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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210
Attn: Annuity Regulation

Re: Proposed Regulation – Selection of Annuity Providers for Individual Account Plans

Dear Sir or Madam:

The American Council of Life Insurers ("ACLI") appreciates the opportunity to comment on the proposed regulation issued by the Department of Labor (the "Department") regarding the selection of annuity providers for the purpose of benefit distributions from individual account plans, published at 72 Fed. Reg. 52,021 (September 12, 2007) (the "Proposed Regulation").

The ACLI represents three hundred seventy-three (373) member companies, accounting for ninety-three (93) percent of the life insurance industry's total assets in the United States. In addition to life insurance and annuities, ACLI member companies offer pensions, including 401(k)s, long-term care insurance, disability income insurance and other retirement and financial protection products, as well as reinsurance. Life insurers are among the country's leaders in providing retirement security to American workers through a variety of group annuities and other products that achieve competitive returns while retirement savings are accumulating and that provide guaranteed income during retirement. In addition to providing investment products and services to qualified retirement plans, ACLI member companies also are employer sponsors of retirement plans for their own employees.

We commend the Department on its interest in reducing impediments to a defined contribution ("DC") plan's offering of annuities as a distribution option. The ACLI believes, however, that simply applying the prudence standard of section 404 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") is more likely to achieve this goal than the safe harbor in the Proposed Regulation, and thus encourages the Department to revise the regulation accordingly. Should the Department choose to retain a safe harbor, we suggest that

certain requirements of subsection (c)(1) of the Proposed Regulation would be sufficient. The ACLI has been actively involved with legislative and executive branch policy makers, including the Department, over the years on policy initiatives related to annuities in qualified plans, and we look forward to opportunities to continue to work with the Department on this important issue.

I. Background

A. IB 95-1 and the PPA

Interpretive Bulletin 95-1, 29 C.F.R. § 2509.95-1 ("IB 95-1"), generally provides that, when purchasing annuities for the purpose of distributing benefits under an employee pension benefit plan, plan fiduciaries must select the safest available annuity provider, unless the interests of participants and beneficiaries dictate otherwise. IB 95-1 sets forth specific requirements plan fiduciaries must meet to receive safe harbor protection for their identification and selection of annuity providers. In Advisory Opinion 2002-14A (Dec. 18, 2002) the Department expressed the view that the principles set forth in IB 95-1 with regard to the selection of annuity providers applied equally to defined benefit and defined contribution plans.

Section 625 of the Pension Protection Act of 2007, signed by President Bush on August 17, 2006, requires the Secretary to issue final regulations clarifying that the selection of an annuity contract as the optional form of distribution from an individual account plan to a participant or beneficiary "is not subject to the safest available annuity standard under Interpretive Bulletin 95-1," but "is subject to all otherwise applicable fiduciary standards." The Joint Committee on Taxation explained:

The regulations to be issued ... are intended to clarify that the ... plan fiduciary is required to act in accordance with the prudence standards of ERISA section 404(a). It is not intended that there will be a single safest available annuity contract since the plan fiduciary must select the most prudent option specific to its plan and its participants and beneficiaries. Furthermore, it is not intended that the regulations restate all of the factors contained in the interpretive bulletin.

J.C.T Rep. No. JCX-38-06.

B. The Annuitization Landscape

There is an increasing recognition of the need for annuitization options in DC plan. Unlike in past years, in which many retirees received monthly benefits from a defined benefit plan, recent data from the Employee Benefits Research Institute ("EBRI") indicate that in 2005, 16.2 million private sector single-employer (i.e., nonunion) employees were actively participating in defined benefit ("DB") plans, compared to 22.2 million in 1988. Other EBRI data suggests that the DC plan retirement savings of most plan participants is quite modest. Further, these account balances have to last longer, because Americans are living longer. For example, data drawn from the Society of Actuaries' Annuity 2000 Mortality table indicates that a woman who reached age 65 had a 50 percent chance to survive to age 88, and a 25 percent chance of reaching 94. A man who reached age 65 had a 50 percent chance of living to 85, and a 25 percent chance of surviving to 92.

Thus, DC plan participants are facing retirement without a guaranteed monthly income, and uncertain about their longevity and the risks of the market. The PPA and the Proposed Regulation recognize that annuities protect retirees against the risks of increased longevity. The preamble to the Proposed Regulation states, "There is growing concern that, with increases in life expectancy, many retirees may outlive their retirement savings." 72 Fed. Reg. at 52023. A 2007 Wharton Financial Institutions Center Study concluded that annuitizing is efficient and effective to ensure a steady, dependable stream of income. The Department's analysis indicated that only a quarter of DC plan participants' plans currently offer an annuitization option.

The Proposed Regulation cites two reports, one by the General Accounting Office and one by the Department's ERISA Advisory Council. The GAO's report, Private Pensions: Participants Need Information on Risks They Face in Managing Pension Assets at and during Retirement, includes the conclusions of a panel of pension experts. In addition to recommending that plan sponsors provide additional information to participants about managing assets during retirement, the experts identified policy initiatives to encourage annuitization. The Advisory Council report, Report of the Working Group on Retirement Distributions and Options, also identifies impediments to annuitization.

As the Department noted in the preamble to the Proposed Regulation, the primary impediment to including annuity options in a DC plan has been, for many plan fiduciaries, the safest available annuity standard and the potential liability for failing to meet that standard. The Proposed Regulation should alleviate these concerns and encourage consideration of annuities.

II. The Proposed Regulation

A. No Safe Harbor Is Needed

The Proposed Regulation recognizes that the general fiduciary standards of ERISA section 404 apply to a fiduciary's selection of an annuity provider for a benefit distribution option made available under a DC plan. The regulation need go no further; these standards are sufficient to guide a fiduciary's consideration of annuity providers. Taken together, the safe harbor provisions of the Proposed Regulation are unduly complex and may be confusing or burdensome to prudent fiduciaries. Thus, the final regulation should not include a safe harbor, but should simply affirm the fiduciary requirements of ERISA applicable to the decision to include an annuity option in a DC plan.

Subsection (b) of the Proposed Regulation states:

(b) In general. When an individual account plan purchases an annuity from an insurer as a distribution of benefits to a participant or beneficiary, the plan's liability for the payment of those benefits is transferred to the annuity provider. The selection of an annuity provider in connection with a benefit distribution, or a benefit distribution option made available to participants and beneficiaries

under the plan, is governed by the fiduciary standards of section 404(a)(1) of ERISA. Pursuant to ERISA section 404(a)(1), fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries. Section 404(a)(1)(A) provides that the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses. In addition, section 404(a)(1)(B) requires a fiduciary to act with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use.

Prop. Reg. 29 C.F.R. § 2550.404a-4 (b).

As the Department frequently notes, ERISA's fiduciary duties are among the "highest known to the law." See Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 294 (5th Cir. 2000); Donovan v. Bierwirth, 680 F.2d 263, 272 n.2 (2d Cir. 1982). These standards apply when a fiduciary makes benefit determinations, determines which investment options should be included in a plan, and communicates to plan participants. In particular, the Department has long held that the selection of service providers for a plan is a fiduciary act subject to the requirements of section 404. Thus, in the preamble to the Proposed Regulation, the Department acknowledged that the exercise of selecting an annuity provider is subject to the same obligations of a fiduciary selecting other service providers for the plan. See 72 Fed. Reg. 52022.

There is no reason to impose additional standards beyond section 404 on the selection of an annuity provider for the purposes of benefit distribution options made under an individual account plan. The selection of an annuity provider for a terminating defined benefit plan involves the shifting of responsibility from the fiduciary to the insurer, and the possibility of a reversion to the employers. In this context, the potential for conflicts, and thus the need for the safe harbor requirements of IB 95-1, is clear. In the DC plan context, the fiduciary is selecting a service provider to provide an option for plan participants. Undoubtedly, an insurer who will provide benefits throughout a participant's retirement needs to be selected carefully. Other decisions made by a fiduciary will similarly affect the participant throughout the accumulation phase of his working life. In all cases, the fiduciary must act solely in the interest of the participant – the result the Proposed Regulation seeks.

Further, inclusion of the Proposed Regulation's safe harbor requirements could have unintended, negative consequences. The breadth of the safe harbor requirements is daunting. Faced with the choice of offering only a lump-sum distribution option, or tackling the numerous steps required by the Proposed Regulation, many fiduciaries may opt to stand pat. Increased regulatory requirements also increase the risk of liability in today's class

action-driven litigation environment.¹ In particular, fiduciaries of small and mid-sized plans may be dissuaded from considering the value of an annuity option for their plans' participants.

Thus, the fiduciary standards of ERISA section 404 robustly protect participants and fiduciaries. Requirements beyond section 404 that discourage additional options for participants reduce retirement security.

B. If The Department Applies A Safe Harbor, It Should Be Limited to Certain Provisions Contained in Subsection (c)(1) of the Proposed Regulation

While the ACLI believes no safe harbor is needed, if the Department disagrees, ACLI urges the Department to limit the safe harbor's requirements to those in Proposed Regulation subsections (c)(1)(i) and (iii) – (vi).

Initially, ACLI notes that, although the preamble to the Proposed Regulation describes it as providing a safe harbor, the language of the regulation could be improved to state more clearly that it is a "safe harbor" for the selection of annuity providers. Specifically, as is stated in other Department regulations structured as safe harbors, this regulation should state at the beginning of section (a) that "this section provides a safe harbor under which a fiduciary will be deemed to have satisfied its duties under section 404(a)(1)(B) in connection with the selection of an annuity provider for the purpose of benefit distributions from an individual account plan or benefit distribution options made available to participants and beneficiaries under such a plan." See e.g., 29 C.F.R. 2550.404a-2 (safe harbor for annuity rollovers); 29 C.F.R. 2550-404a-3 (safe harbor for distributions from a terminated plan). Importantly, the Proposed Regulation does not acknowledge that a fiduciary can discharge her ERISA fiduciary duties with respect to selection of an annuity provider in ways other than those prescribed by the regulation, as other safe harbor regulations issued by the Department have. See 29 C.F.R. § 2550.404c-5 (a)(2) ("The standards set forth in this section apply solely for purposes of determining whether a fiduciary meets the requirements of this regulation. Such standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under the Act . . ."). If the Department intends to retain a safe harbor in the final version of the Proposed Regulation, it should revise the regulation to clarify that a fiduciary can act prudently outside the strictures of the regulation, and to provide a fiduciary relief for one who meets the regulation's requirements.

Subsection (c)(1). Subsection (c)(1)(i) and (iii) – (vi) of the Proposed Regulation provides certain broad descriptions of conduct that will be deemed to be prudent in the selection of an annuity provider. These factors include a review of the costs and benefits of the annuity contract and the stability of the annuity provider. See Prop. Reg. § 2550-404a-4(c)(1). The provisions of subsections (c)(i) and (iii) – (vi) appear to illuminate the steps a fiduciary fulfilling his duties under ERISA section 404 might take. While the ACLI believes the safe harbor is unnecessary, with one exception noted below, these provisions seem to illuminate

¹ Rather than eliminating the impediments to the inclusion of an annuity option, the safe harbor requirements will likely undermine the addition of this option. Because of the numerosity and complexity of the safe harbor requirements, plan fiduciaries may not want to risk failing to satisfy all of these requirements, leaving participants without this kind of opportunity and creating an uneven playing field for annuity providers.

the basic requirements of procedural prudence and while, as noted above, they may impede plan fiduciaries from considering this option, they are not objectionable.

The requirements of subsection (c)(1)(ii), however, underscore the danger of imposing safe harbor requirements. As noted above, the Department has recognized that the exercise of selecting an annuity provider is not dissimilar to selecting other service providers for the plan. See 72 Fed. Reg. 52022. Based on ERISA section 404(a)(1)(B)'s requirement that a fiduciary act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," the Department has long asserted that a fiduciary may have an obligation to retain expert help, if necessary, to discharge his or her duties under ERISA. There is no need to highlight this obligation in the context of selecting an annuity provider, and the fact that the Proposed Regulation does so is likely to continue to worry plan fiduciaries concerned about liability, and discourage them from proceeding to offer annuity distribution options.

Furthermore, the Proposed Regulation's suggestion that the fiduciary must seek advice from an independent expert adds uncertainty. The Department generally only requires an "independent" expert when the fiduciary faces a conflict or a potential prohibited transaction. Such is not the case here. Unlike the selection of a provider of terminal annuities for a DB plan discussed above, there is no such conflict when a fiduciary considers providers for a distribution option in a DC plan. Fiduciaries often seek input from advisers and service providers to the plan. A provision calling for an undefined "independent" expert may cause confusion and unnecessary expense to fiduciaries, particularly those for small and mid-sized plans. This provision should not be included in any safe harbor the Department imposes.

Subsection (c)(2). The provisions included in Proposed Regulation subsection (c)(2) go far beyond the parameters of a safe harbor and instead dictate exacting fiduciary adherence to certain acts which may be prudent, but which certainly are not the only way to fulfill the applicable ERISA fiduciary duties.

These eight requirements are either unnecessary or duplicative of the more general provisions of subsection (c)(1). For example, (c)(1)(iv) requires a fiduciary to "Appropriately consider[] the cost of the annuity contract in relation to the benefits and administrative services to be provided under such contract." Section (c)(2)(ii) already requires that a fiduciary consider "The cost of the annuity contract in relation to the benefits and administrative services to be provided under such contract, taking into account the amount and nature of any fees and commissions." Restatement of the same requirement only adds confusion. Likewise, subsection (c)(1)(v) requires a fiduciary to determine that an annuity provider will be able to make payments in the future; the items in subsection (c)(2) may or may not assist in that determination.

As discussed above, the layering of unnecessary or duplicative safe harbor requirements may have a chilling effect on fiduciaries considering annuities. The extremely detailed

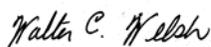
requirements subsection (c)(2) of the Proposed Regulation heighten this risk. Such a result is contrary to the objectives of Congress and the Department.

* * * *

Thank you for the opportunity to provide our comments on this vital matter. The ACLI requests an opportunity to meet with you to discuss these and related issues, and specifically the scope of the Proposed Regulation. We look forward to continuing to work with the Department on providing the guidance that will encourage more plan sponsors to adopt annuity distribution options in their individual account plans.

Please do not hesitate to contact us if you would like to discuss any of our suggestions in more detail.

Respectfully submitted,



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