

<< Electronic Public Inspection

Fr. Doc. E7-17743

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB19

Selection of Annuity Providers for Individual Account Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed regulation.

SUMMARY: This document contains a proposed regulation that, upon adoption, would establish a safe harbor for the selection of annuity providers for the purpose of benefit distributions from individual account plans covered by title I of the Employee Retirement Income Security Act (ERISA). Also appearing in today's Federal Register is an interim final rule amending Interpretive Bulletin 95-1 to limit the application of the Bulletin to the selection of annuity providers for defined benefit plans. The proposed regulation, upon adoption, will affect plan sponsors and fiduciaries of individual account plans, and the participants and beneficiaries covered by such plans.

DATES: Written comments on the proposed regulation 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: Annuity Regulation. 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).

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, also published in today's Federal Register, to limit its application to defined benefit plans.

Given that the fiduciary standards in Interpretive Bulletin 95-1 would not apply to the selection of an annuity contract as an optional form of distribution from an individual account plan, the Department is proposing the adoption of this regulation that, 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. An overview of the proposed regulation follows.

B. Overview of Proposal

Scope of the Proposal

Paragraph (a) of § 2550.404a-4 provides that the scope of the proposed regulation is to provide guidance concerning ERISA's fiduciary standards applicable to the selection of annuity providers for the purpose of benefit distributions from an individual account

plan and benefit distribution options made available to participants and beneficiaries under such plans. Paragraph (a) also includes a reference to § 2509.95-1 for guidance concerning the selection of annuity providers for defined benefit plans.

Application of General Fiduciary Standards

Paragraph (b) of § 2550.404a-4 provides that selecting an annuity provider in connection with a benefit distribution, or a benefit distribution option made available to plan participants and beneficiaries, is a fiduciary act governed by the fiduciary standards of section 404(a)(1) of ERISA, pursuant to which fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries. Section 404(a)(1)(A) provides that the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses. Section 404(a)(1)(B) requires a fiduciary to act 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.

Selection of Annuity Providers and Contracts

Pursuant to paragraph (c) of § 2550.404a-4, a fiduciary will have acted prudently in selecting an annuity provider and contract for purposes of benefit distributions, or benefit distribution options made available to participants and beneficiaries under the plan, if the conditions of that paragraph are satisfied. The specific conditions of this safe harbor are set forth in paragraph (c)(1)(A) - (F) of the proposal.

Consistent with the requirements applicable to the selection of service providers generally, paragraph (c)(1)(A) requires the fiduciary to engage in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. Any such process must avoid self dealing, conflicts of interest or other improper influence, and should, to the extent feasible, involve consideration of competing annuity providers.

Paragraph (c)(1)(B) requires that the fiduciary responsible for the selection of the annuity provider appropriately determine whether he or she has the expertise or knowledge to meaningfully evaluate the annuity provider consistent with the requirements of the regulation. In those instances where the fiduciary appropriately determines that he or she has such expertise or knowledge, the fiduciary is not required to engage an independent expert (i.e., an expert independent of the annuity provider) to evaluate the annuity provider.

Paragraph (c)(1)(C) requires that the fiduciary appropriately consider information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract. Paragraph (c)(1)(D) requires that the fiduciary appropriately consider the cost of the annuity contract in relation to the benefits and administrative services to be provided under the contract. Paragraph (c)(1)(E) requires that the fiduciary appropriately conclude that, at the time of the selection, the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in

relation to the benefits and services to be provided under the contract.

Paragraph (c)(1)(F) requires that, for annuity providers selected to provide multiple annuities over time, the fiduciary periodically review the appropriateness of the conclusion described in paragraph (c)(1)(E), taking into account the factors described in paragraph (c)(1)(C) and (D). However, paragraph (c)(1)(F) does not require the fiduciary to review the appropriateness of an annuity provider with respect to an annuity contract after it is purchased for an individual participant or beneficiary.

Paragraph (c)(2) provides additional guidance regarding how the fiduciary can meet the requirements of paragraphs (c)(1)(C) and (D). For example, paragraph (c)(2)(C) requires consideration of the annuity provider's experience and financial expertise. Paragraph (c)(2)(D) requires consideration of the annuity provider's level of capital, surplus, and reserves available to make payments under the annuity contract. Paragraph (c)(2)(E) requires that the fiduciary consider whether an annuity provider's rating (as determined by an appropriate rating service(s)) demonstrate or raise questions regarding the provider's ability to make future payments under the annuity contract. And, paragraph (c)(2)(G) requires that the fiduciary consider the availability of additional protections through state guaranty associations and the extent of their guarantees. In this regard, the type of information that the fiduciary should consider is information that is available to the public and easily accessible through such associations as well as state insurance departments. If known facts call into question the ability of a state association offering guarantees to meet its obligations under the guarantee, it would be incumbent on the fiduciary to weigh that information when selecting an annuity provider.

Lastly, paragraph (c)(2)(H) requires consideration of any other information that the fiduciary knows or should know would be relevant to an evaluation of paragraphs (c)(1)(C) and (D). Such information would include that information which may not otherwise be described in paragraph (c)(2) or information surrounding events which, because of timing, may not yet have been reflected in those factors. For example, if a fiduciary learned through public indicators, such as the news media, that a corporate event affecting an annuity provider could call into serious question the provider's ability to make future payments under its contracts, or if the provider publicly stated that it was unlikely to survive the event in a manner that would ensure its ability to meet its financial commitments, the fiduciary would have an obligation to consider that information in evaluating paragraphs (c)(1)(C) and (D).

C. Request for Comments

The Department invites comments from interested persons on all aspects of the proposed regulation. 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: Annuity Regulation. 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).

D. Effective Date

The Department proposes to make the regulation effective 60 days after the date of publication of the final rule in the Federal Register.

E. 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 proposed regulation contained in this document, which, upon adoption, will provide, in the form of a safe harbor, standards for the selection of annuity providers by fiduciaries of individual account plans, in conjunction with the amendment to Interpretive Bulletin 95-1, also appearing in today's Federal Register, that, consistent with Congressional intent, establishes that the standards of the Bulletin no longer apply to individual account plans. These regulatory actions together implement section 625 of the Pension Protection Act of 2006. Having considered these regulatory actions in the aggregate, the Department believes that these actions are not economically significant within the meaning of section 3(f)(1) of 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 the following assessment of the potential benefits and costs. As elaborated below, the Department believes that the benefits of the regulation will justify its costs.

There is growing concern that, with increases in life expectancy, many retirees may outlive their retirement savings. In this environment, annuities offer one means by which retirees may ensure a lifetime income.¹ While a number of possible factors may influence a plan sponsor's decision not to offer an annuity distribution option as part of its plan, an often cited factor is concern about the fiduciary liability attendant to selecting the "safest available" annuity, as required by Interpretive Bulletin 95-1.² The Department

believes that many of those plan sponsors that viewed fiduciary liability attendant to compliance with the "safest available" annuity standard as the primary impediment to including an annuity option in their plan will be more willing to consider the addition of such an option with the amendment of Interpretive Bulletin 95-1 and the establishment of fiduciary standards, in the form of a safe harbor, for the prudent selection of annuity providers for individual account plans. Providing such a safe harbor to plan sponsors is unlikely to discourage plans that currently offer an annuity option from continuing to do so, and it may encourage more plans to offer an annuity alternative. This will give more participants the opportunity to annuitize their retirement savings, while not impeding them from choosing other distribution options.

The proposed regulation could affect demand for annuities in two ways: by lowering the price of annuities, and by encouraging more plans to offer annuities by providing a safe harbor. Current research on annuities suggests that individual demand is largely price inelastic, which implies that a lower price would not result in a significant increase in individuals choosing an annuity. Holding the propensity of eligible individuals electing annuities constant but increasing the number of plans offering annuities, however, would result in an increase in the total number of individuals electing annuities.

The Department estimates that in response to the safe harbor, the share of participants offered an annuity option for their withdrawal would increase by 1 percentage point, from 25 to 26 percent,³ while the share of eligible participants electing an annuity would remain at 6 percent.⁴ The resulting total amount transferred into annuities by DC participants annually would be \$2.41 billion, \$93 million of which would be attributable to the regulation.⁵ While the estimated annual effect of this regulatory action is not considered "economically significant," it is sensitive to assumptions regarding average separation rates, election rates and account balances.⁶ The Department invites comments from interested persons on the appropriateness of these assumptions.

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. The Department has considered the likely impact of the proposed regulation 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 foregoing analysis.

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 proposed regulation is not being submitted to the OMB for review under the Paperwork Reduction Act.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the proposed regulation 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 proposed regulation 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 proposed regulation 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 2550

Annuities, Employee benefit plans, Fiduciaries, Pensions.

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

PART 2550 - RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135; sec. 657, Pub. L. 107-16, 115 Stat.38; and Secretary of Labor's Order No. 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b-1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c-1 also issued under 29 U.S.C. 1101. Sections 2550.404c-1 and 2550.404c-5 also issued under 29 U.S.C. 1104. Sec. 2550.407c-3 also issued under 29 U.S.C. 1107. Sec. 2550.408b-1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412-1 also issued under 29 U.S.C. 1112. Sec. 2550.404a-4 also issued under

sec. 625, Pub. L. 109-280, 120 Stat. 780.

2. Add § 2550.404a-4 to read as follows:

§ 2550.404a-4 Selection of annuity providers for individual account plans.

(a) Scope. This section provides guidance concerning the 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 an individual account plan or benefit distribution options made available to participants and beneficiaries under such a plan. For guidance concerning the selection of an annuity provider for defined benefit plans see 29 CFR 2509.95-1.

(b) In general. When an individual account plan purchases an annuity from an insurer as a distribution of benefits to a participant or beneficiary, the plan's liability for the payment of those benefits is transferred to the annuity provider. The selection of an annuity provider in connection with a benefit distribution, or a benefit distribution option made available to participants and beneficiaries under the plan, is governed by the fiduciary standards of section 404(a)(1) of ERISA. Pursuant to ERISA section 404(a)(1), fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries. Section 404(a)(1)(A) provides that the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses. In addition, section 404(a)(1)(B) requires a fiduciary to act 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.

(c) Selection of annuity providers and contracts. (1) With regard to a fiduciary's selection of an annuity provider for purposes of benefit distributions from an individual account plan or benefit distribution options made available to participants and beneficiaries under such a plan, the requirements of section 404(a)(1)(B) of ERISA are satisfied if the fiduciary:

(i) Engages in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities;

(ii) Appropriately determines either that the fiduciary had, at the time of the selection, the appropriate expertise to evaluate the selection or that the advice of a qualified, independent expert was necessary;

(iii) Gives appropriate consideration to information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract;

(iv) Appropriately considers the cost of the annuity contract in relation to the benefits and administrative services to be provided under such contract;

(v) Appropriately concludes that, at the time of the selection, the annuity provider is financially able to make all future payments

under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract; and

(vi) In the case of an annuity provider selected to provide multiple contracts over time, periodically reviews the appropriateness of the conclusion described in paragraph (c)(1)(v) of this section, taking into account the factors described in paragraph (c)(1)(iii) and (iv) of this section. For purposes of this paragraph, a fiduciary is not required to review the appropriateness of an annuity provider with respect to an annuity contract purchased for an individual participant or beneficiary.

(2) For purposes of paragraphs (c)(1)(iii) and (iv) of this section, a fiduciary shall consider information pertaining to the following:

(i) The ability of the annuity provider to administer the payments of benefits under the annuity to the participants and beneficiaries and to perform any other services in connection with the annuity, if applicable;

(ii) The cost of the annuity contract in relation to the benefits and administrative services to be provided under such contract, taking into account the amount and nature of any fees and commissions;

(iii) The annuity provider's experience and financial expertise in providing annuities of the type being selected or offered;

(iv) The annuity provider's level of capital, surplus and reserves available to make payments under the annuity contract;

(v) The annuity provider's ratings by insurance ratings services. Consideration should be given to whether an annuity provider's ratings demonstrate or raise questions regarding the provider's ability to make future payments under the annuity contract;

(vi) The structure of the annuity contract and benefit guarantees provided, and the use of separate accounts to underwrite the provider's benefit obligations ;

(vii) The availability and extent of additional protection through state guaranty associations ; and

(viii) Any other information that the fiduciary knows or should know would be relevant to an evaluation of paragraphs (c)(1)(iii) and (iv) of this section.

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

Bradford P. Campbell,

Assistant Secretary,

Employee Benefits Security Administration,

Department of Labor.

1 See GAO-03-810 Private Pensions: Participants Need Information on Risks They Face in Managing Pension Assets at and during Retirement (July 2003) at <http://www.gao.gov/htext/d03810.html>. Also see Report

of Working Group on Retirement Distributions & Options (November 2005), Advisory Council on Employee Welfare and Pension Benefit Plans, at http://www.dol.gov/ebsa/publications/AC_1105A_report.html.

2 Such factors may include burdens attendant to administering qualified joint and survivor annuity options and spousal consent requirements, complexity of communications, need for participant education, lack of participant interest. See GAO-03-810 Private Pensions: Participants Need Information on Risks They Face in Managing Pension Assets at and during Retirement (July 2003) at <http://www.gao.gov/htext/d03810.html>. Also see Report of Working Group on Retirement Distributions & Options (November 2005), Advisory Council on Employee Welfare and Pension Benefit Plans, at http://www.dol.gov/ebsa/publications/AC_1105A_report.html.

3 Form 5500 data reports the number of participants in a DC plan that use insurance for at least one method of benefit payouts. This information was used to estimate the share of participants currently offered an annuity option for withdrawal, 25 percent in 2003.

4 Hewitt Associates. "Survey Findings: Trends and Experiences in 401(k) Plans, 2005".

5 Estimate based on the average total balance of DC withdrawals as reported in Fidelity Investments', "Building Futures: How Workplace Savings are Shaping the Future of Retirement," A Report on Corporate Defined Contribution Plans: 2006.

6 The reported analysis used separation rates reported in, Poterba, James, Steven Venti and David A. Wise. "Demographic Change, Retirement Saving and Financial Market Returns: Part I," December 19, 2005. An alternative analysis, using withdrawal rates reported in Fidelity Investments', "Building Futures: How Workplace Savings are Shaping the Future of Retirement," A Report on Corporate Defined Contribution Plans: 2006 generated an increase of \$158 million.

21

[FR Doc. E7-17743 Filed 9-11-07; 8:45 am]

BILLING CODE 4510-29-P

<< [Electronic Public Inspection](#)