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404(c)
29 CFR 2550.404c-5

Michael P. Kreps
Groom Law Group, Chartered
1701 Pennsylvania Avenue, N.W.
Washington D.C. 20006-5811

Dear Mr. Kreps:

This letter responds to your request on behalf of AllianceBernstein L.P. (AB) for an advisory opinion regarding AB's Lifetime Income Strategy (LIS) program. The LIS program is designed to be included as an investment option in participant-directed defined contribution plans covered by the Employee Retirement Income Security Act of 1974 (ERISA). You ask whether the LIS program would meet the requirements to be a qualified default investment alternative (QDIA) under ERISA section 404(c)(5) and the Department's regulation at 29 CFR 2550.404c-5 (the QDIA regulation).

Your inquiry focuses on the fact that the LIS program includes a guaranteed lifetime withdrawal benefit (GLWB) under which participants can receive a guaranteed lifetime income stream in retirement. You state that GLWBs insure a portion or all of a participant's account balance. The insurance allows the participant to withdraw a specified amount during his or her retirement years, even if the participant's account has been exhausted due to poor investment returns or a participant's longevity. You state that an advisory opinion is needed to provide plan sponsors with certainty when offering the LIS program and other similar programs as QDIAs. You also seek guidance on fiduciary responsibilities under ERISA section 404(a)(1)(B) with regard to the selection and monitoring of insurers to provide lifetime income guarantees to the LIS program or a similar program.

The LIS Program

The following description of the LIS program is based on the materials and representations you provided and should not be treated as factual findings by the Department.

The LIS program is offered to participant-directed defined contribution plans as part of an investment management service described in paragraph (e)(4)(iii) of the QDIA regulation. Under the LIS program, AB acknowledges its status as an investment manager and fiduciary under ERISA section 3(38) with respect to the investment of participant accounts. AB uses investments on the plan's lineup, including equity and fixed income investments, to construct multiple fixed allocation portfolios. AB invests participant accounts among these fixed allocation portfolios in different proportions over time in order to create an asset allocation strategy unique to the

participant. As a general matter, a participant's allocation to equities is high at a young age, but as the participant grows older, the allocations shift to increase investment in fixed income.¹

The LIS program offers guaranteed lifetime income to participants through the funding of a separate portfolio (the Secure Income Portfolio, or the SIP) which is offered through a variable annuity contract. AB gradually allocates participant funds to the SIP, beginning when a participant reaches age 50 (or such other age selected by a plan fiduciary), and ending two years before the participant's designated retirement age.² Participants may specify the percentage of their account balance to be allocated to the SIP and that will receive lifetime income protection. For participants who do not make a selection, the plan sponsor selects a default allocation percentage.

The LIS program contains extensive education and training for participants. Communications consulting is available for all aspects of participant enrollment and education as well as ongoing communications, including LIS webinars and seminars, a dedicated call center, and a self-service LIS program website featuring video animations, participant communication materials, granular LIS account details and an income estimator. Before participants invest in the LIS program as a default, they receive a notice meeting the requirements of the QDIA regulation, with a complete description of the LIS program including the SIP and GLWB components. In addition, participants who are defaulted into the LIS program before reaching age 50, for example in their thirties, are also notified in writing closely in advance of their first allocation to the Secure Income Portfolio. This notification reminds such participants that allocations to the SIP are about to commence, the amount of income protection they selected or that was selected by default (*e.g.*, ranging from 0-100 % of their account balance), the target date when the selected percentage of income protection will be met, that they can increase or decrease their selected percentage of income protection, and other critical information about their rights and obligations under the LIS program.

Once the participant reaches age 50, the program makes allocations on the participant's behalf to the SIP each calendar quarter until the selected percentage of income protection is met. Each quarter, multiple AB-selected insurers submit bids to provide a guaranteed lifetime income stream based upon the total allocation amounts for that quarter. The fee for the insurance guarantee is expressed as a set percentage of the assets allocated to the SIP. This asset-based fee is fixed across all participating insurers and may not be changed. AB uses an objective formula to allocate amounts across insurers with a goal of maintaining insurer diversification while maximizing the amount of guaranteed income for plan participants. This bidding process is repeated on a quarterly basis as assets are allocated to the SIP, allowing for a "dollar-cost averaging" effect with regard to the insurance guarantees provided.³

¹ Investment in employer securities made through the LIS program, if any, would only occur through a pooled investment vehicle, such as a collective investment trust, in which investment in such securities is made in accordance with the stated investment objectives of the investment vehicle, and independent of the plan sponsor or an affiliate thereof, as specified in paragraph (e)(1)(ii) of the QDIA regulation.

² If a participant does not designate a desired retirement age, a default age will be used.

³ The amount of an insurer's guarantee would depend on the age of the participant at the time of the allocation and the financial market environment, including prevailing interest rates. Insurer submitted withdrawal rates are blended through a monthly auction process managed by AB. The blending process rewards more competitive insurers to ensure fair value. These blended withdrawal rates are then assigned to SIP allocations as they occur for each

AB will not allocate funds to the Secure Income Portfolio for 90 days after a participant's first default investment in the LIS program. Additionally, although the SIP is offered through a variable annuity contract, there are no fees charged to participants for features that will not be used under the LIS program, such as mortality and expense charges.

Based upon the insurance guarantees provided and the amount of assets allocated to the SIP, AB calculates the amount the participant may annually withdraw from the plan in retirement (the Annual Withdrawal Amount).⁴ The insurance guarantees backing the SIP will provide lifetime income to the participant at the Annual Withdrawal Amount.⁵ AB maintains higher growth exposure in its asset allocations under the LIS program, including the SIP, than that reflected in a benchmark for target date investments, due to the protections afforded by the insurance guarantee. To the extent that the investment returns of the SIP increase its account value above its "Income Base" (*i.e.*, the sum of the participant's contributions and transfers into the Secure Income Portfolio), AB will inform the participant that the Annual Withdrawal Amount has increased to a new level and will not fall from that new level if the assets in SIP are exhausted due to poor investment returns or a participant's longevity.⁶

AB selects insurers for participation in the LIS program by first sending a request for proposals seeking information about the insurers' business (*e.g.*, their lines of business and financials), their ability to offer guarantees, and the cost of such guarantees. AB selects the insurers to include in the LIS program based on the insurers' claims paying ability and ability to provide quarterly guaranteed rates based on a fixed insurance fee.⁷ On a quarterly basis, AB reviews each insurer's credit ratings and the guaranteed rates currently provided. AB also consults with an independent insurance research expert to assess the reasonableness of the guarantees being provided given the fixed insurance fee and confirm each insurer's ability to continue to meet their obligations.

Participants may transfer their account balance from the LIS Program to other plan options. Participants also may withdraw amounts from the SIP at any time, including after attaining their

participant in each cycle. Since each participant has a unique glidepath, each participant will allocate to the SIP uniquely resulting in participant specific weighted average (blended) withdrawal rates (Average Withdrawal Rate).

⁴ The guaranteed Annual Withdrawal Amount is determined as the Income Base multiplied by the Average Withdrawal Rate. See footnote 3 for a description of the Average Withdrawal Rate.

⁵ When a participant activates their secure income payments, they make a one-time election for either a single-life or joint-life form of withdrawal (for a joint-life election, a participant's spouse must be at least 45 at the time the participant activates their lifetime income payments, and applicable reduction factors are applied based on the ages of the participant and their spouse at the time of activation).

⁶ A participant's Income Base is equal to the total value of allocations to the SIP plus any recorded market gains of those allocations. Each year on the participant's birthday, the market value of their SIP is compared to their Income Base. If the SIP market value is higher, their Income Base is increased to match the SIP market value on the participant's birthday, so their market gains are locked in.

⁷ AB states that it has developed a process for determining that the fee is reasonable for the guaranteed rates and features being offered by the selected insurers in the LIS program. The Department offers no opinion in this letter on the reasonableness of the fees associated with the LIS program, including the fees and cost of the income protection offered by the GLWBs. In evaluating the reasonableness of the fees and cost of the income protection provided by the GLWBs, AB, as the responsible plan fiduciary selecting the insurers and their guarantees, must balance, at a minimum, such fees and cost against the payout rates and level of risk associated with the assets covered by the guarantees.

designated retirement age, without a termination or liquidity fee.⁸ To the extent participants on their own initiative withdraw assets from the SIP in excess of the Annual Withdrawal Amount, the insurance guarantees and Annual Withdrawal Amount will be reduced going forward.

Upon death of a participant (with a single-life election), a beneficiary will receive the LIS account value (including the balance of the SIP). Upon death of a participant (with a joint life election), the spouse will continue to receive the lifetime income payments for the rest of the spouse's life. Upon death of the participant and the participant's spouse, a beneficiary will receive the LIS account value (including the balance of the SIP). If a participant leaves employment or retires and chooses to move his or her account balance out of the plan, the market value and accumulated guarantees of the GLWB contracts at each insurer may be rolled over into the respective insurer's IRAs. The costs, features, and investment options of each respective IRA will be established by each of the participating insurers. If a plan that offers the LIS program terminates, participants have the opportunity to maintain their accrued benefits by either rolling over the benefit to an IRA or receiving a direct distribution of an insurance certificate evidencing the participant's right to a guaranteed benefit under the annuity contract, which survives plan termination.

The QDIA Regulation

The Department's QDIA regulation implements ERISA section 404(c)(5). Section 404(c)(5)(A) of ERISA provides that, for purposes of section 404(c)(1) of ERISA, a participant in an individual account plan shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary of Labor. When a plan complies with the QDIA regulation, plan fiduciaries remain responsible for the prudent selection and monitoring of the QDIA, but they are not liable for any loss or by reason of any breach that occurs as a result of an investment in the QDIA.⁹

The QDIA regulation requires, among other things, that participants on whose behalf the investment is made had the opportunity to direct the investment of the assets in their account, but did not, and that they are furnished a notice describing: the circumstances under which their assets may be invested in the QDIA, their right to direct the investment of their assets into any other plan investment alternatives, and the investment objectives, risk and return characteristics, and fees and expenses attendant to the QDIA. The regulation also prevents the imposition of restrictions, fees, or expenses on the participant's or beneficiary's transfer or withdrawal of funds from the QDIA in the first 90 days.¹⁰

⁸ While withdrawals will proportionately decrease a participant's Income Base, there are no surrender charges or penalties associated with withdrawals regardless of when they take place.

⁹ The standards established in the QDIA regulation are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities with respect to selection of a default investment for assets in the individual account of a participant or beneficiary. *See* 29 CFR 2550.404c-5(a)(2).

¹⁰ *See* 29 CFR 2550.404c-5(c)(5)(ii) (also providing an exception for fees and expenses that are charged on an ongoing basis for the operation of the investment itself (such as investment management fees, distribution and/or service fees, 12b-1 fees, or legal, accounting, transfer agent and similar administrative expenses), and are not imposed, or do not vary, based on a participant's or beneficiary's decision to withdraw, sell or transfer assets out of the qualified default investment alternative).

Paragraph (e)(4) of the QDIA regulation describes five categories of investment alternatives that the Department determined appropriate for achieving meaningful retirement savings over the long-term for those participants and beneficiaries who, for one reason or another, do not elect to direct the investment of their pension plan assets. As relevant to this request, paragraph (e)(4)(i) describes an investment product with a mix of investments that takes into account the individual's age or retirement date (*e.g.*, a target date fund); paragraph (e)(4)(ii) describes an investment product with a mix of investments that takes into account the characteristics of the group of participants as a whole, rather than each individual (*e.g.*, a balanced fund); and paragraph (e)(4)(iii) describes an investment management service that allocates contributions among existing plan options to provide an asset mix that takes into account the individual's age or retirement date (*e.g.*, a professionally-managed account).¹¹ Each of these QDIA categories requires the investment fund, product, model portfolio, or investment management service to apply generally accepted investment theories, be diversified so as to minimize the risk of large losses, and be designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures.

When the Department proposed the QDIA regulation, some commenters expressed concern that the categories identified in the regulation were based on products currently available in the marketplace which risked stifling innovation. These commenters suggested that QDIAs should be defined based on more general criteria. Additionally, some commenters noted that variable annuity contracts were not specifically addressed in the categories of investment alternatives described in the proposal and sought clarification regarding use of variable annuity contracts within QDIAs. Commenters also requested confirmation that the availability of annuity purchase rights, death benefit guarantees, investment guarantees or other features common to variable annuity contracts would not affect an investment alternative's status as a QDIA.

In the final rule's preamble, the Department emphasized that the approach taken in the regulation was intended to be sufficiently flexible to accommodate future innovation and developments in retirement products.¹² Regarding variable annuities and their associated rights, guarantees, and features, the Department stated:

Consistent with providing flexibility and encouraging innovation in the development and offering of retirement products, model portfolios or services, the Department intends that the definition of "qualified default investment alternative" be construed to include products and portfolios offered through variable annuity and similar contracts, as well as through common and collective trust funds or other pooled investment funds, where the qualified default investment alternative satisfies all of the conditions of the regulation. . . . [W]ith regard to such products and portfolios, it is the view of the Department that the availability of annuity purchase rights, death benefit guarantees, investment guarantees or other features common to variable annuity contracts will not themselves affect the status

¹¹ Paragraphs (e)(4)(iv) and (v) generally describe, respectively, a limited capital preservation QDIA option and a provision for a stable value fund QDIA for investments made prior to the effective date of the regulation.

¹² Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 FR 60452, 60460 (Oct. 24, 2007).

of a fund, product or portfolio as a qualified default investment alternative when the conditions of the regulation are satisfied.¹³

To clarify its position, the Department added a new paragraph (e)(4)(vi) of the QDIA regulation in the final rule, providing that “[a]n investment fund product or model portfolio that otherwise meets the requirements of [the regulation will] not fail to constitute a product or portfolio for purposes of paragraph (e)(4)(i) or (e)(4)(ii)...solely because the product or portfolio is offered through variable annuity or similar contracts or through common or collective trust funds or pooled investment funds and without regard to whether such contracts or funds provide annuity purchase rights, investment guarantees, death benefit guarantees or other features ancillary to the investment fund product or model portfolio.”¹⁴

Since the adoption of the QDIA regulation, stakeholder attention has continued to focus on the availability of, need for, and importance of lifetime income products and features as a way to protect participants and beneficiaries against the longevity risk of outliving the assets they saved to provide retirement income and the risk of having retirement savings eroded by investment losses. In this regard, stakeholders have sought interpretive guidance regarding lifetime income within QDIAs¹⁵ and have asked the Department to take additional action to address the inclusion of lifetime income products as QDIAs.¹⁶

With regard to whether investment management services, described in paragraph (e)(4)(iii) of the QDIA regulation, may incorporate lifetime income products and features in compliance with the regulation, it is the view of the Department that such investment alternatives can be QDIAs provided they satisfy the transferability requirements and other provisions of the regulation.¹⁷ The discussion in the QDIA regulation’s paragraph (e)(4)(vi) regarding variable annuity contracts in paragraphs (e)(4)(i) and (ii) was clarifying, in response to public comments on the proposal, and should not be read to preclude use of lifetime income strategies in an investment management service described in paragraph (e)(4)(iii). Accordingly, the LIS program would not fail to be a QDIA solely because it is offered through a variable annuity contract with a GLWB component, as described above. Thus, based on the information and representations you

¹³ *Id.* at 60460-61.

¹⁴ 29 CFR section 2550.404c-5(e)(4)(vi).

¹⁵ See Information Letter dated December 22, 2016, to Christopher Spence, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-22-2016>; Information Letter dated October 23, 2014, to J. Mark Iwry, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/10-23-2014>.

¹⁶ See ERISA Advisory Council, “Qualified Default Investment Alternatives – Start to Finish, Default to Payout,” December 2024, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2024-qdia.pdf> (Council recommended the Department issue guidance “to serve as a road map for plan fiduciaries when selecting and monitoring both non-guaranteed and guaranteed retirement income options, inside or outside of a QDIA.”); see also ERISA Advisory Council, “Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers,” November 2018, available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2018-lifetime-income-solutions-as-a-qdia.pdf> (Council recommended that EBSA amend the QDIA regulations to address using lifetime income in a QDIA).

¹⁷ Regarding the QDIA regulation’s transferability requirements, we note your representation that AB will not allocate funds to the Secure Income Portfolio for 90 days after a participant’s first default investment in the LIS program.

provided, it is the view of the Department that the LIS program, if operating as you describe, would satisfy the requirements to be a QDIA as described in paragraph (e) of the QDIA regulation.

Whether a fiduciary has satisfied its duties under ERISA section 404(a) in selecting the LIS program, or any other investment alternative, as a QDIA for any particular plan would depend on the facts and circumstances.

Fiduciary Duty with Respect to the Selection and Monitoring of Insurers

You also asked the Department for guidance on how a plan fiduciary, in this case AB in its capacity as an investment manager under section 3(38) of ERISA, may satisfy its duty to act prudently under ERISA with respect to the selection and monitoring of insurers for participation in the LIS program or a similar program. The selection of an annuity provider is a fiduciary decision governed by the provisions of part 4 of title I of ERISA. ERISA section 404(a)(1)(B) requires that plan fiduciaries discharge duties 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.

There are two nonexclusive safe harbors available under ERISA for fiduciaries selecting annuity providers for defined contribution plans. In 2008, the Department adopted a regulatory safe harbor for the selection of an annuity provider and contract for benefit distributions from defined contribution plans, codified at 29 CFR section 2550.404a-4. In 2019, Congress added a statutory safe harbor in a new paragraph (e) of ERISA section 404 for fiduciaries selecting an annuity provider for a guaranteed retirement income contract for a defined contribution plan.¹⁸ Each safe harbor identifies appropriate considerations for the selecting fiduciaries to ensure they are meeting their obligations under ERISA section 404(a)(1)(B).

Under the LIS program, AB acknowledges its status as an investment manager and fiduciary under ERISA section 3(38) with respect to the investment of participant accounts, including selecting the insurers that participate in the LIS program, allocating assets among them based on the described quarterly bidding process, and monitoring the insurers and contracts on an ongoing basis to determine their continuing appropriateness. It is the view of the Department that each of the annuity selection safe harbors sets forth relevant considerations with respect to the selection of the particular insurers to participate under the LIS program or a similar program. Consequently, it follows that AB would satisfy its fiduciary responsibilities under ERISA section 404(a)(1)(B) if it makes the selections in accordance with the conditions of one of the respective safe harbors.

The defined contribution plan's named fiduciary must prudently select AB as the investment manager and appropriately monitor the selection at reasonable intervals to assure the prudence of maintaining the appointment. After AB is appointed as the investment manager, however, AB is

¹⁸ A guaranteed retirement income contract is an annuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant's designated beneficiary as part of a defined contribution plan. See ERISA section 404(e)(6)(B).

responsible for the prudent management of the defined contribution plan's assets and selection of the insurers. Assuming the defined contribution plan's named fiduciary appropriately discharges its selection and monitoring duties, it will not be liable for any acts or omissions of the investment manager, except for any potential co-fiduciary liability under ERISA section 405(a).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Jeffrey J. Turner
Director
Office of Regulations and Interpretations