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ADDRESSING THE CHALLENGES WOMEN FACE IN RETIREMENT: IMPROVING SOCIAL SECURITY, PENSIONS, AND SSI

JOAN ENTMACHER* AND AMY MATSUI**

I. INTRODUCTION

It is a truth universally acknowledged (or it should be) that women are more economically vulnerable than men in retirement. On average, women's lifetime earnings are lower than men's, and divorce, single parenthood, and widowhood have a particularly detrimental impact on women's economic security.¹ Thus, women reach retirement with lower Social Security benefits, smaller pensions and retirement savings, and fewer assets than men. However, women actually need more assets to achieve retirement security because they generally live longer than men, face higher health care costs, and spend more years alone. In 2011, almost 11 percent of women 65 and older lived in poverty compared to about six percent of men 65 and older, and about one in five older single women and older Black and Hispanic women were poor.² For these reasons, addressing America's retirement crisis requires policy solutions that specifically address the challenges women face in retirement, especially low-income women, women of color, and single older women.

The classic metaphor for sources of retirement income is a three-legged stool, whose legs represent income from Social Security, pensions, and other savings and assets. A more apt

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1. See Nat'l Econ. Council Interagency Working Grp. on Soc. Sec., *Women and Retirement Security*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/reports/women.html> (last modified Nov. 28, 2012) (explaining that women have lower lifetime earnings than men and thus have greater need for Social Security).

2. *Insecure & Unequal: Poverty and Income Among Women and Families, 2000-2011*, NWLC 5 (2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_poverty_report.pdf.

metaphor today, however, especially for low- and moderate-income women, is a pyramid. For all but the highest-income families, Social Security provides the largest source of retirement income.³ Pensions and retirement savings, other savings and assets, and income from work, may add a little on top of that base. Unfortunately, for many women, their pyramid of retirement income is hardly an imposing one.

Social Security benefits, which are lifelong, inflation-adjusted, and virtually universal, are the foundation for women's retirement security. Social Security provides more than 60 percent of family income on average for female beneficiaries 65 and older.⁴ For nearly three in ten women 65 and older, Social Security is virtually their only source of income (90 percent or more).⁵ But Social Security benefits are already modest, especially for women, and already declining, as the retirement age increases and rising Medicare premiums consume a larger share of monthly Social Security benefits.⁶

Supplemental Security Income (SSI) is a means-tested program intended to provide a basic income floor for society's most economically vulnerable citizens—the elderly poor and poor adults and children with disabilities.⁷ It is a particularly critical program for women, who make up over two-thirds of all beneficiaries 65 and older.⁸ Yet SSI benefits are below the poverty level, and asset tests and income limits that have barely changed in the 40 years since SSI was enacted leave beneficiaries unable to use modest Social Security benefits or other retirement income to supplement their SSI benefits.⁹

Pensions and retirement savings, including employer-sponsored retirement plans and tax-favored Individual Retirement Accounts (IRAs), are critical supplements to Social Security retirement income. Unfortunately, even though an increasing percentage of women participate in the workforce and have access

3. *Income of the Population 55 and Older: 2010*, SOC. SEC. ADMIN. 37 (2012),

http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/sect02.pdf [hereinafter *Income of the Population 55 and Older: 2010*].

4. *Women and Social Security*, NWLC (Nov. 28, 2012), <http://www.nwlc.org/resource/women-and-social-security>.

5. *Id.*

6. *Id.*

7. Joan Entmacher & Katherine Gallagher Robbins, *Chained CPI Imposes Painful Social Security Benefit Cuts and a Benefit Bump-Up Provides Only Limited Relief*, NAT'L WOMEN'S LAW CTR. 4 (Dec. 2012), http://www.nwlc.org/sites/default/files/pdfs/chained_cpibirthdaybumpup.pdf.

8. *Id.*

9. Joan Entmacher, *After 40 Years, Time to Modernize SSI*, NAT'L WOMEN'S LAW CTR. BLOG (Oct. 31, 2012), <http://www.nwlc.org/our-blog/after-40-years-time-modernize-ssi>.

to employer-sponsored retirement plans, women earn less, are more likely to work part time, spend more time out of the workforce, and have shorter job tenure than men. As a result, women accrue significantly fewer retirement savings than men through the employer-sponsored retirement savings system. And, as traditional defined benefit plans are supplanted by defined contribution plans and IRAs, women's access to lifetime income in retirement, both as workers and as spouses, has diminished over time.

This Article focuses on proposals to improve Social Security, SSI, and employer-sponsored pensions and retirement savings to increase women's retirement security. The Article does not address other sources of retirement income (such as other savings and assets or income from work); housing, energy, and nutrition assistance; nor costs that particularly impact women's retirement security (such as health care, long-term care, or the unexpected costs of caring for grandchildren or other dependents).

II. SOCIAL SECURITY

It is hard to overstate the importance of Social Security to women's retirement security. Without income from Social Security, nearly half of all women 65 and older would be poor.¹⁰ Yet women's benefits are modest, averaging \$12,700 per year for women 65 and older, compared to \$16,700 for men.¹¹

Enhancing Social Security benefits is a key strategy for increasing women's retirement security. Social Security has many of the features of an ideal pension plan in that it: (1) is virtually universal, covering low-paid, part-time, and temporary workers, and the self-employed; (2) is fully portable between jobs; (3) uses a progressive benefit formula that gives lower earners a larger percentage of their pre-retirement earnings; (4) provides secure, predictable, retirement benefits that last for life; (5) is not subject to the ups and downs of the stock market or the risk of depletion prior to reaching retirement; (6) adjusts annually for inflation; (7) provides automatic benefits to eligible spouses, surviving spouses, and divorced spouses, and dependent children; (8) includes disability and life insurance benefits as well as retirement benefits; (9) imposes few responsibilities on employers; and (10) is highly efficient. It spends less than one percent of the funds collected each year on administrative costs.¹²

10. *Id.*

11. *Id.*

12. Virginia P. Reno et al., *Social Security Brief No. 39, Social Security Finances: Findings of the 2012 Trustees Report*, NAT'L ACAD. OF SOC. INS. 1 (2012), http://www.nasi.org/sites/default/files/research/SS_Finances_Findings_of_the_

Since the nation's Social Security system was first created as a worker retirement program in 1935, it has been improved for women in several ways.¹³ In 1939, Social Security became a family insurance plan, with protection for spouses and children against the loss of income when a worker retires or dies.¹⁴ In 1950, coverage was expanded to domestic workers, who were overwhelmingly women of color, and farm workers, and benefits were significantly increased.¹⁵ Disability benefits were added in 1956.¹⁶ In 1965, divorced spouses become eligible for benefits if married for 20 years.¹⁷ In 1972, automatic cost-of-living adjustments (COLAs) were enacted, protecting benefits from being eroded by inflation over women's longer lifespans.¹⁸ That same year, the widow's benefit was increased to 100 percent of the worker's benefit, if both spouses claimed at their full retirement age.¹⁹ In 1977, Congress reduced the duration of marriage requirement for divorced spouses to ten years.²⁰ Furthermore, the Supreme Court ruled that benefits for widows and widowers had to be awarded on a gender-neutral basis.²¹

But in more recent years, Social Security benefits have been declining, the result of both policy choices and rising health care costs. In 1983, legislation enacted to keep the Social Security system solvent reduced benefits for future retirees by 19 percent.²²

2012_Trustees_Report.pdf.

13. See *Historical Background and Development*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/> (last modified Jan. 1, 2013) (discussing the history of Social Security).

14. *Pre-Social Security Period: Traditional Sources of Economic Security*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/briefhistory3.html> (last modified Jan. 10, 2013).

15. See *Fifty Years of Social Security*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/50mm2.html> (last modified Dec. 11, 2012) (explaining that social security benefits were extended to domestic workers in 1950).

16. *Chronology: 1950s*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/1950.html> (last modified Nov. 8, 2012).

17. *Chronology: 1960s*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/1960.html> (last modified Nov. 8, 2012).

18. *Chronology: 1970s*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/1970.html> (last modified Nov. 8, 2012).

19. David A. Weaver, *The Widow(er)'s Limit Provision of Social Security*, 64-1 SOC. SEC. BULLETIN 1 (2001/2002).

20. Christopher R. Tamborini & Kevin Whitman, *Women, Marriage, and Social Security Benefits Revisited*, 67-4 SOC. SEC. BULLETIN 3 (2007), <http://www.ssa.gov/policy/docs/ssb/v67n4/67n4p1.pdf>.

21. See generally *Califano v. Goldfarb*, 433 U.S. 199 (1977) (prohibiting differential treatment of widows and widowers).

22. Virginia P. Reno et al., *Social Security Brief No. 37, Social Security Beneficiaries Face 19% Cut; New Revenue Can Restore Balance*, NAT'L ACAD. OF SOC. INS. 1 (June 2011), http://www.nasi.org/sites/default/files/research/SS_Brief_037.pdf.

Most of the reduction is due to a phased-in increase in the age at which retirees can receive full benefits from age 65 to age 67 for workers born after 1959.²³ The percentage cut in benefits from the increasing retirement age is the same for workers at all benefit levels.²⁴ But the cuts will reduce total income the most for lower-income beneficiaries, such as women, who depend most heavily on Social Security. In addition, rising Medicare premiums, which are deducted from Social Security benefits, will further reduce the income available to meet other needs.

With all Americans facing greater economic risks in today's economy—and older women still at greater risk of poverty and economic insecurity than older men—policymakers should be considering improvements, not cuts, to Social Security benefits.

This Article outlines several options for improving Social Security benefits to increase retirement security for economically vulnerable older women, including improving the minimum benefit, crediting caregiving, reforming the benefit for surviving spouses, and using the more accurate Consumer Price Index for the Elderly to calculate the annual COLA. Other reforms that should be considered as part of a comprehensive Social Security reform package include improvements to disability benefits, restoring student benefits, eliminating discrimination against same-sex married couples, partners, and their children, and an across-the-board increase in benefits to increase retirement security for an increasingly insecure middle class. These reforms cost money and Social Security faces a long-term financing shortfall. However, it is feasible to raise the revenue to close the shortfall and pay for reforms, as a number of recent reform packages have demonstrated—if the political will is there.²⁵ By

23. *Id.* at 2.

24. *Id.* at 1-2.

25. See, e.g., *Breaking the Social Security Glass Ceiling: A Proposal to Modernize Women's Benefits*, NAT'L COMM. TO PRESERVE SOC. SEC. & MEDICARE, NAT'L ORG. FOR WOMEN FOUND. & INST. FOR WOMEN'S POLY RESEARCH 18 (2012), http://www.ncpssm.foundation.org/Portals/0/embargo_breaking_ss_glass_ceiling.pdf [hereinafter *Breaking the Social Security Glass Ceiling*] (proposing ways to strengthen the Social Security program); *Plan for a New Future: The Impact of Social Security Reform on People of Color*, COMM'N TO MODERNIZE SOC. SEC. 31-38 (2011), http://www.insightcced.org/uploads/CRWG/New_Future_Social_Security_Commission_Report_Final.pdf [hereinafter *Plan for a New Future*] (discussing possible reforms for Social Security); Virginia P. Reno & Joni Lavery, *Fixing Social Security: Adequate Benefits, Adequate Financing*, NAT'L ACAD. OF SOC. INS. 13 (2009), http://www.nasi.org/sites/default/files/research/Fixing_Social_Security.pdf (providing revenue raising options for Social Security); see generally *Strengthening Social Security and SSI to Improve Women's Retirement Security: Hearing Before the S. Special Committee on Aging*, 112th Cong.

large margins, Americans support protecting and improving Social Security, and are willing to pay higher taxes to do that.²⁶ In addition, reforms to Social Security benefits should be considered in conjunction with reforms to SSI, discussed in the next section of this paper, to ensure that the many poor people who are eligible for both programs benefit from the increase in Social Security benefits and that their eligibility for Medicaid is protected.

A. *Improve the Special Minimum Benefit for Low Lifetime Earners*

The regular Social Security benefit formula is progressive.²⁷ It provides workers with low lifetime earnings a benefit that represents a higher percentage of their pre-retirement income than higher-income workers.²⁸ However, benefits are proportional to average lifetime earnings, and for workers with very low lifetime earnings, benefits calculated under the regular formula will still be very low. More than twice as many women as men receive benefits as retired workers that provide less than a poverty-level income: over 40 percent of female workers compared to 18 percent of male workers receive below-poverty benefits.²⁹

Social Security has an alternative benefit formula, the Special Minimum Benefit (SMB), which is intended to “provide long-term

(2012) (testimony of Joan Entmacher, Vice President for Fam. Econ. Sec., NWLC), *available at* http://www.nwlc.org/sites/default/files/pdfs/entmacher_testimony_senate_agin_g_7-25-2012.pdf (discussing need for improvements and reforms for Social Security).

26. Jasmine V. Tucker et al., *Strengthening Social Security: What Do Americans Want?*, NAT'L ACAD. OF SOC. INS. 8 (2013), http://www.nasi.org/sites/default/files/research/What_Do_Americans_Want.pdf.

27. Andrew G. Biggs et al., *A Progressivity Index for Social Security*, OFFICE OF RET. & DISABILITY POL'Y, SOC. SEC. ADMIN., (2009), http://www.ssa.gov/policy/docs/issue_papers/ip2009-01.html.

28. *Id.*

29. *Compare Annual Statistical Supplement to the Social Security Bulletin, 2012: Old-Age, Survivors, and Disability Insurance, Benefits in Current Payment Status*, OFFICE OF RET. & DISABILITY POL'Y, SOC. SEC. ADMIN. tbl.5.B9 (Feb. 2013), <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5b.html> [hereinafter *Old-Age, Survivors, and Disability Insurance*] (providing information regarding retired worker benefits for individuals age 62 and older), *with Current Population Survey, 2012 Annual Social and Economic Supplement, Table POV35: Poverty Thresholds by Size of Family and Number of Related Children*, CENSUS BUREAU (Feb. 14, 2013), <http://www.census.gov/hhes/www/cpstables/032012/pov/toc.htm> [hereinafter *Current Population Survey*] (explaining the Census' poverty threshold for one adult at age 65 and older). Using the Census Bureau's thresholds, the poverty line for one elderly individual in 2011 was about \$899 per month. *Id.*

workers with an income that would free them from dependency on welfare.”³⁰ Workers receive the higher of a benefit calculated under the SMB or any other benefit to which they are entitled under the regular formula as a worker or as a spouse, surviving spouse, or divorced spouse of a higher earner.³¹

However, the current SMB does little to help workers with low benefits. Only about 70,000 people—a little over one-tenth of one percent of all beneficiaries—receive benefits under the SMB.³² The number has been declining because the SMB is price-indexed, while the regular formula is wage-indexed; soon, the SMB will disappear entirely. Another reason the SMB is ineffective is that it requires significant earnings for a year of credit: it took \$12,280 in 2012 to qualify for one year of credit toward the SMB, compared to only \$4,530 to qualify for a year (four quarters) of credit toward Social Security.³³ For a woman earning the federal minimum wage of \$7.25 per hour, earning one year of credit toward the SMB requires steady employment of about 34 hours per week, 50 weeks per year. But the low-wage labor market is characterized by unstable, part-time and seasonal jobs, and the work histories of low earners are interrupted by caregiving—a particularly important factor for women—unemployment, or poor health.³⁴ And, if a worker falls even \$1 short of the threshold, she gets no credit toward the SMB. Finally, even workers who have the 30 years of qualified earnings needed to receive the maximum SMB receive a benefit that leaves them about \$1,800 below the federal poverty guideline.³⁵

30. See Kelly A. Olsen & Don Hoffmeyer, *Social Security's Special Minimum Benefit*, 64-2 SOC. SEC. BULLETIN 1, 4 (2001-2002), <http://www.ssa.gov/policy/docs/ssb/v64n2/v64n2p1.pdf> (discussing a committee bill to help prevent consistent long-term workers from needing to rely on welfare).

31. *Id.* at 2.

32. *Old-Age, Survivors, and Disability Insurance*, *supra* note 29, at tbl.5.A1, tbl.5.A8 (providing the number and average monthly benefit by type of benefit and sex, and the number, average primary insurance amount, and average monthly benefit for persons with benefits based on special minimum primary insurance amount by type of benefit and sex).

33. *Breaking the Social Security Glass Ceiling*, *supra* note 25, at 12.

34. Melissa Favreault, *A New Minimum Benefit for Low Lifetime Earners*, URBAN INST. 1 (Nov. 19, 2008), http://www.nasi.org/sites/default/files/research/Melissa_Favreault_January_2009_Rockefeller.pdf.

35. Effective December 2012, for 2013, the maximum SMB is \$804.00 per month, or about \$9,650 per year. *Special Minimum Benefit Tables*, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/progdata/tableForm.html> (last visited Feb. 14, 2013). The 2013 poverty guideline for a single individual is \$11,490. U.S. Dep't of Health and Human Services, *Annual Update of HHS Poverty Guideline*, FED. REGISTER (Jan. 24, 2013), <https://www.federalregister.gov/articles/2013/01/24/2013-01422/annual->

A number of changes to the SMB would make it more effective in providing a meaningful benefit. They include: (1) increasing the maximum value of the benefit to at least 125 percent of the federal poverty level; (2) reducing the earnings needed to earn credits toward the SMB to the same amount required for regular Social Security credits; (3) allowing workers to earn partial credit, as they can under the regular Social Security formula; (4) indexing initial benefits to wage growth, the way regular benefits are indexed; and (5) providing up to eight years of credit toward the SMB for years in which a worker was caring for a young child or dependent adult. Similar recommendations for improving the SMB have been part of several recent reform proposals.³⁶

B. Credit Caregiving in the Regular Benefit Formula

Many workers, especially women, take time out of the paid labor force to care for children, elderly parents, or other family members, sacrificing both current income and retirement security. Many other countries provide pension credits for such socially and economically vital caregiving work.³⁷ However, Social Security does not provide credit for lost or reduced earnings due to caregiving, so those who took time out of the labor force, worked part-time, or accepted lower pay in exchange for the flexibility to meet caregiving responsibilities can see significantly lower benefits. The only way Social Security currently compensates caregiving is indirectly, through spousal benefits. But many women, who took time out of the labor force for caregiving, including women who have never married or whose marriage lasted less than ten years, do not qualify for spousal benefits, and

update-of-the-hhs-poverty-guidelines#t-1.

36. Compare Reno & Lavery, *supra* note 25, at 11 (promoting the increase in Special Minimum Benefits); *Plan for a New Future*, *supra* note 25, at 38 (explaining that the Special Minimum Benefits need to be increased); *Breaking the Social Security Glass Ceiling*, *supra* note 25, at 11-12 (suggesting improvements for Special Minimum Benefits), with *The Moment of Truth*, THE NATIONAL COMMISSION FOR FISCAL RESPONSIBILITY AND REFORM (2012), http://www.momentoftruthproject.org/sites/default/files/TheMomentofTruth12_1_2010.pdf (proposing options for strengthening the SMB while also proposing substantial benefit cuts, as a way to mitigate the impact of those cuts for some beneficiaries).

37. Elaine Fultz, *Pension Crediting for Caregivers, Policies in Finland, France, Germany, Sweden, the United Kingdom, Canada, and Japan*, INST. FOR WOMEN'S POL'Y RESEARCH 6 (2011), <http://www.iwpr.org/publications/pubs/pension-crediting-for-caregivers-policies-in-finland-france-germany-sweden-the-united-kingdom-canada-and-japan>. In 2009, 26 of 30 OECD member countries had pension crediting for caregivers. *Id.* at 1. Only the United States, Turkey, Mexico and Australia lacked these systems. *Id.* at 6.

the number of women who do not qualify for spousal benefits is growing.³⁸

One way to provide credit for caregiving in the Social Security benefit formula would impute earnings for caregiving years up to 50 percent of the average wage that year, if the actual wages that year were less. Up to five years of credit would be available for providing care for a young child, older disabled child, or other dependent relative.³⁹

C. *Improve Benefits for Widowed Spouses*

Older single women—widowed, divorced, and never-married—face a far greater risk of poverty than older married women and men. In 2010, only 4.2 percent of married women 65 and older receiving Social Security benefits were poor, compared to 15.8 percent of single older women.⁴⁰

Although poverty rates are higher for never-married and divorced women than for widows (20.3 percent and 17.6 percent compared to 14.1 percent, respectively),⁴¹ widows are—and are projected to remain—the largest group of poor elderly women by marital status.⁴² An improved Social Security benefit for widowed spouses could reduce poverty and provide more equitable benefits for the survivor of dual-earner, lower-income couples.

Social Security provides protection to workers and their families in case of disability or early death and, at retirement, offers benefits to spouses, surviving spouses, and divorced spouses (if the marriage lasted ten years). The benefit for a spouse or divorced spouse equals 50 percent of the worker's benefit; the benefit for a surviving spouse or divorced surviving spouse equals 100 percent of the worker's benefit, if no early retirement reductions apply. These spousal benefits, like all Social Security benefits, are available on an equal basis to women and men, wives and husbands, widows and widowers, but the vast majority of individuals receiving spousal benefits are women.⁴³

38. Howard Iams & Christopher Tamborini, *The Implications of Marital History Change on Women's Eligibility for Social Security Wife and Widow Benefits, 1990-2009*, SOC. SEC. BULLETIN (2012), <http://www.socialsecurity.gov/policy/docs/ssb/v72n2/v72n2p23.html>.

39. Reno & Lavery, *supra* note 25; *Plan for a New Future, supra* note 25; *Breaking the Social Security Glass Ceiling, supra* note 25.

40. *Income of the Population 55 and Older: 2010, supra* note 3, at tbl.11.1.

41. *Id.*

42. Joan Entmacher, *Strengthening Social Security Benefits for Widow(er)s: The 75% Combined Worker Benefit Alternative*, NAT'L WOMEN'S LAW CTR. 1 (Nov. 2008), <http://www.nwlc.org/sites/default/files/pdfs/BenefitImprovementforWidowsFeb09.pdf> [hereinafter *Strengthening Social Security Benefits for Widow(er)s*].

43. *Old-Age, Survivors, and Disability Insurance, supra* note 29.

The spousal benefits are designed to provide basic income security for a spouse, so a spouse or widowed spouse who is also eligible for a benefit as a worker can receive the higher of the worker benefit or spousal benefit, but not both. The following examples illustrate how the current survivor benefit works, assuming both spouses claim benefits at their full retirement age:

(1) George receives a monthly Social Security benefit of \$1,000 per month. His wife Martha does not have sufficient credits to qualify for Social Security and receives a benefit as a spouse of \$500 per month, giving the household combined benefits of \$1,500. At widowhood, Martha receives a benefit of \$1,000, 67 percent of their combined benefits.

(2) John and Abigail have equal lifetime earnings and equal monthly benefits of \$750, for combined benefits of \$1,500. At widowhood, Abigail receives a \$750 benefit, because her benefit as a worker offsets her benefit as a widow dollar for dollar. The benefit she receives when widowed is 50 percent of their combined benefits.

These examples highlight several features of the current surviving spouse benefit. First, household Social Security benefits drop at widowhood by 33 percent to 50 percent. Although the cost of maintaining a household declines when there is only one person to support, based on the Census Bureau's poverty thresholds a one-person elderly household needs 79 percent of the income of a two-person household to maintain the same standard of living.⁴⁴ Second, the decline in Social Security benefits at widowhood is largest for households in which the spouses' earnings were more equal. Third, the survivor of a dual-earner couple who contributed more to Social Security over their working lives can end up with a lower benefit than the survivor of a single-earner couple that contributed less. Moreover, these examples assume that both spouses waited to their full retirement age to claim benefits; if either claims benefits earlier, the survivor benefit would be further reduced.⁴⁵

The drop in Social Security income at widowhood—the largest component of most families' income—is a significant factor in widows' poverty.⁴⁶ And, it is often accompanied by a drop in pension income, loss of earnings from a spouse who was still

44. See *Poverty Thresholds by Size of Family and Number of Children for 2011*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/threshld/index.html> (showing 79 percent for two-person adult household with elderly householder and 78 percent for two-person adult household with non-elderly householder).

45. *Strengthening Social Security Benefits for Widow(er)s*, *supra* note 42, at 6.

46. *Id.* at 24.

employed, or depletion of assets due to medical and other expenses associated with the death of a spouse.⁴⁷ Ironically, the increase in labor force participation by married women and the increased share of household income contributed by wives means that more widows—and widowers—in the future will experience a drop in household Social Security benefits that approaches 50 percent.

One approach to making the surviving spouse benefit more adequate and equitable would provide an alternative benefit equal to 75 percent of the sum of the spouses' combined worker benefits. (Individuals would continue to receive the current law benefit, if it were higher.) In addition, the value of the deceased spouse's benefit used in the calculation should not be reduced because of that spouse's decision to claim benefits before full retirement age. The benefit increase could be targeted to low- and moderate-income couples by capping the alternative benefit.⁴⁸ For example, the benefit could be capped at the level of the benefit for a worker with lifelong average earnings—\$1,575 per month or \$18,900 per year for an individual retiring at age 66 in 2012.⁴⁹

Other reforms would improve benefits for disabled widow(er)s, a small but particularly vulnerable group,⁵⁰ by eliminating the age 50 requirement, the requirement that the disability occur within seven years of the spouse's death or last eligibility for benefits as a caregiving parent, and actuarial reduction for claiming benefits early. These limitations serve no purpose for a group that is, by definition, unable to work and no longer has the support of a spouse.

Reforms to the surviving spouse benefit could improve the economic security of many women, but will not assist the growing number of women, especially African-American women, who,

47. Nadia Karamcheva & Alicia Munnell, *Why Are Widows So Poor?*, CTR. FOR RET. RESEARCH AT BOSTON COLL. 1, 4 (2007), http://crr.bc.edu/wp-content/uploads/2007/07/i_b_7-9.pdf; Kathleen McGarry & Robert F. Schoeni, *Medicare Gaps and Widow Poverty*, 66-1 SOC. SEC. BULLETIN 58, 59 (2005), <http://www.ssa.gov/policy/docs/ssb/v66n1/v66n1p58.pdf>.

48. See generally Entmacher, *supra* note 42 (providing more detailed information about this proposal); see also generally Reno & Lavery, *supra* note 25; Plan for a New Future, *supra* note 25; *Breaking the Social Security Glass Ceiling*, *supra* note 25 (providing a similar recommendation).

49. *Annual Statistical Supplement to the Social Security Bulletin, 2012*, U.S. SOC. SEC. ADMIN. Tbl.2A.26 (Feb. 2013), <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/2a20-2a28.pdf>.

50. See generally *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf> (explaining that people with disabilities had higher rates of poverty in 2010 than those without disabilities, and that for those working full time, men and women with disabilities had much lower median earnings in 2010 than their counterparts without disabilities).

because of changing marital histories, will not qualify for a widow's benefit.⁵¹ Thus, improvement of the widow(er)'s benefit should be part of a broader reform plan.

D. Improve the Cost-of-Living Adjustment to Reflect Elders' True Cost of Living

To prevent inflation from eroding the value of Social Security benefits over time, Social Security provides an automatic annual cost-of-living adjustment (COLA) based on the Consumer Price Index (CPI). This protection is especially important to women, who constitute 72 percent of beneficiaries age 90 and older.⁵² But the current CPI underestimates the effect of inflation on the elderly because it does not reflect the spending patterns of older Americans, who spend twice as large a share of their budgets on health care,⁵³ where costs are rising much more rapidly than for other goods and services.⁵⁴

When the annual COLA became a part of Social Security 40 years ago, there was only one Consumer Price Index: the CPI-W, which is based on the spending patterns of urban wage earners, a group that does not include retirees. Recognizing the need to update the COLA, in the Older Americans Act of 1987, Congress directed the Bureau of Labor Statistics to develop an alternative experimental Consumer Price Index for the Elderly, the CPI-E, to take account of the spending patterns of elderly individuals.

The Congressional Budget Office found that compared to the CPI-E, the CPI-W understated the effects of inflation on older individuals by about 0.3 percentage points per year between 1983

51. Iams & Tamborini, *supra* note 38.

52. See *Old-Age, Survivors, and Disability Insurance*, *supra* note 29 (providing data for NWLC's calculations based on Table 5.A10); see generally Joan Entmacher & Katherine Gallagher Robbins, *Cutting the Social Security COLA by Changing the Way Inflation Is Calculated Would Especially Hurt Women*, NWLC (2011), <http://www.nwlc.org/sites/default/files/pdfs/cuttingsocseccola.pdf> (providing information about the importance of the COLA to women, different ways of calculating it, and their implications).

53. See Brian W. Cashell, *A Separate Consumer Price Index for the Elderly?*, CONGRESSIONAL RESEARCH SERV. 4 (Jan. 20, 2010), <http://aging.senate.gov/ocrs/aging9.pdf> [hereinafter CRS, *Separate Price Index*] (explaining that for people 65 and older, the share of spending devoted to health care is twice that of consumers generally; for people 65 and older, it is two and one-half times).

54. See *Consumer Price Index - All Urban Consumers*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/pdq/querytool.jsp?survey=cu> (last visited Jan. 29, 2013) [hereinafter CPI-U] (providing the calculator and data for NWLC's calculations). Between 2003 and 2012, the annual CPI-U for all items less medical care (2.4 percent) has grown at a slower rate than for medical care alone (3.8 percent). *Id.*

and 2009, primarily because of the greater weight given to rapidly rising health care costs.⁵⁵ However, Congress has not adopted the more accurate CPI-E for calculating Social Security and Supplemental Security Income benefits.

Because the current Social Security COLA does not reflect the rising cost of health care, health care costs consume a greater share of the Social Security check over time, leaving seniors less money to meet other needs. Replacing the current CPI with one that more accurately reflects the impact of inflation on the elderly would be particularly helpful to women, helping Social Security benefits to keep pace with health care costs that are rising both with inflation and advancing age, just as replacing the current CPI with a lower, less accurate index—the chained-CPI—would be particularly harmful.⁵⁶ To make the COLA more accurate and adequate, the CPI-W could be replaced with the CPI-E or other inflation index developed to measure changes in the cost of living for the elderly for calculating Social Security and Supplemental Security Income benefits.⁵⁷

III. SUPPLEMENTAL SECURITY INCOME

In addition to enhancing Social Security benefits, a comprehensive strategy for reducing poverty among elderly women should include improvements to SSI. SSI is a means-tested program intended to provide a basic income floor for society's most economically vulnerable people—the elderly poor and poor adults and children with disabilities.⁵⁸ It is a particularly critical program for women, who make up over two-thirds of all beneficiaries age 65 and older.⁵⁹

The maximum federal SSI benefit is \$710 per month for an individual.⁶⁰ Raising it to \$937 per month would provide at least a

55. Noah Meyerson, *Using a Different Measure of Inflation for Indexing Federal Programs and the Tax Code*, CONGRESSIONAL BUDGET OFFICE 7 (Feb. 24, 2010), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/112xx/doc11256/cpi_brief.pdf [hereinafter CBO, *Different Measure of Inflation*].

56. Entmacher & Gallagher Robbins, *supra* note 7.

57. See *Breaking the Social Security Glass Ceiling*, *supra* note 25. Senator Mark Begich (D-AK) and Representative Ted Deutch (D-FL) introduced bills in the 113th Congress to calculate the COLA using the Consumer Price Index for the Elderly. Protecting and Preserving Social Security Act, S. 3651, 113th Cong. (2013).

58. *The Supplemental Security Income Program, 2011 Annual Report of the SSI Program*, SOC. SEC. ADMIN. (May 27, 2011), <http://www.ssa.gov/oact/ssir/SSI11/ProgramDescription.html>.

59. *SSI Annual Statistical Report*, U.S. SOC. SEC. ADMIN. 22 tbl.5 (2011), http://www.socialsecurity.gov/policy/docs/statcomps/ssi_asr/2011/sect02.pdf.

60. See *Recommendations to Update the Supplemental Security Income Program*, NAT'L SENIOR CITIZEN'S LAW CTR. (Jan. 2013),

poverty-level income.⁶¹ And updating out-of-date program rules would allow beneficiaries to supplement those payments with modest Social Security benefits, pensions, or savings.

A. Update SSI's Earnings Disregard

A majority of SSI recipients also qualify for Social Security benefits, and some may have modest income from a pension or annuity. SSI rules count Social Security benefits, pensions, and annuity income as “unearned” income.⁶² With the exception of a \$20 per month general income disregard, every additional \$1 in Social Security or pension benefits means \$1 less in SSI benefits, the equivalent of a 100 percent tax.⁶³ The \$20 per month unearned income disregard has not changed since the SSI program was enacted in 1972.⁶⁴

Updating the disregard to reflect inflation since 1972 would increase it to \$110 per month.⁶⁵ Indexing the higher disregard to increases in the cost of living would protect it from similar erosion in the future.⁶⁶

B. Modernize SSI's Asset Limit

The current asset limit for SSI recipients is just \$2,000 for an individual and \$3,000 for a couple, amounts that Congress has not updated in nearly 30 years. Savings held in an IRA or other

<http://www.nslc.org/wp-content/uploads/2013/01/RecommendationsSSI-0113.pdf> (stating that the current monthly benefit is \$710).

61. See *Supplemental Security Income Improvements Are Long Overdue*, NAT'L SENIOR CITIZENS' LAW CTR. 1 (June 2012), <http://www.nslc.org/wp-content/uploads/2011/07/SSI-Modernization-Revised12.pdf> [hereinafter *Supplemental Security Income Improvements Are Long Overdue*] (explaining that in the majority of states, individuals who receive SSI benefits cannot have a monthly income greater than \$718.00 and proposing some possible reforms). See generally *Recommendations to Update the Supplemental Security Income Program*, NAT'L SENIOR CITIZEN'S LAW CTR. (Jan. 2013), <http://www.nslc.org/wp-content/uploads/2013/01/RecommendationsSSI-0113.pdf> [hereinafter *Recommendations to Update the Supplemental Security Income Program*] (providing a discussion of needed SSI reforms).

62. *A Guide to Supplemental Security Income (SSI) for Groups and Organizations*, SOC. SEC. ADMIN. 11 (2013), <http://www.ssa.gov/pubs/11015.pdf>.

63. Robert Greenstein & Eileen Sweeney, *Proposed Improvements in Social Security's Minimum Benefit and Widow's Benefit Could Harm Some of Nation's Poorest People: Proposals Would Have Unintended Side-Effect Unless Accompanied by a Change in the SSI Program*, CTR. ON BUDGET & POLY PRIORITIES 2 (June 27, 2005), <http://www.cbpp.org/files/6-27-05socsec.pdf>.

64. *Supplemental Security Income Improvements Are Long Overdue*, *supra* note 61.

65. *Recommendations to Update the Supplemental Security Income Program*, *supra* note 61, at 2.

66. *Id.*

qualified retirement plan count toward these asset limits, making it virtually impossible for an SSI recipient to save for retirement.⁶⁷

Increasing the asset limit to at least \$10,000 for an individual, and \$15,000 for a couple, would allow individuals to accumulate some savings for emergencies.⁶⁸ Enacting a separate exclusion for qualified retirement savings of at least \$10,000 for an individual, and \$15,000 for a couple, would enable low-income workers to accumulate some savings for retirement. Both amounts should be indexed to inflation.

IV. PENSIONS AND RETIREMENT SAVINGS

The national Elder Index shows that single individuals need between \$19,104 to \$28,860, and couples need between \$29,448 and \$39,204, annually to meet expenses as older adults.⁶⁹ Although Social Security forms the basis of women's retirement security, the average Social Security benefit (\$12,700 for women 65 and older) is insufficient to provide for a secure and dignified retirement. Women need income from savings and assets to supplement the guaranteed lifelong benefits that form the base of their retirement income pyramid. For most, employer-sponsored pension and retirement savings plans are the most likely source of additional retirement income.⁷⁰

Traditional, defined benefit (DB) pensions have been shown to play a vital role in reducing the risk of poverty and economic hardship among older Americans who receive them, particularly for the most vulnerable populations.⁷¹ But defined contribution

67. See *Asset Limit Reform in the Supplemental Security Income (SSI) Program: Remove the Penalty for Saving*, CFED, http://www.realeconomicimpact.org/UploadedDocs/Documents/SSI_Asset_Limits_One_Pager_HR_4937.pdf (last visited Apr. 4, 2013) (mentioning that the SSI program counts that resources that are accessible to a person).

68. *Id.* at 3.

69. *The National Economic Security Standard Index*, GERONTOLOGY INST., UNIV. OF MASS. BOSTON 6 (2012), http://scholarworks.umb.edu/gerontologyinstitute_pubs/75.

70. See Chris E. Anguelov et al., *Shifting Income Sources of the Aged*, OFFICE OF RET. & DISABILITY POL'Y, SOC. SEC. ADMIN. (2012), <http://www.ssa.gov/policy/docs/ssb/v72n3/v72n3p59.html> (identifying the "three pillars" of retirement income as social security, personal savings, and employer-provided pensions).

71. See generally Frank Porell & Diane Oakley, *The Pension Factor 2012: The Role of Defined Benefit Pensions in Reducing Elder Economic Hardships*, NAT'L INST. ON RET. SEC. (July 2012), http://www.nirsonline.org/storage/nirs/documents/Pension%20Factor%202012/pensionfactor2012_final.pdf (discussing the significance of defined benefit pensions for older recipients facing economic hardship).

(DC) plans have increasingly supplanted DB pensions.⁷² Women have modest savings; in 2004, the median DC plan and/or IRA account balances for women ages 55 to 64 were \$34,000.⁷³ But women's retirement savings lag far behind those of men; the median DC plan/IRA balance for men of the same age was \$70,000 in 2004.⁷⁴ Although neither men's nor women's median account balances are sufficient to provide a secure retirement, women are more at risk: a recent analysis by the Employee Benefit Research Institute found that for people on the verge of retirement (Early Boomers), the shortfall in retirement savings for single women is about triple that of married individuals and nearly double that of single males.⁷⁵ As a result, on average, income from pensions and annuities makes up a smaller percentage of women's family income than men's family income, and the percentages are even smaller for women of color.⁷⁶ Yet, because women live, on average, longer than men, they need more savings than men to get them through retirement. At 65, the average life expectancy for women is 19.7 years, compared to 17.0 for men.⁷⁷ But this does not fully

72. See *Private Pension Plan Bulletin Historical Tables and Graphs*, EMP. BENEFITS SEC. ADMIN., U.S. DEPT' OF LABOR 1 (Nov. 2012), <http://www.dol.gov/ebsa/pdf/historicaltables.pdf> (showing number of DB plans declining from 103,346 in 1975 to 46,543 in 2010, and number of DC plans increasing from 207,784 in 1975 to 654,469 in 2010).

73. Leslie E. Papke et al., *Retirement Security for Women: Progress to Date and Policies for Tomorrow*, THE RET. SEC. PROJECT 4 tbl.1 (Feb. 2008), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Retirement_security/RSP-PB_Women_FINAL_4.2.2008.pdf.

74. *Id.*

75. See Jack VanDerhei, *Retirement Income Adequacy for Boomers and Gen Xers: Evidence from the 2012 EBRI Retirement Security Project Model*, EBRI.ORG 3 tbl.5 (May 2012), http://ebri.org/pdf/notespdf/EBRI_Notes_05_May-12.RSPM-ER.Cvg1.pdf (finding that for people on the verge of retirement (Early Boomers), the shortfall in savings is approximately \$22,000 per person for married individuals, \$34,000 for single males, and \$65,000 for single females).

76. *Percentage Distribution of Persons in Recipient Families, by Sex, Type of Pension, and Age, 2010*, OFFICE OF RET. & DISABILITY POL'Y, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/sect06.html#table6.b1 (last visited Mar. 1, 2013); *Percentage Distribution by Source of Family Income, Race, Hispanic Origin and Sex, 2010*, OFFICE OF RET. & DISABILITY POL'Y, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/sect08.html#table8.b5 (last visited Mar. 1, 2013).

77. Elizabeth Arias, *United States Life Tables, 2006*, NAT'L VITAL STATISTICS REPORTS tbl.A (June 2010), http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_21.pdf [hereinafter U.S. LIFE TABLES, 2006]. The Social Security Administration Office of the Chief Actuary uses life expectancy tables in its estimates. See generally Felicitie C. Bell et al., *Unisex Life Expectancies at Birth and Age 65*, SOC. SEC. ADMIN.,

capture the difference in the odds that men and women who reach age 65 will live to 80, 90, or 95. For individuals who reach 65, women are 1.6 times as likely as men to live to 90 and twice as likely as men to live to age 95.⁷⁸

This gender gap in retirement savings is largely attributable to women's experience in the labor force. As discussed above, women spend fewer years in the workforce, are more likely to work part-time⁷⁹ and earn less than their male counterparts.⁸⁰ These trends have persisted over time. Thus, despite greater labor force participation, future female retirees are also expected to fall short of their retirement savings needs—indeed, “Generation X-ers” are projected to be less prepared for retirement than late Baby Boomers.⁸¹

Some of these work patterns are due to family responsibilities: women tend to bear greater responsibility for caregiving, whether parenting,⁸² caring for sick, elderly, or disabled family members,⁸³ or sometimes both.⁸⁴ Among working

OFFICE OF THE CHIEF ACTUARY (June 2008), <http://www.ssa.gov/oact/NOTES/ran2/an2008-2.pdf> (establishing that the Office of the Chief Actuary uses life expectancy tables).

78. NWLC calculations using U.S. LIFE TABLES, 2006, *supra* note 77.

79. See Hilda L. Solis & Keith Hall, *Women in the Labor Force: A Databook*, U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS 69-72, tbl.20 (Dec. 2011), <http://bls.gov/cps/wlf-databook-2011.pdf> [hereinafter *Women in the Labor Force: A Databook*] (stating that nearly 27 percent of all employed women are in part-time jobs, compared to about 13 percent of men).

80. See *National Women's Law Center (NWLC) Calculations Based on Current Population Survey, Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2011 – People 15 Years Old and over by Total Money Earnings in 2011, Age, Race, Hispanic Origin, Sex, and Disability Status*, U.S. BUREAU OF LABOR STATISTICS & U.S. CENSUS BUREAU (2012), <http://www.census.gov/hhes/www/cpstables/032012/perinc/toc.htm> (indicating that the typical full-time, year-round female worker is paid 77 percent of what her male counterpart is paid).

81. See VanDerhei, *supra* note 75, at 7 fig.5 (including retirement income from Social Security, DC account balances, IRA balances, DB annuities and/or lump-sum distributions in the figures). The study found that for Generation X-ers, the present value of the projected shortfall in savings will be approximately \$25,000 (per person) for married individuals, \$42,000 for single males, and \$76,000 for single females; for late Boomers, the shortfalls would be \$21,000 (per person) for married individuals, \$33,000 for single males, and \$67,000 for single females. *Id.*

82. See *Economic News Release, Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Survey*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (July 25, 2012), <http://www.bls.gov/news.release/nlsoy.nr0.htm> [hereinafter *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers*] (stating that women of childbearing age (18 to 46) spend 25 percent of their time out of the labor force, compared to 10 percent for men in that same age range).

83. See *Caregiving in the U.S.: Executive Summary*, NAT'L ALLIANCE FOR

caregivers, two-thirds report having to take time off, one in five have taken a leave of absence, and nearly one in ten have stopped working entirely for caregiving-related reasons.⁸⁵

Women's marital and family status can also affect their ability to save for retirement. Following a divorce, women are more likely to experience a drop in their standard of living that may, in turn, make it difficult for them to save for retirement.⁸⁶ Women also may lose marital pension benefits and retirement savings in the course of the division of property pursuant to the divorce.⁸⁷ In addition, single mothers, whether divorced or never married, have, on average, less income than either single fathers or married couples, making it even more difficult to put aside current income to save for future retirement.⁸⁸

All of these factors limit women's ability to save for retirement. This Part highlights some options for improving women's ability to accumulate pension benefits and retirement savings through the employer-based retirement system, including helping low- and moderate-income workers save for retirement, improving access to lifetime income options, and bolstering spousal protections in pension plans and other retirement savings accounts. This discussion focuses on pensions and retirement savings plans covered under ERISA, and to a lesser extent, IRAs. It does not address state or federal employee pension plans, including military, Foreign Service, or Railroad Retirement

CAREGIVING & AARP 4 (2009), <http://www.caregiving.org/pdf/research/CaregivingUSAllAgesExecSum.pdf> [hereinafter *Caregiving in the U.S.: Executive Summary*] (stating that two-thirds of caregivers for sick, elderly or disabled family members are women).

84. See, e.g., Kim Parker & Eileen Patten, *The Sandwich Generation: Rising Financial Burdens for Middle-Aged Americans*, PEW RESEARCH CTR. (Jan. 13, 2013), <http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/> (stating that one in seven middle-aged adults is providing financial support to both an aging parent and a child).

85. *Caregiving in the U.S.: Executive Summary*, *supra* note 83, at 17.

86. GAO-08-105, *Retirement Security: Women Face Challenges in Ensuring Financial Security in Retirement*, U.S. GOV'T ACCOUNTABILITY OFFICE 22 (2007), <http://www.gao.gov/assets/270/267910.pdf> [hereinafter *Women Face Challenges in Ensuring Financial Security in Retirement*].

87. See ERISA Advisory Council, *Report: Disparities for Women and Minorities in Retirement Savings*, DEPT. OF LABOR (2010), <http://www.dol.gov/ebsa/publications/2010ACreport3.html> (stating that numerous issues that arise during the division of retirement assets during divorce put divorced women at risk of losing their share of marital retirement benefits).

88. See *Current Population Survey, Annual Social and Economic Supplement, 2011 Family Income Table of Contents*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032012/faminc/finc03_000.htm (last modified Sept. 12, 2012) (referring to median income levels for these family structures).

pensions.⁸⁹

A. *Help Low-Earning Women Workers Save for Retirement*

Women constitute the majority of low- and moderate-income workers. Nearly two-thirds of minimum wage workers are women,⁹⁰ and the median annual earnings of full-time, year-round working women are \$37,118, compared to \$48,202 for men.⁹¹ In addition, women are twice as likely to work part-time than men.⁹²

Low- and moderate-income workers are less able to forego income to save for retirement than higher-income workers. But low- and moderate-income workers also face particular barriers to saving for retirement through DC plans, which are the dominant model in the employer-sponsored retirement system. First, women participate heavily in small businesses,⁹³ which are less likely to offer retirement plans to their employees—almost 72 percent of workers in small companies (those with fewer than 100 employees) had no retirement plan at work in 2006.⁹⁴ For those low- and moderate-income workers whose employers do offer retirement plans, there may be limits on their ability to participate. For example, under current law, employers can generally exclude part-time employees (those working under approximately 20 hours per week) from coverage under a DC plan.⁹⁵ Further, although

89. Note that some of the issues that adversely affect women in the private pension system exist in these plans, to a certain extent, as well.

90. See *Fair Pay for Women Requires Increasing the Minimum Wage and Tipped Minimum Wage*, NWLC (Nov. 30, 2012), <http://www.nwlc.org/resource/fair-pay-women-requires-increasing-minimum-wage-and-tipped-minimum-wage> (defining a minimum wage worker as someone who earns the federal minimum wage or less).

91. *Insecure and Unequal: Poverty and Income Among Women and Families, 2000-2011*, NWLC 10 (2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_povertyreport.pdf.

92. See *Women in the Labor Force: A Databook*, *supra* note 79, at 2 (stating that nearly 27 percent of all employed women are in part-time jobs, compared to about 13 percent of men).

93. See, e.g., Floyd Norris, *By Gender and by Age, an Unequal Recovery*, N.Y. TIMES (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/business/economy/recovery-has-brought-more-jobs-for-men-than-women.html?_r=0 (quoting economist as saying that “[w]omen are more likely to be employed by small service-sector companies than by large manufacturers”).

94. Kathryn Kobe, *Small Business Retirement Plan Availability and Worker Participation*, SMALL BUS. ADMIN., OFFICE OF ADVOCACY 4 (2010), [http://www.sba.gov/sites/default/files/Small%20Business%20Retirement%20Plan%20Availability%20and%20Worker%20Participation%20\(Full\).pdf](http://www.sba.gov/sites/default/files/Small%20Business%20Retirement%20Plan%20Availability%20and%20Worker%20Participation%20(Full).pdf).

95. Minimum Participation Standards, 26 U.S.C.A. § 410(a)(1)(A) (West 2012); see also Minimum Participation Standards, 29 U.S.C.A. § 1052(a)(1)(A)-3(A) (West 2012) (stating that employers who offer pension plans are not

employers are not permitted to exclude from eligibility employees who work at least 1,000 hours in a 12-month period on the basis of their status as part-time workers, an employer may exclude a group of employees based on a “reasonable classification,” such as hourly paid employees (as opposed to salaried employees).⁹⁶

Participation rates in employer-sponsored DC plans for eligible low- and moderate-income workers have been historically much lower than those of higher-income workers.⁹⁷ Even when low- and moderate-income workers participate, they simply have less disposable income to put away for retirement. Although participants can contribute up to \$17,500 to a DC plan account per year under current law, few workers, especially low- and moderate-income workers, do so.⁹⁸ Among women making a contribution to a 401(k)-type plan in 2005, only six percent made the maximum contribution, compared to almost 12% of men who did so.⁹⁹ Indeed, women’s mean contribution in 2005 was roughly \$3,500, while men’s mean contribution was \$4,949 (almost \$1,500 higher).¹⁰⁰ Moreover, with lower account balances, high fees, particularly fixed fees, will disproportionately affect low- and moderate-income workers.¹⁰¹

required to include employees who work fewer than 1,000 hours in a 12-month period, which is approximately 20 hours per week).

96. 26 C.F.R. § 1.410(b)-4; see also *Employee Plans Determinations Quality Assurance Bulletin: Part-Time Employees Revisited, FY-2006, No. 3*, INTERNAL REVENUE SERV. 2 (Feb. 14, 2006), http://www.irs.gov/pub/irs-tege/qab_021406.pdf (reiterating the legal standard from the Code Sections).

97. Craig Copeland, *Ownership of Individual Retirement Accounts (IRAs) and 401(k)-Type Plans*, EBRI NOTES 6 fig.2 (May 2008), http://www.ebri.org/pdf/EBRI_Notes_05-2008.pdf [hereinafter *Ownership of Individual Retirement Accounts (IRAs) and 401(k)-Type Plans*] (showing that, for example, only 11% of workers with family income between \$20,000 and \$29,999, compared to over 21% of workers with income between \$50,000 and \$74,999, owned 401(k)-type plans).

98. *Id.* at 11 n.5. In 2005, only 1.3% of workers with a family income between \$20,000 and \$29,999 and making a contribution to a 401(k) type plan made the maximum contribution while 14.6% of those with incomes of \$75,000 and up did so. *Id.* at 7 fig.3.

99. *Id.*

100. *Id.* Between 1990 and 2001, average annual contributions were \$3,818 for men and \$2,630 for women. See Barbara A. Butrica & Richard W. Johnson, *Racial, Ethnic, and Gender Differentials in Employer-Sponsored Pensions*, THE URBAN INST. 8.n.2 (June 30, 2010), <http://www.urban.org/UploadedPDF/901357-racial-ethnic-gender-differentials.pdf> (citing Karen E. Smith, Richard W. Johnson & Leslie A. Muller, *Differing Income in Employer-Sponsored Retirement Plans: The Dynamics of Participant Contributions*, CTR. FOR RET. RESEARCH AT BOSTON COLL. (Aug. 2004), http://crr.bc.edu/wp-content/uploads/2004/08/wp_2004-201.pdf).

101. See, e.g., *Comments on Proposed Regulations on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*,

In addition, low- and moderate-income workers are the most likely to use DC plan account savings for non-retirement needs, thus reducing savings targeted for retirement.¹⁰² Low-income workers are, specifically, the most likely to cash out their DC plan accounts after a job change, a tendency that is even more problematic for retirement security because lower-income workers have more job changes than higher-income workers over the course of their working lives.¹⁰³ Some research has further found that women are more likely than men to spend lump sums received from DC plan accounts after they leave a job to meet expenses (rather than roll those amounts over into other retirement savings vehicles),¹⁰⁴ and there are ample opportunities to do so, given that the average woman holds approximately 11 jobs during her working life.¹⁰⁵ Thus, the effect of retirement savings “leaking” out of DC plans can be significant for low- and moderate-income working women. Indeed, the Government Accountability Office (GAO) estimated that preserving for retirement all accumulated retirement savings alone would increase the pension benefits of women in the three lowest income quintiles, with the largest impact on the lowest quintiles.¹⁰⁶ This is so, despite the fact that current law requires employers to automatically roll DC plan account savings over \$1,000 into an IRA when an employee changes jobs if the employee does not affirmatively elect to roll the balance into another retirement savings account or to receive the lump sum directly.¹⁰⁷

In this Section, we discuss several options aimed at improving the ability of low- and moderate-income working women to save

PENSION RIGHTS CTR. 4 (Sept. 8, 2008), http://www.pensionrights.org/policy/regulations/pension_rights_center_fee_comments.pdf (noting that if an investment fund imposed a \$20 annual fee on accounts with less than \$10,000, a participant invested \$1,000 per year and had an average 2% annual return, the account balance would not have grown at all over a five-year period).

102. Matt Fellowes & Katy Willemin, *The Retirement Breach in Defined Contribution Plans: Size, Causes, and Solutions*, HELLOWALLET 9-11 (Jan. 2013), www.hellowallet.com/retirementbreach.

103. *Id.* at 10-11.

104. Lois Shaw & Catherine Hill, *The Gender Gap in Pension Coverage: What Does the Future Hold?*, INST. FOR WOMEN'S POLY RESEARCH 8-9 (2002), <http://www.iwpr.org/publications/pubs/the-gender-gap-in-pension-coverage-what-does-the-future-hold-final-report>.

105. See *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers*, *supra* note 82 (describing how the average woman born in the later years of the baby boom (individuals born from 1957 to 1964) held 11.1 jobs from age 18 to age 46).

106. *Retirement Security: Women Face Challenges in Ensuring Financial Security in Retirement*, *supra* note 86, at 48.

107. 26 U.S.C.A. § 401(a)(31)(B).

through the employer-sponsored retirement savings system, including increasing coverage of part-time workers, lowering vesting requirements, and improving savings vehicles and incentives for low- and moderate-income workers.

1. *Increasing Coverage of Part-Time Workers*

Under current law, private-sector employers are not required to extend retirement benefits to part-time workers (those working less than approximately 20 hours per week).¹⁰⁸ Less than 32 percent of part-time, full-year workers work for an employer that offers a retirement plan for any worker, compared to over 58 percent of full-time, full-year workers.¹⁰⁹ Just 18 percent of part-time, full-year workers participate in employer-offered retirement plans compared to 52 percent of full-time, full-year workers.¹¹⁰ Women are more than twice as likely as men to work part-time, either for their entire work lives or for a part of their careers.¹¹¹ A recent study by the Employee Benefit Research Institute found that women's lower probability of participating in an employer-sponsored retirement plan is the likely result of lower earnings and lower rates of full-time work, as compared to men.¹¹²

One option for increasing low- and moderate-income women's retirement security, then, would be to require employers sponsoring DC plans to cover part-time employees, for example, if they work at least 500 hours of service per year.¹¹³ Employers could require that part-time employees work for a year before becoming eligible to participate in their DC plan, as permitted for other eligible employees under ERISA.¹¹⁴

108. 29 U.S.C.A. § 1052(a)(1)(A)-3(A).

109. Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, EBRI.ORG ISSUE BRIEF 10 (Oct. 2010), http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-2010_No348_Participation.pdf [hereinafter *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*].

110. *Id.* at 11.

111. See *Women in the Labor Force: A Databook*, *supra* note 79 (finding that nearly 27 percent of all employed women are in part-time jobs, compared to about 13 percent of men).

112. See *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, *supra* note 109 (providing figures including workers working for a union).

113. See Part-Time Worker Bill of Rights Act of 2013, H.R. 675, 113th Cong. (2013) (proposing that workers who "customarily" work between 500 and 1,000 hours per year be eligible for pension coverage after 500 hours of service); Women's Retirement Security Act of 2006, S. 3951, 109th Cong. (2006) (proposing requiring coverage of workers who worked at least 500 hours for 3 years).

114. 29 U.S.C.A. § 1052(a)(1)(A)(ii).

2. *Decrease Time Required for Employer Contributions to DC Plan Accounts to Vest*

As discussed above, women will hold over 11 jobs, on average, during the course of their careers.¹¹⁵ And as discussed above, the lowest-income workers (including women) are at the greatest risk of “leaking” funds saved for retirement when they leave jobs. But in addition to the risk that workers will withdraw DC plan account funds pursuant to a job change (or a job loss), if workers leave jobs after too short a period of time, they may lose out on employer-matching contributions, if any.¹¹⁶ Under current law, workers who contribute to a DC plan have immediate and full ownership over their own contributions.¹¹⁷ However, if their employer makes a matching contribution, workers only become vested in those contributions either fully after three years (“cliff vesting”) or gradually over a six-year period (“graduated vesting”).¹¹⁸ The median job tenure for women is just over four and one-half years,¹¹⁹ and more than half of women (18-46) have been with their employers for less than two years.¹²⁰ As a result, many workers risk losing out on employer-matching contributions when they leave an employer after a less-than-median tenure.

Women’s median job tenure is very similar to that of men (4.6 years versus 4.7 years in 2012).¹²¹ A statistical micro simulation by the GAO in 2007 examined the effects of a reduced vesting schedule (for cliff vesting, from three to two years, and for graduated vesting, from six to three years).¹²² This model showed

115. *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers*, *supra* note 82.

116. See *FAQs About Retirement Plans and ERISA*, EMP. BENEFITS SEC. ADMIN., U.S. DEPT. OF LABOR, http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html (last visited Apr. 4, 2013) (explaining that employees may have to work for a company for a few years before they are vested in the employer’s contribution).

117. *What You Should Know About Your Retirement Plan*, U.S. DEPT’ OF LABOR, EMP. BENEFITS SEC. ADMIN., <http://www.dol.gov/ebsa/publications/wyskapr.html> (last visited Mar. 12, 2013).

118. See, e.g., *id.* (explaining when a participant has a right to accumulated benefits).

119. See *Employee Tenure Summary: Employee Tenure in 2012*, BUREAU OF LABOR STATISTICS, U.S. DEPT’ OF LABOR 1 (Sept. 18, 2012), <http://www.bls.gov/news.release/pdf/tenure.pdf> [hereinafter *Employee Tenure Summary: Employee Tenure in 2012*] (explaining that in 2012, the median tenure for female wage and salary workers age 16 or older was 4.6 years, whereas the median tenure for male wage and salary workers was 4.7 years).

120. *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers*, *supra* note 82, at tbl.2.

121. *Employee Tenure Summary: Employee Tenure in 2012*, *supra* note 119.

122. *Retirement Security: Women Face Challenges in Ensuring Financial Security in Retirement*, *supra* note 86, at 45.

that median pension benefits increased for more eligible women overall, compared to men, but grew the most for eligible women in the lowest income quintile.¹²³ Accordingly, policymakers should consider lowering vesting requirements in order to improve the retirement security of low- and moderate-income working women.

3. *Increasing Investment Options and Incentives for Low- and Moderate-Income Workers*

For those workers whose employers offer DC plans, automatic enrollment policies are projected to dramatically increase the participation rates and retirement savings of lower-wage workers.¹²⁴ But many workers still lack access to a pension or retirement savings plan at work. One policy proposal aimed at the millions of Americans whose employers do not offer a retirement plan that has received a great deal of support and attention over

123. Under the GAO micro simulation, the median pension benefit of women in the lowest income quintile who were affected grew for over 16 percent, and by nearly 9 percent for women in the second-lowest income quintile, compared to 6.29 percent for women overall and 5.74 percent for men overall. *Id.* at 45-46. In 2006, the median job tenure for men aged 25 and above was 5 years, compared to 4.8 years for women. *Employee Tenure Summary: Employee Tenure in 2012*, *supra* note 119, at tbl.1.

124. Jack VanDerhei, *The Impact of Automatic Enrollment in 401(k) Plans on Future Retirement Accumulations: A Simulation Study Based on Plan Design Modifications of Large Plan Sponsors*, EBRI.ORG 1, 14 (Apr. 2010), http://www.ebri.org/pdf/briefspdf/EBRI_IB_04-2010_No341_Auto-Enroll1.pdf. Automatic enrollment contemplates requiring employees to opt out of enrollment in a 401(k) plan, rather than affirmatively elect to enroll. *Id.* at 14. The Pension Protection Act of 2006 facilitated auto-enrollment. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as 26 U.S.C. § 401) (2006). But as of 2010, the majority of employers had not adopted auto-enrollment policies. See *Surveys and Statistics, Automatic 401(k) Plans: Employer Views on Enrolling New and Existing Employees*, AARP (June 2010), <http://www.aarp.org/work/retirement-planning/info-06-2010/auto401k.html> (noting that only 42 percent of employers surveyed offered 401(k) plans with automatic enrollment). For an employer that makes all employees immediately eligible to participate in the 401(k) plan and automatically enrolls all employees in the plan, participation increased from 37 percent to 86 percent. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 THE QUARTERLY J. ECON. 1159, tbl.IV (2001). In addition, assuming a lifetime of work and continuous participation in 401(k) plans that featured auto-enrollment, studies have projected significant increases in 401(k) account balances. Jack VanderHei, *The Impact of Automatic Enrollment in 401(k) Plans on Future Retirement Accumulations: A Simulation Study Based on Plan Design Modifications of Large Plan Sponsors*, 341 EMP. BENEFIT RES. INST. 5 (2010), http://www.ebri.org/pdf/briefspdf/EBRI_IB_04-2010_No341_Auto-Enroll1.pdf (finding that the median 401(k) balance of the lowest-income quartile of workers after being auto-enrolled in 401(k) plans throughout their career would be over sixty times greater than under a purely voluntary enrollment system).

the past six years is the so-called “Automatic IRA.”¹²⁵ The basic premise of the Automatic IRA is that employers of a particular size (such as those with ten or more employees) that do not sponsor other retirement plans could establish payroll deduction IRAs for their employees, with the option of automatically enrolling their employees.¹²⁶ The contribution level would start at three percent of salary.¹²⁷ Employers would not be required to contribute to employee accounts or match employee contributions, and would receive a tax credit to partially offset any costs associated with establishing an Automatic IRA.¹²⁸ The proposal contemplates that third-party financial institutions would manage the IRAs, and that, in order to limit participant confusion and to keep administrative costs low, investment choices would be limited.¹²⁹ As discussed further below, one safe and low-cost investment choice that has been discussed, a new U.S. Treasury “R-bond,” would be tailored to low- and moderate-income workers, and/or “new savers.”¹³⁰

The Automatic IRA proposal is generally thought to have the potential to increase retirement savings and improve retirement outcomes, particularly for moderate-income workers.¹³¹ The proposal is expected to make between 24.4 and 35.8 million workers who currently lack access to a retirement savings plan at work eligible to participate in an Automatic IRA, with more than

125. See generally J. Mark Iwry & David C. John, *Pursuing Universal Retirement Security Through Automatic IRAs*, 2007-2 BROOKINGS INST. 6-17 (2007), http://www.brookings.edu/~media/research/files/papers/2007/4/universal%20retirement%20iwry%20john/04_universal_retirement_iwry_john.pdf (discussing automatic IRAs).

126. *Id.* at 6-17.

127. Automatic IRA Act of 2012, H.R. 4049, 112th Cong. § 408(B)(d)(4)(A)(i) (2012).

128. See, e.g., Testimony on Retirement Security by David C. John, *Pursuing Universal Retirement Security Through Automatic IRAs and Account Simplification*, THE HERITAGE FOUND. (Apr. 17, 2012), <http://www.heritage.org/research/testimony/2012/04/pursuing-universal-retirement-security-through-automatic-iras-and-account-simplification> (noting that the Automatic IRA proposal would not require employers to match employee savings but employers would have added benefit of a tax credit).

129. Iwry & John, *supra* note 125, at 21-24.

130. See, e.g., John, *supra* note 128 (discussing the proposal of an R-Bond account that would allow new and small savers to accumulate retirement savings).

131. Benjamin H. Harris & Rachel M. Johnson, *Economic Effects of Automatic Enrollment in Individual Retirement Accounts*, AARP PUB. POLY INST. 1 (2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/Economic-Effects-of-Auto-IRA-Research-Report-AARP-ppi-econ-sec.pdf.

80 percent of the eligible workers earning less than \$50,000.¹³² The Obama Administration proposed an Automatic IRA in its 2010-2013 Budget documents,¹³³ and it has been introduced several times in both houses of Congress.¹³⁴

The Automatic IRA has generated a great deal of discussion. But the proposal, despite its significant promise, has limitations. First, Automatic IRAs, standing alone, would provide limited benefits to the lowest-income workers.¹³⁵ The Automatic IRA proposal is estimated to increase annual IRA contributions, on average, over \$970 for automatically enrolled workers in the lowest income quintile.¹³⁶ But for workers who are closer to retirement—for example, those who have fewer than twenty years of work before them—savings from Automatic IRAs may not meaningfully increase retirement security. Although, as one report put it, “any additional savings, created by automatic IRAs, no matter how small, will improve retirement security” for low- and moderate-income workers,¹³⁷ the benchmark for success with

132. Benjamin H. Harris & Ilana Fischer, *The Population of Workers Covered by the Auto IRA: Trends and Characteristics*, AARP PUB. POLY INST. 1-2 (2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/Population-of-Workers-Auto-IRA-Trends-and-Characteristics-Research-Report-AARP-ppi-econ-sec.pdf.

133. *General Explanations of the Administration's Revenue Proposals, Fiscal Year 2013*, U.S. DEP'T OF TREASURY 15-18 (Feb. 2012), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf>; *General Explanations of the Administration's Revenue Proposals, Fiscal Year 2012*, U.S. DEP'T OF TREASURY 5-7 (Feb. 2011), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2012.pdf>; *General Explanations of the Administration's Revenue Proposals, Fiscal Year 2011*, U.S. DEP'T OF TREASURY 16-18 (Feb. 2010), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2011.pdf>; *General Explanations of the Administration's Revenue Proposals, Fiscal Year 2010*, U.S. DEP'T OF TREASURY 7-9 (May 2009), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2010.pdf>.

134. See Automatic IRA Act of 2012, H.R. 4049, 112th Cong. (2012); Automatic IRA Act of 2011, S. 1557, 112th Cong. (2011); Automatic IRA Act of 2010, S. 3760, 111th Cong. (2010); Automatic IRA Act of 2010, H.R. 6099, 111th Cong. (2010); Automatic IRA Act of 2007, S. 1141, 110th Congress (2007); Automatic IRA Act of 2007, H.R. 2167, 110th Cong. (2007) (following introduction by Senator Jeff Bingaman in the U.S. Senate and Representative Richard Neal in the U.S. House of Representatives).

135. HARRIS & FISCHER, *supra* note 132, at 5.

136. HARRIS & JOHNSON, *supra* note 131, at 14, tbl.9.

137. Barbara A. Butrica & Richard W. Johnson, *How Much Might Automatic IRAs Improve Retirement Security for Low- and Moderate-Wage Workers?* URBAN INST. BRIEF #33 6 (July 2011), <http://www.urban.org/UploadedPDF/412360-Automatic-IRAs-Improve-Retirement-Security.pdf>.

regard to low- and moderate-income workers can, and should, be set higher.

This Article does not purport to add to the analysis of the potential impact of the Automatic IRA proposal, standing alone, on the retirement savings of low- and moderate-income workers, or to compare the Automatic IRA proposal to other proposals intended to increase retirement security for workers who cannot save for retirement through their workplace.¹³⁸ Instead, this Article seeks to highlight two ancillary proposals that could enhance the impact of the Automatic IRA upon low- and moderate-income savers, and especially women—the potential for a government “match” in the form of an improved Saver’s Credit and the implementation of the R-bond as an investment option.

a. Improving the Saver’s Credit

Even when low- and moderate-income women workers can participate in retirement savings plans, whether DC plans or the Automatic IRA proposal, the fact remains that in order to save for retirement, those workers must defer compensation. Low- and moderate-income workers struggling to make ends meet often cannot spare even small amounts from their paychecks, particularly if they are single mothers. Therefore, some have proposed supplementing the amounts that low- and moderate-income workers are able to save for retirement with a government retirement savings match.¹³⁹ Research has shown that the offer of

138. For a discussion of some alternative proposals, see generally Senator Tom Harkin, *The Retirement Crisis and a Plan to Solve It*, S. COMM. ON HEALTH EDUC. LABOR & PENSIONS (July 2012), [http://www.harkin.senate.gov/documents/pdf/5011b69191eb4 .pdf](http://www.harkin.senate.gov/documents/pdf/5011b69191eb4.pdf) (laying out a two-part proposal involving the provision of universal access to “Universal, Secure and Adaptable Retirement Funds” and the improvement of Social Security by increasing benefits while strengthening the long-term finances of the trust fund); David Madland, *Making Savings for Retirement Easier, Cheaper, and More Secure*, CTR. FOR AM. PROGRESS (Sept. 2012), <http://www.americanprogress.org/wp-content/uploads/2012/09/MadlandBunkerRetirementBrief.pdf> (discussing a proposed collective defined-contribution plan and the expansion of the Thrift Savings Plan); *Retirement Security Funds*, PENSION RIGHTS CTR. http://www.pensionrights.org/sites/default/files/docs/retirement_security_funds_full_summary.pdf (last visited Mar. 7, 2013) (detailing Retirement Security Funds, a proposed private retirement plan administered by private single-purpose institutions that provide for risk-sharing, reverse matching, and lifetime income payouts); *State-Based Retirement Plans for the Private Sector*, PENSION RIGHTS CTR. (Oct. 2, 2012), <http://www.pensionrights.org/issues/legislation/state-based-retirement-plans-private-sector> (describing the California Secure Choice Retirement Savings Trust Act).

139. See, e.g., William G. Gale, *A Proposal to Restructure Retirement Savings Incentives in a Weak Economy with Long-Term Deficits*, BROOKINGS

a match makes tax filers more likely to save for retirement, and to save more than those not offered the match.¹⁴⁰

One proposal that has been introduced in a number of contexts is based on the existing Saver's Credit. Under current law, the Saver's Credit offers up to a 50 percent credit for up to \$2,000 in retirement savings by married couples filing joint tax returns and earning less than \$34,500, a 20 percent credit for couples earning between \$34,500 and \$37,500, and a ten percent credit for couples earning between \$37,500 and \$57,500.¹⁴¹ The same credit rates apply for single or married filing separately and head of household filing status, but at lower income levels.¹⁴² Because the Saver's Credit is a nonrefundable tax credit, however, it can only reduce tax liability down to zero.¹⁴³ Thus, it offers little incentive for low- and moderate-income tax filers, who are not likely to have enough income tax liability to take full advantage of the credit. Indeed, in 2005, only five percent of households with income below \$20,000 received any benefit from the Saver's Credit.¹⁴⁴

Accordingly, most proposals to make the Saver's Credit a more effective incentive for low- and moderate-income savers have focused on making the credit refundable, such that if the credit eliminates the filer's tax liability, he or she could then receive the remainder of the credit as a cash refund.¹⁴⁵ In 2005, the Tax Policy

(Sept. 8, 2011), <http://www.brookings.edu/research/papers/2011/09/08-retirement-incentives-gale> (proposing the replacement of the current income tax deduction for contributions to retirement savings accounts with a flat-rate refundable credit that would be deposited directly into the saver's account); Teresa Ghilarducci, *Guaranteed Retirement Accounts: Toward Retirement Income Security*, EPI Briefing Paper #204 THE ECON. POL'Y INST. 3 (Nov. 20, 2007), <http://www.gpn.org/bp204/bp204.pdf> (proposing a universal system of retirement savings accounts with mandatory contributions in connection with which employees would be eligible for a \$600 refundable tax credit).

140. Esther Duflo et al., *Savings Incentives for Low- and Middle-Income Families: Evidence from a Field Experiment with H&R Block*, MASS. INST. OF TECH. 3 (2006), <http://economics.mit.edu/files/801>.

141. *Form 8880: Credit for Qualified Retirement Savings Contributions*, INTERNAL REV. SERV., DEP'T OF THE TREASURY, <http://www.irs.gov/pub/irs-pdf/f8880.pdf> (last visited Apr. 4, 2013).

142. *Id.*

143. *Id.*

144. William Gale, J. Mark Iwry & Peter R. Orszag, *Improving Tax Incentives for Low-Income Savers: The Saver's Credit*, THE URBAN INST. tbl.5 (June 2005), http://www.taxpolicycenter.org/UploadedPDF/411177_TPC_DiscussionPaper_2.pdf.

145. *See, e.g., id.* at 12-13 (discussing the tax benefits of making the credit refundable). Some proposals contemplate reducing the size of the credit, however, in order to limit the revenue impact. *See, e.g.,* William G. Gale, David C. John & Spencer Smith, *New Ways to Promote Retirement Saving*,

Center estimated that making the Saver's Credit refundable would make the credit available to 49 million tax filers who under current law received no benefit from the credit.¹⁴⁶ The GAO projected that making the Saver's Credit refundable throughout a worker's lifetime would annually increase retirement income from a DC plan for workers in the lowest income quartile by just over \$300.¹⁴⁷ To further encourage the use of the refund for retirement savings purposes, some proposals call for depositing any refund from the credit into the retirement savings vehicle to which the qualifying contributions were made, resulting in an effective match.¹⁴⁸

Further, some proposals have paired improving the Saver's Credit with the Automatic IRA proposal. For example, the Obama Administration's 2010 and 2011 budgets proposed converting the Saver's Credit to a refundable 50 percent match of qualified retirement savings contributions up to \$500 per individual (indexed annually for inflation) combined with "automatic enrollment in IRAs."¹⁴⁹ Studies have shown that combining an expanded Saver's Credit with the Automatic IRA, as proposed by the Obama Administration, would increase the benefits for the bottom three income quintiles more than would the Auto IRA proposal alone.¹⁵⁰ Assuming a high level of enrollment in Automatic IRAs over a lifetime of work, the average increase in yearly income at age 70 has been projected to be about \$3,000 for the very lowest-income workers,¹⁵¹ although this projection seems

AARP PUB. POL'Y INST. 20-24 (October 2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/new-ways-promote-retirement-saving-AARP-pp-econ-sec.pdf (proposing changing the Saver's Credit to a 6.64% matching credit).

146. Gale, Iwry & Orzag, *supra* note 144, at 12.

147. GAO 11-333, *Private Pensions: Some Key Features Lead to an Uneven Distribution of Benefits*, U.S. GOV'T ACCOUNTABILITY OFFICE, 29-32, tbl.5 (Mar. 2011), <http://www.gao.gov/assets/320/317137.pdf> [hereinafter *Private Pensions: Some Key Features Lead to an Uneven Distribution of Benefits*].

148. Gale, Iwry & Orzag, *supra* note 144, at 13; Gale, John & Smith, *supra* note 145, at 20-24.

149. *General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals*, *supra* note 133, at 6.

150. See Harris & Johnson, *supra* note 131, at 13 (providing that combining the Saver's Credit and the Automatic IRA would greatly benefit the lowest three quintiles); Butrica & Johnson, *supra* note 137, at 3-6 (finding that Automatic IRAs would improve participation rates and increase retirement income, especially for retirees in the bottom and second-lowest income quintiles).

151. Compare Butrica & Johnson, *supra* note 137, at 5-6 (projecting \$3,000 increase in income), with *Private Pensions: Some Key Features Lead to an Uneven Distribution of Benefits*, *supra* note 132, at 30-32 (projecting that making Saver's Credit refundable in conjunction with automatic enrollment in DC plan would increase annual retirement income from a DC plan for workers

highly optimistic. Thus, in conjunction with the Automatic IRA, an expansion of the Saver's Credit presents a promising option for increasing the retirement security of low- and moderate-income workers.

The primary argument made against the refundable Saver's Credit, standing alone, or a less generous improvement of the credit in conjunction with an Automatic IRA proposal is cost. Yet our tax system already subsidizes saving for retirement, but provides the most generous subsidies to those who need them least.¹⁵² The proposals discussed here would make the distribution of these tax benefits somewhat more progressive.

b. The "R-Bond"

One retirement savings option for low- and moderate-income savers that has drawn attention and interest over the past several years has been savings bonds issued by the U.S. Department of the Treasury.¹⁵³ Savings bonds are seen as good investment choices for low- and moderate-income savers because they are familiar and trusted, offer stable returns, have few administrative fees, can be purchased in a number of consumer-friendly ways, and are available in multiple denominations. Under current law, tax filers can direct part of their federal tax refund to purchase savings bonds.¹⁵⁴ In addition, the TreasuryDirect program allows consumers to purchase savings bonds through payroll deductions.¹⁵⁵ Some IRA providers already offer savings bonds as

in the lowest quartile by about \$559).

152. See, e.g., *Private Pensions: Some Key Features Lead to an Uneven Distribution of Benefits*, *supra* note 147, at 19-25 (discussing different tax subsidies); Gale, Iwry & Orzsag, *supra* note 144, at 1 (exploring types of tax incentives for low-income families).

153. See, e.g., *West Virginia Rural Retirement Project*, WISER, <http://www.wiserwomen.org/index.php?id=39> (last visited Mar. 13, 2013) (describing Rural Retirement Project, a grassroots effort that explored savings vehicles for low-income, self-employed women); Peter Tufano & Daniel Schneider, *Reinventing Savings Bonds*, *Tax Analyst Special Report*, TAX NOTES 1 (Oct. 31, 2005), <http://www.d2dfund.org/files/publications/Reinventing-Savings-Bonds.pdf> (explaining the importance of savings bonds for low- and moderate-income families); *Savings Bond Working Group*, D2D FUND, <http://www.d2dfund.org/sbwg> (last visited Mar. 13, 2013) (describing the efforts of the "coalition of national and grassroots non-profit organizations, commercial tax preparers, tax software firms, and public officials" to encourage low- and moderate-income individuals to purchase savings bonds).

154. See *More Tax Refunds Paid, IRS Reminds Filers About Savings Bond Option*, INTERNAL REVENUE SERV. (Mar. 14, 2011), <http://www.irs.gov/uac/More-Tax-Refunds-Paid,-IRS-Reminds-Filers-About-Savings-Bond-Option> (explaining the various savings bonds available for tax refunds).

155. *The Payroll Savings Option in TreasuryDirect*, TREASURYDIRECT,

possible investment options.¹⁵⁶

Some have proposed creating a savings bond that would serve as a savings vehicle for retirement, dubbed an “R-Bond.”¹⁵⁷ The R-bond would share characteristics with other savings bonds, including portability, a wide range of denominations, and guaranteed investment returns. Further, the R-bond would receive the same income tax treatment as an IRA, including deferral of tax on interest and early withdrawal penalties. In addition, contributions to an R-Bond would qualify for the Saver’s Tax Credit.¹⁵⁸ Others have described the R-Bond as a small, no-fee account, backed by Treasury bonds.¹⁵⁹ The account would be administered by the U.S. Treasury Department, tracked by the owner’s Social Security number, and could include rollover retirement savings from a variety of sources.¹⁶⁰ There would be no fees associated with the R-bond.¹⁶¹ Another possibility would be for R-bonds to be paid out in the form of lifetime income payments at retirement.

Recently, proponents of Automatic IRAs have integrated the R-Bond proposal as a potential investment option for low- and moderate-income, as well as “new,” savers.¹⁶² For example, federal legislation introduced in 2012 would create Automatic IRAs that allow employers to facilitate employee contributions to either an

http://www.treasurydirect.gov/indiv/products/prod_tdpayrollinfo.htm (last updated July 3, 2012).

156. See, e.g., *Choosing Investments for Your IRA*, FIDELITY.COM (July 2012), <https://www.fidelity.com/retirement-planning/learn-about-iras/ira-choosing-investments> (describing IRA investments).

157. See Sean Luechtefeld, *Innovation Update: Diane Browning*, CFED (July 28, 2010, 3:17 PM), http://cfed.org/blog/innovation/innovation_update_diane_browning/ (describing R-Bond).

158. See *id.* (explaining that R-Bonds are different than other bonds because they qualify for the Saver’s Credit); Diane L. Browning, *Simplify Savings for Retirement: Create a U.S. Retirement R-Bond*, WISER RURAL RET. PROJECT 1–2,

https://www.wiserwomen.org/images/imagefiles/U%20S%20RetirementBond2_F.pdf (last visited Mar. 13, 2013) (describing ability to claim contributions to the R-Bond for a refundable Saver’s Credit as a positive feature of the proposed R-Bond).

159. Gale, John & Smith, *supra* note 145, at 11-12.

160. *Id.*

161. *Id.*

162. See John, *supra* note 128 (explaining that R-bond accounts are one type of simple investment choice that could be offered through Automatic IRAs); Mark Iwry *Speaks About Retirement at the National Press Foundation*, RET. INCOME J., <http://retirementincomejournal.com/upload/567/pdf/mark-iwry-speaks-about-retirement-at-the-national-press-foundation.pdf> (last visited Mar. 8, 2013) (providing a summary of Mark Iwry’s comments to journalists that included a description of R-bonds as minimal risk bonds that could meet the needs of small account holders).

IRA or “a qualified retirement bond.”¹⁶³ The legislation defines a “retirement bond” as a bond that credits interest based on duration, is inflation-protected, and is not transferable.¹⁶⁴ The legislation states that the purpose of the retirement bond program is to provide “new savers with a convenient, low-cost investment option” for small contributions.¹⁶⁵ The retirement bond would be capped at a certain amount, such as \$5,000, at which point, it has been proposed, the funds could be rolled into an account managed by private financial services companies or an employer-sponsored retirement savings plan account.¹⁶⁶ Further, the legislation contemplates that individuals could remain invested in retirement bonds, but “reflect[s] the intent that the long-term investment of automatic IRA funds for most savers be in the private market rather than in retirement bonds.”¹⁶⁷ In all other regards, the legislation gives authority to the Secretary of the Treasury to promulgate regulations to implement and administer retirement bonds.¹⁶⁸

The R-bond proposal offers a safe, low-cost vehicle for starting new and low-income savers on the path to more significant retirement savings.¹⁶⁹ R-bonds thus present one stable investment option for Automatic IRAs, although other proposals may offer higher, but still stable, investment returns.¹⁷⁰

B. Improve Access to Lifetime Income Options

One of the many challenges faced by retirees is making their savings last a lifetime. All retirees face the challenge of ensuring that they do not outlive their savings, but women are at a higher risk of doing so because they have fewer savings, but a longer life expectancy.¹⁷¹ As a result, the availability of annuities and other

163. Automatic IRA Act of 2012, H.R. 4049, 112th Cong. § 408(B)(d)(1)(B)(i)(I) (2012).

164. H.R. 4049, § 408(B)(g)(1).

165. H.R. 4049, § 408(B)(f)(5)(A).

166. See John, *supra* note 128 (stating that when accumulated retirement funds in an R-bond reached a specified level, they would be rolled over to private investment accounts).

167. H.R. 4049, § 408(B)(f)(5)(B).

168. H.R. 4049, § 408(B)(f)(6).

169. H.R. 4049, § 408(B)(f)(5)(A).

170. See, e.g., Lewis Mandell et al., *Real Savings+ An Automatic Investment Option for the Automatic IRA*, ASPEN INST. INITIATIVE ON FIN. SEC. 13, 16 (Dec. 17, 2009), http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/RealSavings%2B_Complete.pdf (proposing a new investment option for “low- and moderate-income savers”, RealSavings+, that would grow investments with reduced risks of loss).

171. See *supra* notes 102-08 and accompanying text (providing data and sources regarding women’s life expectancy and retirement savings rates).

guaranteed lifetime income streams, in addition to the guaranteed, inflation-adjusted lifetime benefits provided by Social Security, is critical to ensuring women's retirement security.¹⁷²

Access to various lifetime income options depends largely on the source of retirement savings. The default retirement benefit for workers participating in traditional defined benefit (DB) pension plans is lifetime income in the form of a monthly annuity payment. Further, DB annuities are calculated without regard to gender, as required by Title VII of the Civil Rights Act of 1964.¹⁷³ In addition, DB plans offer retirement protection for spouses.¹⁷⁴ Under the Retirement Equity Act of 1984 (REA), the default form of benefit for married participants is a joint-and-survivor annuity, and a participant's spouse must agree to receive benefits in a different form,¹⁷⁵ which tends to benefit women.

However, over the past 30 years, the number of workers participating in DB plans has dramatically decreased, while the number of workers participating in DC plans has grown exponentially. Few DC plans offer participants the option of receiving their DC plan account balance as an annuity.¹⁷⁶ Because DC plans typically pay out in lump sums at retirement, workers bear the responsibility of managing their account balances so they can provide additional support over their lifetimes and, for many, the lifetime of a surviving spouse. In addition, an increasing number of DB plans offer lump-sum payouts, thereby decreasing the proportion of workers with access to lifetime income even further.¹⁷⁷ As a result, the number of workers (and their spouses) with access to lifetime income from an employer-sponsored

172. See, e.g., John, *supra* note 128 (explaining that Automatic IRAs would provide retirement savings plans to portions of the population who currently do not have adequate retirement savings, including women).

173. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 701 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2012)).

174. See Retirement Equity Act of 1984, Pub. L. No. 98-397, § 203(a), 98 Stat. 1426 (1984) (providing that DB plans must establish qualified joint and survivor annuities and preretirement survivor annuities as the default form of benefit for married participants).

175. See *id.* § 203(b) (providing that spouse must consent in writing before a notary public if a married participant elects a form of benefit other than the default joint-and-survivor annuity).

176. See Michael J. Brien & Constantijn W.A. Panis, *Annuities in the Context of Defined Contribution Plans*, U.S. DEP'T. LABOR 12 (Nov. 2011), <http://www.dol.gov/ebsa/pdf/Deloitte2011.pdf> (citing BLS data indicating that only fifteen percent of retirement savings and thrift plans offered participants an annuity option).

177. Sudipto Banerjee, *Annuity and Lump-Sum Decisions in Defined Benefit Plans: The Role of Plan Rules*, EBRI.ORG 4 (Jan. 2013), http://www.ebri.org/pdf/briefspdf/EBRI_IB_01-13.No381.LSDs1.pdf (stating that most DB plans now offer lump sum payouts).

retirement plan has decreased dramatically in recent years.

If women are unable to take their pension benefits and retirement savings in the form of an annuity through an employer-sponsored plan, they may use funds from DC plan accounts (or lump-sums from DB plans) or IRAs to purchase annuities and other lifetime income options from insurance companies. Many individuals may be unwilling to purchase annuities with savings because, among other things, they want to maintain asset liquidity, or leave bequests to their heirs.¹⁷⁸ But the cost of annuities from private insurance providers may be prohibitive for lower- and moderate-income workers, including women. For example, small annuities purchased from insurance companies are generally burdened by high fees and low effective rates of return, which can reduce their attractiveness, notwithstanding the value of a lifetime stream of income. In addition, insurance companies offer lifetime income options with a dizzying array of features, such as the option to provide death benefits to a beneficiary, or for the annuitant to opt out of the annuity at a certain point, or inflation adjustment, which increase costs and further reduce retirement income. Moreover, many products on the market are called annuities, but are actually investment vehicles rather than sources of secure lifetime retirement income.¹⁷⁹ Further, individuals who purchase annuities on the open market face the risk of the insurance company offering the annuity going out of business or filing for bankruptcy, and thus becoming unable to fulfill its obligation, in full or in part, to provide the annuitant with lifetime income.¹⁸⁰

In addition, and of particular concern to women, annuity products offered by insurance companies are generally priced

178. See Jeffrey R. Brown, *Financial Education and Annuities*, 8 OECD JOURNAL: GENERAL PAPERS 173 (2008) (stating that although annuities can provide valuable insurance against longevity risks, people are reluctant to purchase annuities for a number of reasons).

179. Letter from Nat'l Women's Law Ctr. et al. to Office of Regulations and Interpretations, Emp. Benefits Sec. Admin. 9 (May 30, 2010), <http://www.dol.gov/ebsa/pdf/1210-AB33-640.pdf>.

180. State insolvency guaranty funds provide some relief from that risk, up to certain levels of liability. See *State Guarantee Funds*, ANNUITYADVANTAGE.COM, <http://www.annuityadvantage.com/stateguarantee.htm> (last visited Apr. 28, 2010) (setting out the liability limits for each state). Depending on the state, the state guaranty fund may not protect out-of-state residents. See Kenneth S. Apfel & Michael J. Graetz, *Uncharted Waters: Paying Benefits from Individuals Accounts in Federal Retirement Policy*, NAT'L ACAD. OF SOCIAL INSURERS 82 (2005), http://www.nasi.org/sites/default/files/research/Uncharted_Waters_Report.pdf (explaining the importance of jurisdictional boundaries because of the varying state laws that apply to annuities).

using gender-distinct mortality tables, which can amount to an appreciable decrease in retirement income for women. For example, a 64-year-old woman living in the District of Columbia who used \$34,000 in savings to purchase a single-life annuity would receive monthly payments of \$170, compared to the \$186 per month that a man of the same age would receive; similarly, a woman would receive \$351 per month from an annuity purchased with \$70,000 while a man would receive \$383 per month.¹⁸¹ Moreover, if an annuity is purchased from an insurance company, federal law does not protect the interests of women as spouses by requiring spouses to give written consent if the worker takes benefits in a form other than an annuity that provides a benefit to the surviving spouse.

This Section examines several options for increasing access to lifetime income through employer-sponsored DC plans, as well as improving the lifetime income options available to women from private insurance companies.

1. *Employer-Based Retirement Savings Plans*

The following policies present options for increasing access to lifetime income options from DC plans, the predominant form of employer-sponsored retirement plans.

a. *Requiring DC Plans to Offer Lifetime Income Options*

Research indicates that women are more likely than men to choose annuities when given the option.¹⁸² Recent research further suggests that making an annuity the default form of benefit, as it is for DB plans, would increase the number of plan participants electing annuities.¹⁸³ In addition, if plans were required to offer lifetime income options, it would be expected that the price of annuities would drop further as increasing numbers of participants select annuities. Thus, in order to expand lifetime income options and improve women's retirement security, employers could at least be required to offer lifetime income options in their DC plans.

181. See INSTANT ANNUITY CALCULATOR, <http://immediateannuities.com> (providing the calculator used in the search run by NWLC Jan. 25, 2013).

182. Julie R. Agnew et al., *Who Chooses Annuities? An Experimental Investigation of Gender, Framing and Defaults*, 1 (Dec. 18, 2007), http://www.aeaweb.org/annual_mtg_papers/2008/2008_655.pdf.

183. Robert Gazzale et al., *Do Default and Longevity Annuities Improve Annuity Take-Up Rates? Result from an Experiment*, AARP PUB. POL'Y INST. 11 (Oct. 2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/annuities-take-up-rates-experiment-AARP-ppi-econ-sec.pdf (showing percentage of participants choosing annuity increasing from 28 to 51 percent when annuity, rather than lump-sum, was default).

b. Partial Annuitization

Research has shown that some individuals may be unwilling to purchase annuities because they are reluctant to lose access to their retirement savings by locking those funds into an annuity.¹⁸⁴ Lack of access to savings may be a particular concern for low- and moderate-income women who may have few other cash reserves. Reflecting the cogency of this concern, experts, consulted for a recent GAO study, recommended that individuals in the lowest-income quintile accumulate some cash savings before annuitizing some portion of their retirement savings, while recommending that individuals in the middle-income quintile annuitize approximately half of their retirement savings.¹⁸⁵

Partial annuitization is one option that would permit DC plan participants to provide themselves with some additional lifetime income to supplement Social Security, while maintaining access to the remainder of the funds in the account to meet unexpected needs. Both the Federal Thrift Savings Plan and some private-sector retirement plans such as TIAA-CREF allow participants to receive their account balance in the combined form of lifetime income payments and a lump-sum payment. The evidence suggests that many DB plan participants would elect partial annuity options, if they were available.¹⁸⁶

One concern that a partial annuitization option presents, which is especially relevant for low- and moderate-earning women, is whether annuitizing only a portion of DC account balances when those accounts are, on average, modest, makes sense. Account balances below a certain amount present administrative burdens and are unlikely to result in significant monthly lifetime income payments. Yet, even relatively small amounts of dependable lifetime income can be significant for low- and moderate-income workers as supplements to Social Security. In addition, DB plans and the federal Thrift Savings Plan contemplate very small monthly payments—DB plans must annuitize benefits with a present value in excess of \$5,000,¹⁸⁷ and the Federal Thrift

184. See generally Brown, *supra* note 178 (explaining that a number of concerns discourage people from purchasing annuities).

185. GAO 11-400, *Retirement Income: Ensuring Income Throughout Retirement Requires Difficult Choices*, U.S. GOV'T ACCOUNTABILITY OFFICE 18 (2011), <http://www.gao.gov/assets/320/319385.pdf>.

186. See *Lifetime Income RFI Comment Letter 3*, TIAA-CREF 29 (Apr. 30, 2010), <http://www.dol.gov/ebsa/pdf/1210-AB33-625.pdf> (stating that “[i]n recent years, TIAA-CREF has found that approximately 30 percent of those who begin an income stream will choose to annuitize some portion of their assets. Approximately 17 percent of those beginning an income stream choose to fully annuitize”).

187. Minimum Vesting Standards, 26 U.S.C.A. § 411(a)(11) (West 2013).

Savings Plan must do so for account balances above \$3,500.¹⁸⁸ Thus, policymakers should consider requiring employers to offer the option for employees to partially annuitize their DC plan accounts as one option for increasing access to lifetime income for DC plan participants.

c. Rollovers

Despite the risk of “leakage” of retirement savings, to which low- and moderate-income workers are particularly susceptible, many workers may have accumulated retirement savings from different jobs over their careers.

Under current law, workers with retirement savings in an employer-based plan can either keep the account balance in the employer’s plan (if they have more than \$5,000 in savings), or roll the account balance into another tax-qualified retirement savings account—such as another DC plan, if it accepts rollover contributions, or, more likely, an IRA.¹⁸⁹ Thus, as a worker nears retirement, he or she may have retirement savings in one or more employer-based retirement savings accounts, and/or in one or more IRAs.

Unfortunately, unless an individual could aggregate his or her accumulated retirement savings in a DC plan account that offered a lifetime income payout, he or she would be unable to use a DC plan to maximize his or her lifetime income payments. Under current law, a DC plan may, but is not required to, accept rollovers from other qualified retirement accounts.¹⁹⁰ Although a worker could aggregate rollover funds in an IRA, purchasing an annuity from a private insurance company has financial penalties, especially for women, as discussed above. Requiring plan administrators to accept such rollovers, therefore, is another option that could increase access to meaningful lifetime income options.¹⁹¹

188. Protections for Spouses and Former Spouses, 5 U.S.C.A. § 8435(g) (West 1996).

189. 26 U.S.C.A. § 408(d)(3)(A) (West 2010), *amended by* Pub. L. No. 112-240, 126 Stat 2313 (2013). Workers can also withdraw some or all of the account balance, subject to a tax penalty, if they are not yet of retirement age. Annuities; Certain Proceeds of Endowment and Life Insurance Contracts, 26 U.S.C. § 72(t)(1) (West 2012).

190. 26 U.S.C.A. § 401(a)(31)(E); Requirement to Offer Direct Rollover of Eligible Rollover Distributions; Questions and Answers, 26 C.F.R. § 1.401(a)(31)-1, Q-13 (West 2007).

191. The Treasury Department recently issued a revenue ruling that is intended to encourage employers with both DC and DB plans to allow plan participants to roll DC account balances into the DB plan to increase the size of the DB annuity at retirement. I.R.S. Rev. Rul. 2012-4, 2012-8 I.R.B. 386 (2012), *available at* http://www.irs.gov/irb/2012-08_IRB/ar08.html.

2. Improving Annuity Products

A significant amount of retirement assets are deposited in IRAs as rollovers from 401(k) or other DC accounts when individuals leave a job before retiring.¹⁹² Individuals may thus have more assets with which to purchase lifetime income payments in an IRA than in their current 401(k) or other DC plan. But women face disadvantages when seeking to do so on the open market, as discussed above.

For all of these reasons, policymakers should strongly consider improving annuity products offered by insurance companies so that they offer better lifetime income options for women—particularly if a proposal like the Automatic IRA, which would dramatically increase the number of IRA accountholders, were implemented.¹⁹³ One important improvement would be eliminating sex-discriminatory pricing by insurance companies, similar to the ban on gender rating in health insurance policies effectuated by the Patient Protection and Affordable Care Act.¹⁹⁴ Additional improvements could take the form of uniform policies by state insurance industry regulators, or changes in federal law to ensure that protections are available to individuals purchasing annuities in every state. These protections could include creating standard, low-cost alternatives (whether offered under the auspices of a government clearinghouse, retirement savings bonds, or other low-fee, reliable lifetime income options) to the annuity products currently available to individuals on the market.

C. Target Leakage of Marital Pension Benefits and Retirement Savings

One consequence of women's lower lifetime earnings and concomitantly smaller amounts of retirement savings is that women are more likely than men to rely on their spouses' retirement benefits. For example, one recent study indicated that

192. See Craig Copeland, *Individual Retirement Account Plans: An Analysis of the 2007 Survey of Consumer Finances, with Market Adjustments to June 2009*, EMP. BENEFIT RESEARCH INST. 4 fig.1, 24 fig.12b (Aug. 2009), http://www.ebri.org/pdf/briefspdf/EBRI_IB_8-2009_No333_SCF.pdf [hereinafter *Individual Retirement Account Plans*] (explaining that in 2008, \$3.61 trillion dollars in retirement assets were held in private-sector IRAs, mostly as a result of rollovers from 401(k)s or other defined contribution accounts).

193. See Automatic IRA Act of 2012, H.R. 4049, 112th Cong. § 4(a)(2) (2012) (directing the Secretary of the Treasury and the Secretary of Labor to jointly conduct a study of the feasibility and desirability of “promoting the use of low-cost annuities, longevity insurance, or other guaranteed lifetime income arrangements in automatic IRA arrangements. . .”).

194. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119 (2010).

in 2012, over 21 percent of all women aged 60 and over received DB pension income from their spouse's former employer, compared to about seven percent of men.¹⁹⁵ However, although Congress established robust spousal protections for traditional DB pension plans, the same protections do not apply to DC plans or IRAs, where the bulk of private retirement savings are found.

Pension benefits and retirement savings accrued during a marriage are generally considered marital property under state law, under the theory that they represent deferred compensation for the productive efforts of the working spouse.¹⁹⁶ And ERISA provides mechanisms for effectuating the division of pension benefits pursuant to a divorce decree.¹⁹⁷ Yet, women are often at risk of foregoing their share of pension benefits during a divorce, whether because they are trading future retirement income for current income or assets, because they are unaware of their spouse's pension or retirement savings plan accounts, or because their attorney (if any) does not competently deal with pension-related issues. This Section discusses a number of options that would increase protections for spouses in employer-sponsored retirement savings plans and IRAs in intact marriages, and mechanisms for ensuring that spouses' share of pensions and retirement savings are available for division at divorce.

1. *Extend Spousal Protections to Defined Contribution Plans*

The REA's requirement of the joint and survivor spousal annuity as the default form of benefit only applies to married DC plan participants if they elect to receive their benefits in the form of a life annuity. This discrepancy in ERISA means that spouses lack the legal right to participate in the decision of whether the DC plan account balance will be received as a lump sum or as an annuity at retirement. There is only one circumstance in which a participant in a DC plan must obtain spousal consent: if a participant in a DC plan declines to choose an annuity form of benefit, he or she must obtain spousal consent before designating a beneficiary other than the spouse who would receive the account balance if the participant died while participating in the plan.¹⁹⁸

195. Porell & Oakley, *supra* note 71, at 6.

196. LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, *FAMILY LAW* 422-38 (4th ed. 2010).

197. *See* Form and Payment of Benefits, 29 U.S.C. §1056(d) (2012) (concerning "assignment or alienation of plan benefits" and domestic relations orders).

198. *See* Definitions and Special Rules for Purposes of Minimum Survivor Annuity Requirements, 26 U.S.C. § 417(a)(2) (2012) (providing that a participant's spouse must consent in writing in order for the participant to elect a form of benefit other than a joint and survivor annuity).

But no spousal consent is required if the participant retires or changes jobs and decides either to withdraw the account balance as a lump sum, or to roll the account balance into an IRA. Further, although spouses may have rights under state community property law,¹⁹⁹ IRA account holders are not required, under federal law, to obtain spousal consent to either elect to receive account funds in a form other than a joint and survivor annuity, or designate a beneficiary other than a spouse.²⁰⁰ As a result, if DC plan account funds are rolled over into an IRA following a job change or retirement, those funds are shielded from joint decision-making, and can be placed out of the reach of spouses when they need it most, in an intact marriage.

Industry groups have argued that ERISA's qualified joint survivor annuity (QJSA) requirement is overly burdensome and should be restricted or eliminated because many spouses consent to the waiver of a QJSA.²⁰¹ But this assertion ignores the fact that the waiver of a QJSA means the legal protection is operating as intended: unless there has been fraud, the spouse has participated in a joint decision about marital pension benefits. Without that legal right, the worker spouse can unilaterally decide how pension benefits are received. Particularly because women tend to outlive their spouses, decisions about retirement income are critically

199. For federal income tax purposes, IRAs are deemed to be separate property. 26 U.S.C. § 408(g). But federal tax law does not abrogate community property rights under applicable state law. *See, e.g.*, I.R.S. P.L.R. 199937055 (Sept. 17, 1999) (finding that community property-based rights to IRAs should be determined under applicable state law). Specifically, in states that have adopted community property regimes (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin and, to a limited extent, Alaska and Puerto Rico), spouses have rights to IRA assets, even if the IRA is titled in the other spouse's name alone, if the assets were earned or acquired during the marriage (except as an inheritance or gift to one spouse). *Id.*; *see, e.g.*, *Individual Retirement Account Beneficiary Designation Form*, WELLS FARGO ADVANTAGE FUNDS, http://www.wellsfargoadvantagefunds.com/pdf/forms/desig_bene.pdf (listing community property states where spousal consent may be necessary when the beneficiary is not a spouse). As a result, many IRA providers require spousal consent when an IRA beneficiary other than a spouse is designated and there is a nexus between the IRA owner and a community property state. *Id.*

200. Charles DelaFuente, *Spouse's Consent Is Required to Change Retirement Account Beneficiary*, N.Y. TIMES (Sept. 11, 2012), <http://www.nytimes.com/2012/09/12/business/retirementspecial/spouses-consent-is-required-to-change-retirement-account-beneficiary.html>.

201. *See, e.g.*, *Lifetime Income RFI Comment Letter*, DEFINED CONTRIBUTION INSTITUTIONAL INV. ASS'N 14 (May 3, 2010), <http://www.dol.gov/ebsa/pdf/1210-AB33-656.pdf> (explaining that "most participants and beneficiaries waive the QJSA and QPSA benefits even when they are available, and implementing the survivor annuity rules creates significant costs and administrative burdens due to the notice, waiver, revocation and spousal consent requirements.").

important to female spouses. Accordingly, policymakers should seriously consider improving spousal rights to pensions by making the default form of benefit from DC plans a joint and survivor annuity, or its equivalent, if spousal consent is not obtained.

2. *Evaluating Spousal Rights to Individual Retirement Accounts (IRAs)*

With IRA assets totaling over \$4.7 trillion,²⁰² in large part from rollovers from DC plan accounts, and potentially growing even more if Automatic IRAs are implemented,²⁰³ spouses lack any legal rights under federal law to participate in decisions regarding a substantial pool of retirement wealth. As a result, the time is right for a serious discussion of improving spousal protections in IRAs. Whether modeled on rights to marital assets under state community property law²⁰⁴ or the spousal protections applicable to either DB or DC plans under ERISA, or some other principle, designing a logical and fair system of spousal protections would close a glaring loophole in retirement savings policy.

3. *Protect Spouses' Interests in Retirement Assets at Divorce*

Divorce is financially costly for both men and women, but women fare worse economically than men following a divorce. Following a divorce, women are more likely to experience a drop in their standard of living.²⁰⁵ This decline in income can make it more difficult for women to save for a secure retirement: a recent study on the retirement prospects of divorced women found that one in three divorced women born between 1966 and 1975 are expected to

202. Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2010: The EBRI IRA Database*, EBRI ISSUE BRIEF 14 fig.A (May 2012), http://www.ebri.org/pdf/briefspdf/EBRI_IB_05-2012_No371_IRAs.pdf.

203. See Automatic IRA Act of 2012, H.R. 4049 (directing the Secretary of the Treasury and the Secretary of Labor to jointly conduct a study of the feasibility and desirability of “[e]xtending to automatic IRA arrangements spousal consent requirements similar to, or based on, those that apply under the Federal Employees’ Thrift Savings Plan, including consideration of whether modifications of such requirements are necessary to apply them to automatic IRA arrangements”).

204. See also Ghilarducci, *supra* note 139, at 3 (noting that the “contributions of husbands and wives are combined and divided equally between their individual accounts”).

205. ERISA Advisory Council, *supra* note 87; *Women Face Challenges in Ensuring Financial Security in Retirement*, *supra* note 86, at 22; see also GAO 12-699, *Retirement Security: Women Still Face Challenges*, U.S. GOV’T ACCOUNTABILITY OFFICE 28-31 (2012), <http://aging.senate.gov/events/hr250gao.pdf> (describing drop in assets for women who divorce over age 50).

have low incomes and high poverty rates in retirement.²⁰⁶

In addition, women are at risk for losing out on retirement assets that were accrued prior to divorce. Retirement savings earned during a marriage are generally considered marital property and as such are divisible at divorce under the law of every state. Anecdotally, practitioners have noted that in many divorces, women have fewer retirement assets than their male spouses.²⁰⁷ But women may be inclined to “trade off” the future benefits of pensions for other assets (like the family home), or may not make obtaining a share of a pension a priority while focused on more immediate issues (such as child custody or support, or domestic violence).²⁰⁸ In addition, even when the parties intend to include pensions and retirement savings in divorce proceedings, many women may be unfamiliar with the details of their spouse’s pensions or retirement savings, making it less likely that they will receive the retirement assets to which they are entitled under the law.²⁰⁹ Further, the valuation and division of pensions and retirement savings at divorce is an extremely complex area of the law. Many practitioners lack expertise with the different legal requirements for different kinds of retirement plans.²¹⁰ As a result, even if a former spouse was able to obtain the appropriate share of pension benefits or retirement savings during the divorce, legal

206. See Barbara A. Butrica & Karen E. Smith, *The Retirement Prospects of Divorced Women*, 72-1 SOC. SEC. BULLETIN (2012), <http://www.ssa.gov/policy/docs/ssb/v72n1/v72n1p11.html> (detailing how divorce trends implicate women’s retirement security generally and their Social Security benefits specifically).

207. ERISA Advisory Council, *supra* note 87.

208. See, e.g., *Financial Issues When Divorcing*, DIVORCE HQ (Mar. 2, 2013), <http://www.divorcehq.com/divorce-financial-issues.shtml> (warning that individuals should consult professionals before deciding whether to relinquish rights to their share of pensions because “[p]ension plans . . . can be used as a bargaining chip when negotiating . . . [a] final settlement agreement[,] . . . but . . . trading off the pension for an asset may not be in [their] best interest. . . .”).

209. ERISA Advisory Council, *supra* note 87 (“[o]btaining information is particularly difficult . . . when a company has been through a merger, consolidation or name change.”). Additionally, when companies fail to provide necessary information, “it is difficult and time consuming to get the information through other means.” *Id.*

210. See, e.g., *Dividing Pension Property: Underrated Malpractice Concerns*, NAT’L LEGAL RESEARCH GRP. (Feb. 19, 2013), <http://www.qdrodesk.com/qdro/Dividing-Pension-Property-Underrated-Malpractice-105.shtml> (stating that “[p]ensions are without question the least understood property that family law attorneys routinely divide.”); *An Interview with Judge McCarthy, Lack of Preparation for Court Costs Clients, the System and the Lawyers*, FAM. LAW. MAG. 10 (Nov. 2012), <http://www.divorcemarketinggroup.com/dmg/fb/FLB/2012flm-november.pdf> (stating that “[m]ost people’s primary asset is their pension and retirement, and lawyers today are still ill-equipped to properly deal with dividing those.”).

and technical errors may make it difficult for the spouse to actually receive her share of those benefits.²¹¹ Problems obtaining the appropriate share of pensions and retirement benefits can be further exacerbated when individuals represent themselves, which is becoming increasingly common, especially for low- and moderate-income individuals.²¹²

When pensions are not included, or are unfairly or incorrectly divided, in divorce settlements, divorced women can face retirement at a particular disadvantage. The Pension Protection Act of 2006 prohibited pension plan administrators from rejecting Qualified Domestic Relations Orders simply because they were issued after the date of a divorce decree, but did nothing that would facilitate the fair division of pension benefits in the first instance.²¹³ Thus, additional steps should be taken to improve protections for spouses with regard to marital pension benefits during the divorce process. Further, the Department of Labor should more widely publicize, and make available to family law practitioners and state courts, information about the kinds of benefits that can be awarded under ERISA and links to the Department's model QDRO forms.

Although the divorce process contemplates bargaining and trade-offs of different assets and income, including pension benefits and retirement assets, policymakers should consider policy changes to ensure that women know about marital pension benefits and retirement savings to which they may be entitled, to preserve pension benefits and retirement assets subject to division at divorce, and to facilitate the division and payout of such benefits. For example, federal legislation was introduced in the past providing that a domestic relations order (DRO) entered upon the dissolution of a marriage that lasted for at least five years shall be "deemed" a DRO specifying that the former spouse is entitled to 50 percent of the marital share of the participant

211. See ERISA Advisory Council, *supra* note 87 (outlining various issues related to the court orders that effectuate the division of pension benefits or retirement assets, including the timing of and the standards for such orders that apply to different kinds of pension plans).

212. See, e.g., Robert Eckhart, *Courts Seeing More Do-It-Yourself Divorces*, SARASOTA HERALD-TRIBUNE, (Sept. 9, 2012), <http://www.heraldtribune.com/article/20120909/ARTICLE/120909620?p=6&tc=pg> (reporting anecdotal evidence that pro se divorces have increased during the economic downturn); John T. Broderick & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES (Jan. 1, 2010), <http://www.nytimes.com/2010/01/02/opinion/02broderick.html> (noting increase in pro se litigants "in cases involving life-altering situations like divorce" due to economic conditions).

213. See Pension Protection Act of 2006, Pub. L. No. 109-280, § 1001, 120 Stat. 780 (2006) (authorizing regulations to ensure that qualified domestic relations orders do not fail to be treated as such by pension administrators).

spouse's accrued benefit, and would be recognized as a Qualified Domestic Relations Order under ERISA.²¹⁴ California provides an alternative method for default division of retirement benefits: a provisional order that awards each party 50 percent of all retirement benefits accrued during a marriage as well as survivor benefits, "subject to an adjustment by a later domestic relations order."²¹⁵

Another approach would require pension plans to "hold" the participant's interest in the pension, disallowing any distributions, when provided with specific written notice of a pending divorce proceeding to allow the spouse the opportunity to obtain a QDRO or other court order to allocate retirement benefits. The plan participant could lift the hold by providing the plan administrator with a document signed by the non-participant spouse and approved by the court. Such a document could also serve to help educate the parties (and possibly their attorneys) about their rights to pensions and retirement benefits in divorce proceedings.

V. CONCLUSION

Women are not alone in facing a retirement crisis, and many of the challenges they face are not unique to women. Yet because two out of three poor older Americans are women, and because women face some particular, and greater, challenges in retirement than men, it is appropriate to consider a range of policy proposals that specifically address the sources and increased scope of those

214. See, e.g., Comprehensive Women's Pension Protection Act of 1997, S. 320, 105th Cong. § 103(a)(1) (1998) (providing that domestic relations order shall be deemed to allocate 50 percent of marital share of pension benefits to spouse upon dissolution of marriages lasting at least five years); Women's Pension Protection Act of 1999, S. 132, 106th Cong. § 103(a)(1) (1999) (providing that domestic relations order shall be deemed to allocate 50 percent of marital share of pension benefits to spouse upon dissolution of marriages lasting at least five years); Retirement Enhancement Act of 2004, H.R. 5397, 108th Cong. § 204(a) (2004) (providing that domestic relations order that does not specifically address pension benefits shall be treated as a Qualified Domestic Relations Order providing that former spouse receive at least 50 percent of the marital share of pension benefits upon dissolution of marriages lasting at least five years).

215. See *Pension Benefits—Attachment to Judgment (FL-348)*, JUDICIAL COUNCIL OF CAL., <http://www.courts.ca.gov/documents/fl348.pdf> (last visited Feb. 14, 2013) (charging the parties with delivering a copy of the order to the plan administrator of the retirement plan provided by employers for whom they work or worked in which they participated during the marriage and before separation).

challenges.

