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FILED ELECTRONICALLY

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attn: Annuity Regulation

Re: Proposed Regulation (E7-17743) on Annuity Selection Criteria

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") to comment on proposed regulations that were recently issued pursuant to section 625 of the Pension Protection Act of 2006 (the "PPA"), which directs the Department of Labor (the "Department") to issue regulations clarifying the fiduciary standards that apply to the selection of an annuity contract as an optional form of distribution from an individual account plan. The Committee is a coalition of 32 life insurance companies representing more than two-thirds of the annuity business in the United States. The Committee was formed in 1982 to participate in the development of federal policy with respect to annuities and the Committee's current members are among the largest issuers of annuity contracts to retirement plans subject to Title I of ERISA. A list of the Committee's member companies is attached.

The Committee greatly appreciates the Department's efforts in developing the proposed regulations. The regulations are clearly intended to encourage the use of annuities in individual account plans, such as 401(k) plans, and we are heartened that the Department and the Committee share the common goal of facilitating higher levels of annuitization in individual account plans. We are deeply concerned, however, that the proposed regulations may have the unintended effect of discouraging the use of annuities. We have outlined our concerns below and would like to meet with the Department to discuss the issues in more detail.

As discussed below, our primary concern is with the portion of the proposed regulations that deems a fiduciary to have acted prudently in selecting an annuity if the

conditions of paragraph (c) of the regulations are satisfied. We believe that the "safe harbor" outlined in paragraph (c) will be viewed as establishing a heightened standard of fiduciary review for the selection and monitoring of annuities. In our experience, plan fiduciaries will be reluctant to offer annuity distribution options if it means taking on a special responsibility. For these reasons, we urge the Department to omit paragraph (c) from the final regulations.

I. The "safe harbor" in the proposed regulations appears to establish a heightened standard of fiduciary review for annuities relative to other plan investments.

The proposed regulations state that the selection of an annuity in a plan is subject to general fiduciary considerations and provide a safe harbor process in paragraph (c) for the selection of an annuity. As a threshold matter, paragraph (c) requires that plan fiduciaries determine whether they have the "appropriate expertise" to evaluate the selection of an annuity. If not, paragraph (c) provides that advice must be obtained from a qualified independent expert. Paragraph (c) goes on to provide a detailed list of factors that the plan fiduciary or qualified independent expert must consider, including, among other things, review of the issuer's level of capital, surplus and reserves available to make payments under the contract as well as state guarantees, ratings by insurance rating services, and the role of separate accounts under the contract.

The preamble to the proposed regulations does not expressly state why the Department included a "safe harbor." However, presumably the Department's reasoning is that a safe harbor will give plan fiduciaries a level of comfort with the relevant fiduciary considerations in selecting an annuity, which will encourage fiduciaries to offer annuity options. We believe, however, that the safe harbor in the proposed regulations will not provide plan fiduciaries with comfort but rather will be viewed by many as setting forth the process that fiduciaries must utilize in order to satisfy their fiduciary obligations. Paragraph (c) clearly establishes the process that the Department expects plan fiduciaries to utilize, and, in our experience, the vast majority of well-advised plan fiduciaries will feel compelled to use the safe harbor if they decide to offer an annuity form of payout. Viewed as a minimum standard of conduct, we are concerned that the fiduciary process outlined in paragraph (c) will be widely perceived as imposing a heightened fiduciary process for a number of reasons.

First, paragraph (c) creates a specific and detailed process for annuities. There are no comparable regulations for any other type of plan investment, including much more common types of plan investments, such as mutual funds and other investment options. The Department has never published detailed guidance with precedential value on the fiduciary process applicable to selecting plan investments and plan investment options. The absence of guidance for the most common of plan decisions stands in marked contrast to the proposed regulations and makes it appear that the regulations single out annuities.

Second, if the process outlined in paragraph (c) is the Department's view of the "right" process for all plan investments, that view would have significant implications for prevailing standards of fiduciary conduct. One of the key requirements under paragraph (c) is

the determination of whether a "qualified independent expert" is needed. To our knowledge, this is a new term of art (at least outside of the context of prohibited transaction exemptions) and it is not clear how this fits into existing practices. In our experience, employers (usually the fiduciary) will often seek advice from third-parties in selecting and monitoring a plan's investment options and this advice will typically be provided by a party with significant financial acumen. However, employers (acting in their fiduciary capacity) do not typically ask whether these advisers are "qualified independent experts" and it is not clear whether many common advisors will be considered "qualified independent experts." Moreover, in our experience, many employers feel that they have the requisite skills to act prudently in selecting investment options without extensive input from an outside expert. In light of the proposed regulations, we believe that these same fiduciaries will feel compelled to hire a qualified independent expert to monitor and select annuity options simply because the proposed regulations make this a threshold determination. Engaging a qualified independent expert as part of the selection and monitoring of annuities is likely to be expensive and could deter many plans from selecting annuities, particularly small and mid-size plans. In short, while we can appreciate the value of the analysis and process that is outlined in paragraph (c), we do not believe that this is the type of analysis in which fiduciaries routinely engage, and it makes little sense to break new ground in the context of annuities.

Third, the very notion of a safe harbor from the general prudent man rule implies a heightened standard of conduct. In order to obtain the comfort of the safe harbor, the regulations suggest that a fiduciary must do more than simply satisfy the prudent man rule, which generally requires acting with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use. Instead, the plan fiduciary must clear the hurdles that paragraph (c) establishes. This mechanical process is fundamentally inconsistent with the prudent man standard of conduct, which is a facts and circumstances standard that evolves as prevailing standards of conduct evolve.

II. A heightened standard of review is contrary to the intent of Congress in directing the Department to issue regulations on annuity selection criteria.

The PPA directive to clarify the fiduciary standards that apply to the selection of an annuity in an individual account plan arose from concerns about the effect of Interpretive Bulletin 95-1. The Interpretive Bulletin had been widely perceived as establishing a heightened standard of fiduciary review (popularly know as the "safest available annuity standard") on the selection of an annuity contract as an optional form of distribution from an individual account plan. The purpose of the PPA directive was to clarify that the heightened standard reflected in the safest available annuity guidance did not apply to individual account plans and therefore to encourage the use of annuities in such plans.

As discussed above, we believe that the proposed regulations will perpetuate the impression that the selection of an annuity is subject to a higher standard of fiduciary review, which was clearly not the goal of Congress. Moreover, we believe that the proposed regulations

have the potential to dramatically broaden the scope of this fiduciary review to virtually every instance in which annuities are used in retirement plans. Prior to the PPA, the only annuities covered by a specific set of fiduciary considerations, i.e., Interpretive Bulletin 95-1, were distributed annuity contracts, and the PPA directive is specific to distributed annuity contracts. The proposed regulations, however, apply to the selection of an annuity provider "for the purpose of benefit distributions. . . or benefit distribution options made available to participants and beneficiaries."

There are numerous questions about the scope of the phrase "for the purpose of benefit distributions . . . or benefit distribution options." While we do not believe this is the better reading, taken at its broadest, the regulations potentially suggest that any annuity purchase right, i.e., the right to receive benefit distributions from an annuity, gives rise to the heightened fiduciary analysis under the proposed regulations. In this regard, the proposed regulations could be read as potentially applying to (i) distributed annuity contracts; (ii) annuities held by a plan and used to make payments to participants; (iii) annuity investment options (which invariably serve as distribution options); and (iv) plans that are funded through annuity contracts (and therefore provide an annuity purchase right). The regulations potentially could apply even where an annuity does not provide purchase rate guarantees.[1]

As a result, the proposed regulations could represent a significant expansion of the heightened fiduciary standard that was reflected in Interpretive Bulletin 95-1, which would be directly contrary to the PPA directive. Moreover, such a sweeping application could muddy the fiduciary considerations that are appropriate to the different uses of annuities in retirement plans. In this regard, the considerations that are relevant to selecting an annuity, for example, as a funding vehicle, a distribution option or an investment option depend in large part on the purpose for which the annuity is selected. The proposed regulations, however, appear to sweep these different considerations into a one-size-fits-all approach.

The broad potential scope of the regulations could significantly reduce the use of annuities in retirement plans. That is, in the few areas in individual account plans where annuity options are common, such as plans that are funded through group annuity contracts, the regulations may cause plan fiduciaries to rethink their existing approach, which may be detrimental to the interests of participants. This is clearly not good retirement policy and, again, is inconsistent with Congressional intent.

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[1] The scope of the proposed regulations is also unclear in that the regulations do not define the term "annuity" and we are not aware of any generally applicable definition under ERISA. In general, the term "annuity" covers a broad array of instruments which are used to both accumulate and distribute benefits, often under the terms of a single contract, and covering both guaranteed and non-guaranteed benefits. See KENNETH BLACK, JR. AND HAROLD D. SKIPPER, JR., LIFE & HEALTH INSURANCE 161-187 (13th ed. 2000).

III. A special standard of fiduciary review for annuities is not appropriate.

At times, it has been suggested that there are special fiduciary considerations for annuities relative to other investments. We appreciate that annuities have the special characteristic that they can provide a participant with a guaranteed income for life. However, the fact that annuities can provide a guaranteed income for life does not mean that a special fiduciary process for selecting a particular issuer and contract is necessary or appropriate.

The aspect of annuity providers and annuities that the proposed regulations focus on – claims paying ability – is not unique to annuity providers and annuity contracts. Credit risk (the risk that a counterparty will become insolvent) is a common feature to many plan investments, including stable value funds, guaranteed investment contracts, bonds, derivatives, and life insurance. However, we are not aware of any guidance establishing a specialized review for such other investments. We recognize that credit risk in annuities is arguably different in terms of degree because an annuity promise may have a duration as long as a participant's life (or the joint lives of a participant and a beneficiary). This risk, however, is not qualitatively different than the risk that is common to other plan investments and, for this reason, we do not believe that a special type of fiduciary review is needed. Indeed, we believe that creating a special type of fiduciary review for annuities will increase the possibility that defined contribution plan benefits will be paid out in lump sums, which in the words of the November 2005 Advisory Council report quoted in the preamble "expose retirees to a wide range of risks including the possibility of outliving assets, investment losses, and inflation risk."

Another problem with a singular focus on claims paying ability for all annuities is the wide variety of different types of annuities. The importance of the claims paying ability of an annuity provider varies with the type of annuity involved. For example, the claims paying ability of the issuer of a deferred variable annuity may be far less relevant to the safety of the investment than the creditworthiness of the issuer of a GIC.[2] In addition, credit risk is in part a function of liquidity. A deferred annuity is typically fully liquid. Many payout annuities (i.e., annuities under which payments have commenced) also allow commutation of some or all of the remaining payments and are therefore at least partially liquid. In terms of credit risk, annuities with significant liquidity features are effectively indistinguishable from any other plan investment where credit risk is a factor, including bonds, derivatives, wrap contracts on stable value funds, GICs and life insurance.

Some payout annuities (such as a pure life annuity) may be illiquid in that the annuity may not have a commutation value. Even with respect to such a pure life annuity, however, the importance of the claims paying ability of the insurer to the participant varies significantly depending on whether the life annuity is fixed or variable, because in the case of the

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[2] The claims paying ability of the insurer may still be relevant, because the variable annuity may offer guarantees that are backed by the claims paying ability of the insurer, but the importance of that factor will depend on the particular features of the annuity involved.

latter the assets will be segregated in a separate account. As a result, it makes little sense to consider these different types of annuities without any sensitivity to their unique aspects. The proposed regulations appear to paint all annuities with a broad brush that emphasizes credit risk. This misapprehends the diversity of annuities and will have the effect of discouraging plans from offering annuities. Instead, the appropriate approach is for fiduciaries to apply the general prudent man standard by taking into account the different facts and circumstances of the annuities involved.

In short, annuities are not particularly unique in terms of the fiduciary considerations that are relevant to the prudent selection and monitoring of an annuity payout option and the "safe harbor" process fails to recognize the enormous variety in the different types of annuities. More generally, there is something of the "tail wagging the dog" in the proposed regulations. Credit risk is only one of a myriad of risks faced by defined contribution plan retirees. Certainly, the promise of a guaranteed lifetime income may be well worth the assumption of some degree of credit risk. Further, as noted above, many annuities, including variable annuities, have little credit risk because the assets funding the contracts are held in separate accounts set aside from the claims of the issuer's creditors. In addition, state guarantee funds typically stand behind annuities in the event an insurer becomes insolvent and insurers generally work together to acquire the business of struggling insurers, in part because the entire insurance industry suffers if any insurer fails to make payments on annuity contracts.

For these reasons, we believe that the final regulations should delete the so-called safe harbor in paragraph (c). The process outlined in paragraph (c) is inappropriate because it (i) effectively imposes a heightened fiduciary standard on annuities, (ii) creates an uneven regulatory landscape for different assets, (iii) is inconsistent with the PPA directive to the Department, and (iv) fails to identify what it is about annuities that warrants a special fiduciary standard of review.

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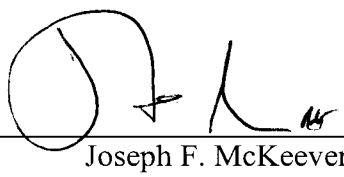
Thank you for your time and consideration of these matters. Please do not hesitate to contact the undersigned at (202) 347-2230 if you have any questions and, as mentioned above, we respectfully request an opportunity to meet with the Department to discuss these matters.

Sincerely,

by: 

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AXA Equitable Life Insurance Company, New York, NY
Commonwealth Annuity and Life Insurance Co.
(a Goldman Sachs Company), Southborough, MA
Conseco, Inc., Carmel, IN
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Great American Life Insurance Co., Cincinnati, OH
Guardian Insurance & Annuity Co., Inc, New York, NY
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Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
RiverSource Life Insurance Company (an
Ameriprise Financial Company), Minneapolis, MN
Sun Life of Canada, Wellesley Hills, MA
Symetra Financial, Bellevue, WA
USAA Life Insurance Company, San Antonio, TX

The Committee of Annuity Insurers was formed in 1982 to participate in the development of federal tax and securities law policies with respect to annuities. The member companies of the Committee represent over two-thirds of the annuity business in the United States.

10/29/2007