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From: Kant, Doug
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To: EBSA, E-ORI - EBSA
Subject: Selection of Annuity Providers for Individual Account Plans

(Filed Electronically)

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

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

These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, “Fidelity”). Fidelity companies provide investment management, record keeping and trustee services to more than 12,000 401(k) and other individual account plans covering more 12 million participants. A Fidelity insurance agency may assist with the purchase of annuity contracts for work place plan participants or IRA customers from insurance companies not affiliated with Fidelity by ownership. In addition, a Fidelity insurance company may issue annuity products for work place retirement plans.

These comments relate to Section 625 of the Pension Protection Act of 2006 (“PPA” or the “Act”), which instructs the U.S. Department of Labor (“Department”) to issue regulatory guidance confirming that the “safest available annuity” standard in Interpretive Bulletin 95-1 does not apply to the selection of an annuity contract as an optional form of distribution from an individual account plan to a participant or beneficiary. The Act provision also states that the general fiduciary standards of the Employee Retirement Income Security Act of 1974 ("ERISA") continue to apply in such cases.

Background:

In 1995 the Department of Labor (“DOL”) offered its initial guidance on annuity selection in Interpretive Bulletin 95-1. Due to conflict of interest considerations, the DOL guidance held sponsors to an extremely high standard of scrutiny with regard to their choice of an annuity provider in the context of a defined benefit termination. Interpretive Bulletin 95-1 stated that the sponsor must not choose an “unsafe” annuity and specified six criteria regarding claims paying ability and creditworthiness that the sponsor should consider. The DOL guidance concluded that the plan sponsor should generally obtain independent expert advice before making a decision to purchase annuities to terminate a defined benefit plan.

By contrast, when an annuity is offered in a defined contribution plan, the sponsor does not have any vested interest in choosing a lower-cost (and potentially riskier) insurer. Consequently, DOL guidance regarding the purchase of annuities under defined contribution plans (Advisory Opinion 2002-14A) did not obligate the

sponsor to hire an independent expert if it has the ability to evaluate an annuity provider's credit worthiness. However, the advisory opinion focused again on the plan sponsor's obligation to consider the same six financial issues that were listed in the 1995 interpretive bulletin.

PPA Guidance:

As stated above, PPA Section 625 provides a clear Congressional instruction to the Department to address the different legal framework for individual account plans. In particular, the statutory language refers to the selection of an annuity contract as an optional form of distribution under such plans. Concurrently with the issuance of this proposed guidance, the Department has issued an interim final rule that revises Interpretive Bulletin 95-1 to limit its application to defined benefit plans.

We believe that PPA Section 625 is intended to convey Congressional intent that plan sponsors not be subject to overly restrictive requirements for annuity contracts in an individual account plan. Assuming that the sponsor exercises reasonable due diligence in selecting annuity products as an option and providing participants with all necessary information, the sponsor should be deemed to have met its fiduciary obligations. Of course, financial viability is an important matter, but it should be balanced against matters of product design and purchase rates. In addition, order to clarify the scope of the new guidance, the Department should confirm whether it applies only to the purchase of an annuity product for the immediate payout of benefits or whether it also applies to the selection of an annuity product as an investment choice prior to distribution.

Finally, we note that under many individual account plans, participants ultimately make the choice between different issuers or types of annuity products offered under the plan. In addition, under some plans a participant may be able to choose an annuity product during his or her active period of participation. This raises an additional question, as described below. The Department should confirm that annuity products may be subject to the ERISA Section 404(c) framework.

Application of Section 404(c):

Some new annuity products been designed specifically to serve as an investment option during the participant's period of active participation. This decision may come early in a participant's period of active participation or as he or she prepares to decide among distribution alternatives. In this context, the participant can choose (or not choose) the annuity from among a variety of investment options. The elements of choice and diversification should serve to limit the sponsor's fiduciary obligations in choosing to offer a particular annuity product under a plan intended to comply with Section 404(c) of ERISA. The regulations issued by DOL under Section 404(c) of ERISA dictate the conditions for relieving plan fiduciaries for the consequences of plan participant investment decisions.

The DOL regulations under ERISA section 404(c) impose a quarterly frequency of transfer rule for at least three diversified "core" investment options along with a broad range of other investment

alternatives. See 29 CFR 2550.404(c)-1(b)(2)(ii)(C). There is an additional frequency rule under 29 CFR 2550.404c-1(b)(ii)(C) for the most conservative core option. Thus, the liquidity features of a fixed, variable, or fund-based annuity would have to satisfy these rules or the product have to be offered as a "non-core" investment option. In either event, the sponsor's overall fiduciary duties with respect to choosing an annuity option should generally be the same as would be applicable to choosing other core or non-core investment options for the plan.

For products with limited liquidity, one concern is whether the DOL regulation's focus on transferability means that each option subject to Section 404(c) relief, even a non-core option, must allow investment transfers with at least some frequency. The regulation requires frequency "appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject." The preamble to the final regulations includes an example of a limited partnership investment alternative that prohibits transferability of ownership during the first three years. The preamble discussion does not reject the treatment of the limited partnership as a non-core 404(c) option per se, but rather points to the "appropriate" standard quoted above. The same approach should be followed for annuity products.

Finally, we appreciate that participant disclosure is a necessary element of the relief granted to a fiduciary under Section 404(c). Here the participant needs to understand the (1) irrevocable nature of the decision, depending on the refund features of the annuity product in question, (2) the challenge of determining financial viability far into the future, and (3) any surrender changes if there is a refund feature. These features would appear to constitute required disclosure under the 404(c) regulations regarding restrictions on transferability. The Department may consider whether some supplemental language should be added to the current 404(c) regulations to address these issues.

We would be pleased to provide additional information if that would be deemed helpful

Sincerely,

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