

---

**From:** Martin, Alson R. [mailto:AMartin@LathropGage.com]  
**Sent:** Wednesday, February 10, 2010 11:56 AM  
**To:** EBSA, E-ORI - EBSA  
**Subject:** RIN 1210-AB33

This is in response to your request for information and comment in Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans Annuities for retirement plan retirees at Federal Register p. 5253 et seq., Vol. 75, No. 21, Tuesday, February 2, 2010 and found on the internet at <http://edocket.access.gpo.gov/2010/pdf/2010-2028.pdf>

Annuitization of Retirement Plan Payouts. You requested comments on annuitization of retirement plan payouts. I work, in the main, with smaller plans and closely held plan sponsors. These plans and sponsors generally do not have the same level of independent investment help as do large plans and their sponsors. I am concerned that the disadvantages of annuities could far outweigh their advantages. They lock the annuitant into an investment, right now at very low rates. To get out of the investment early, there is often a significant penalty of 10% or more. On the other hand, I often consider annuities for high net worth individuals; but the amount used is small in relationship to total net worth and there is a specific reason for the use of this investment vehicle when we consider using it.

Even if Americans had accumulated enough for an annuity to make sense (and most do not), annuities can at times be the worst possible solution for managing a lifetime income stream, at least for the entire amount of retirement savings.

Additionally, mandating annuities could harm participants, given the documented irresponsible behavior of the salespeople in the industry. For example, in 2006 the Financial Industry Regulatory Authority issued an investor alert regarding annuity salespeople who conducted workplace seminars in which they convinced employees to retire early and cash out of their 401(k) accounts, causing them to pay “penalty taxes” if they were under 59 1/2 and buy an annuity. In another disciplinary case, the broker told the employees that he could generate annual investment returns of 18%.

In addition, in 2008, Florida Governor Crist signed a law increasing penalties on annuity salespeople to as much as \$150,000 for deceptive practices such as “twisting,” in which a salesman lies about the benefits of his annuity to get clients to sell their current annuity, or “churning,” which involves replacing the annuity with a new product from the same company. In 2006, New York Attorney General Eliot Spitzer announced an agreement in

which the Hartford Financial Services Group would pay \$20 million in restitution and fines and implement reforms designed to bring transparency to the marketing of retirement products.

Annuitization has always been available for any type of plan. Thus, it is not a new concept. However, until the economics of annuitization improve (i.e., interest rates increase), the incentive to select an annuity is not there. An annuity in the current environment would be the worst option in addressing the inflation risk mentioned by the GAO in its 2009 report. I would suggest that rather than focus on immediate annuities at retirement, we should concentrate on "super deferred" annuities; ones that are purchased at age 65, but do not start paying until age 80 or 85. The relative cost is more reasonable and it provides protection for outliving your money without tying up substantial assets today at low interest rates. These can be especially beneficial for a surviving spouse.

Employer nonelective or matching contributions. At least 90% of our clients sponsor profit sharing or 401(k) plans. A few have both defined benefit and defined contribution plans. A small number have only defined benefit plans. Those sponsors with a defined contribution plan, which is most of them, all make either matching or employer nonelective contributions or both. The only exception would be in cases of financial hardship, where the employer would discontinue contributions. We have had some instances of that occurring in the last year in greater numbers than the past, but fortunately it is a small minority of the plans with which we work.

404(c) Plans & Annuities. Your questions 33 and 34 ask several questions. My answers, based on my experience with several hundred closely held employers' plans, is as follows: To what extent are fixed deferred lifetime annuities (i.e., incremental or accumulating annuity arrangements) or similar lifetime income products currently used as investment alternatives under ERISA 404(c) plans? Almost never in my experience. Most 404(c) plans use core funds or core funds plus the right to invest in any publicly traded investment ("brokerage window" or open option plans).

Are they typically used as core investment alternatives (alternatives intended to satisfy the broad range of investments requirement in 29 CFR 2550.404c-1) or non-core investment alternatives? Neither. Given current interest rates, fixed annuities would likely be imprudent choices. The annuities I see used are those which are wrappers for various mutual funds, not fixed annuities.

What are the advantages and disadvantages of such products to participants? Protection against loss (assuming there are no fees for surrender, which is rare) versus low yield. What information typically is disclosed to the participant, in what form, and when? Typically none as they are not offered as an investment. To what extent could or should the ERISA 404(c) regulation be amended to encourage use of these products? It shouldn't due to their inherent flaws. This is why money market funds, GICs, and other stable value funds are not an option for QDIAs.

34. To what extent do ERISA 404(c) plans currently provide lifetime income through variable annuity contracts or similar lifetime income products? Many of our clients plans offer the annuity option. My experience is that an annuity is almost never selected by the participant.

What are the advantages and disadvantages of such products to participants? Guaranteed income versus guaranteed low income in present environment.

What information about the annuity feature typically is disclosed to the participant, in what form, and when? What is required by regulation when this option is offered as a payout choice.

To what extent could or should the ERISA 404(c) regulation be amended to encourage use of these products? I would not recommend fixed annuities as an investment option, especially a required one, but only as a payout option, which plans can now do.

**Alson R. Martin**  
**Lathrop & Gage LLP**  
**10851 Mastin Boulevard**  
**Suite 1000**  
**Overland Park, KS 66210-1669**  
**Tel: (913) 451-5170**  
**Mobile: (913) 220-8334**  
**Fax: (913) 451-0875**  
***amartin@lathropgage.com***

---

Any U.S. federal tax advice contained in this communication (including any attachments or enclosures) was not intended or written by the author to be used, and cannot be used, for the purpose of (1) avoiding penalties that may be imposed on a taxpayer or (2) promoting, marketing, or recommending to another party any transaction or other matter addressed herein.

This e-mail (including any attachments) may contain material that (1) is confidential and for the sole use of the intended recipient, and (2) may be protected by the attorney-client privilege, attorney work product doctrine or other legal rules. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

---