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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Re: RIN 1210-AB33: Request for Information Regarding Lifetime
Income Options for Participants and Beneficiaries in Retirement Plans

Dear Sir or Madam:

AEGON USA (“AEGON”) appreciates the opportunity to provide its views with regard to the request for information that the Department of the Treasury and the Department of Labor (collectively, the “Agencies”) published on February 2, 2010, regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans (the “RFI”). The AEGON companies market life insurance, annuities, pensions and supplemental health insurance, as well as mutual funds, throughout the U.S. and in certain countries in Europe and Asia. Its parent company is AEGON N.V., an international life insurance, pension and investment company based in The Hague, the Netherlands that has businesses in over twenty markets in the Americas, Europe and Asia, employs approximately 28,000 people and has over 40 million customers across the globe.

The AEGON companies include two divisions dedicated to employer-sponsored retirement plans, a division focused on individuals transitioning into retirement and a division that delivers investment protection and retirement solutions. Diversified Investment Advisors (“Diversified”) offers the entire spectrum of defined benefit and defined contribution plans, including traditional and Roth 401(k) plans, traditional and Roth 403(b) plans, 457 plans and traditional and Roth individual retirement arrangements (“IRAs”).¹ Transamerica Retirement Services (“TRS”) offers a wide range of products, including 401(k), profit sharing, defined benefit and multiple

¹ A leader in the retirement plan marketplace for mid- to large-sized organizations, Diversified is recognized for its commitment to participant education and for motivating participants to take charge of their financial future. Diversified offers retirement solutions to participants of every age and at every stage through its *Plan of a Lifetime*[™], a comprehensive communications program that includes automated tools, solutions and services that grow with participants’ needs from the date of hire, continuing through retirement. More information about Diversified can be found on its web site at <http://www.divinvest.com>. Diversified has received many awards for its communication and education services, and services more than 2,500 retirement plans, representing more than 1.7 million participants and \$42 billion in assets.

employer plans. TRS provides customized retirement solutions to meet the needs of small- to mid-sized businesses by marketing and distributing its products through consulting firms, broker-dealers, wire houses, independent agents, third party administrators (“TPAs”) and banks.² Transamerica Retirement Management, Inc. (“TRM”) delivers education, product and advice alternatives through salaried financial advisors to help pre-retirees transition into retirement.³ Transamerica Capital Management (“TCM”) is an integrated AEGON business unit whose mission is to deliver investment protection and retirement solutions that build better futures for consumers. TCM has over 30 years of experience providing guaranteed annuity solutions to help consumers grow their retirement savings and help those savings last a lifetime. In addition to this business experience, AEGON companies perform and draw on significant research and surveys regarding the retirement market and the perspectives of both plan sponsors and individual savers.^{4,5}

Currently, the prevalence of lifetime income options in defined contribution plans is low. However, AEGON believes that the Agencies and Congress can take modest steps to increase the inclusion and use of lifetime income options in defined contribution plans. Experts, too, believe that the offering and election of lifetime income options will increase in the future.⁶

AEGON strongly supports fostering the use of lifetime income options in defined contribution plans and IRAs in order to help ensure that Americans can successfully meet the challenge of translating savings to income and achieving a more financially secure retirement. We expect that the Agencies will receive voluminous comments in response to the RFI. We intend for our comments to supplement the submissions of the American Council of Life Insurers, the Committee of Annuity Insurers and the Insured Retirement Institute.

² TRS has been recognized by *PLANSPONSOR*[®] *Magazine* as a top retirement plan provider for outstanding service for three years in a row (2009, 2008, 2007), earning 43 out of 46 “Best in Class” Cups for participant and sponsor services for 2009. TRS was awarded the DALBAR Seal of Excellence for Communications for its Defined Contribution Plan participant and plan sponsor web sites, at <http://www.TA-Retirement.com>. As of December 31, 2009, TRS services more than 15,500 retirement plans (including more than 200 multiple employer plan sponsors and thousands of adopting employers), representing more than 700,000 participants and more than \$16.5 billion in assets.

³ On its web site (<http://www.SecurePathbyTransamerica.com>), TRM provides articles, videos and tools that help educate the Baby Boomer generation as they enter retirement. Through its communication programs and workshops, TRM provides consumers with an experience that helps them envision their retirement and map out a plan for the next stage of their lives. Services are provided directly to participants in employer plans as well as individuals. TRM provides services and advice through its team of licensed, registered financial advisors and offers its customers a variety of products, including annuities and IRAs.

⁴ Diversified’s research group, the Retirement Research Council, has more than 50 years of experience in retirement plan management. The Retirement Research Council’s findings are available at <http://www.divinvest.com>.

⁵ The Transamerica Center for Retirement Studies (the “Center”) is a non-profit corporation and private foundation. The Center is funded by contributions from Transamerica Life Insurance Company and its affiliates and may receive funds from unaffiliated third parties. The Center’s research can be found at www.transamericacenter.org.

⁶ See Diversified Investment Advisors, *Prescience 2013: Expert Opinions on the Future of Retirement Plans* (2008) (retirement plan experts surveyed collectively projected that, by 2013, 40% of plan sponsors would be offering lifetime benefit options to encourage retirement income discussions and help employees plan appropriately).

SECTION I. Mandatory Participant Education Pertaining to Retirement Distributions is Vital

One reason that defined contribution plan lifetime income options are underutilized even when they are available is that participants often simply are not aware of the importance of income planning for retirement. Thus, we believe that modest mandatory education of plan participants would help more workers attain a financially secure retirement.⁷

The need for participant education, particularly as it relates to securing lifetime income from employee-funded plans, is reflected in participant behavior in plans administered by AEGON. In a ten-month study of defined contribution plans administered by Diversified and concluding in October 2008, Diversified paid out \$1,539,194,174 in lump sums to 105,261 participants but only annuitized \$1,442,316 on behalf of fourteen participants. This low use of annuity payouts occurred even though approximately 40% of the defined contribution plans administered by Diversified offer an annuity distribution option. The experience of TRS is even more sobering – in more than 600 defined contribution plans that offer annuities in the small- to mid-sized employer market, only two participants annuitized their benefits under their plans in the 10-year period ending December 31, 2009. Individuals would benefit from education regarding, among other things, how much they will need to save to generate sufficient income in retirement, the formulation of a personal retirement strategy and the explanation of distribution options that can create a retirement income stream (such as purchasing an annuity).⁸

Given the lack of education or awareness about income issues on the part of participants, it is critical that policymakers require the provision of educational materials to defined contribution plan participants regarding the distribution of plan accounts and how to translate plan balances into income streams in retirement. Participants are typically focused on the “savings” aspect of planning for retirement and are not sufficiently focused on how their savings will translate into income in their later years. When the “income” aspect of planning for retirement is neglected, participants may not know enough about how much they will need to save, how best to invest their plan account balances or what types of distributions will ensure financial security in retirement.

⁷ Increased numbers of plan sponsors are providing education regarding the distribution phase. *See* Diversified 2009 Report on Retirement Plans (stating that 44% of plan sponsors plan to conduct an education campaign for the specific purpose of helping employees closer to retirement make income decisions; these campaigns typically include providing near-retirees with print materials, the opportunity to attend seminars and counseling focused on retirement income decisions; 39% refer those approaching retirement to outside advisers for additional counsel or make available annuities outside the plan). This is a positive trend; however, we believe that to reach defined contribution plan participants at large, the provision of some basic educational materials must be required.

⁸ *See* 11th Annual Transamerica Retirement Survey. The Center’s survey found that 44% of workers cite 401(k) plans, 403(b) plans and IRAs as their expected primary source of retirement income, with only 50% of workers “confident” (and only 8% “very confident”) in their ability to fully retire with a comfortable lifestyle. While 55% of workers have a retirement strategy, only 8% have “a written plan.” Participants have expressed a desire for more information and education regarding saving for retirement. 56% of workers would like to receive more information and advice from their employer on how to reach their retirement goals. Full survey results can be found at <http://www.transamericacenter.org>.

To this end, in connection with requiring that defined contribution plan sponsors provide educational materials to participants regarding retirement income planning, we urge the Agencies to develop tools to assist plan sponsors in meeting this requirement.

Below we recommend two specific ways in which policymakers can make participant education mandatory – requiring inclusion of annuity illustrations on participant benefit statements and requiring distribution of an educational booklet developed by the Agencies – but do so in a way that will limit the operational burden for plan sponsors.

1. Require Inclusion of Annuity Illustrations on Participant Benefit Statements

Defined contribution plan administrators have an obligation under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), to provide a benefit statement to each participant at least annually, and, if a participant has the right to direct the investment of her assets, at least quarterly. Such a benefit statement is required to show the amount and vested status of a participant’s account under the plan.

We believe that Congress and the Department of Labor (“DOL”) should take steps to require that benefit statements also set forth a monthly annuity amount commencing at the plan’s normal retirement age based on the participant’s current account balance (assuming no further contributions are made). The annuity amounts should be shown as a single life annuity, with a note that if the participant is married at the time of distribution, she may take the distribution in the form of a qualified joint and survivor annuity covering both lives, in which case the monthly amount will be less for each life.

Through AEGON Global Pensions,⁹ an international unit of AEGON N.V., we are actively involved in the European retirement plan market. In March 2010, the European Federation for Retirement Provisions (“EFRP”) found that approximately one-third of defined contribution plans provide active participants with a best estimate of expected pensions upon retirement, not unlike the annuity illustrations we are proposing.¹⁰ The European experience may be instructive for the Agencies.¹¹

To assist plan administrators in including annuity amounts on benefit statements, we urge the Agencies to designate appropriate assumptions to be used in determining these amounts. For example, the annuity rates determined via survey by the Pension Benefit Guaranty Corporation

⁹ AEGON Global Pensions currently operates in about twenty countries, including Austria, China, Czech Republic, France, Germany, Hungary, India, Luxembourg, Netherlands, Poland, Romania, Slovakia, Spain, Sweden, the United Kingdom and the U.S. AEGON Global Pensions was created to provide a single point of contact for multinational companies looking to improve management of their pensions. Its web site is located at <http://www.aegonglobalpensions.com>.

¹⁰ See March 2010 Survey on Workplace Pensions – Defined Contribution. The EFRP represents various national associations of pension funds and similar institutions for supplementary occupational pension provisions. The survey represented 21 countries, 42 different pension schemes, 58 million active plan members and 1.3 trillion euro savings. A full copy of the survey can be found at <http://www.efrp.eu>.

¹¹ For example, in the United Kingdom, plan service providers send “reminder” letters to plan participants six months and three months before retirement explaining what participants need to do to receive retirement income in the form of an annuity. In the U.S., it could prove helpful if plan sponsors were encouraged to provide certain information (especially regarding the relative merits of different distribution options) close to retirement, *i.e.*, at the time a participant is deciding whether to annuitize.

could be used to determine the annuity conversion rate. In the case where an in-plan annuity investment option is made available to participants and would result in a different annuitized amount, plan administrators should be permitted to include that amount on the benefit statement in lieu of the amount determined using the factors established by the Agencies.

Inclusion of these monthly annuity amounts will impose relatively minor burdens on sponsors and recordkeepers but will provide invaluable information to participants. Including such amounts will likely encourage participants to continue to save at current or higher levels as they see the balances that are needed to produce meaningful monthly income. In addition, the inclusion of these annuity amounts will illustrate to participants the benefits of electing a steady, *e.g.*, monthly, stream of income in retirement as opposed to another form of distribution and will help to re-frame defined contribution plans as retirement income-generating vehicles, not just savings vehicles. Finally, the inclusion of the annuity equivalent could lead a participant in a plan that does not offer an annuity distribution option to request such an option of the plan sponsor.

Bipartisan legislation that would require inclusion of annuity amounts on benefit statements has been introduced in both chambers of Congress. Senators Bingaman, Isakson and Kohl have introduced the Lifetime Income Disclosure Act of 2009 (S. 2832), and Representatives Kind and Reichert have introduced the Small Businesses Add Value for Employees Act of 2009 (H.R. 4742). These bills would require annual disclosure of a projected annuity amount on benefit statements based on a participant's current account balance. We strongly urge the Administration to support these bills and to push for their enactment. Until such legislation is passed, we encourage Congress and/or the Agencies to take steps to facilitate voluntary inclusion of annuity amounts on benefit statements by defined contribution plan sponsors.

Although we believe inclusion of annuity illustrations on benefit statements should be mandatory, we do believe that sponsors should be able to use illustrations that they or their service providers develop that are more detailed or sophisticated than the standard illustrations we recommend above.

2. Develop a Booklet and Online Tools Regarding Retirement Distributions for Use by Plan Sponsors and Participants

We encourage the Agencies to create an online "toolbox" for plan sponsors and participants to use in learning about lifetime income options. This toolbox would contain resources both to help plan sponsors meet their new obligations to provide distribution education and to help individual participants with their retirement income planning.

The toolbox should include, at a minimum, a booklet developed by the Agencies in consultation with the private sector that contains objective information regarding typical distribution and income options available under defined contribution plans and rollover IRAs. Such information should include discussion and comparison of various distribution options (annuities, installments, lump sums, combinations of these forms, etc.) and the role these options can play in generating lifetime income. The booklet should also discuss the relative merits of electing an annuity distribution from the plan (where available) as opposed to rolling over to an IRA and subsequently electing an annuity distribution. This discussion would address such issues as fees and pricing, mortality assumptions, product choice, etc. Plan sponsors should be required to distribute the booklet to participants via hard copy or electronically. (We believe that circulating

a web link to the booklet should suffice; however, inclusion of a mere reference to the booklet in another document would not.) Plan sponsors could use the booklet as developed by the Agencies or could customize it with plan-specific information.

Studies have consistently found that workers need more education regarding saving, investing and planning for retirement.¹² AEGON believes that plan participants would benefit from simple “principles” to help them understand and properly prepare for their income needs in retirement. For inclusion in the booklet and to assist participants more generally, we strongly urge the Agencies to create a set of “Principles of Retirement Income” to enumerate certain basic rules of thumb or guidelines regarding retirement income planning. For example, one Principle would be ensuring steady monthly retirement income to cover fixed expenses such as housing and food.

We recommend that the Agencies develop other tools in addition to the booklet. For example, an online calculator that enables participants to input individualized data to project their retirement income would be a useful “do-it-yourself” addition. It would also be helpful if the Agencies were to provide on their web sites an objective list of resources for plan participants to utilize in retirement income planning, including (i) telephone and internet contact information for non-proprietary organizations that can provide access to financial professionals who can assist individuals with retirement income planning, (ii) information regarding sources and amounts of guaranteed income that a participant might have, such as a web link to the Social Security Administration web site, information about defined benefit plans and steps to take if an individual is unsure whether she has access to a defined benefit plan or has earned pension benefits, and (iii) other tools and resources to assist participants in retirement income planning.

3. Allow Annuity Illustrations and the Booklet to Be Delivered Electronically

Consistent with our general view that plan communications to participants be permitted to be delivered electronically, we believe that it is critical that participant education tools such as the annuity illustration and the booklet described above be permitted to be delivered electronically, *e.g.*, by email attachment or by circulating a web link to the information. The Agencies each have their own set of electronic delivery rules, but we strongly encourage the Agencies to adopt the Internal Revenue Service (“IRS”) electronic delivery rules for this purpose as experience has shown that these rules effectively balance promotion of electronic distribution and protection of participant interests. Such an adoption would be consistent with recent DOL pronouncements on how benefit statements can be delivered electronically.¹³

4. Require Education of IRA Investors Regarding Lifetime Income Considerations

IRA assets comprise a significant portion of retirement savings. As such, any focus on fostering lifetime income options is incomplete without considering IRA assets. Similar to our suggestions with respect to defined contribution plans, we recommend consideration of the following changes with respect to IRAs: (i) requiring annual disclosure of annuity values to IRA investors, similar to the annuity illustration described in this Section; (ii) requiring education of

¹² The 11th Annual Transamerica Retirement Survey found that 68% of workers indicated that they do not know as much as they should about retirement investing. Further, 51% said they “guessed” at their retirement savings needs. See full survey results at <http://www.transamericacenter.org>.

¹³ See, *e.g.*, DOL Field Assistance Bulletin 2006-03 (noting that employers may furnish pension benefit statements to participants and beneficiaries in accordance with the IRS rules regarding electronic communications).

IRA investors regarding the income stage of retirement planning as discussed in this Section; and (iii) making fiduciary relief discussed in Section II available to IRAs.

5. Expand Interpretive Bulletin 96-1 and Guidelines Applicable to Computer Modeling to Expressly Address In-Plan Annuity Investment Options and the Income Distribution Phase of Retirement

As discussed in detail in Section II below, we believe that there are steps DOL can take to revise its guidance surrounding investment education and advice to encourage plan sponsors to go beyond the mandatory education we recommend above and to assist plan participants with retirement income planning.

First, DOL could facilitate plan sponsor education of participants regarding lifetime income and distribution decisions by expanding the application of Interpretive Bulletin 96-1 (“IB 96-1”) to address investment-related education regarding in-plan annuity and annuity hybrid investment options and the provision of educational information regarding plan distribution options and decisions. Second, expansion of the guidelines applicable to computer-generated investment advice recommendations would greatly encourage investment advisers to incorporate annuities and income distribution advice into their computer models.

SECTION II. Certain ERISA and Internal Revenue Code Guidance Should Be Extended to Apply to In-Plan Annuity Investment Options and Retirement Plan Distributions

ERISA and the guidance thereunder contain numerous fiduciary obligations and safe harbor methods for meeting such obligations. Similarly, the Internal Revenue Code (“Code”) and related guidance contain myriad rules applicable to retirement plans. The manner in which these rules apply to lifetime income investment and distribution features and products is not always clear. Given the consequences of becoming liable for a fiduciary breach or failing to adhere to applicable rules of the Code, additional guidance and safe harbors in this area would be quite valuable to plan sponsors and would assist with the effort to facilitate the inclusion and use of income options in defined contribution plans. We suggest that the Agencies review and modify the guidance items discussed below to clarify their application to lifetime income features and products.

1. Expand IB 96-1 to Encompass Participant Education Concerning Distribution Options and In-Plan Annuity Investment Options

As mentioned in Section I, IB 96-1 provides guidance with respect to the extent to which investment-related educational information (*i.e.*, regarding allocation of account balances among various asset classes) can be provided without resulting in the provision of investment advice. IB 96-1 has been very helpful in assisting plan sponsors in providing defined contribution plan participants with effective and meaningful investment education. However, given the importance of the income distribution phase of retirement, we encourage DOL to expand the application of IB 96-1 to encompass education regarding retirement income planning and selection of plan distribution options. With such an expansion, plan sponsors will be significantly less hesitant to provide educational information to participants in connection with the income distribution phase and the forms or combinations of distributions that will assist in

generating lifetime income. Such an expansion will have the effect of facilitating participant education as discussed in Section I by providing fiduciary comfort to sponsors.

Specifically, it would be helpful if DOL were to expand IB 96-1 to apply to the income distribution phase by clarifying the kinds of information that can be provided to a participant without constituting investment advice. For example, the guidance should clarify that generic computer model outputs regarding forms of distribution based on various participant inputs should be treated as education, not advice. Computer models should be permitted to generate generic education and guidance regarding the forms of distribution (annuity, installment, lump sum, etc.) a participant should consider in translating her account balance into income in retirement. It would also be helpful if the guidance specified that use of questionnaires and other interactive tools about forms of distribution constitutes education and not advice.

In addition, we recommend expanding IB 96-1 to clarify its application to in-plan annuity investment options and hybrid guaranteed insurance products (such as guaranteed lifetime withdrawal benefits and guaranteed minimum withdrawal benefits). In particular, it would be helpful if DOL would clarify that investment education may be provided with respect to these in-plan insurance investment options to the same extent it may be provided with regard to other plan investment options. While we view this as more of a confirmation of how to read IB 96-1, it would be helpful to have formal guidance upon which employers may rely.

2. Extend Advice Computer Models to Expressly Include Distribution Advice and In-Plan Annuity Investment Options

DOL has also issued important guidance with respect to the provision of investment advice through the use of various computer models that rely on generally accepted investment principles. The SunAmerica Advisory Opinion has led to a great expansion of advice based on computer models developed by third parties, and recently DOL issued proposed regulations regarding the provision of investment advice through proprietary computer models in accordance with the Pension Protection Act of 2006 (“PPA”).

We encourage DOL to make two changes with respect to the existing computer model guidance. First, we urge DOL to issue guidance similar to its SunAmerica letter, pursuant to which a computer model could be used to provide distribution advice based on standard and accepted distribution principles and individualized participant inputs. For example, the computer model might recommend partial annuitization through specific annuities or certain installment payments, and could also provide specific recommendations as to investment of the remaining assets.

Second, we encourage DOL to clarify that computer models under SunAmerica and the PPA at a minimum may include advice about investing in in-plan annuity investment and hybrid guaranteed income options available under a plan. Each helps to stem longevity risk and should be considered by participants in determining how best to invest their defined contribution plan assets. Indeed, we believe not only that DOL should permit such options to be included, but that DOL should require such options to be taken into account (when offered by the plan) in order for the computer model to satisfy the applicable standards. These are the sort of steps we believe the Agencies must take if we are to significantly increase the use of lifetime income options.

3. Modify the Annuity Selection Criteria Regulation to Provide Less Burdensome Insurer Evaluation Rules and Clarify Its Application to In-Plan Annuity Investment Options

Pursuant to a provision of the PPA, DOL issued new regulations in 2008 on the fiduciary standard to be applied by defined contribution plan sponsors when selecting an annuity provider for plan distributions. The new standard, contained in DOL Reg. § 2550.404a-4, includes a fiduciary safe harbor for the selection of providers of annuity distributions from defined contribution plans.

We recommend that DOL substantially simplify the process by which a fiduciary must evaluate a potential insurer's financial health by providing an objective safe harbor for evaluating solvency. Plan fiduciaries are understandably intimidated by the requirement to evaluate the financial stability of insurers. They are uncertain about exactly how to do so and fear the potential liability consequences from any missteps.

As a result, an objective safe harbor that provides relief to fiduciaries regarding financial evaluations of annuity providers would be immensely helpful. For example, it would be helpful if the safe harbor was at least in part based on the fact that (i) an annuity provider has passed the review of state regulators (which are charged with overseeing insurance companies and ensuring financial solvency), and (ii) the annuity provider's capital is sufficient pursuant to standards set by the National Association of Insurance Commissioners. Once the annuity provider is selected, plan sponsors would, of course, have a continuing obligation to monitor the provider but could continue to rely on the objective benchmarks described above and would only need to pursue further evaluation if confronted with significantly changed circumstances affecting the insurer.

The application of the ERISA fiduciary rules to in-plan annuity investment options is somewhat unclear. It is our view that, under current law, such annuities are like other investment options under the plan, and, as a result, the fiduciary rules applicable to investments apply. In-plan annuity investment options typically also provide annuity forms of distribution. If so, then the annuities are subject to both the fiduciary standards applicable to investments and those applicable to annuity distributions, including DOL's annuity selection criteria regulation and safe harbor. It would be helpful to plan sponsors and annuity providers, and would foster the inclusion of more in-plan annuity investment options, if this understanding is confirmed through law or guidance.

4. Clarify the Application of the Qualified Joint and Survivor Annuity/Spousal Consent Rules to In-Plan Annuity Investment Options and Other Lifetime Income Products

We believe clarification is needed regarding the application of the Code's qualified joint and survivor annuity ("QJSA") and spousal consent rules to annuity options offered under a plan, including to guaranteed income products that either do not have a traditional annuity payout option or have a unique payout option where the insurance contract regarding the annuity does not become irrevocable until after a trial period of payments or until the cash value of the participant's account reaches zero. The QJSA and spousal consent rules generally do not apply to a defined contribution plan that meets certain death benefit requirements unless the participant

elects “payment of benefits in the form of a life annuity.”¹⁴ Treasury regulations offer additional detail by providing that the spousal consent rules apply if the “participant elects at any time” a life annuity option.¹⁵ It would be helpful if clarification could be provided with respect to how several of these concepts apply to plan annuity products.

First, we recommend confirmation that, for an in-plan annuity investment option, the QJSA and spousal consent rules do not become effective upon investment in the option, but rather upon distribution. The clear general rule, as spelled out in the preceding paragraph, is that investment elections do not trigger the QJSA rules; rather, distribution elections do.

Second, clarification as to the application of the QJSA rules to hybrid guaranteed income products (guaranteed lifetime withdrawal benefits (“GLWBs”), etc.) and trial annuities is necessary. We are not aware of any guidance that addresses the degree to which the QJSA rules apply to hybrid guaranteed income products, and the IRS has only issued one piece of nonprecedential guidance with respect to application of the QJSA rules to trial annuities (guidance with which we respectfully disagree).¹⁶

It appears to us that a participant does not “elect a life annuity” and therefore become subject to the QJSA rules simply by commencing payments under a trial annuity or a hybrid guaranteed lifetime income product. Rather, an irrevocable election to receive a life annuity frequently is not made under the contract until the end of the trial period or until the cash value of the participant’s account is exhausted. Typically with respect to such products, a participant may change the conditions of the payout at any time prior to the date the obligations under the contract become fixed. We do not believe that simply commencing payments under the product results in application of the QJSA rules. Rather, we believe the life annuity becomes irrevocable – and triggers the QJSA rules – when the obligations under the contract become fixed.

While we believe the QJSA rules do not legally apply until the life annuity becomes irrevocable, we recommend that some flexibility be provided with regard to the administration and timing of spousal consent so that, for example, consent could be obtained at the time initial payments under the hybrid product begin.

We also urge the Agencies to explore the feasibility of allowing the plan sponsor to transfer administrative obligations and/or fiduciary liability regarding QJSA and spousal consent administration for annuity products offered in the plan to the annuity provider.

5. Facilitate Development of Electronic Spousal Consent Regime

As mentioned in Section I, permitting plan sponsors to use electronic delivery mechanisms can both make disclosures more effective and control costs. We urge the Agencies to move beyond electronic delivery of disclosures and to work with all stakeholders in the retirement plan system to develop and approve an electronic means for complying with the spousal consent rules. Such

¹⁴ Code § 401(a)(11)(B).

¹⁵ Treas. Reg. § 1.401(a)-20, Q&A-4.

¹⁶ See Priv. Ltr. Rul. 200951039 (Sept. 21, 2009) (treating an election to commence a trial annuity providing for systematic withdrawals followed by a life-contingent annuity as an election of a life annuity with respect to the life-contingent annuity, notwithstanding that the participant could stop, accelerate or opt out of the annuity).

a step would address what has been a significant impediment to the adoption of annuity options in defined contribution plans.

6. Provide Guidance on Section 404(c) Relief and Expand the Safe Harbor to Include In-Plan Annuity Investment Options and Other Lifetime Income Options

Section 404(c) of ERISA provides relief from fiduciary liability for any losses that occur as a result of the exercise of control by a plan participant or beneficiary over assets in her individual account. DOL regulations provide a safe harbor regarding what constitutes an “ERISA section 404(c) plan.”¹⁷ This safe harbor has been considerably helpful in encouraging plan sponsors to offer a diversified array of investment options as part of a plan’s menu. However, the safe harbor makes no specific reference to in-plan annuity investment options or other lifetime income options. DOL should confirm that 404(c) relief is available for a participant’s investment of her assets in an in-plan annuity option or other lifetime income investment option held in an ERISA section 404(c) plan. In addition, policymakers should give serious consideration to expanding the fiduciary relief to a participant’s or beneficiary’s exercise of control over the distribution of her assets from an ERISA section 404(c) plan where the plan offers a range of distribution forms and/or a range of specific annuity distribution offerings. This would encourage the offering of in-plan annuity options and other lifetime income options.

SECTION III. Adopt Reforms to Address Impediments to In-Plan Annuity Investment and Distribution Options

One impediment to the adoption of in-plan annuity investment options in defined contribution plans has been uncertainty about what occurs if in the future the annuity investment option is no longer part of the plan’s menu. This could occur as the result of a change in plan recordkeeper, a merger of plans or a decision to discontinue the offering of the annuity option. This uncertainty may cause employers and participants to be hesitant with regard to inclusion or election of an annuity investment option under the plan. An employer may hesitate to include lifetime income products in its plan, for example, because of a concern that it will make it more difficult to change plan recordkeepers at a later date. Likewise, participants may be discouraged from selecting lifetime income products because they believe they will change jobs soon and may be unable to continue to fund the option once they have separated from service. Plan sponsors and participants have understandably wondered how such circumstances would affect them.

1. Amend the Law to Clarify Rules Relating to In-Service Distributions of In-Plan Annuity Amounts

In order to make in-plan annuity offerings more attractive to employers and participants, we recommend making a few changes and clarifications to the Code and ERISA in order to enable sponsors and participants to retain the value of such offerings even under changed plan or participant circumstances.

It can be difficult for a plan sponsor to eliminate an in-plan annuity investment option in the event of plan recordkeeper change or to distribute an annuity contract to a participant in the event of severance. The plan fiduciary has the authority to unilaterally eliminate an investment option,

¹⁷ DOL Reg. § 2550.404c-1.

including the ability to liquidate an investment and move the proceeds to another plan option. Yet, in the case of an in-plan annuity investment option, such action could potentially cause participants to lose valuable economic rights. In that regard, ordinarily only the cash surrender value of an annuity contract is payable to participants if the annuity is removed from the menu. This could result in participants losing the value of insurance guarantees they may have built up. With this in mind, an employer may be reluctant to add an in-plan annuity to its investment menu unless it has a way to protect participants if it decides to drop the annuity option at a later point.

Lack of clarity in the current retirement plan rules also make it difficult for a plan sponsor to comfortably distribute an annuity contract to affected participants. Although it is true under the law that a plan may make an in-service distribution of an annuity contract that retains all of the in-service restrictions specified under the plan, the rules regarding such a distribution are not well-developed and remain rather unclear, particularly with respect to the extent of ongoing obligations by the plan sponsor. Many plan sponsors are not aware these distributions are possible and the lack of clarity causes others to hesitate in relying on this avenue for eliminating plan annuity options.

While it would certainly be helpful to clarify the rules surrounding these in-service distributions of annuity contracts, we believe facilitation of a traditional IRA rollover solution would also be beneficial for both sponsors and participants.

Specifically, we believe the law should be clarified to allow participants to take in-service IRA rollovers of amounts in in-plan annuity investment options when the in-plan annuity is no longer available in the plan (as a result of discontinuation by the plan sponsor or inability of a new plan recordkeeper to support the option). We also recommend that the law be amended to make clear that such in-service rollovers are not taxable or subject to an early distribution penalty tax. We urge the Administration to advocate for these changes before Congress.

2. Permit Employers to Establish a Minimum Account Balance Threshold for Annuitization

The economics of annuitization do not necessarily make good sense in the case of very small account balances, as the level of charges needed to finance the insurance guarantees tend to be large relative to the account balance. It is also the case that many participants with very small defined contribution plan account balances are often well-served by keeping those modest amounts in liquid form to finance unexpected expenses. Accordingly, with regard to account balances below a certain dollar amount, it may not make good sense to permit an annuity form of distribution. In establishing a minimum threshold, plan sponsors would have to ensure that application of such a threshold does not result in a discrimination issue. Plan sponsors would have to test the “group” of participants with balances in excess of the threshold (which they likely are not currently doing) and this could result in a failure of the nondiscrimination rules. To relieve these uncertainties and because it is important that employers be encouraged to offer annuity forms of distribution in their plans, we believe it would be fruitful to clarify the nondiscrimination rules under Code section 401(a)(4) regarding the testing of plan benefits, rights and features to deem as nondiscriminatory certain requirements for minimum annuity

purchase amounts or minimum monthly annuities. Similar “deemed” rules are already in effect with regard to plan loans.¹⁸

3. Employers Should Permit Employees to Elect an Annuity Distribution with Respect to Only a Portion of Their Accounts

In order to foster use of annuity distribution options, the ability to annuitize only a portion of a defined contribution plan account balance is key.¹⁹ For a variety of reasons, individuals are hesitant to commit their entire retirement account balance to the purchase of an annuity. Individuals are particularly concerned about the need to access cash to cover unplanned expenses in retirement. If it is a question of annuitizing all of an account balance or none of it, individuals will pick none almost every time. Partial annuitization can be attractive because it permits an individual to purchase an annuity to cover certain fixed expenses (such as housing, food, health insurance, utilities, etc.) in retirement.

Many defined contribution plans that offer annuity forms of distribution only permit annuitization of the entire account balance. In our experience, many sponsors of such plans have not contemplated the possibility of partial annuitization or are not aware that such choices can be easily and effectively offered.²⁰

To increase the inclusion of partial annuitization distribution options, we suggest that the Agencies publish educational materials for plan sponsors and participants regarding the availability and the benefits of such options.

4. Contingent Support of Mandatory Annuity Distribution Offering in Defined Contribution Plans

We believe that, in order to successfully encourage the use of annuity forms of distribution in defined contribution plans, the Agencies must resolve the key compliance and fiduciary issues discussed in prior Sections of this letter, such as clarification regarding the application of the qualified joint and survivor annuity and spousal consent rules and revision of the 404a-4 safe harbor for selection of an annuity provider.

¹⁸ See Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii)(E).

¹⁹ One proposal not addressed in detail in this paper is the provision of tax incentives for annuity distribution. TRS’ experience in the group purchase annuities market for terminating defined benefit plans has shown that employees are more likely to annuitize all or a portion of their vested benefits when the plan provides enhanced conversion factors for annuitized distributions. Over the last five years, between 3% and 10% of plan participants in terminated plans that provided such enhancements have elected an annuity distribution option rather than a lump sum option. In addition, according to the Center’s 11th Annual Transamerica Retirement Survey, 53% of employees with an employee-funded plan believe tax breaks and incentives would help motivate them to save more for retirement. We believe the enactment of tax incentives for annuitization would be an effective way to encourage distributions in the form of guaranteed lifetime income.

²⁰ A Diversified survey found that many plan sponsors do not provide a great deal of flexibility within the plan to help retiring employees structure a retirement income strategy that will keep pace with inflation, changing needs or a longer-than-anticipated lifespan. Indeed, two-thirds of plan sponsors allow participants to draw down a fixed periodic income from the retirement plan, but only 41% allow an adjustable periodic income and less than one-third offer a lifetime income distribution option. In the absence of partial annuitization options under plans, employees who want to structure an income strategy that will evolve with their lifestyle in retirement may need to take a lump sum distribution and set up their income strategy through a retail brokerage account.

Once such issues are successfully resolved, we believe Congress and the Administration should give serious consideration to the adoption of legislation that would require all defined contribution plans (including those that are exempt from the QJSA and spousal consent rules) to offer an annuity form of distribution. We believe such a requirement is likely to be necessary at some point so that all defined contribution plan participants have access both to this vital income generation and longevity protection tool and to the economies of scale and efficiencies that come from offering the annuity in the plan context.

SECTION IV. Conclusion

AEGON sincerely appreciates the opportunity to present our views on this vitally important public policy challenge. We encourage the Agencies and Congress to consider the recommendations we have addressed in this response to the RFI, which we strongly believe will encourage both the inclusion of annuity investment and distribution options in defined contribution plans and the use of these options by participants. Specifically, we support the following actions by the Agencies and/or Congress, as applicable, discussed in detail herein:

- Mandating certain types of participant education relating to plan distributions and retirement income planning, specifically with respect to (i) inclusion of annuity illustrations on benefit statements, and (ii) distribution of a booklet developed by the Agencies that contains objective information regarding typical distribution and income options under plans and IRAs, as well as a set of retirement income “principles” to educate participants;
- Expanding and clarifying the application of certain ERISA and Code guidance with regard to lifetime income investment and distribution options, including, among others, (i) IB 96-1, (ii) the advice computer model guidance, (iii) the QJSA and spousal consent rules, and (iv) ERISA section 404(c); and
- Adopting reforms to address impediments to in-plan annuity investment and distribution options, including with respect to (i) the distribution of in-plan annuity contracts and in-service rollovers of such contracts to IRAs, (ii) partial annuitization, and (iii) consideration of mandatory annuity distribution offerings in defined contribution plans.

We believe these actions will ultimately help workers achieve a more financially secure retirement while alleviating the operational and fiduciary impediments for employers sponsoring defined contribution plans.

Thank you again for your consideration of our perspective and recommendations. Should any questions arise in connection with our response to the RFI, please contact Jeanne de Cervens at jdecervens@aegonusa.com.

Sincerely,



Mark W. Mullin
President and CEO