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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210-AB22

Amendment to Interpretive Bulletin 95-1

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Interim final rule.

SUMMARY: This document contains an interim final rule that amends Interpretive Bulletin 95-1 to limit the application of the Bulletin to the selection of annuity providers for defined benefit plans. This interim final rule implements section 625 of the Pension Protection Act of 2006. Also appearing in today's Federal Register is a proposed regulation, entitled "Selection of Annuity Providers for Individual Account Plans", which, in the form of a safe harbor, provides guidance concerning the fiduciary considerations attendant to the selection of annuity providers and contracts for purposes of benefit distributions from individual account plans. The amendment to Interpretive Bulletin 95-1, as well as the proposed safe harbor for annuity selections, will affect plan sponsors and fiduciaries of individual account plans, and the participants and beneficiaries covered by such plans.

DATES: This interim final rule is effective November 13, 2007. Written comments on the interim final rule should be received by the Department of Labor on or before November 13, 2007.

ADDRESSES: To facilitate the receipt and processing of comments, the Department encourages interested persons to submit their comments electronically to www.regulations.gov (follow instructions for submission of comments) or e-ORI@dol.gov. Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting comments on paper should send or deliver their comments to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Interpretive Bulletin 95-1. Comments received will be posted without change, including any personal information provided, to www.regulations.gov and <http://www.dol.gov/ebsa>, and also available for public inspection at the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC, 20210.

FOR FURTHER INFORMATION CONTACT: Janet A. Walters or Allison E. Wielobob, Office of Regulations and Interpretations, Employee

Benefits Security Administration, U.S. Department of Labor,
Washington, DC 20210, (202) 693-8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

In 1995, the Department issued Interpretive Bulletin 95-1 (29 CFR 2509.95-1) (the IB), providing guidance concerning the fiduciary standards under Part 4 of Title I of ERISA applicable to the selection of annuity providers for purposes of pension plan benefit distributions. In general, the IB makes clear that the selection of an annuity provider in connection with benefit distributions is a fiduciary act governed by the fiduciary standards of section 404(a)(1), including the duty to act prudently and solely in the interest of the plan's participants and beneficiaries. In this regard, the IB provides that plan fiduciaries must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interest of the participants and beneficiaries to do otherwise. The IB also provides that fiduciaries must conduct an objective, thorough and analytical search for purposes of identifying providers from which to purchase annuities and sets forth six factors that should be considered by fiduciaries in evaluating a provider's claims paying ability and creditworthiness.

In Advisory Opinion 2002-14A (Dec. 18, 2002) the Department expressed the view that the general fiduciary principles set forth in the IB with regard to the selection of annuity providers apply equally to defined benefit and defined contribution plans. The opinion recognized that, the selection of annuity providers by the fiduciary of a defined contribution plan would be governed by section 404(a)(1) and, therefore, such fiduciary, in evaluating claims paying ability and creditworthiness of an annuity provider, should take into account the six factors set forth in 29 CFR 2509.95-1(c).

During 2005, the ERISA Advisory Council created the Working Group on Retirement Distributions & Options to study, in part, the nature of the distribution options available to participants of defined contribution plans. In November 2005, after public hearings and testimony, the Advisory Council issued a report, entitled Report of the Working Group on Retirement Distributions & Options¹, concluding that many defined contribution plan distributions tend to be paid out in lump sums which "expose retirees to a wide range of risks including the possibility of outliving assets, investment losses, and inflation risk." The Advisory Council recommended that the Department revise Interpretive Bulletin 95-1 to facilitate the availability of annuity options in defined contribution plans.

The Pension Protection Act of 2006 (the PPA) (Pub. L. 109-280, 120 Stat. 780) was enacted on August 17, 2006. Section 625 of the PPA directs the Secretary to issue final regulations within one year of the date of enactment, clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan is not subject to the safest available annuity standard under Interpretive Bulletin 95-1 and is subject to all otherwise applicable fiduciary standards.

Consistent with section 625 of the PPA, the Department is amending Interpretive Bulletin 95-1 to limit its application only to defined

benefit plans. The Department is also proposing the adoption of a regulation, published in today's Federal Register, which, in the form of a safe harbor, provides guidance concerning the fiduciary considerations attendant to the selection of annuity providers and contracts for purposes of benefit distributions from individual account plans.

B. Overview of Interim Final Rule

In order to implement the Congressional mandate of section 625 of the PPA and to eliminate any confusion regarding the applicability of the fiduciary standards set forth in IB 95-1 to the selection of annuity providers for the purpose of benefit distributions from individual account plans, the Department is amending Interpretive Bulletin 95-1 to provide that Interpretive Bulletin 95-1 is applicable only to the selection of annuity providers for the purpose of benefit distributions from a defined benefit pension plan.

C. Good Cause Finding That Proposed Rulemaking Unnecessary

Rulemaking under section 553 of the Administrative Procedure Act (APA) ordinarily involves publication of a notice of proposed rulemaking in the Federal Register and the public is given an opportunity to comment on the proposed rule. The APA authorizes agencies to dispense with proposed rulemaking procedures, however, if they find both good cause that such procedures are impracticable, unnecessary, or contrary to the public interest, and incorporate a statement of the finding with the underlying reasons in the interim final rule issued.

In this case, the Department finds that it is unnecessary to undertake proposed rulemaking with regard to the amendment of Interpretive Bulletin 95-1. The Department believes such rulemaking is unnecessary because section 625 of the Pension Protection Act of 2006 specifically directs the Secretary to issue final regulations within one year clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan is not subject to the safest available annuity standard under the Interpretive Bulletin 95-1. The amendment to Interpretive Bulletin 95-1 contained in this document does nothing more than limit, consistent with the statutory directive, the application of the Bulletin to defined benefit plans, thereby establishing that the "safest available" standard does not apply to individual account plans. To avoid any confusion on the part of the regulated community, the amendment includes a reference to separate guidance for the selection of annuity providers for individual account plans.

For the foregoing reason, the Department finds that proposed rulemaking procedures are unnecessary and is publishing the rule as an interim final rule. Nevertheless, the Department is affording interested persons the opportunity to comment on the amendment. Because the Department exercised very limited discretion in implementing the directive contained in section 625 of the Pension Protection Act of 2006, the Department is limiting the comment period to 60 days.

D. Request for Comments

The Department invites comments from interested persons. To facilitate the receipt and processing of comments, EBSA encourages

interested persons to submit their comments electronically to www.regulations.gov (follow instructions for the submission of comments) or e-ORI@dol.gov. Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting comments on paper should send or deliver their comments to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Interpretive Bulletin 95-1. All comments will be available to the public, without charge, online at www.regulations.gov and <http://www.dol.gov/ebsa>, and at the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC, 20210 from 8 a.m. to 4:30 p.m. (Monday-Friday).

E. Effective Date

This interim final rule is effective 60 days after the date of publication in the Federal Register.

F. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ``significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ``significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ``economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. For purposes of Executive Order 12866, the Department has determined that it is appropriate to review the amendment contained in this document, which merely serves to make clear that the standards set forth in Interpretive Bulletin 95-1 no longer apply to individual account plans, in conjunction with the review of the proposed rule, also appearing in today's Federal Register, that establishes, in the form of safe harbor, standards for the selection of annuity providers and contracts by fiduciaries of individual account plans. As reflected in that analysis, the Department believes that these regulatory actions are not economically significant within the meaning of section 3(f)(1) the Executive Order. The actions, however, have been determined to be significant within the meaning of section 3(f)(4) of the Executive Order, and the Department accordingly provides an assessment of the potential costs and benefits. See notice of proposed rulemaking appearing in today's Federal Register entitled Selection of Annuity Providers for Individual Account Plans.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes

certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Because this rule is being issued as an interim final rule, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant impact on a substantial number of small businesses or conduct an initial regulatory flexibility analysis. Nevertheless, the Department has considered the likely impact of the interim rule on small entities in connection with its assessment under Executive Order 12866, described above, and believes this rule will not have a significant impact on a substantial number of small entities. See notice of proposed rulemaking appearing in today's Federal Register entitled Selection of Annuity Providers for Individual Account Plans.

Paperwork Reduction Act

This rulemaking is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 301 et seq.) because it does not contain "collection of information" requirements as defined in 44 U.S.C. 3502(3). Accordingly, this interim final rule is not being submitted to the OMB for review under the Paperwork Reduction Act.

Congressional Review Act

The interim final rule being issued here is subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and will be transmitted to Congress and the Comptroller General for review. The interim final rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it does not result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the interim final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding \$100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on

the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This interim final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the interim rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

For the reasons set forth in the preamble, the Department amends Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

PART 2509 - INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for part 2509 is revised to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75-10 and 2509.75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002. Sec. 2509.95-1 also issued under sec. 625, Pub. L. 109-280, 120 Stat. 780.

2. Section 2509.95-1 is amended by revising the section heading and paragraph (a) to read as follows:

§ 2509.95-1 Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104-1114, applicable to the selection of an annuity provider for the purpose of benefit distributions from a defined benefit pension plan (hereafter "pension plan") when the pension plan intends to transfer liability for benefits to an the annuity provider. For guidance applicable to the selection of an annuity provider for benefit distributions from an individual account plan see 29 CFR 2550.404a-4.

* * * * *

Signed at Washington, DC, this 31st day of August, 2007.

Bradford P. Campbell,

Assistant Secretary,

Employee Benefits Security Administration,

Department of Labor.

1 A copy of the Report can be found on the About EBSA page under the heading ERISA Advisory Council at http://www.dol.gov/ebsa/publications/AC_1105A_report.html.

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