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FILED ELECTRONICALLY

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-AB53; 408(b)(2) Guide*

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the “Committee”)<sup>1</sup> in response to the request for comments on the Department of Labor’s (the “Department”) proposal to amend its regulation under section 408(b)(2) of ERISA. Under this proposal, covered service providers would be required in most cases to furnish a guide (the “Guide”) that indexes the information provided under the 408(b)(2) regulation.

### **Introduction and Background**

Committee members support clear, understandable fee disclosures furnished in a manner allowing relevant information to be located.<sup>2</sup> However, the Committee’s member companies have no reason to believe that the plan fiduciaries with whom they deal have experienced any difficulty locating the information furnished to them pursuant to the section 408(b) regulation. Members of the Committee have been providing fiduciaries the information called for by the regulation and the fiduciaries have not expressed concerns about locating the required information.

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<sup>1</sup> The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. The Committee’s current 28 member companies represent approximately 80% of the annuity business in the United States and are among the largest issuers of annuity contracts in connection with employer-sponsored retirement plans and individual retirement arrangements. A list of the Committee’s member companies is attached.

<sup>2</sup> For example, the Committee has supported and worked with the Securities Exchange Commission on the development of a summary prospectus for variable annuities.

Committee members also believe that the benefits of any disclosure should outweigh its costs. Concerns have been expressed by the American Council of Life Insurers and others over the cost to implement the Guide and whether the benefits obtained from the Guide will outweigh those costs. We agree with those concerns. We are writing to comment specifically on issues the Guide proposal presents for annuities and annuity insurers.

As described below, we believe the Guide will be particularly burdensome and costly for covered service providers issuing annuities used in plans. As a result, the burden of the Guide could fall disproportionately on annuity contracts and discourage the offering and use of annuity contracts in retirement plans, especially by insurers who provide annuities to small and mid-size plans. This would be an unfortunate result when plans are increasingly looking to offer lifetime income options, and policymakers, including Department officials, are working hard to help Americans manage their savings throughout retirement by encouraging the offering and selection of lifetime income options. The Administration and Department officials have repeatedly expressed a desire to *remove* barriers to the offering of lifetime income, not make it more costly.

As we stated in our comment letter on the interim final 408(b)(2) regulations,<sup>3</sup> annuity contracts can and do play different roles in the employer-based retirement system. In some cases, the annuity contract is merely an investment option or funding mechanism in lieu of a trust. Often, the insurer provides no services other than those inherent in the annuity contract, *e.g.*, the payment of annuity benefits and the collection of premiums. This activity should not, and we believe does not, cause the insurer to be a covered service provider.<sup>4</sup>

In some cases, however, the issuer of an annuity contract or an affiliate will perform covered services like plan recordkeeping or will act as an ERISA fiduciary or registered investment adviser. In this case, the insurer must furnish a 408(b)(2) disclosure. In addition, if the annuity contract is a designated investment alternative in a defined contribution plan, the issuer might not be a covered service provider, but the plan's recordkeeper or broker will be required to disclose the contract's fees.<sup>5</sup> The regulation provides that the recordkeeper or broker in this case can provide the current disclosure materials of the issuer, if the issuer is not an affiliate.

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<sup>3</sup> See Comment Letter from Committee of Annuity Insurers to Office of Regulations and Interpretations (August 30, 2010), available at <http://www.dol.gov/ebsa/pdf/1210-AB08-0025.pdf>.

<sup>4</sup> As we stated in our 2010 comment letter, the reference to "insurance services" in the third category of covered service providers should not be read to include an issuer simply because the issuer receives premiums in connection with an insurance contract issued to a covered plan. Rather, it should refer to insurance services like insurance brokerage. The Department appears to have confirmed this reading in the preamble to the final regulation. See 77 Fed. Reg. 5632, 5635 n. 14 (Feb. 3, 2012).

<sup>5</sup> See DOL Reg. § 2550.408b-2(c)(1)(iv)(F)(1).

**The requirement to provide a page number or other locator for any place an annuity contract provides information required by section 408(b)(2) is unworkable.**

Under the proposal, if the Guide requirement applies, as it would in most cases,<sup>6</sup> the covered service provider must furnish a separate document listing a page number or other locator for any information contained in another document that satisfies the 408(b)(2) requirement. In most cases involving annuities, the services, fees and compensation, and termination costs that the 408(b)(2) regulation requires are contained in the annuity contract.<sup>7</sup> For a number of reasons, the member companies of the Committee believe that it will generally not be possible to systematize either the initial preparation of a Guide or necessary updates to the Guide. Rather, insurers will need to use a manual process to both implement and update the Guides.

To begin with, insurers issue annuity contracts using many different contract forms and a variety of endorsements and optional riders, which often differ with the particular contract form. These materials vary substantively from one another, but due to various state law requirements, forms that are substantively largely identical can also differ depending upon the state in which they are issued. In addition, the content of contracts, endorsements, and riders offered changes over time, both for business reasons and due to changing state regulatory requirements. From the perspective of a fiduciary who wishes to review the relevant information in his plan's contract, the fact that an insurer offers and has issued multiple contract forms with different riders and endorsements that vary from state to state and that have changed over many years is irrelevant. This is because the document package for any one plan will typically consist of a single contract with a few endorsements and riders (and perhaps a prospectus) – it is of no consequence to the fiduciary that the contract forms issued to another plan 3 years ago or in another state are different than the ones issued to her plan.

However, from the perspective of an insurance company that would have to provide a Guide to each fiduciary, these variations are very significant. Essentially, they mean that there will almost always be a very large number of document combinations among all the plans to which the insurer is making disclosures. For example, Plan 1 may have the version of contract X issued in 2001 with riders A and B, each of which were also issued in 2001. Plan 2 may have the version of contract X issued in 2005, with a new version of rider A, but the same version of rider B. Plan 3 may have the New York documents rather than the California documents that Plan 2 has. The relevant fee information may be on the same page of the 2001 version of contract X as the 2005 version of contract X. In many cases, however, the page numbers will be different and thus the Guide for Plan 1 and the Guide for Plan 2 will have to be different. Likewise, the

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<sup>6</sup> Under the proposal, a Guide, which must be a separate document, would be required if the information required to be disclosed under the 408(b)(2) regulation is not contained in a single document or if the document is in excess of a yet-to-be-decided page limit. With such uncertainty surrounding the specific circumstances in which the Guide will need to be furnished, we must assume that a Guide will be required in most cases involving an annuity contract.

<sup>7</sup> In the case of a variable annuity, some of the 408(b)(2) information also is likely to be in the prospectus.

relevant fee information for the New York documents may or may not be on the same pages as in the California documents.

The issuing insurer will, of course, have records showing which annuity contract and which endorsements or riders each policyholder currently has in-force. However, there is a very large gap between possession of that knowledge (often on multiple administrative systems) and converting that information into a Guide with page numbers or section headings that will accurately reflect each of the combinations that have been issued over multi-year periods to each plan.

By way of example, due to the variations of products (including rider variations) of one Committee member, the company has 34 different fee disclosures for products being sold currently, and another 98 different fee disclosures for products in-force but no longer issued, *i.e.*, it currently has 132 different fee disclosures.<sup>8</sup> Each of these current fee disclosures represents a potentially unique Guide, and this number will almost certainly grow in the future as new products are developed and made available to plans. The burden of such customized guides can quickly far outweigh the marginal benefits to a fiduciary, given that the document package for any particular plan will likely be very straightforward and easy for the fiduciary to understand, *e.g.*, a single contract with a few endorsements and riders and perhaps a prospectus.

When evaluating the burdens for annuities that the Guide would create, it is also important to take into account that there has been a great deal of consolidation in the life insurance industry in recent years – there were 2,195 life insurance companies in the United States in 1990, but only 868 in 2012.<sup>9</sup> This consolidation, as well as reinsurance transactions, means many annuity insurers are administering contracts issued many years ago by other insurers. These contracts have long histories and the current obligor on the contract will have no systematic way of tracking where precisely in the contract the section 408(b)(2) information is contained. This process could be done manually in some cases, but only at great expense, and in other cases may not be able to be done at all. Yet, the fiduciary that is in possession of the contract will almost always be able to look at her particular contract, endorsements, and riders and readily identify the disclosures.

Finally, the “fee” for any particular contract could be referenced in more than one location in the contract. For example, a variable annuity contract commonly will identify on one of the schedule pages the mortality and expense charge, but the time when that charge is

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<sup>8</sup> The number of riders associated with this particular Committee member’s variable annuity contracts ranges from 1 to 17. Of course, some of the riders are mutually exclusive. For example, there might be 4 death benefit riders available with contract X, but only one can be chosen and issued with contract X. Thus, the fiduciary will only need to look at the information pertinent to the death benefit rider issued with her contract. However, from the perspective of the company, each rider – and the different combinations of riders – represents a potentially different fee and a unique “locator” for the Guide.

<sup>9</sup> American Council of Life Insurers, 2013 Life Insurers Fact Book, Table 1.7, available at [https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/FB13%20Chapter%201\\_Overview.pdf](https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/FB13%20Chapter%201_Overview.pdf).

assessed, or the specific manner in which it is calculated, may be on another page in the contract. Similarly, a contract typically will list a surrender charge or market value adjustment formula on a schedule page, but describe in more detail elsewhere in the contract the circumstances in which the charges will or will not be paid and the manner in which they will be computed when they are payable. The same contract could contain a rider providing additional circumstances in which the surrender charge is waived. The Department's proposal presumes that every required disclosure can be referenced in a single place, which is simply not the case with annuity contracts.

From the perspective of a fiduciary who is reviewing a contract to assure she understands, *e.g.*, a surrender charge, the fact that there are several references in the contract to the surrender charge will not impede her understanding. To the contrary, it will typically facilitate that understanding. For example, if she wants an overview of the various charges under the contract, including the surrender charge, these charges typically appear together on one or more schedule pages at the beginning of the contract. Likewise, if she wishes to review the specific circumstances and specific manner in which the charge is made, there will be a section of the contract under a heading such as "Surrender Charges" that sets out that information. However, from the perspective of the insurer who needs to prepare a Guide with specific page references or "Locators," the picture is quite different, for the same reasons described above.<sup>10</sup>

### **The cost of complying with the Guide will be substantial.**

It is difficult to estimate accurately the cost of the Guide proposal, but we believe that the Department's estimate is too low. The Committee member mentioned above that has 132 different fee disclosure variations estimated that the creation of each Guide would take a full-time employee approximately 2 hours per Guide to develop and review.<sup>11</sup> A full-time employee would need to spend approximately one month of his time fully devoted to the creation of the Guides. The member estimated that the annual update of each Guide would take a full-time employee approximately 30 minutes per Guide (*i.e.*, a full-time employee would need to fully devote approximately 8 days of his time each year to annually updating the Guides).

Another, larger, member company of the Committee estimated that for its group annuity and recordkeeping business it would need to prepare approximately 2,500 unique Guides. This company estimates that the initial preparation of the Guides would cost approximately \$1.9 million and the annual costs of updating the Guides would be approximately \$100,000.

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<sup>10</sup> Because of the large number of different contract forms, the great difficulties with using page numbers in a Guide are apparent. Even the use of "Locators" is quite problematic, however. For example, as noted in the text, a surrender charge may be under the heading "Surrender Charge" in contract form A, but it may be under the heading "Surrenders" in contract form B, "Withdrawals" in form C, and "Withdrawal Charges" in form D. For the fiduciary looking at her contract, the "Locator" will be obvious, but for an insurer trying to provide a Guide, the burdens are substantial.

<sup>11</sup> This member estimated the cost per hour at \$75, higher than the Department's assumption.

We understand that other groups representing other parts of the service provider community plan to survey their members to provide the Department with broader cost data. We strongly urge the Department to carefully consider that data if it decides to move forward with the Guide proposal.

**The requirement for variable annuity issuers to cross reference documents created by unaffiliated entities (when unaffiliated investment options are offered in a separate account) cannot be administered without great expense.**

Most variable annuity contracts function in some respects like 401(k) platforms – they offer the policyholder access to a range of mutual funds or other investments held in an insurance company separate account. Some of the investment options are managed by an affiliated entity and some are managed by an unaffiliated entity. For example, a variable annuity issued by one of the Committee’s larger member companies offers 12 options that are managed (in whole or in part) by an affiliate and 53 options managed by unrelated parties. Under the current 408(b)(2) regulation, if the issuer is providing access to a platform of investments to an individual account plan that permits participants to direct the investment of their account, which is a very common situation, the issuer must provide fee information on each designated investment alternative. The Guide proposal would require that the Guide reference a page number or other sufficiently specific locator to where this information can be found in the disclosure materials of the unaffiliated entity.

Tracking changes to information regarding the investment options of an unaffiliated entity will be extremely challenging. In many cases, there will be a large number of such options available. In addition, the unaffiliated entity is not required to inform the annuity issuer when the location of required disclosures changes. Indeed, it is not clear that it is even possible to develop an automated or manual system that could accurately track changes to the documents of unaffiliated entities.

**Plan fiduciaries are obligated under ERISA section 404(a) to act with a certain level of care, skill, prudence, and diligence.**

An annuity contract contains important information about the contract’s terms. Some of this information is encompassed by the 408(b)(2) regulation, but much of it is not. It is incumbent upon a fiduciary to read and understand the contract before agreeing to purchase it. As the Department itself has said: “Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments.”<sup>12</sup> It is reasonable to expect a plan fiduciary to read the entire annuity contract. And it is reasonable to expect that plan fiduciaries have the expertise to understand the contract or will seek assistance if they do not.<sup>13</sup>

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<sup>12</sup> DOL, Meeting Your Fiduciary Responsibilities, available at <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html>.

<sup>13</sup> Cf. DOL Reg. 2509.95-1(c)(6) (suggesting fiduciary should hire qualified, independent expert if the fiduciary does not have the necessary expertise). In this regard, insurance companies and state insurance regulators recognize that

Section 404(a) of ERISA requires as much, because a fiduciary must act with the care, skill, prudence, and diligence that a prudent person “familiar with such matters would use.”

## Recommendations

In view of the above, the Committee recommends:

- Given the absence of demonstrable need, the ambiguities and uncertainties of the proposal itself, and the potentially significant cost implications of the proposal, the proposal should be withdrawn. The Department should pursue gathering (beyond the small plan focus groups) the information and data necessary to perform a realistic assessment of whether there is a specific problem and, if identified, undertake to work with service providers to develop a targeted, cost-effective, solution.
- If the Department, nonetheless, moves forward without any additional fact finding, any rule should be limited to the required disclosure of a contact source for assistance. The Committee strongly supports the requirement in the proposal to provide fiduciaries with a contact name and number for someone who can assist them if they are having trouble locating information.
- The application of any proposal that moves forward should be limited to new contracts and agreements only. Because of the enormous complexities described above for legacy annuity contracts, it simply is not practical for an issuer to look through years of documents to determine on what page or section a particular fee is disclosed.
- Any consideration of an effective date of less than 24 months for any rule should be based on an informed assessment of the technological and other capabilities of covered service providers to comply with the rule, without incurring significant costs to providers, plans and participants.

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In conclusion, we ask the Department to consider that the complexities of complying with the Guide requirement even for new contracts are likely to discourage some annuity issuers from selling contracts to ERISA-governed plans. This is particularly a risk for insurance companies that do not have a large 401(k) recordkeeping business and focus primarily on issuing annuity contracts outside the large and mid-size plan market. Decreased competition by issuers for this business could easily mean higher costs and fewer options for some plans, especially small and mid-size plans.

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annuity contracts are complex and technical by their very nature. As a result, a significant amount of time and effort is expended in developing client-friendly contracts and disclosures to enhance the understanding of all annuity purchasers, including plan fiduciaries.

Committee of Annuity Insurers  
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We appreciate this opportunity to offer input on the Guide proposal. If you have any questions, or if we can be of any assistance in your consideration of the issues summarized above, please do not hesitate to contact either of the undersigned at 202-347-2230.



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Attachment



**THE Committee**  
**OF**  
**Annuity Insurers**  
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AIG Life & Retirement, Los Angeles, CA  
Allianz Life Insurance Company, Minneapolis, MN  
Allstate Financial, Northbrook, IL  
Athene Annuity & Life Company, Des Moines, IA  
AXA Equitable Life Insurance Company, New York, NY  
Fidelity Investments Life Insurance Company, Boston, MA  
Genworth Financial, Richmond, VA  
Global Atlantic Life and Annuity Companies, Southborough, MA  
Great American Life Insurance Co., Cincinnati, OH  
Guardian Insurance & Annuity Co., Inc., New York, NY  
Jackson National Life Insurance Company, Lansing, MI  
John Hancock Life Insurance Company, Boston, MA  
Life Insurance Company of the Southwest, Dallas, TX  
Lincoln Financial Group, Fort Wayne, IN  
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Metropolitan Life Insurance Company, New York, NY  
Nationwide Life Insurance Companies, Columbus, OH  
New York Life Insurance Company, New York, NY  
Northwestern Mutual Life Insurance Company, Milwaukee, WI  
Ohio National Financial Services, Cincinnati, OH  
Pacific Life Insurance Company, Newport Beach, CA  
Protective Life Insurance Company, Birmingham, AL  
Prudential Insurance Company of America, Newark, NJ  
Symetra Financial, Bellevue, WA  
The Transamerica companies, Cedar Rapids, IA  
TIAA-CREF, New York, NY  
USAA Life Insurance Company, San Antonio, TX  
Voya Financial, Inc., Atlanta, GA

The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal tax and securities law policies with respect to annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States.