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RETIREMENT SAVINGS IN THE FACE OF INCREASING LONGEVITY: THE ADVANTAGES OF DEFERRING RETIREMENT

CHASE A. TWEEL*

I. INTRODUCTION

The United States retirement plan system exists in a world of rapidly changing economic variables. Assuming Congress's commitment to the policies underlying the Employee Retirement Income Security Act (ERISA)\(^1\) remains constant, how does it confront issues of rising living costs,\(^2\) rising healthcare costs,\(^3\) a drying well of risk-appropriate investment opportunities,\(^4\) and heightening "race to the bottom"\(^5\) pressures from global competitors? Among the growing threats to the sustainability of the U.S. retirement system is increasing longevity.\(^6\) These threats

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2. See Harry Wallop and Edmund Conway, Cost of Living to Keep Rising as Oil and Food Hit Record Highs TELEGRAPH.CO.UK (June 9, 2008), available at http://www.telegraph.co.uk/news/majornews/2100048/Cost-of-living-to-keep-rising-as-oil-and-food-hit-record-highs.html ("The price of food, clothes, petrol and other goods are set to climb far faster than most salaries - leading to a severe downturn in families standard of living.").

3. See Blue Cross Blue Shield of Illinois, Understanding Rising Health Care Costs, http://www.bcbsil.com/PDF/health_care_costs.pdf (last visited Jan. 30, 2010) ("Some of the factors that contribute to the rising cost of medical care - such as an aging population - are beyond anyone's control. As people reach middle age, they tend to require more medical care, a fact that many graying Baby Boomers have come to appreciate.").


5. See id. at 2-10 (discussing the effects of globalization).

6. Sweeping demographic changes have led many experts to question whether our nation can provide retirement income and medical benefits to the future elderly at levels comparable to those of today. S. REP. NO. 107-158, at 24 (2002). There is concern that the baby boom is not saving adequately for retirement, yet it is unlikely that Social Security benefits will be increased. Id. To the contrary, the age for unreduced benefits will rise to 67 early in the 21st century, amounting to a benefit
concern not only the welfare of future retirees and their employers but also a large number of financial institutions who increasingly offer retirement plan products and services. This article examines the possible changes that policymakers may wish to consider to brace the retirement plan system for this phenomenon and, in doing so, endorses policy reforms that incentivize the deferral of retirement.

Part II of this paper summarizes the structure, policies, evolution, and current status of the U.S. retirement plan system. Part III describes in detail the issue of increasing longevity and introduces a number of possible solutions, grouping the solutions into two broad categories: reforms aimed at increasing savings and reforms aimed at deferring retirement. Part III also analyzes the relative strengths and weaknesses of reforms aimed at increasing savings. Part IV argues that private pension reform should include policies that encourage the deferral of retirement.

II. THE U.S. RETIREMENT PLAN SYSTEM

The current U.S. model of retirement savings was structured early in the twentieth century around a tripartite system of private pensions, personal savings, and Social Security, frequently referred to as the “three-legged stool.” The private pension leg of this metaphorical stool has morphed into two general types of employer provided retirement plans – the more reduction, and further cuts are being contemplated. Id. Thus, lawmakers, economists, consultants, and others concerned about retirement income security will likely continue to seek reforms in the private pension system. Id.


8. See infra Part IV (discussing policies aimed at deferring retirement).


10. See infra Part III, pp. 112-30.


12. See infra Part IV, pp. 130-37.


traditional type of pension plan, the defined benefit plan, and the defined contribution plan. Congress passed the Employee Retirement Income Security Act in 1974 to regulate these employer provided retirement plans and to protect the interests of plan participants.

A. Pre-ERISA

Employee benefit plans had been in existence long before the passage of ERISA. American Express established the first private pension plan in 1875. The law surrounding early pension and benefit plans was slow to recognize the policy virtue of encouraging such plans. For instance, some courts treated pensions like gratuities, revocable at will by the employer, and other courts treated pensions as unilateral contracts.

By the 1920s, U.S. tax law had encouraged the growth of pension plans. Recognizing that pensions are deferred compensation, the Revenue Act of 1926 permitted employers to deduct contributions to pension plans and taxed employees only upon the distribution of the benefits. Furthermore, the act allowed the earnings of the contributions held in trust to be tax exempt.

The passage of the Social Security Act of 1935 reflected a national policy commitment to the welfare of retirees. By itself, however, Social Security is "merely a floor incapable of replacing

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15. See infra Part II.C (discussing defined benefit and defined contribution plans).
16. Id.
19. Id.
20. See id.
21. See id.
23. Id.
24. See id.
income for most American workers.” Congress expected the other two legs of the stool, private pension and personal savings, to fill the gap. Subsequent legislation more specifically targeted private pensions. The Revenue Act of 1942 created coverage and nondiscrimination requirements for pensions. The Welfare and Pension Plan Disclosure Act of 1958 imposed certain disclosure requirements regarding pensions to the Department of Labor. Public support for comprehensive federal regulation of pensions was lukewarm until the “spectacular failure” of the automobile manufacturer, Studebaker.

The closing of the Studebaker automobile plant in South Bend, Indiana, is generally regarded as the pivotal event in the history of the movement toward comprehensive federal regulation of private retirement plans. In 1963, Studebaker announced that it was closing its manufacturing plant in South Bend, Indiana, and consolidating its remaining auto manufacturing activity at its plant in Hamilton, Ontario, resulting in more than 7,000 lost jobs. The workers were covered under a pension plan, and when the plant closed, Studebaker terminated the plan. Although the termination implemented default priorities, many of the employees fell into a “non-vested” category and lost their pensions. Lawmakers capitalized on the media coverage of Studebaker to build public support for comprehensive pension reform. Indeed, public opinion “coalesced around the idea of federal protection of pensions, based on concerns about mismanagement of assets, forfeiture of pension rights, and default

27. See id., at 7.
31. See Goldowitz, supra note 18, at 2.
33. Id.
34. Id.
35. See id.
36. See Goldowitz, supra note 18, at 3.
by failing businesses," thereby setting the stage for the passage of ERISA.\(^{37}\)

**B. Reform and ERISA**

In 1974, Congress passed the Employee Retirement Income Security Act.\(^{38}\) ERISA introduced broad changes to all employee benefit plans, and the legislative history indicates that it was passed to provide protection to participants' rights under such plans.\(^{39}\) Furthermore, ERISA provides employers with a uniform set of requirements regarding standards of conduct, responsibility, and obligations under such plans.\(^{40}\) Like most sweeping legislation, ERISA represents a balancing of interests. For example, rather than requiring immediate vesting, ERISA requires employees to work for certain minimum periods to have an enforceable right to a benefit.\(^{41}\) Additionally, it permits funding over a period of time rather than full funding at all times.\(^{42}\) Perhaps the most important interests ERISA struggles to balance involve revenue. While tax-favored treatment is necessary to encourage the formation of qualified pension plans, there are revenue concerns if too many tax dollars are lost.\(^{43}\)

**C. Defined Benefit Versus Defined Contribution Plans**

There are two fundamental categories of retirement plans – defined benefit plans and defined contribution plans.\(^{44}\) Under a defined benefit plan, employees are promised a level of retirement

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37. *Id.*


40. *Id.*

41. See *infra* Part III.C.1 ¶ B (discussing vesting rules under ERISA).

42. See *infra* Part III.C.1 ¶ A (discussing funding rules under ERISA).


income according to a formula. The formula may be based on the employee’s years of service. Alternatively, the formula may be independent of the employee’s years of service. For employees who terminate their service prior to retirement, an accrued benefit formula provides an annual level of accrual, to be paid at the normal retirement age as a life annuity or joint life annuity. The sponsor who establishes a defined benefit plan must contribute funds to the plan trust on a continual basis. These funds are invested, and the investment performance affects the employer’s future contribution obligations. The plan’s investment performance does not, however, affect the level of benefits to which the employee is entitled. In other words, under a defined benefit plan, the employer bears the exposure to market risk. The employee, on the other hand, is insulated from market risk.

Under defined contribution plans, the structure provides for employer or employee contributions, or a combination of both, that will accumulate over time in an individual account; the employee’s individual account is credited with investment earnings or capital gains or losses. The resulting balance in the employee’s account is the amount available to the employee. Once the employer contribution is made to the plan, the employer obligation is fulfilled and the investment risk shifts to the employer.


46. See Conison, supra note 44 (explaining that a plan that employs this type of formula is a “unit benefit plan”). For example, a plan’s formula for the annual retirement benefit might be: (Years of service) x (final average salary) x 1.5%. Id.

47. See id. at 4 (providing further that a plan that employs this type of formula is “flat benefit (or fixed benefit) plan”). This type of plan may provide either a fixed dollar amount or a fixed percentage of final or average pay on retirement. Id.


49. Typically, the plan sponsor is the employer; see Conison, supra note 44, at 4.

50. See infra Part III. 1.B.1 (discussing contributions rules and possible changes to these rules).

51. See id. (explaining that if a plan invests in common stocks, market gains may reduce, and market losses may increase, the employer’s obligation to contribute to the plan in future years).


53. Kennedy, supra note 48, at 910.
employee. There are a variety of kinds of defined contribution plans. For example, under a money purchase plan, the employer is obligated to contribute “a specified dollar amount each year to each participant’s account.” Another kind of defined contribution plan is a target benefit plan, which is essentially a species of money purchase plans and has characteristics of both defined benefit and defined contribution plans. Under a target benefit plan, the employer determines a target level of benefits and then actuarially determines a contribution level sufficient to fund those benefits. Unlike a defined benefit plan, the target level of benefits is only a projection and not a guarantee. The most prevalent type of defined contribution plan is a profit sharing plan, which provides for annual employer contributions, and their allocation to employees’ accounts pursuant to a formula – the amount of the employer’s contribution may be set by a formula or left to the employer’s discretion. In addition to profit sharing plans, there are many other similar, more specialized defined contribution plans such as stock bonus plans, employee stock ownership plans (ESOP), cash or deferred arrangements (CODA), and cash balance plans.

Over the last several decades, the U.S. retirement system has witnessed a shift from defined benefit pension plans to various

54. Id.
55. Conison, supra note 44 at 5 (explaining that typically, the specified amount is a percentage of the participant's compensation).
57. Conison, supra note 44, at 5.
58. See id.
59. See id.
61. See 26 U.S.C. § 4975(e)(7) (2006) (explaining that an ESOP is a stock bonus plan or combination stock bonus and money purchase plan designed to invest in the stock of the employer).
62. See id. at § 401(k) (explaining that this gives participants the choice of having the employer contribute money to their accounts in the plan or pay the same amount to them as current compensation).
63. See Conison, supra note 44, at 6. (explaining that a cash balance plan is essentially a type of defined benefit plan where the benefit for each participant is calculated by reference to a hypothetical account, in which the participant is credited with hypothetical allocations plus interest at a rate determined by the plan; unlike a defined contribution plan, the participant’s ultimate benefit is not affected by investment performance).
types of defined contribution plans. This trend may constitute a threat to the U.S. retirement system. Among the age group forty-seven to sixty-four, the rate of increase of median pension wealth has steadily declined over the last several decades. Also, median net worth excluding defined contribution pension plans fell by 4.3% between 1983 and 2001. Overall, median “private accumulations” fell by 2.2% for those aged forty-seven to sixty-four. The inequality of total pension wealth increased substantially between 1983 and 2001. This trend is traceable to the switchover from defined benefit plans to defined contribution “accounts.” While traditional defined benefit plans once had an equalizing effect on overall household wealth, “the switch to defined contribution plans has had the opposite effect.” While the defined contribution plan may in some ways be a virtuous device for retirement savings, policymakers should, for these reasons, guard against the extinction of the defined benefit plan.

D. Tax Code as Policy Lever

Congress does not require employers to have ERISA-qualified plans. Instead, it encourages the formation and
continuation of such plans through the Internal Revenue Code (I.R.C.). Generally, employers are not allowed a deduction until the contribution to the employee is included in the employee's income, even if the employer is an accrual basis taxpayer.\(^7\) Applying this general rule to any type of deferred compensation arrangement, including employer contributions to pension plans, an employer gets no current deduction for such contributions. From the employer's perspective, therefore, non-deferred compensation is preferable, as the employer receives a current deduction for paying the compensation.\(^7\) To encourage retirement plans, however, the I.R.C. allows employers to deduct contributions to "qualified" retirement plans when made.\(^7\)

The fact that an employer who adopts a qualified plan is allowed to deduct its contribution, even though there is no current income inclusion for employees, is perhaps the most significant impetus for an employer to adopt a qualified plan.\(^7\) To receive a full deduction for plan contributions, the contributions must be "ordinary and necessary business expenses"\(^7\) and must comply with § 404 of the I.R.C., which provides the qualification requirements under ERISA.\(^9\) Among these requirements are limitations on the amount of the deduction an employer may receive.\(^8\) The deductibility limits under § 404 are additionally limited by the "full funding limit" imposed by ERISA's funding

74. See 26 U.S.C. § 162 (2006) (providing that the deductible liability generally is taken into account in the taxable year incurred); see also 26 C.F.R. § 1.446-1(c)(1)(ii)(A) (2009) (providing that "under the accrual method, a [deductible] liability is incurred . . . in the taxable year in which all events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability).

75. See id.

76. See id.


78. 26 U.S.C. § 162 (2006). The contributions must be deductible as an "ordinary and necessary business expense" but for the fact there current inclusion for the employee.

79. Id.

80. See id. at § 404(a)(1)(A)(i)-(iii) (stating that the amount necessary to satisfy the minimum funding standard may be deductible if this amount is greater than: (i) level funding – the remaining unfunded cost of benefits over the remaining future service of each participant; and (ii) normal cost plus ten year amortization – the normal cost of the plan, plus any unfunded supplementary costs, amortized over ten years).
rules. The limit is expressed as the excess of a percentage of a plan's current liabilities over its assets. To generate revenue, Congress has lowered the full funding limit to reduce the amount of available deductions. Congress has also raised the full funding limit out of a concern that too low a limit leads to unsound plan accounting and unduly restricts plan funding.

Congress often legislates through the tax law, and this is especially true in the context of retirement plans. Much of the discussion on pension reform requires analyses of specific provisions of the I.R.C. A more general consideration of budgetary and fiscal policy issues is also essential to the discussion.

III. THE PROBLEM OF INCREASED LONGEVITY AND POTENTIAL ADJUSTMENTS TO THE RETIREMENT PLAN SYSTEM

A. The Problem of Increased Longevity

Life expectancy is continually increasing. The average life expectancy (at birth) for people born in 1900 is age forty-seven, sixty-eight for people born in 1950, and seventy-eight for those born in 2005. Increasing longevity contributes to the more general phenomenon of population aging. Population projections show that the world median age will rise from 26.4 in 2000 to 36.8 in 2050. Changes in fertility and mortality will lead to a

81. See id. at § 412(c)(7)(A)(i)(II).
82. The percentage has vacillated – depending on Congress's revenue appetite, it has imposed harsher full funding limit to limit deductions and raised full funding limits to enlarge the available deductions. See Kennedy and Shultz, supra note 39, at 206.
83. See id. at 207.
84. See id.
85. Id.
86. See infra Part IV.
87. Id.
88. Goldowitz, supra note 18, at 1.
89. Id.
90. See Mehmet S. Tosun, Global Aging and Fiscal Policy with International Labor Mobility: A Political Economy Perspective, IMF WORKING PAPER SERIES, No. 05/140 (July 2005).
91. Id. at 3.
significant increase in the share of the elderly. Trends of increasing longevity and population aging are especially pronounced in advanced economies like the United States. An important consequence of population aging “is increasing fiscal pressure through higher government spending on social security, health care, and other welfare programs for the elderly.” To alleviate such fiscal strains, policymakers may initiate reforms in the area of private sector pension plans. Reform in this area may quickly become an imperative as the increasing longevity of the workforce, along with other demographic and economic changes, make it uncertain whether the United States can provide retirement income and medical benefits to the future elderly at levels comparable to the income and benefits provided today.

The problem resulting from longevity is not difficult to grasp. Lengthening life spans “will lead to a major shift in the balance among the young, the working, and the elderly,” with the shift posing serious implications for the aggregate savings rates. As workers live longer, they will outlive their retirement savings unless measures are taken to increase savings to cover their extended periods of life. To prevent a deterioration of retirement living standards, policymakers may seek reforms to strengthen the legs of the so-called three-legged stool. Indeed, longevity gains will saddle the stool with a troublesome load, but what can Congress do to prevent the legs from snapping? This article considers reforms aimed at private sector retirement plans. Longevity-based adjustments to Social Security and reforms aimed at individual savings are beyond the scope of this article; however, some of the reforms discussed below necessarily involve normative valuations of government financed social insurance.

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93. See Tosun, supra note 90, at 4.
94. Id. at 3.
96. Heller, supra note 92, at 5.
97. See id. (explaining further that these demographic trends may lead to a decline in private savings).
98. See Dilley, supra note 14.
99. See infra Part IV.
B. Potential Solutions

In the context of private pension reform, two basic responses to the challenge of heightened life-expectancy exist – increasing savings and offsetting longevity. Reforms aimed at increasing the amount of savings to account for heightened life-expectancies may be desirable in certain circumstances, as described below, but an over-reliance on reforms of this type will impel a host of inefficiencies.\(^{100}\) Offsetting longevity, on the other hand, is a lower cost alternative for preserving retirement living standards.\(^{101}\) Offsetting longevity simply means to shorten the duration between retirement and death. To effect reforms that offset longevity, Congress can incentivize the deferral of retirement.

C. Increasing Savings

Congress may pursue a range of possible reforms aimed at increasing retirement savings. The range includes both direct and indirect measures. A direct measure may include increasing the level of funds flowing into retirement plans. More indirect measures may include some combination of deferring the distribution of retirement benefits and strengthening the investment experiences of retirement plan funds. Any reform seeking to inflate the American nest egg would, in theory, help solve the problem of increasing longevity. The problems attendant to implementing reforms of this nature, however, may overwhelm the possible virtues. Nonetheless, bolstering savings is a logical response to increasing life expectancies. Reforms that would increase savings may include: increasing the amount of money going into qualified retirement plans by increasing contribution levels and accelerating vesting requirements; increasing the amount of money staying in retirement plans by tightening funding requirements and deferring distributions; and increasing the amount of money earned by funds by enhancing plans’ investment opportunities.

\(^{100}\) See infra Part III.C.
\(^{101}\) See infra Part IV.A.
1. Increasing the Amount of Money Going into Plans

A direct way to increase the amount of money available to future retirees is to increase the amount of funds going into retirement plans. ERISA and the I.R.C. operate in tandem to govern nearly every dimension of retirement plans and provide rules affecting plan contribution levels and vesting requirements. If legislators want to encourage a greater flow of money into retirement plans, they can adjust these rules to increase contribution levels and accelerate vesting. Such adjustments could result in a larger, more secure nest egg for future retirees participating in these plans.

a. Raising Contribution Levels

Under current law, a plan does not qualify unless it provides that benefits or contributions will not be in excess of certain limitations. In the case of defined benefit plans, a qualified plan must limit the maximum contributions and other additions that may be allocated on behalf of a plan participant. In addition, the plan must limit the maximum amount of annual benefits that may be paid to a participant from the plan. On its face, this latter rule has savings-enhancing attributes, as it prevents frontloaded payout structures, promotes more steady, annuity-like payout structures, and stabilizes the supply of plan assets by limiting the annual payout liability. But prior to the payout of benefits, accruals of such benefits are always subject to limitations that correspond to the payout limitations. Thus, the current payout limitations seem to be tied more to revenue concerns.

102. See supra Part II.D.
103. See infra Part III.C.1 ¶¶ A, B (discussing contribution and funding rules under ERISA).
105. See supra Part II.C (explaining defined benefit plans).
107. Id. at § 415(b).
108. Id. at §§ 415(c) and § 415(d).
109. In other words, the payout limitation rules just operate has part of the overall amount of money an employer can contribute to a qualified plan, and from a Revenue perspective, Treasury has to put some ceiling on the current deduction.
than to retiree-welfare concerns. As a means to providing greater savings to future retirees with greater life expectancies, however, Congress may increase the contribution limits imposed by I.R.C. § 415. The maximum contribution is currently subject to both a dollar limitation and a percentage of compensation limitation.\footnote{110} The two limits for a defined benefit plan are disjunctive, and the lesser of the two limitations is to apply.\footnote{111} The dollar limit is $160,000,\footnote{112} and the percentage of compensation limit is 100 percent of the participant’s average total compensation for the highest three consecutive years of service.\footnote{113}

Defined contribution plans\footnote{114} are subject to similar limitations.\footnote{115} A participant’s account under a defined contribution plan cannot receive “annual additions” greater than the lesser of $40,000 or 100 percent of the participant’s compensation.\footnote{116} The term “annual addition” is defined broadly and includes employer contributions, employee contributions, and forfeitures.\footnote{117}

Congress may effect an increase in contribution levels in two ways. First, it may simply increase maximum limitation amounts. Raising the maximum amount of contributions that may be allocated annually on behalf of a participant under a qualified plan would cause employers and employees \footnote{118} to contribute greater amounts because such amounts would be deductible.\footnote{119}

Greater contributions would constitute an increase in retirement

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\footnote{110}{See Goldowitz, supra note 18.}
\footnote{111}{See id. at § 415(1).}
\footnote{112}{Id. at § 415(b)(1)(A). The dollar limit was increased to $160,000 in 2002, and the Regulations provide that is amount is to be raised in $5,000 increments for future cost of living adjustments (COLA’s). See 26 C.F.R. § 1.401(a)(17)-1 (2009). Thus, for example, the amount was increased $5,000 every between 2002 and 2006 so that the dollar limit in 2006 was $175,000. See id.}
\footnote{113}{See 26 U.S.C. § 414(b)(1) (2006).}
\footnote{114}{See supra Part II.C (explaining defined contribution plans).}
\footnote{115}{26 U.S.C. § 415(c) (2006).}
\footnote{116}{Id. at § 415(c)(1)(A), (B).}
\footnote{117}{See id. at § 415(c)(2)(A)-(C) (explaining “forfeitures”).}
\footnote{118}{In the case of defined contribution plans or where participants under a defined benefit plan also have access to participation in a defined contribution plan.}
\footnote{119}{26 U.S.C. § 404 (2006).}
ERISA

savings, and increasing retirement savings ostensibly helps to resolve the issue of increasing longevity.

Secondly, Congress may narrow the meanings of the terms “annual benefit” and “annual addition.” In the context of defined benefit plans, some items are not included as annual benefits. For example, voluntary employee contributions and rollover contributions are currently excluded. By expanding the scope of items not included by the term “annual benefit,” defined benefit plans will be able to receive greater levels of contributions without becoming disqualified.

The Treasury Department issued regulations in 2006 under which the term “annual benefit” does not include certain survivor and ancillary benefits unrelated to the retirement benefits. Congress may consider adding to this list. In addition, it may opt to adjust the ancillary benefits rules. Combining a contraction of the term “annual benefit” (to exclude ancillary benefits) with a liberalization of the rules governing ancillary benefits could achieve a powerful increase in retirement savings.

More particularly, if the rules pertaining to ancillary health benefits were liberalized, future retirees would be better able to cope with rising healthcare and living costs. Under I.R.C. § 401(h), a pension plan “may provide for the payment of benefits

120. See 26 C.F.R. § 1.415(b)-1(b)(2)(E)(iv) (2009). If voluntary employee contributions are made to the plan, the portion of the plan to which voluntary employee contributions are made is treated as a defined contribution plan pursuant to § 414(k) and, accordingly, is a defined contribution plan pursuant to § 1.415(c)-1(a)(2)(i). Id. Accordingly, the portion of a plan to which voluntary employee contributions are made is not a defined benefit plan within the meaning of paragraph (a)(2) of this section and is not taken into account in determining the annual benefit under the portion of the plan that is a defined benefit plan. Id.

121. See id. at § 1.415(b)-1(b)(2)(E)(iv). In the case of rollover contributions from a defined contribution plan to a defined benefit plan to provide an annuity distribution, the annual benefit attributable to those rollover contributions for purposes of § 415(b) is determined by applying the rules of section 411(c). Id.

122. See id. at § 1.415(b)-(1). Survivor benefits payable to a surviving spouse under a qualified joint and survivor annuity as defined by § 417(b) to the extent survivor benefits would not be payable if the participant’s benefits was not being paid as a qualified joint and survivor annuity. Id.

123. A pension plan may provide for the payment of a pension due to disability and may also provide for the payment of incidental death benefits through insurance or otherwise; it may also provide for health and medical benefits pursuant to § 401(h). See 26 C.F.R. § 1.401-1(b)(1)(i) (2009).

124. See id. at § 1.415(b)-(1).
for sickness, accident, hospitalization, and medical expenses of retired employees" if the benefits are subordinate to the plan’s retirement benefits, are held in a separate account, and are reasonable and ascertainable.\textsuperscript{125}

Under the current regulations, the medical benefits described in § 401(h) are considered subordinate to the retirement benefits if at all times the aggregate of contributions to provide such medical benefits (together with any life insurance protection) does not exceed twenty-five percent of the aggregate contributions.\textsuperscript{126} If, for instance, this amount were raised to thirty-five percent,\textsuperscript{127} and the exclusion of ancillary benefits from the term “annual benefits” is preserved, then employers would be able to set aside larger amounts for participants without jeopardizing the qualified status of the plan. And because rising health care costs will add to the burden of financing greater life expectancies,\textsuperscript{128} § 401(h) appears to be a worthy policy lever—especially if pulled in tandem with Treasury Regulation § 1.415(b)-1.\textsuperscript{129}

If Congress were inclined to raise the contribution limits under the ancillary benefit rules, particularly under § 401(h), would the increase of contributions for such benefits be currently deductible for employers? Even if employers were not entitled to currently deduct these additional ancillary contributions, at least they would have the option to make such contributions without losing the plan’s qualification. For a change to truly have a profound impact on future retirement savings levels, however, the current deduction incentive seems indispensable.\textsuperscript{130}

In the context of defined contribution plans, Congress may narrow the term “annual additions.”\textsuperscript{131} In the not so distant past,

\begin{itemize}
\item \textsuperscript{125} 26 U.S.C. §§ 401(h)(1)-(3) (2006).
\item \textsuperscript{126} See 26 C.F.R. § 1.401-14(c) (2009).
\item \textsuperscript{127} The thirty-five percent is used simply as an illustration. Raising the percentage by any amount would provide a similar effect.
\item \textsuperscript{128} What is particularly interesting, but beyond the scope of this paper, is the reality that rising health care is both a cause of and a burden on heightened life expectancies.
\item \textsuperscript{129} Providing for the exclusion of survivor benefits and ancillary benefits from the term “annual additions.”
\item \textsuperscript{130} See supra Part II.D.
\item \textsuperscript{131} See supra note 115 and accompanying text.
\end{itemize}
however, Congress has gone the other direction by expanding the term “annual additions” to include, for any limitation year, any forfeitures allocated to an employee’s account balance and all employee contributions made during the limitation year. Like narrowing the term “annual benefits” in the context of defined benefit plans, narrowing the term “annual additions” may bolster retirement savings.

b. Accelerating Vesting

In order to be qualified, a plan must also comply with minimum vesting standards. While qualified plans must limit their contributions so that participants’ annual benefits or annual additions do not exceed certain amounts, they must also comply with minimum standards regarding when benefits become nonforfeitable. Under a qualified defined benefit plan, amounts derived from non-elective employer contributions must vest at least as quickly as five years or, alternatively, seven years. Amounts derived from employees’ contributions must always be fully vested.

It may seem out of place to include vesting rules in a discussion on reforms that “increase the amount of money going into plans.” This is because vesting does not directly affect the

134. See supra Part III.C.1.
136. Referring to amounts of “accrued benefits.”
137. A plan satisfies ERISA’s vesting requirements “if an employee who has completed at least five years of service has a nonforfeitable right to 100 percent of employee’s accrued benefit derived from employers contributions.” § 411(a)(2)(A)(ii). Such a vesting schedule is known as “cliff vesting.” See Kennedy and Shultz, supra note 39, at 78.
138. A plan satisfies ERISA’s vesting requirements “if an employee has a nonforfeitable right to a percentage of the employee’s accrued benefit derived from employer contributions” that is equal to twenty percent after three years, forty percent for the fourth year, sixty percent for the fifth year, eighty percent for the sixth year, and 100 percent for the seventh year or more. See § 411(a)(2)(A)(iii). Such a vesting schedule is known as “graded vesting.” See Kennedy and Shultz, supra note 39, at 78.
140. See supra Part III.C.1.
amount of money flowing into a plan – the “vested portion of an employee’s benefit means the portion of the accrued plan benefit to which an employee is entitled to if he or she leaves prior to the plan’s normal retirement date.”\textsuperscript{141} From the employee’s perspective, therefore, faster vesting may increase the amount of money going into the plan for his benefit. This may be particularly important as the labor markets in many industries are becoming increasingly mobile and susceptible to turnover.\textsuperscript{142} If, for instance, qualified defined benefit plans were bound by vesting schedules providing for 100% nonforfeitability of accrued benefits after eighteen months of service,\textsuperscript{143} then workers, particularly those who frequently separate from their employers, whether voluntarily or involuntarily, will enjoy an increase in retirement savings.

Tinkering with ERISA’s minimum vesting standards may, however, deprive employers of a powerful tool for creating a culture of loyalty and commitment. The more an employer loses the ability to defer the vesting of participants’ benefits, the less it is able to incentivize participants to stay. Economists have thoroughly demonstrated the efficiencies of long term investment in human capital.\textsuperscript{144} Additionally, to the extent that employers wish to compete for labor among cohorts that are inherently mobile or prone to frequent turnover, defined contribution plans already offer a flexible alternative.\textsuperscript{145} Therefore, tightening vesting standards for qualified defined benefit plans seems to be overly burdensome for many types of employers.

\textsuperscript{141} Kennedy and Shultz, supra note 39, at 77.


\textsuperscript{143} As opposed to current minimum vesting schedules. See generally 26 U.S.C. § 411 (2006) (providing the minimum vesting standards).


\textsuperscript{145} See supra Part II.C (illustrating the flexible nature of defined contribution plans).
2. Increasing the Amount of Money Staying in Plan Trusts

a. Tightening Funding Rules

ERISA prescribes pension funding rules "to determine how much a firm sponsoring a defined benefit pension plan must contribute to its plans each year." One of the primary issues ERISA sought to redress was the under-funding of pension plans. An individual plan's funding requirements depend on a set of actuarial assumptions, and ERISA prescribes rules regarding the assumptions that employer-sponsors must use to measure plan liabilities and assets. Some types of plans are, however, excepted from the funding requirements. Namely, certain types of (defined contribution) plans such as profit sharing and stock bonus plans are excepted. Although, minimum funding standards do apply to defined contribution money purchase plans and target benefit plans.

Notwithstanding ERISA's reforms, under-funded plans still plague the system. Recently, "the level of total plan under-

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147. See CONF. COM. JOINT EXPLANATION (Part IV Funding) for Pub. L. No. 93-406 (ERSIA).
148. See Ford, supra note 146 (illustrating that for plan years 2004 and 2005, the I.R.C. specifies that the interest rate used to calculate a plan's current liability must fall within 90 to 100 percent of the weighted average of the rate on an index of long-term investment-grade corporate bonds during the four-year period ending on the last day before the beginning of the plan year). Similarly, rules dictate that sponsors report an actuarial value of assets that must be based on reasonable assumptions and must take into account the assets' market value. Id. This value may differ in any given year, within a specified range, from the current market value of plan assets, which plans also report. Id.
150. See id.
151. See id.
152. In the spring of 2005, "United Airlines' parent UAL Corp. requested that the bankruptcy court terminate four of its under-funded defined benefit plans to bypass its required annual pension contributions . . . . While such huge UAL under-funded deficiencies might be difficult for certain participants and retirees to understand in light of original legislative intent, compliance with the funding rules never guaranteed that benefits accrued to date would be fully funded." Kathryn J. Kennedy, Pension Funding Reform: It's Time to Get the Rules Right (Part II) BNA TAX ANALYST, 108 TAX NOTES 1049, 1059 (2005) [hereinafter Kennedy].
funding has increased rapidly, from about $39 billion in 2000 to an amount estimated to exceed $450 billion as of September 30, 2004.”

Termination of large plans by bankrupt sponsors threatens to push the private pension system more quickly into insolvency, generating greater pressure on Congress to respond. But what can Congress do? If employers are already unable to satisfy current funding standards, what will tightening the current standards do other than impose greater costs on distressed employers in a distressed economy? Indeed, changing the rules midstream would “subject financially strapped employers to increased funding costs at a time when they could least afford it, while imposing additional administrative expenses on financially healthy employers who ask, ‘where’s the additional benefit for the extra cost?”

The challenges presented by under-funded plans are daunting, and lawmakers have been busy working towards a solution. Increasing longevity is an additional strain on the liabilities of defined benefit plans and will continue to exacerbate funding deficiencies. At the same time, an aging population with increasing life expectancy creates an even greater necessity for viable pension plans. Because the phenomenon that begs for a solution is itself a contributing factor to the problem, the funding crisis at hand cannot be fixed by simply subjecting plan sponsors to more exacting funding requirements. If Congress too suddenly accelerates funding obligations, it would force many employers to liquidate or to become insolvent. Such a result would further strain an already beleaguered Pension Benefit Guaranty Corporation (PBGC), the federal corporation created by ERISA

153. Ford, supra note 146, at 357.
154. Id. (stating that the obvious action for Congress to take against undefended plans is to enhance the PBGC, the federal insurer of defined benefit plans).
155. Kennedy, supra note 152, at ¶ A.
157. See infra Part IV.
158. See Ford, supra note 146, at 354 (illustrating that many employers are increasingly unable to fund their plans).
159. See Kennedy and Shultz, supra note 39.
to insure defined benefit pension plans. With increased liabilities, the PBGC would likely raise the premiums it charges employers, and any substantial increase in PBGC premiums may preclude future adoptions of defined benefit plans and may encourage healthy employers with funded defined benefit plans to leave the system in response to the added administrative costs.

Congress is at a delicate crossroad; it has the opportunity “to legislate avoiding the next taxpayer bailout for under-funded defined benefit plans while encouraging the development of existing and future defined benefit plans.” Defined benefit plans may be an endangered species, as more and more employers are opting for various types of defined contribution plans instead, but, for a variety of reasons, public policy should encourage the continuation and formation of defined benefit plans. From a policy perspective, defined benefits are worth preserving because they are designed to provide replacement income as an annuity stream of payments – thereby shifting investment and mortality risks to employers, who are better able to spread those costs over the entire participant population and over the timeline represented by the employer’s existence. While defined contribution plans provide an invaluable supplement to retirement savings, they “should not be regarded as replacements of the defined benefit model.”

160. See Welcome to PBGC, http://www.pbgc.gov/ (last visited January 30, 2010). The PBGC currently protects the pensions of nearly 44 million American workers and retirees in more than 29,000 private single-employer and multiemployer defined benefit pension plans. Id. It receives no funds from general tax revenues. Id. Its operations are financed by insurance premiums set by Congress and paid by sponsors of defined benefit plans, investment income, assets from pension plans trusteed by PBGC, and recoveries from the companies formerly responsible for the plans. Id.

161. See Kennedy and Shultz, supra note 39.

162. Id. at 907.

163. See infra III.C.3 ¶ A.

164. Id. (highlighting the risk shifting that occurs as defined contribution plans proliferate).

165. See Kennedy, supra note 152.

166. Id.
b. Deferring Distribution

ERISA governs when a participant in a qualified plan must begin receiving benefits under the plan.\textsuperscript{167} Before 1997, employees had to start receiving benefits by age 70 $\frac{1}{2}$.\textsuperscript{168} The Small Business Job Protection Act of 1996 (SBJPA) modified this "required beginning date," providing that benefits must be paid on April 1 of the calendar year following the later of: the calendar year in which the employee attains age 70 $\frac{1}{2}$; or the calendar year in which the employee retires.\textsuperscript{169} Additionally, the minimum distribution rules require that a further distribution must be made by "December 31 of each year after [the required beginning date has commenced]."\textsuperscript{170} Thus, the rules impose both a required beginning date upon which the distribution of benefits must commence and a requirement that such payments must periodically continue thereafter.

The policy rationale underlying the minimum distribution rules is to preclude the use of pension accounts as will substitutes – providing a means for participants to accumulate death benefits for their heirs without being subject to estate taxation.\textsuperscript{171} The concern over estate tax gaming may be subsumed, however, by the need to provide retirement income security for an aging population marked by continually increasing longevity. By making the minimum distributions rules that apply to qualified plans more flexible, participants who have access to other monies, either because they are continuing their employment or because of other savings, will be more likely to access such benefits on an \textit{as-needed} basis only. More generally, deferring distributions will provide security for increasing longevity in two ways. From the plan's perspective, the deferral of current payout obligations keeps more

\begin{itemize}
  \item \textsuperscript{168} Id. at § 401(a)(9)(A).
  \item \textsuperscript{170} See 52 Fed. Reg. 28070 (1996).
  \item \textsuperscript{171} Robert E. Helm and Brian P. Goldstein, Pension Reform/Simplification – An Urgent Need: Practical Proposal from the Front Lines, 25 GA. L. REV. 91, 107 (Fall 1990).
\end{itemize}
money in the plan today, accumulating earnings tax free,\textsuperscript{172} thereby alleviating the burden of complying with funding requirements. From the participant’s perspective, deferral may encourage the participant to subsist on other resources, thus providing security if a greater-than-expected lifespan is experienced.

Notwithstanding the potential benefits of adjusting the minimum distribution rules, “only those who have sufficient other means to maintain themselves in retirement . . . would actually benefit from such a delay in required distributions.”\textsuperscript{173} Most American workers “continue to retire long before age seventy-five and need to begin withdrawals from whatever retirement savings they have in order to meet everyday household needs.”\textsuperscript{174} The potential benefits of adjusting the minimum distribution rules may be overwhelmed by this fact. From the plan’s perspective, the funding benefit derived from deferring distribution is a pure function how many participants actually defer their benefits unless such deferrals are mandatory. And, of course, mandatory deferrals would greatly discriminate against lower income participants who struggle to meet day-to-day expenses. From participants’ perspective, therefore, deferrals may only favor higher-income retirees, and it is lower-income retirees that will struggle to provide for increasing longevity.

3. Enhancing the Investment of Performance of Plan Funds

In addition to increasing the level of funds sitting in qualified retirement plans, policymakers may also attempt to increase the investment performance of these funds. If plan funds are able to generate greater returns, and if participants are able to directly share in these returns,\textsuperscript{175} then retirees will enjoy larger nest eggs and will thus have greater security for heightened life expectancies. To effect such an outcome, policymakers must focus on two elements--expanding the investment opportunities

\textsuperscript{172} See Dilley, supra note 14 (explaining that allowing a delay in distributions would, in effect, give more years of tax-free build-up in account balances).
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} See supra Part II.C (highlighting the differences between defined benefit and defined contribution plans).
available to plans and enhancing participant exposure to plan investment options.

a. Expanding Investment Opportunities

In the hopes of making plans earn higher returns, Congress may want to encourage plan investment managers to pursue riskier investments with higher potential returns by dulling the bite of ERISA’s fiduciary provisions. While riskier investments do not guarantee higher returns, they could theoretically allow some plans to shoot for higher returns. There are three fiduciary restraints that tend to affect the investment experience of plan assets: the duty to diversify, the duty to follow plan documents, and the duty of prudence. With respect to the diversity requirement, Congress chose not to legislate a specific percentage limit on any one investment. Instead, diversification under ERISA depends upon the facts and circumstances surrounding each plan and investment. With respect to the requirement to follow plan documents, a plan fiduciary may be in breach for investments that run afoul of a plan’s idiosyncratic terms, even if such investments would not violate other fiduciary provisions in the absence of the plan’s terms.

176. See ERISA, supra note 1, at § 3(38) (stating that “the term ‘investment manager’ means any fiduciary . . . who has the power to manage, acquire, or dispose of any asset of a plan; who is registered as an investment advisor under the Investment Advisers Act of 1940 . . . and has acknowledged in writing that he is a fiduciary with respect to the plan”).

177. See id. at § 404(a)(1)(C) (stating that “a fiduciary shall discharge his duties . . . by diversifying the investments of the plan so as to minimize the risk of large losses . . .”).

178. See id. at § 404(a)(1)(D) (stating that “a fiduciary shall discharge his duties . . . in accordance with plan documents and instruments governing the plan . . .”).

179. See id. at § 404(a)(1)(B) (stating that “a fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”).


181. See id.

182. See Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1044 (9th. Cir. 2001). (observing that “[a]mong other things, the more conservative nature of the Welfare Trust’s investment goals, the relatively higher percentage of that Trust’s assets that were invested in inverse floater [sic], and the
More than any other fiduciary restraint, the duty of prudence discourages plan investment managers from seeking aggressive returns. In determining whether an investment is reasonably prudent, the investment manager must take “into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action.”\textsuperscript{183} The prudence is thus twofold in nature – first, it requires the manager to conduct due diligence with respect to an investment, and second, it requires the manager to refrain from excessive risks.\textsuperscript{184} In other words, an investment that is excessively risky cannot be deemed prudent because the manager carefully investigated, considered, and fully understood the investment.\textsuperscript{185} Furthermore, prudence under ERISA is shaped by the special nature, purpose, and importance of modern employee benefit plans.\textsuperscript{186} Legislative history reflects the need for plans’ investment philosophies to vindicate the principle of retirement income security.\textsuperscript{187} Nonetheless, if Congress wishes to enlarge retirement benefits by bolstering plan investment returns, loosening ERISA’s prudence requirement is a logical place to start.

Rather than implementing affirmative language to soften the prudence requirement, Congress could encourage plans which provide for “individual accounts” and permit participants to “exercise control” over the assets in their accounts.\textsuperscript{188} Plan participants that exercise such control over their accounts are not themselves fiduciaries, and other plan fiduciaries will not be liable for any loss or breach that results from the participants’ exercise of control over the investment.\textsuperscript{189} Put another way, no one is liable for participant losses resulting from the participant’s own informed

\textsuperscript{183} Id. at 1043.
\textsuperscript{185} See id.
\textsuperscript{186} See H.R. REP. NO. 93-1280, 93D CONG., 2D SESS. (directing courts to interpret the prudent person rule “bearing in mind the special nature and purpose of employee benefit plans”).
\textsuperscript{187} See id.
\textsuperscript{188} ERISA, supra note 1, at § 404(c)(1)(A).
investment choices.\textsuperscript{190} Further proliferating these types of plans, however, may subject retirement savings to too much risk.\textsuperscript{191} Given that the fundamental aim of ERISA is retirement income security, Congress should not transform the American pensioner into the American speculator, especially in the light of the fact most pensioners lack the financial acumen to game the markets.

b. Greater Participant Exposure to Plan Investment Experiences

Regardless of the investment returns a plan generates, no added benefit passes to the individual participant unless the plan allows the participant to share in the returns. In the absence of participant exposure to market risks, gains flowing from liberalized investment strategies will only benefit the plan sponsor or employer. Therefore, reforms aimed at expanding plan investment opportunities are only germane in the context of defined contribution plans.\textsuperscript{192} Again, a distinguishing characteristic between defined contribution plans and defined benefit plans is that the former exposes the participant to market risk and the latter insulates the participant from market risk.\textsuperscript{193} A corollary policy approach to increasing investment performance, therefore, is to further encourage defined contribution plans.

The emergence of the defined contribution plan as a replacement for the defined benefit plan has already had injurious effects on the system.\textsuperscript{194} Indeed, "the devolution of the traditional pension system has left many families unprepared to meet the challenges of retirement."\textsuperscript{195} As part of the general unraveling of the "worker safety net," the shift from defined benefit to defined contribution has hurt the average family.\textsuperscript{196}

\textsuperscript{190} Id.
\textsuperscript{191} See infra Part IV.A \S 3.B (discussing the dangers of exposing retirement savings to too much risk).
\textsuperscript{192} See supra Part II.C.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Dilley, supra note 14, at 254.
\textsuperscript{196} Id.
Aside from the concern that the surge of the defined contribution plan is crumbling the defined benefit pillar, there are many other problems with policies aimed at increasing plans’ investment performances and exposing participants to market risk. Most basically, “the purported advantages of defined contribution schemes can be obtained only at the expense of higher underlying risks to the incomes of future pensioners.”197 It is important to remember that the principal goal of pension policy is retirement income security.198 There is not much security in a fast-paced global economy where workers are self-investing their savings instead of counting on company pensions.199

Even amidst a robust economic outlook, mass-injections of market risk into to the pension system is of questionable policy prudence. Furthermore, the phenomenon of increasing longevity, among other factors, presents a less than robust market outlook. A systematic decline in asset prices “can easily be envisaged from models that seek to assess the possible impact of the aging of the population of the industrial economies over the next several decades.”200 Equity markets will be particularly affected as the large cohort of baby boomers moves through the population; experts expect this phenomenon to create significant volatility in the markets over the next several decades.201 In addition to demographic volatility, the new global economy “is more like a highly dynamic, living organism,” where large corporations are forever threatened with obsolescence by an “internationally mobile, risk-taking, extraordinarily venturesome entrepreneurial class of individuals.”202 Although capable of producing fabulous wealth, financial globalization raises systemic risks to new heights.203 Therefore, the philosophy of promoting security in the retirement system clashes with policies that expose participants

197. Heller, supra note 71.
198. See, ERISA, supra note 1.
199. See Smick, supra note 4, at 2-23.
200. Heller, supra note 71, at 11 (explaining that as elderly baby boomers seek to sell assets to a younger generation of workers which is smaller in size, aggregate prices will decline).
201. See id.
203. See id.
and their benefits to market risk. What is more, the macro-volatility looming on the horizon should prompt Congress to ponder the other side of the coin – that is, it may need to further insulate the retirement system from such volatility by redefining traditional notions of risk-appropriate pension investments.

IV. OFFSETTING LONGEVITY BY DEFERRING RETIREMENT

Congress may pursue a variety of policies in hopes of strengthening retirement security in the face of increasing longevity. Virtually all of the options at its disposal, however, are riddled with caveats. While no remedial policy in this context is cost free, Congress must pursue a course of action capable of yielding results with relatively low macroeconomic costs. This must entail an economic offset of the increasing longevity phenomenon, and a macro-level deferral of retirement will provide the necessary offset.204

A. The Policy Advantage of Deferring Retirement

Among the policies aimed at enhancing the quantity (or quality) of retirement savings, reversing the deterioration of defined benefit plans is desirable, particularly from the perspective of retiree security and welfare. Thus, as a solution to the problem presented by increasing longevity and an aging population, it might seem obvious to simply encourage the formation and continuation of defined benefit plans.205 There is no question, restoring the defined benefit paradigm may be an important part of the broader solution. In the absence of a complimentary strategy, however, restoring defined benefit plans does not offer the U.S. retirement system the strongest long-term solution. Although this policy would confer annuity-structured retirement income on a larger number of retirees, it would simply shift the longevity risk to the employer. Granted, it may be sound public policy for employers to bear a greater share of longevity risk. But as longevity gains become increasingly systemic, is it good policy to

204. See infra Part IV.A.
205. See supra Part II.C (discussing defined benefit plans and annuity risk).
simply heap the excess risk on employer-sponsors? Not only would an unmitigated shift of longevity risk encourage employers to exit the private pension system, it would also pressure many already fledgling companies into failure.\textsuperscript{206} Even financially sound employer-sponsors would become less globally competitive.\textsuperscript{207} Therefore, offsetting longevity is a policy imperative. Any broad based reform aimed at restoring and proliferating the defined benefit paradigm must be accompanied by policies aimed at deferring retirement.

B. Reforms Deferring Retirement

There are many combinations and variations of reforms that may effect a deferral of retirement, and there is plenty of room for Congress to be creative in this area. Some reforms may target the tax qualification rules, such as implementing optional or mandatory deferrals of benefit distributions under qualified plans.\textsuperscript{208} Congress may also pursue more qualitative approaches; for example, it may encourage employers to do a better job of encouraging, improving, motivating, and retaining older labor.\textsuperscript{209} Regardless of the policy or combination of policies Congress may choose, it is important that it act quickly to address the problem of increasing longevity.

C. The Economics of Deferring Retirement

Among the economic effects of deferring retirement are the impact on human capital, retirement savings, and revenue.

1. Effect on Human Capital: Externalities of an Aged Workforce

A macro-level deferral of retirement would necessarily result in an older workforce. Although somewhat peripheral to

\textsuperscript{206} See generally, Kennedy, supra note 48.
\textsuperscript{207} See Smick, supra note 4, at 214-241 (discussing how class driven domestic policies can hinder global competitiveness).
\textsuperscript{208} See supra Part III 2.B (discussing some of the advantages and disadvantages of deferring distributions).
\textsuperscript{209} See infra Part IV.C.1.
retirement savings and pension economics, it is important to consider the human capital consequences of deferring retirement. The particular implications of an older workforce may vary from industry to industry, but there are advantages and disadvantages of retirement deferral.

A key advantage of deferring retirement is that it will prevent the runaway emergence of an idle retirement class – a disproportionately large class of economic non-producers. A systemic swell of old-aged dependency ratios will result in economic waste, primarily in the form of labor underutilization and fiscal drain. Economists and policymakers emphasize the necessity to “pull older workers out of inactivity into employment.” Many of today’s retirees are both able and willing to continue working, and considering the financial burden of heightened life expectancies, they should continue to work. However, employers are doing little to encourage older workers to remain. Many older workers believe that their supervisors have denied them developmental opportunities because of their age. These workers profess that it is not a lack of ability or will that is driving them into retirement; instead, they are being “pushed out by a perceived lack of respect and reward for the work they do.”

To effect a broad deferral of retirement, therefore, policymakers must encourage employers to attract, retain, and motivate older workers.

From the perspective of employers, however, older workers do pose certain challenges. For example, there is ample statistical

210. See Tosun, supra note 90, at 3 (discussing the economic consequences of increases in the old-aged dependency ratio). An important consequence of population aging is increasing fiscal pressure through higher government spending on social security, health care, and other welfare programs for the elderly. Id. This may mean lower government spending for other programs that primarily benefit the young. Id.
211. See id.
212. Ken Mayhew and Bob Rijkers, How to Improve the Human Capital of Older Workers or the Sad Tale of the Magic Bullet, in EC-OECD SEMINAR ON HUMAN CAPITAL AND LABOUR MARKET PERFORMANCE, 2 (Dec. 8, 2004).
214. See id.
215. Id.
216. Id.
evidence showing that older workers experience higher rates of illness and disability, which poses a cost to employers either directly or indirectly.\textsuperscript{217} Furthermore, retaining older workers may create a potential for "cross generational conflict."\textsuperscript{218} Considering also that older employees tend to draw higher because under seniority based compensation arrangements, employers may be particularly sensitive these challenges.\textsuperscript{219}

Another adverse externality that could stem from deferring retirement is a displacement of younger human capital. That is, if Congress enacts policies encouraging employers to retain older workers, and assuming labor demand does not experience dramatic shifts, younger labor cohorts will be pushed under the market.\textsuperscript{220} The result would be an underutilization of younger labor. Arguably, underutilizing younger labor generates a greater inefficiency than underutilizing older labor, due to the relative useful lives of the cohorts. Labor inefficiency may further stem from the mental and physical deterioration, as well as the skill obsolescence, associated with older labor.\textsuperscript{221} Therefore, policies encouraging the retention of older workers may not be free from adverse consequences.

Concededly, some adverse externalities could stem from deferring retirement. However, these externalities are counterbalanced by a number of factors. In response to statistics showing that older workers are more prone to disability and illness, many labor experts posit that these risks may be outweighed by positive attributes inherent in older workers.\textsuperscript{222} These positive attributes include: valuable knowledge and skill, including technical skill unique to long tenure, thus limited in supply; institutional wisdom; loyalty to the organization; the

\textsuperscript{217} See Anthony P. Rienzi, Productivity for the Ages: Maximizing the Contributions of Older Labor, in INSIGHTOUT, (Buck Consultants, an ACS Co.) (Feb. 2009).
\textsuperscript{218} Id.
\textsuperscript{219} See id.
\textsuperscript{220} See Tosun, supra note 90.
\textsuperscript{221} See Mayhew and Rijkers, supra note 212.
\textsuperscript{222} See Rienzi, supra note 217, at 2.
unique capacity to provide mentorship for younger workers; and lower rates of turnover and unscheduled absences. In response to concerns that deferring retirement will displace younger labor, many economists suggest that underutilizing younger labor actually yields a more efficient result than underutilizing older labor. This is because younger individuals possess greater “educational malleability,” and are better situated to continue their education. Furthermore, by reducing the fiscal pressure to provide for the elderly, deferring retirement will enable greater social spending for education. Essentially, deferring retirement will defer labor market entry; individuals will retire later but will also begin working later. Delayed entry into the market will encourage greater investment in education, which in turn will result in increased specialization among younger cohorts. The overall efficiency of human capital will be enhanced, as younger cohorts will enter the market with greater skill and knowledge.

With respect to skill obsolescence associated with older labor, any reform aimed at deferring retirement should encourage

223. Providing a cogent offset to possible the risk of “cross generational conflict.” See supra note 215 and accompanying text.

224. See Rienzi, supra note 217, at 2 (discussing ways employers can improve their ratio of productivity to labor cost (ROI)). Recognizing [that older workers offer these specific positive attributes], employers must seek to optimize the advantages of retaining their older workers, while diminishing the disadvantages. Id. If this can be accomplished in a way that promotes collaboration and understanding across all generations, employers can significantly improve their talent ROI. Id.

225. See Tosun, supra note 90, at 3-6.

226. But see Mayhew and Rijkers, supra note 212, at 7 (suggesting that because younger workers do in fact possess greater “malleability,” they are more amenable to firm-inculturation and can benefit more from firm-provided training programs).

227. See infra Part IV.C.3 (discussing the impact of deferring retirement on revenue). See also Tosun, supra note 90, at 5 (illustrating the significance of the political economy consideration of the relationship between population aging and education spending).


229. But see id. at 2 (explaining that the economic growth effect one might expect from higher educational attainment may be offset by the “burden of knowledge” phenomenon). A substantial portion of the knowledge received from higher educational obtainment may be comprised of “catching up” knowledge, so increased educational obtainment may have an attenuated or negative effect on labor productivity. See id.
employers to not simply retain older workers, but to invest in their productivity as well. Certainly, the infirmities of aging diminish technical skills.\textsuperscript{20} Costs associated with technical skill obsolescence may be offset by the experience, accumulated knowledge, and “institutional wisdom” unique to older workers.\textsuperscript{21} Furthermore, concerns over “technical skill” obsolescence, however, may be silenced by a slowing of the avalanche-like destruction of natural aging.\textsuperscript{22} In other words, evidence shows that increasing longevity manifests itself not just as an extension of life, but also as an extension of middle-aged vitality.\textsuperscript{23} And as a proactive measure to reduce the technical skill obsolescence associated with aging, employers should establish various forms of health and wellness programs specifically aimed at middle aged and elderly workers. Congress may consider making this public policy by granting a number of tax subsidies for these types of programs.

Even more significant than technical skill obsolescence, however, is “economic skill obsolescence,” which often takes one of the following forms: job-specific skills obsolescence as a consequence of technological or organizational renewal of the production process; obsolescence due to shifts in the sectoral structure of employment; or firm-specific obsolescence due to firm closure or reorganization.\textsuperscript{24} To both retain \textit{and} enhance older labor, therefore, policymakers should incentivize employers to invest in the continued training of their older employees. By investing in continued, firm-specific training and education, employers can both prevent obsolescence and endear older employees, thereby facilitating a deferral of retirement.\textsuperscript{25}

Again, a broad-scale deferral of retirement would necessarily result in an older workforce. While retaining older

\begin{itemize}
\item \textsuperscript{20} See Mayhew and Rijkers, \textit{supra} note 212, at 7.
\item \textsuperscript{21} See Rienzi, \textit{supra} note 217, at 3.
\item \textsuperscript{23} See \textit{id}.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} See Mayhew and Rijkers, \textit{supra} note 212, at 2 (emphasizing the need for pension policy to incentivize older employees to remain in their jobs instead of settling for retirement).
\end{itemize}
labor may generate adverse externalities, these are outweighed by a number of countervailing factors. Policies deferring retirement, therefore, would likely yield a net macroeconomic benefit.

2. Savings

Deferring retirement impacts savings in a number of key ways. First, working longer will allow workers to keep their accumulated equity in a tax-free trust for a longer period of time and thus help to ensure that their reserves are sufficient to last their entire lifetimes. Second, it will shorten the window between retirement and death, thereby lowering the amount of savings necessary required to provide for retirement. Third, shortening the window between retirement and death will temper annuity risk. By effecting a macro-offset of annuity risk, shortening the retirement-to-death window will enable a low cost defined benefit renaissance. Without such an offset, policies aimed at preserving and proliferating defined benefit plans amidst increasing longevity will heap excessive risk on employers at an already shaky time. Deferring retirement, therefore, is an antidote to pro-retiree policies that use the defined benefit model to shift annuity and market risks to employers.

Finally, deferring retirement will alleviate employers’ funding burdens by deferring current payout liabilities. By softening current liabilities, financially weak employers will be better able to avoid failure. Preventing the failure of larger plan sponsors will strengthen the future viability of the private pension system, which is perhaps the most important leg of the three-legged stool. For these reasons, policies aimed at deferring retirement will have a positive impact on retirement savings.

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236. See Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. § 201(a)(2) (2003); See also Dilley, supra note 14, at 264 (discussing the Portman-Cardin Bill and raising the age for required minimum distributions to seventy-five).

237. See id.

238. This is regardless of who bears the annuity risk. See supra Part IV.B ¶ 1.

239. See supra Part III.C.2. ¶ A (discussing ERISA funding rules’ broader effect on retirement savings).
3. Revenue

Congress can implement policies aimed at deferring retirement without further relying on revenue-corroding incentives such as raising deductibility limits.\textsuperscript{240} This is not to suggest that additional tax incentives have no place in pension reform.\textsuperscript{241} Coupling a deferral of retirement with a moderate increase in the tax favorability of qualified plans could offer a synergistic solution to increasing longevity. This synergistic approach to pension reform will prevent an over-reliance on tax incentives, thereby sparing fiscal resources.

Also, to the extent that deferring retirement will enhance the viability of private pensions, it will save the social security leg of the proverbial stool from bearing the weight of heightened life expectancies.\textsuperscript{242} Any policy aimed at strengthening the private pension leg of the three legged stool will positively impact revenue in this way.

V. CONCLUSION

Life expectancy is continually increasing, a phenomenon that will strain the U.S. retirement system. One way Congress may address the issue is by reforming the private pension leg of the three legged stool. It may do this in a number of ways, but fundamentally, there are two broad categories of possible reform. First, reforms may attempt to bolster the level retirement savings that flow from such plans. Second, there are reforms that incentivize a deferral of retirement. Congress may effect the former by adjusting ERISA's contribution, vesting, funding, distribution, and fiduciary provisions.\textsuperscript{243} It may also preference defined benefit plans over defined contribution plans.\textsuperscript{244}

\textsuperscript{240} See supra Part II.D (discussing deductibility of employer contributions to qualified plans).

\textsuperscript{241} For example, polices aimed at deferring retirement may very well take the form of tax incentives themselves, such as credits or deductions for employer investments in the education of older workers. See supra Part IV.C.1.

\textsuperscript{242} See Heller, supra note 92.

\textsuperscript{243} See supra Part III.C.1-3.

\textsuperscript{244} See supra Part IV
Congress may effect the latter by deferring minimum distribution dates and by raising the normal retirement age under ERISA.\textsuperscript{245} It may also do so by encouraging employers to take affirmative steps to retain older labor, such as investing in continued training and offering health and wellness programs.\textsuperscript{246}

From a macroeconomic perspective, any reform in the area of private retirement plans should include policies aimed at deferring retirement. These policies may be enhanced by a resurgence of defined benefit plans. These policies may also be complimented by other measures aimed at bolstering retirement income. But in the face of increasing longevity, deferring retirement provides the risk offsets necessary for an affordable renovation of the U.S. retirement system.

\textsuperscript{245} See supra note 236 and accompanying text (discussing Portman-Cardin Bill).

\textsuperscript{246} See supra Part IV.C.1 (discussing the externalities of an aged workforce).