An increase in the Consumer Price Index of 6% or more is uncommon. The last time that occurred was in 1990, when the increase was 6.1%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONSUMER PRICE INDEX (2010), ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. Prior to that the previous year with an increase of 6% or more was 1981. *Id.*

180. Automatic cost-of-living adjustments for Social Security benefits were adopted in the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329.

181. The amount of a refund would have to balance the desire to increase the sale of annuities against the need to lower monthly benefits in order to be able to finance the partial refunds. The refund amount would also have to be calculated with consideration to the problem of adverse selection; those most likely to die within ten years would be those most often electing the refund option.

paying smaller monthly benefits, but some potential purchasers would be willing to accept that trade-off in order to preserve some of the value of their estate in case they die before recovering their investment in the annuity. In order to limit the cost of offering refunds, the amounts repaid might be capped at a dollar amount, such as $200,000. The effect might be to discourage retirees from investing more than $200,000 in an annuity, but because only a small percentage of retirees would have that much in a retirement IRA, a cap would affect only a small number of the potential purchasers of FAIC annuities.[182]

Another way to guarantee a return of capital would be to offer the option of life insurance payable at the death of the annuitant. Research indicates that annuities have much greater appeal when perceived as insurance rather than as an investment.[183] The loss of wealth that an annuitant incurs by dying before the projected life expectancy is a significant deterrence to the purchase of annuities. When asked, potential purchasers indicate a much higher likelihood of buying an annuity if they are assured that their principal will be repaid to them regardless of when they die.[184] To be sure, an annuity is a form of insurance in that it guarantees income for life, but the insurance aspect would be more apparent if the annuity were sold with insurance that paid a death benefit. The insurance would initially pay the estate of the purchaser of the annuity an amount equal to the cost of the annuity with the death benefit declining over time to reflect the prior return of capital in the form of the monthly annuity payments.[185] The life insurance would guarantee purchasers of FAIC annuities that they would recapture the cost of the annuity if they were to die before their life expectancy. The insurance would not have any medical precondition, enabling purchasers of FAIC annuities to buy the insurance regardless of their

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182. In 2004, among married couple households headed by individuals age 55 and older, the median amount of all retirement accounts in the household was $119,500. PATRICK PURCELL & DEBRA B. WHITMAN, CONG. RESEARCH SERV., RL33845, RETIREMENT SAVINGS: HOW MUCH WILL WORKERS HAVE WHEN THEY RETIRE? 6, 8 tbl.3 (2007), *available at* http://aging.senate.gov/crs/pension5.pdf.

183. PURCELL & TOPOLESKI, *supra* note 143, at 26.

184. BROWN ET AL., *supra* note 153, at 4; JEFFREY R. BROWN ET AL., TIAA-CREF INST., RESEARCH DIALOGUE: FRAMING, REFERENCE POINTS, AND PREFERENCES FOR LIFE ANNUITIES 4 (2008), *available at* http://www.tiaa-crefinstitute.org/pdf/research/research_dialogue/110108.pdf.

185. A monthly annuity payment reflects payment of investment earnings on the purchase price and a return of a portion of the purchase price.

health, with the only limit being that the annuitant would have to live a minimum period of time, such as three years, in order to be eligible for the death benefit. A minimum survival period would be necessary to avoid the adverse selection problem of the sickest annuity buyers disproportionately purchasing the life insurance. To keep the insurance component affordable, it might be modestly subsidized on the premise that helping to encourage the sale of annuities is critical to maintaining the financial solvency of the elderly.

To reduce the cost of subsidies for these ancillary products, FAIC could offer different kinds of annuities at different prices. A basic annuity could be sold without any guarantees, refunds, or insurance. It would provide the largest payout. As other guarantees, refunds, and insurance were added, the payout would decrease—although not enough to fully pay for the added benefit—or the annuities could be priced higher to capture some or all of the cost of the additional benefits.

Another form of encouragement to buy a FAIC annuity would be to grant relief from federal income taxes. Because the 401(k) account was never subject to income tax and neither were the funds in a rollover IRA, the distribution of funds from the IRA used to purchase of the annuity would have to be exempted from taxation. To encourage the timely purchase of an annuity, the tax exemption for the distribution to purchase the annuity should only apply for a limited period, such as the later of age 70 or within 90 days of separation from service of the employer that sponsored the 401(k) plan. But the annuity could be granted tax-free status, much like the treatment of a Roth IRA, so that all or part of the distributions from the annuity would be tax-free.[186] Absent such tax relief all the payments received from an annuity purchased with a tax-exempt 401(k) would be subject to income taxation.[187] To ensure that the tax relief goes to those most in need, the tax exemption should

186. Proposed House Bill 2748 of the 111th Congress introduced by Congressman Pomeroy would exclude from gross income up to 50% of annuity income up to a maximum of $5000 for a single taxpayer and $10,000 for couples filing jointly. Retirement Security Needs Lifetime Pay Act of 2009, H.R. 2748, 111th Cong. § 2 (2009).

187. I.R.C. § 72 (2006). Annuities purchased with previously taxed dollars can exclude the return of the cost of the annuity from income taxation by use of the exclusion formula. *Id.*

only apply so long as the annuitant's adjusted gross income or a modified adjusted gross income, which includes other tax-free income such as distributions from a Roth IRA or tax-free interest paid by municipal bonds, is below a prescribed dollar limit. The latter is a way of directing the benefit to those with more modest income and so avoids providing a tax subsidy for those with higher incomes. The lower the modified adjusted gross income, the greater the percentage of the annuity that would be excluded from income taxation, much in the way that Social Security benefits are wholly or partially exempt from income taxation.[188] Not taxing all or part of an FAIC annuity payment would be an efficient way of promoting its sale. Though it would be very costly in terms of lost tax revenue, total or partial relief from income taxation would be a strong incentive to purchase an FAIC annuity.

X. CONCLUSION

In line with current federal laws that encourage and subsidize the reliance on 401(k), 403(b), and 457(b) plans, the added benefit of federally sponsored, minimum benefit annuities would encourage employees to save more money for retirement and permit them to convert those savings into lifetime income. Unfortunately, the current reliance on retirees managing IRAs during their declining years exposes them to excessive risks. Unless we relieve retirees of the burden of the responsibility for their retirement assets, we can expect growing poverty among the elderly as they mismanage and spend down their retirement funds. The willful creation of a retirement system that relies on millions of individuals age 80 and older successfully husbanding their limited retirement funds can only be explained as the triumph of ideology over common sense.

It is time to admit that what most retirees need is a stream of income backed by the federal government so that they are assured of having a check arrive every month regardless of their financial acumen or physical and mental capabilities. The foundation for retirement income should be the voluntary conversion of part or all of retirement plan defined contribution accounts into guaranteed lifetime annuities that reflect the reality that aging retirees need income protection, not financial speculation.

188. *See id.* § 86 (2006).