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Phyllis C. Borzi, JD

ASSESSING RETIREMENT SAVINGS PROGRAMS

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Phyllis C. Borzi is the nation's leading expert on the law that governs workplace benefits, the Employee Retirement Income Security Act of 1974 (ERISA).

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A U.S. Senate-confirmed appointee in the Obama administration's Department of Labor, she served as assistant secretary of the Employee Benefits Security Administration, where she oversaw issues relating to the administration and enforcement of laws affecting retirement plans, group health plans, and other ERISA-covered benefit plans, including primary responsibility for implementation of the Affordable Care Act as it related to employer-sponsored plans.

Before accepting this appointment, Borzi was a research professor in the Department of Health Policy at George Washington University Medical Center's School of Public Health and Health Services, where she was involved in research and policy analysis concerning employee benefit plans, the uninsured, managed care, and legal barriers to the development of health information technology. During this same period (1995–2009), she also worked at the Washington, DC, law firm of O'Donoghue & O'Donoghue LLP, specializing in ERISA and other legal issues affecting employee benefit plans, including pensions and retirement savings, health plans, and discrimination based on age or disability. Earlier in her career, Borzi served as pension and employee benefits counsel for the U.S. House of Representatives Subcommittee on Labor-Management Relations (part of the Committee on Education and Labor).

Borzi is a charter member and former president of The American College of Employee Benefits Counsel, serving on its board of governors during 2000–2008; a former member of the advisory committee of the Pension Benefit Guaranty Corporation; a former member of the advisory board of the Boettner Center for Pensions and Retirement Research at The Wharton School of the University of Pennsylvania; and a former board member of the Women's Institute for a Secure Retirement. An active member of the American Bar Association, she is the former chair of the association's Joint Committee on Employee Benefits.

Borzi earned a JD from Catholic University Law School, where she was editor-in-chief of the law review; an MA in English from Syracuse University; and a BA from Ladycliff College in Highland Falls, New York.

In August 2022, Robert Powell, Retirement Management Journal *editor-in-chief; David John, a nonresident senior fellow in economic studies at Brookings and a senior strategic policy advisor at the AARP Public Policy Institute focusing on pension and retirement savings issues; and Nevin Adams, then chief content officer for the American Retirement Association, spoke with Borzi about the importance of saving for retirement, the structure of state or federal programs that facilitate employee retirement savings, and the desirability of lifetime income streams like the default distribution mechanism of Social Security.*

Robert Powell: Tell us a little about what you're doing now.

Phyllis Borzi: When I first retired, I thought I would spend much of my time traveling, working on my bucket list, and catching up with friends and family whom I had neglected over my 40-plus-year career, and particularly during the past eight years at the Department of Labor. But the pandemic intervened, so my travel plans were set aside. I did only one of my big bucket trips—I went to Southeast Asia—but after that, I stuck close to home.

I've been asked to serve on various boards, and I'm on six right now. One is a corporate board, the Edelman Financial Engines board, and the rest are nonprofit groups. Before I joined the Department of Labor, I was appointed by the court in Ohio to serve on the administrative committee of the Goodyear Voluntary Employees' Beneficiary Association (VEBA) Trust.[1] But under the ethics rules in place under the Obama administration and previous administrations, I had to get off that board. Now I'm back on it and am enjoying that.

My board activity is essentially divided between the areas of pensions and health. I'm on the FAIR Health Board, which is a data collection analysis group in New York.[2] And most recently, I was appointed to the board of Maryland$aves, a state retirement program for small employers in the private sector.[3] I came on the board when they were finalizing contracts with the vendors, and now we're in the pilot stage.

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In addition to serving on boards, I'm doing a little speaking and consulting, and I've done a bit of expert witness activity as well. One of my former staff members at the Department of Labor told me last year that I had flunked retirement.

Nevin Adams: Let's discuss the subject of tax benefits. Ever since 401(k) plans have been around, a primary incentive for investing in one of these retirement savings plans is the ability to set aside money for retirement on a pre-tax basis. The assumption is that your taxes will be lower after you retire because your income will be lower relative to the tax base.

But now we're facing a situation in which an increasing number of lower-income individuals don't pay federal income tax and thus receive no tax advantage for investing in a 401(k). There's concern that even after retirement, a person's taxes won't be lower than they are now. Is it time for us in the investment industry to set aside the emphasis on pre-tax advantages and start talking up Roth IRA [individual retirement account] and Roth 401(k) plans?

Phyllis Borzi: I think you're on target. One of my hobbies is thinking about how we can expand coverage, an issue I've been thinking about for decades. When I began working in this field, the Employee Retirement Income Security Act of 1974, or ERISA, had just been passed, and everybody was talking about the strength of the tax advantages. I think tax advantages are still important to higher-income individuals. But over the past 50 years, the low- and moderate-income earners are having the hardest time saving, and I don't see the tax advantage providing anything of value to them.

So our challenge is what can we substitute? With Maryland$aves, which is an auto-enrollment program, we've been focusing on how to encourage employers to sign up for the program and employees not to opt out. In other states, there appears to be a relatively high opt-out rate of about 30 percent. I haven't yet begun the homework to examine what's behind that rate.

Regardless, I've always thought these retirement programs have to be sold. They're not bought—they're sold. You have to give people incentives. And if you can't offer tax incentives, what other incentives can you suggest? Recently, I've been thinking in particular about our COVID experience, the economic twists and turns it's caused, and how it's highlighted the need for emergency savings.

People who are reluctant to commit to saving on a regular basis typically think, rightly or wrongly, that they can't afford to save. Of course, we in the policy world have been touting the benefit of compound interest that accrues to people who put away even a little bit on a regular basis. What we need to do is to craft a positive message about how it's not that you can't afford to save, it's that you can't afford not to save—if you want to get married, buy a home, send your kids to college. Young people, particularly millennials, need to hear this message.

We need to encourage people to put away small pots of money, as they call it in the United Kingdom, NEST [the National Employment Savings Trust].[4]

Nevin Adams: NEST does seem to encourage employers to set up plans.

Phyllis Borzi: Yes, we have to make it simple for employers to set up a plan. Many are worried about the complications, real or perceived, that they see in setting up and monitoring plans and keeping them going.

Over the years, Congress has been pretty good about creating simplified arrangements for employers. The problem is that employers don't know about them. A second problem is the perception created by service providers that creating a retirement plan is too complicated—this is a way they try to keep their jobs. They tell employers: "It's too complicated. Hire me because I can solve those problems." So simple arrangements are available, and we just need to connect employers to them.

Nevin Adams: You've mentioned several ideas that pertain to our next question, which is about the myRA program. Created as a nationwide system for low-income earners and uncovered workers, this program originally generated a lot of excitement, but it was later shut down amid criticism of the marketing and administrative costs relative to participation in the program. How would you compare the U.S. experience with myRA and the United Kingdom's NEST program, which is generally regarded as a pretty solid success?

Phyllis Borzi: I was a big supporter of myRA. I considered it a good beginning step to get people accustomed to savings. But the people in the Obama administration who conceived this program, people like Mark Iwry,[5] were not necessarily those who were put in charge of implementing it. I think there was a disconnect between the vision of how the program should be set up, marketed, and operated—and its implementation.

At the time, I was the Department of Labor's representative on the Financial Literacy and Education Council, FLEC, which was a government-wide body of all the cabinet-level departments and independent agencies that had a stake in financial literacy and financial regulation. FLEC was very supportive of Treasury's efforts to create the myRA program, not just because the secretary of the treasury was the chair, but because we thought this was a good first step.

Within FLEC, I was also part of a smaller group that conducted some outreach activities and hearings in various parts of the country. Employers from companies of varying sizes would come to these hearings, but most of those who testified in these hearings saw the myRA program differently from the way it was envisioned. Most of them offered 401(k) plans for some or all of their employees, but they had pockets of employees who weren't participants.

They saw myRA primarily as an emergency savings vehicle rather than a starter retirement account. There was some dismay within the administration that the employers we had to rely on to make this program a success didn't understand it. I just thought it was important to get people to save. While retirement savings is my number one concern, saving for other purposes creates a habit of saving, and that eventually spills over to retirement savings.

Because of my 16-plus years on the Hill, I know there will always be pressure for money from the retirement savings system to be diverted to other purposes—home mortgages, college tuition, student loans, those types of things. I've always thought we needed something like a side-by-side savings system—a broad initiative to encourage savings of all kinds. Keep the pension, keep the retirement savings locked up to be used for retirement, but also have another savings vehicle that can be accessed on an emergency basis.

As for the way NEST is marketed, I visited its website just this morning and was struck by how user-friendly it is, how positive it is, how it encourages individuals to save. It emphasizes all the benefits that can come from participation in a program like this. NEST is a more structured system than our fractured system in which all the states deal with this individually. I hope we'll eventually get to a single federal system. As someone once said: "You have to give credit to the Americans. They always come up with the right answer after everything else has failed."

I'm a big fan of pilot projects. Test an idea, give it a chance, and then pick up the good and correct the bad. We're stumbling toward reaching consensus that we need to do something different. No reasonable person can look at the system we have and say it couldn't benefit from more consistency and perhaps some mandates. I'm optimistic that we're moving toward recognizing this in the policy area, but politically, we couldn't be more divided as a country. So getting anything through Congress is probably not in the cards for the foreseeable future.

David John: Considering your experience with Maryland and other state programs that are up and running or being implemented, what ideas can we bring to this eventual national system? What's worked and what needs to be improved?

Phyllis Borzi: Honestly, I think it's a bit too early to come to any big conclusions about that because only a handful of states are operating savings programs. In Maryland's program, the accounts are called work-life accounts, not retirement accounts, so participants get the picture that this is a savings plan for your career and your whole life. The program also includes an emergency savings vehicle. The first thousand dollars saved through these accounts are designated as emergency savings, and I think that's the correct priority.

As much as it's important for people to have retirement savings, they're not usually willing to lock up money for retirement if they know they won't have ready access to it in case of an emergency. This is the only savings some families might have. But I'm not a fan of diverting retirement savings to other purposes.

In the area of employee benefits, we've spent decades focusing on the accumulation phase, but only in the past decade have people begun to think about dealing with the distribution phase. I think this same evolution is happening in the state programs. While I'm absolutely committed to the idea that we need a federal infrastructure for these programs, so long as Congress is not doing anything along these lines, we shouldn't stand in the way of the states, provided they stay within the specified framework.

My other bedrock principle, which many of your readers may disagree with, is that I much prefer the structure of an ERISA-covered plan over the IRA structure. The biggest advantage of an ERISA-covered plan is the role employers play in administering the program and in helping employees shape their investment choices. I was interested in whether any states would take up the challenge of offering something with the potential for being an ERISA plan. The publicity at the beginning of this process was that ERISA was like kryptonite. The last thing an employer wanted was to be associated with an ERISA plan. But it's the protections, imperfect as they may be, that ERISA provides employees and the value employers can offer by helping employees understand the need for saving for retirement and by providing a structure to facilitate that are really important.

I wanted to make sure that whatever positions we took at the Department of Labor allowed states that wanted to offer something like an ERISA-type, multiple-employer plan could provide that option. Massachusetts immediately comes to mind because of the way its program is structured.[6] I've always thought that allowing employers to aggregate under a single administrative structure was likely to be more appealing to some people—for example, the exchange structure under the Affordable Care Act and the HIPC [health insurance purchasing cooperatives] structure under the original Clinton plan, which looks like a multiple-employer welfare arrangement or a multiple-employer trust on the pension side.

One of the things we've learned is that the states have had a difficult time, at least at the beginning, getting their legislatures to adopt these programs. And the strong opposition of the financial services industry has resulted in the same old arguments: This is going to undercut the private sector, and so forth. But so far, the data in the handful of states that have moved forward don't show any diminution in the role of the private sector in this marketplace. The data show an uptick in coverage, and that's what we want.

One of the to-be-filled-in issues is one that I alluded to earlier—the opt-out rate appears to be higher than it is in the private sector. I think we need some researchers to examine why people have chosen to opt out and identify the lessons we've learned. We learned from the private sector that auto-enrollment increases participation. One issue that has come up in our discussions in Maryland is that sometimes people have to opt out because they're not eligible for the choice of a Roth IRA.

But back to my point about focusing on the decumulation side. Maryland is hoping to have a lifetime stream of income distribution as its default form of distribution. I think states should consider that. People can see that they have a pot of money, but they don't have a sense of how long that pot will last. So I think having lifetime income distributions as the default in these state programs would be a good development. Aside from these suggestions that I think might be useful, I believe it's too early to discern the real lessons.

David John: What are your thoughts on an appropriate default structure for a national system? Is the structure of the Maryland program also applicable to the overall 401(k) structure? And what about the issue of portability—moving money from various jobs into one system?

Phyllis Borzi: I think a national system would benefit from a default consisting of a lifetime payment of monthly benefits. But I want to be clear that I'm not advocating a commercial annuity. I'm not a fan of including all kinds of annuities as a qualified default investment alternative or any kind of default investment. I think it's important to have a default distribution mechanism like Social Security, in which participants get a monthly benefit, because that's much easier for people to manage. What we know about people's financial literacy suggests that it would be an improvement to guarantee lifetime income for retirement security.

As for portability, I've been thinking about this since 1979, when I first went to work on the Hill. In some ways, portability would be easy for the system to deal with because so much of it is automated. At the same time, it's difficult because no financial institution wants to lose the money it has under management. Nobody wants to let a penny go.

When I was at the Department of Labor, we tried hard to address this issue. Judy Mares,[7] who was my deputy during the second Obama administration, was really focused on this. We brought the biggest recordkeepers together and said: "Look, you guys need to work together. Can we have a simple system that includes a single rollover form that everybody can use to move money from one financial institution to another, from employer plan X to employer plan Y if the plan provides for it?"

I'd love to gather all the recordkeepers in a room, lock the door, and say no food and water until you come up with a portability system. I think it can be done. I just don't think there's a will to do it.

Nevin Adams: We've seen ESG [environmental, social, and governance] investments swing one way and then the other. The sensitivity around ESG as a concept seems to change somewhat with the politics of the moment. Crypto investments are perhaps even more controversial. The Department of Labor didn't say people couldn't invest in crypto. It just said, "If you do, know that we're probably going to ask you about that decision and the process you went through." We've also seen smaller vacillations in the sentiment about private equity investments.

People seem to think the Labor Department is more inclined than it used to be to put its thumb on the scale with regard to these investments. Do you sense that, and given the fluctuations in people's sentiments toward some of these investments, what would you advise an ERISA fiduciary to do?

Phyllis Borzi: The department's longstanding position, which I completely embrace, is that the standard for measuring prudence is to examine the specific facts and circumstances of the investment decision. Think back to what the states did with respect to public plans and their legal lists of what was good and what was bad. ERISA rejected that concept. So ERISA's fiduciary rules are flexible, but we still need to be prudent. People need a prudent process to decide how and where they're going to invest.

You've identified three important buckets, which I think are somewhat different. ESG was probably the most difficult of all the issues I dealt with at the Department of Labor. The private equity and crypto issues have been addressed by the department since then.

The concept of considering the nontraditional financial aspects of an investment has been around for a long time. As a matter of fact, it first came up in the corporate context. Years ago when I was on the Hill, there was a raging debate about whether the good old boys in the CEO [chief executive officer] investment network invested in each other simply because of the incidental benefit they got by entrenching their companies' management in the four guys who played golf together every week.

Then when the housing market fell apart, the trade unions got involved. At the Labor Department during the Obama administration, we conducted a lot of research and hearings on these issues before we took any steps. But with respect to ESG issues, we've seen a tremendous evolution.

The problem has always been how to quantify these nontraditional factors. How do you measure the impact of carbon emissions, for example? In the United States, our quantification methods are based on the fiduciary, prudence, facts, and circumstances approach. But in many other countries, fiduciaries are actually required to incorporate ESG factors in their investment decisions, which I strongly oppose.

Other countries have mandated that fiduciaries benchmark and evaluate the so-called benefits of these factors. Consequently, the pros and cons of ESG investments have been more rapidly developed than those of the other two investments you asked about, Nevin. But I don't think it's good for the employee benefits universe, either for participants or employers, to be subject to constant fluctuations caused by politics.

Maybe I'm deluding myself, but I didn't see our work at the Department of Labor as based 100-percent on politics. When our economists and policy analysts looked at all these factors, what we endeavored to do was objectively evaluate the data. My former deputy, Judy Mares, did a lot of good work in this area too. We attempted to evaluate the state of the art in terms of our ability to measure whether, and to what extent, there were benefits from considering these other factors. That's what caused our guidance to be structured in the way it was structured. We tried not to move from the basic principle that you can't sacrifice any of the traditional financial measures in order to pursue these other considerations, but you could take them into account after you followed a prudent process to evaluate them.

So let's just put ESG aside for a minute and talk about crypto. To my knowledge, it's not even in a discrete asset class. There are products, but we don't have a regulatory structure. We are in the infancy of the crypto world. I think we need a lot more research, data, and analysis to be able to evaluate whether at some point crypto investments may be perfectly fine for pension funds.

When people ask me about this, I say, "Never invest in anything you don't fully understand." I don't fully understand crypto, so I have no intention of investing in it personally at this point. Another piece of advice I give people is: "Never invest more than a small part of your assets in any new asset class until it's been tested and evaluated and you know you can trust it. And if you're not prepared to lose 100 percent of your investment, then don't do it." Honestly, this is the same advice I've been giving people for 40 years, and it certainly applies to crypto investment.

I think the Department of Labor did the right thing about crypto investment. It's as if they put out a flashing yellow sign but didn't say this flashing yellow sign would last forever. As the world evolves and more data become available, maybe this flashing yellow signal will turn to green. Maybe it'll turn to red. We don't know.

The same rules apply with regard to private equity. The most important consideration in deciding what investments should be part of your portfolio—whether it's your individual portfolio or you're a plan sponsor creating a platform for your 401(k) participants—is that you have to understand the investment. We obviously need private equity for capital investment, but not too many people understand it as a retirement plan asset, and it's hardly transparent. So I would advise plan sponsors to avoid being distracted by bright, shiny objects that claim to be a silver bullet allowing you to make up for a lifetime of not saving by counting on a windfall at the end of your life.

Robert Powell: What challenges do you see for women in retirement, and what steps are needed to improve their financial prospects during retirement?

Phyllis Borzi: There are the challenges everybody knows about: Women generally earn less than men. Women's work patterns are sometimes substantially interrupted by family responsibilities, and entering and leaving the workplace affects cumulative lifetime earnings. In addition, women often have jobs that don't give them access to retirement savings. All these circumstances continue to be challenges for women in retirement.

Another problem that's underappreciated is the tendency of women to subjugate their own need for retirement income to the needs of their family or children. Women are the first to say to their kids: "You want to buy a house? Well, here's some money for your house, or your college expenses, or come back and live at home."

I see this issue in myself, in my family, in my friends, and it has both short- and long-term implications for women's ability to save for retirement. It's not so much that women don't save. It's that they're willing to give away the money they've saved to support family members. As the economy becomes more difficult for people to cope with, this will be a bigger problem.

I also observed this problem in connection with a project I'm working on with the Pension Rights Center. For a couple of years, this organization has been working on a project focused on women and divorce. Last summer, AARP conducted a series of structured interviews for the project. The couple of dozen women who were interviewed represented various racial, ethnic, and age cohorts. Some were divorced, some were in the process of getting divorced, some had no interest in divorce, and some were happily married. The interviews were recorded, and the contractor produced a fascinating report. But a couple of us who were advisors to this project were offered the opportunity to listen in to the interviews, with the permission of the person being interviewed.

I listened to two-and-a-half or three interviews, and in each one, as well as in the results summarized in the report, when the woman was asked what she wanted out of the divorce, her response was: "I don't want anything for me. I just want to make sure my kids are taken care of." Well, that's the wrong answer. It's understandable that you want your kids to be taken care of, but you need to be taken care of as well. This response was consistent regardless of the woman's age. Even the women in their sixties only wanted to make sure their kids were taken care of. But they didn't have toddlers. Their kids were adults. Their kids had kids.

This tendency of women to not put themselves first, or maybe even second, as they think about retirement is a troubling trend. Anna Rappaport[8] was the first person to raise this issue in an academic article. But once you mention it to people, they realize we all know people who do this. It's not that it's bad; it's just shortsighted.

Robert Powell: So what can be done to address this problem and fix it?

Phyllis Borzi: We certainly need more research that focuses on this tendency and aims to uncover the root cause. Elevating the issue as a problem is a good step forward, but I don't have any good answers for how we might fix it because that would require people to stop being who they are. I just don't think people focus on the right issues. The women whose interviews I listened to didn't seem to have a clue about how difficult it was going to be for them to get through the upcoming years into retirement.

Caregiving issues are another big problem for women, and there's been some research on them. There is also some public awareness that caregiving functions often fall disproportionately on women, even though men often contribute financially. But what can we do to make things better?

One significant piece of legislation that I worked on years ago is the Retirement Equity Act of 1984–85, which gives spouses the statutory right to claim part of a pension. In the Pension Rights Center project I've been working on recently, we've identified a number of problems with this law, particularly the provision dealing with qualified domestic relations orders. A lot of people don't know this provision exists, and a lot of lawyers don't know how to deal with it. Some lawyers tend to use the same old paperwork they've used in the past, not realizing that this doesn't always work for a spouse because you can't order the plan to disburse benefits that aren't provided for under the plan.

I'm proud of that legislation, but one of my biggest regrets at the time Congress passed it was that we didn't push harder for the same kind of protections for spouses on IRAs as we did in the qualified plan arena. When you look at the marketplace now, you see a tsunami of assets moving from the qualified plan universe to the IRA universe, where there are no protections. This is something Congress could and should address because fixing this problem would go a long way toward helping spouses achieve some level of adequacy or stability in their retirement funds. Typically, though not always, the spouse needing protection is a woman. The amount of money in IRAs is enormous, and there isn't any provision to make sure that money will eventually go to the spouse or the dependent children. You can designate anybody as your IRA beneficiary.

From my nearly two decades of work on Capitol Hill, my two decades in private practice, and my decade or so in the executive branch of government, I know that far too often when an IRA owner dies, the family thinks money is available but it isn't. It's been left to somebody else. That's okay, of course, so long as there's a joint agreement that that's how the money should be disbursed.

You might remember that Geraldine Ferraro[9] was the sponsor of the Retirement Equity Act. I was a member of the congressional staff when she was elected to Congress, and one of her staff members asked me to meet with her. In her office, she showed me a yellow pad with example after example of the financial plight of an elderly widow whose spouse had died. Often, the widow had not been in the paid workforce, had been working hard at home, and thought she was entitled to her spouse's pension but didn't have one of her own. Many of the important provisions of the Retirement Equity Act, including all the joint and survivor issues, were a direct result of those examples.

When people say to me, "One person can't make a difference," I reply, "One person can make a difference if the person you talk to about your issues is someone in a position to make things happen." Members of Congress can still make things happen when they take their job seriously. Geraldine Ferraro was ferocious in her devotion to her constituents, and she wasn't alone. Members of Congress often get a bad rap, and sometimes they deserve it, but there are lots of members like Geraldine Ferraro who care about their constituents and want to make things better.

Robert Powell: What steps might help people with gaps in their financial literacy do a better job of preparing for retirement?

Phyllis Borzi: This is a difficult issue because not everybody wants to be or can be a financial expert. Around the 40th anniversary of ERISA I was at the Labor Department, and the favorite question of reporters back then was if I ruled the world, was there a provision in ERISA that I would repeal? I don't know what people expected me to say, but I shocked everybody by saying it was ERISA's 404(c) provision, which relieves fiduciaries of the fiduciary duty to the extent that they allow participants to make their own investment choices.

This provision has caused more headaches and more long-term damage to the system than almost any other provision in ERISA, because it forces every participant to become a financial expert. Even though I've heard a million consultants and lawyers deny they ever said this, I know that employers, especially small- and medium-size employers, have been advised to take advantage of that provision and offer self-directed 401(k)s and 403(b)s as a way of selling employers on how they can reduce their fiduciary liability. That claim is not completely true because even under a 404(c) plan, the employer retains some legal obligations. So if I ruled the world and if we could start with a clean slate, even in a defined contribution plan I would provide the default option—a fund in which a professional actually manages participants' investments, rather than having the individuals take on the investment risk and responsibility themselves.

I don't mean that we should go back to a system in which professionally managed funds are the only option, but I'm skeptical that we can close the financial literacy gaps for enough consumers to enable them to protect themselves by accumulating adequate retirement savings.

Robert Powell: Perhaps this is a bad analogy, but I've often said that with 401(k)s, we essentially give people the keys to a car without driver's ed. Maybe what you're saying is that we need to give people driverless cars.

Phyllis Borzi: I think that's a pretty good analogy. The overwhelming majority of people would benefit from a self-driving car. On the other hand, there's a handful of super-brilliant people who think they can do better than the professionals. Still, if you need brain surgery, I say, "Don't try to do it yourself."

Robert Powell: I suppose you're also saying, Phyllis, that the cost of a managed account far outweighs the damage you could do to yourself by not knowing how to invest.

Phyllis Borzi: The cost of a managed account may be worth it because the cost of solid professional fiduciary advice may be less than the losses you can incur by doing it yourself. But the quality of advice is the key.

One of my concerns about do-it-yourself investing is that a lot of marketing is going on without any data to back up the products being marketed. It's also difficult for investors to separate marketing language from advice and to figure out the right thing to do. Primarily, that's because there's no one answer, no one-size-fits-all guideline, for investing. People have different sources of retirement income, different risk tolerances, different levels of knowledge, and different levels of interest.

Now that I'm retired, I take great interest in opening my investment statements, but there were times in my life when I didn't bother to open the envelope. Now, I'm ripping open the envelope and wondering: "Why do I have a big loss in this account? What's going on here?" You might think that after more than 40 years in this business, I would feel confident enough to invest for myself. I don't. That's why I have an investment advisor who is a fiduciary and therefore has a responsibility to act solely in my interest.

Robert Powell: The current iteration of the fiduciary Conflict of Interest Rule allows advisors to give advice if they follow certain guidelines, but what if they say, "I'm just going to concentrate on educating my clients and not be held to the fiduciary standard?" Is that as good as it gets?

Phyllis Borzi: The problem is how does anybody know they're giving only educational information versus advice? If an advisor says something like, "Well, a person who's 55 and has a couple of kids and a mortgage might want to look at these types of considerations," that's generalized information—it's not specific. That's education in my mind. But often there comes a point in the conversation when somebody asks, "So what should I do?" If you answer that question, you've crossed the line into advice.

Robert Powell: What changes in the 401(k) system would you recommend to help people entering the workforce with large student loans? I believe that in the SECURE Act 2.0 proposed legislation, they've talked about allowing companies to match in 401(k) plans.[10]

Phyllis Borzi: As I've said, I don't support any policy that allows leakage from retirement saving systems for any other purpose, including student loans. When I worked on the Hill in the eighties, I was developing a proposal that allowed plan sponsors to set up pension funds that had an emergency savings component and that allowed contributions from both the employer and the employee.

Under this proposal, a voluntary employee contribution would be put in a separate account within the pension fund to be available for medical and other kinds of emergencies. The distribution rules for the money in that account would have been much less strict than in the rest of the pension fund. The point, of course, was that the money in the retirement account would not be touched. Employees could decide on an annual basis how much of the contribution they made, or their employer made, should be diverted to this emergency fund. We looked at 10, 15, or 20 percent—not a whole lot. I think 20 percent was the highest percentage we considered. However, we never got any traction with that proposal. Now, particularly in light of COVID, I think there's more interest in this type of emergency savings.

Anna Rappaport was at the forefront of thinking about emergency savings. She was one of the few people who thought this was a good idea back then. I think anything that encourages people to save is a good idea.

Maryland$aves is the first of the state savings programs to recognize the need for emergency savings. In this program, the first thousand dollars of a participant's savings goes into an emergency savings fund, which can be replenished if a participant wishes. But I absolutely do not support any proposal that allows participants to take money out of Social Security, or private pensions, or IRAs for other purposes. The money is supposed to be there for retirement, and goodness knows, it's not like most people have over-saved for their retirement.

Robert Powell: Let's turn our attention to another topic—how to manage and mitigate the risk of disability. Should there be changes in the method of protecting against disability risk?

Phyllis Borzi: The answer is probably yes. People don't think about the possibility of disability much, but I think there are big gaps in the disability system. When people think about retirement, if they think about retirement at all, they assume they're going to work until they are 60 or 70. They never consider the possibility that their working years could be cut short by a variety of factors outside their control—for example, your company is sold or it is downsized and you're let go.

The Secretary of Labor is one of the statutory trustees for Social Security and Medicare, so we at the department were concerned about the disability trust fund. As a citizen taxpayer, I'm still concerned about it. I'm particularly concerned about people who are not covered under Social Security and often have no disability protection. These are primarily state and local workers who are outside the Social Security system. This is a big problem, but I don't have any great solutions to propose, short of mandating participation in a disability insurance system.

Robert Powell: Let's talk about target-date funds [TDFs]. Have we done right by plan participants with these funds or not?

Phyllis Borzi: I think target-date funds are basically a good idea, but there needs to be greater transparency and disclosure of fees of the underlying investments in the TDF and greater consumer education about the glide path that the target-date fund uses. For example, there still is not a clear understanding of what the glide path actually represents. Is the investment target of a 2030 TDF adequate income at the individual's retirement date or adequate income through the rest of the individual's life? What might be the implications of that difference?

Robert Powell: What aspect of your time in public service are you most proud of?

Phyllis Borzi: As I look back over my career, what I'm most proud of is that my door has always been open. Even though I'm a person with strongly held beliefs, I'm always willing and eager to hear from people who disagree with me or people who have new ideas. I think we should all strive for that openness. I'm hardly using myself as a model, but I'm proud that I've had a career in which I've tried hard to listen. As a result, I've learned a lot more.

I was a high school English teacher at the beginning of my career. At the end of each semester, I'd thank my students and tell them I'd learned more from them than they learned from me. That's how I feel about my employee benefits career. I had the opportunity to learn from wonderful, talented people, even though not everything I heard was something I wanted to learn.

If I focus on just what I was most proud of in my last eight years at the Department of Labor, I would name three things. Two of them your readers might be able to predict; the third, maybe not. I'm extremely proud of the work my staff and I did on the Conflict of Interest Rule. That was a subject that needed to be tackled. It's still a work in progress, and it's really important. Everybody needs financial advice. Investors need to be sure that the people giving them that advice are held to a standard of transparency and do not have conflicts of interest.

I'm also extremely proud of the work we did to implement the Affordable Care Act. That was an enormous task. We had six months after the law was passed to adopt dozens of tri-agency regulations. Adopting a regulation within one agency is tough enough, but dealing with three agencies is enormously more challenging. Again, I was blessed with wonderful staff.

The third thing I'm most proud of is something that people may not know. People are talking now about the importance of diversity and inclusion. When the first secretary of labor in the Obama administration, Hilda Solis, talked to us, she said one of her objectives was to have the leadership of the Department of Labor look like the community we served.

Within the department, the Employee Benefits Security Administration had been led for many years by terrific people, but they tended to have a single profile in terms of their diversity. I'm a strong believer in promoting from within. I think leadership development is really important, and you can't develop leaders if employees don't believe they have a path to a greater future. By the time I left the department, just by increasing the number of candidates in the applicant pool, the leaders, both in the national office and in the regions, did indeed look more like the community we served. I'm especially proud of that because we gave people opportunities that they perhaps hadn't thought they had before.

Robert Powell: What's the one big thing you wish you had accomplished at Labor but weren't able to?

Phyllis Borzi: Oh, it has to be lifetime income. I wish we had been able to finish our project on lifetime income because I think retired people shouldn't receive a pile of money that they then have to manage. A lifetime income stream that's distributed monthly is much easier to manage. I think about my parents. My father got paid every week. When he came home, he'd have cashed his check, and my mother had envelopes labeled for expenditures like the mortgage and groceries, and there was always an envelope for savings. She insisted that no matter what their bills were every week, some money had to go in that savings envelope.

Robert Powell: Do you think the lifetime income disclosure that's now part of what plan participants get has helped, or is that not enough?[11]

Phyllis Borzi: The disclosure that Congress adopted was not the disclosure we were working on. We tried to be even-handed, but the disclosure Congress adopted clearly favors commercial annuities, which demonstrates the power of the insurance industry. Within the financial services community, the insurance industry is in the catbird seat. The proposal we were prepared to make public would have treated mutual funds, insurance products, and other products the same, so we wouldn't have our fingers on the scale or be forced to convert to insurance concepts. This is why I always refer to lifetime income streams, not annuities. A simple, plain vanilla annuity with no investment component is perfectly fine. But most of the annuity products that are causing problems in the marketplace and are so expensive and nontransparent—they are really investment vehicles, but they are marketed as if the guaranteed income component was the only feature that consumers needed to focus on.

Robert Powell: Finally, is there anything we didn't ask you about that you wish we had asked?

Phyllis Borzi: I don't think so. There's hardly anything in the world of employee benefits that you guys didn't touch on.

ENDNOTES

1. A voluntary employees' beneficiary association (VEBA) is a tax-exempt trust fund set up by an employer or a group of employees to pay medical and other comparable benefits to members, their dependents, or designated beneficiaries. https://www.thebalancemoney.com/what-is-a-voluntary-employees-beneficiary-association-plan-veba-5208413.
2. FAIR Health is an independent nonprofit that collects data for and manages the nation's largest database of privately billed health insurance claims. It is entrusted with Medicare Parts A, B, and D claims data for 2013 to the present. https://www.fairhealth.org/.
3. Maryland$aves is a new workplace savings program, sponsored by the state of Maryland Small Business Retirement Savings Program. https://www.marylandsaves.org/.
4. The National Employment Savings Trust (NEST) Corporation is the trustee of the NEST occupational pension scheme in the United Kingdom. Operated on a not-for-profit basis, the scheme ensures that all employers have access to suitable, low-cost pension provisions in order to comply with their duty to automatically enroll all eligible workers into a workplace pension plan.
5. Mark Iwry is a nonresident senior fellow in economic studies at the Brookings Institution. He also is a visiting scholar at The Wharton School of the University of Pennsylvania. From 2009 to January 2017, he served as senior advisor to the Secretary of the Treasury and concurrently as Treasury's Deputy Assistant Secretary for Retirement and Health Policy, with legislative, policymaking, rulemaking, and other regulatory responsibilities related to pensions, retirement, savings, health care (including legislative and regulatory implementation of the Affordable Care Act), other employee benefits, and related tax policy.
6. The Massachusetts Defined Contribution CORE® Plan is a multiple-employer 401(k) retirement program for nonprofit organizations with 20 or fewer employees. It's designed to help eligible employers provide their employees with saving opportunities that are cost-effective and easy to manage. See https://www.mass.gov/core-plan-for-nonprofits.
7. Judy Mares was the deputy assistant secretary at the Employee Benefits Security Administration (EBSA) from October 2013 to January 2017. Before joining EBSA, she was the Defined Contribution Committee Chair of the Committee on the Investment of Employee Benefit Assets, and a member of the Plan Sponsor Advisory Committee of the Defined Contribution Institutional Investment Association.
8. Anna Rappaport researches and writes about changing demographics, focusing on future benefits for an aging workforce. She strives to educate the public, policymakers, and business about the importance of helping older Americans achieve a secure retirement, and she is particularly committed to addressing women's issues.
9. Geraldine A. Ferraro (1935–2011) was a member of Congress and the first woman to run for the U.S. vice presidency on a major party platform.
10. The U.S. House of Representatives passed its version of SECURE 2.0, formally known as the Securing a Strong Retirement Act of 2022, in March 2022. The Senate is working on two pieces of legislation that should, if everything goes as planned, be condensed into one package and ultimately reconciled with the House bill. The House version would require most employer-sponsored retirement plans to automatically enroll new employees, encourage student-loan borrowers to save, and lower retirement-plan administration costs for small businesses, among other measures. Many provisions in the two Senate bills overlap with the House's efforts; others, such as access to an emergency fund in your 401(k), are unique. See https://www.forbes.com/advisor/retirement/secure-act-2/.
11. See "Pension Benefit Statements-Lifetime Income Illustrations," *Federal Register* (September 18, 2020), https://www.federalregister.gov/documents/2020/09/18/2020-17476/pension-benefit-statements-lifetime-income-illustrations.

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