AMERICAN BENEFITS
COUNCIL

STATEMENT OF

JAY HAINES
ON BEHALF OF THE
AMERICAN BENEFITS COUNCIL

BEFORE THE

DEPARTMENT OF TREASURY
AND INTERNAL REVENUE SERVICE

HEARING ON PROPOSED REGULATIONS
RELATING TO LONGEVITY ANNUITY CONTACTS

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American Benefits Council 1501 M St. NW, Suite 600 Washington D.C. 20005

Good afternoon. My name is Jay Haines, and I am an employee benefits lawyer in the Legal Department of FMR LLC, the parent company of a group of financial services companies known as Fidelity Investments. My legal practice focuses on the Fidelity affiliates that provide recordkeeping, investment management, and trustee services to thousands of 401(k) and other employer sponsored defined contribution plans, covering millions of employees and their beneficiaries. Fidelity also offers various services to millions of IRA owners, including an Annuity Purchase Service that enables IRA investors to easily compare fixed-payment annuity products from a number of well-rated carriers.

I am testifying today on behalf of the American Benefits Council, of which Fidelity is a Board member company. The Council's members are primarily major US employers that provide employee benefits to active and retired workers and that do business across the country. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

We appreciate this opportunity to provide comments to the Department of Treasury and the Internal Revenue Service on their proposed rulemaking relating to the purchase of longevity annuity contracts under tax qualified defined contribution plans, individual retirement accounts or annuities, section 403(b) plans, and eligible governmental plans. We want to commend Treasury for focusing on the distribution phase of retirement planning and express our thanks for this guidance package which is a very promising start to what we understand will be continuing efforts in this area. The Council supports efforts to help Americans save sufficiently for retirement and to manage those assets effectively in retirement. In short, we want to do what's best for participants.

Today, I want to make three specific points with respect to the proposed guidance, each of which comes from a desire on the part of the Council to make Treasury's thoughtful proposal with respect to longevity annuities even more workable, accessible and attractive from the point of view of employer plan sponsors and their participants.

First, the Council urges Treasury to develop a correction program through which inadvertent errors can be appropriately corrected without loss of the benefits offered by qualified longevity annuity contracts or QLACs. As you are aware, in order to obtain the benefits of a QLAC, a number of requirements must be met under the proposed regulation, including, for example, ensuring that premiums paid for the annuity contract do not exceed certain percentage and dollar limits. We understand these requirements as being intended to ensure that Code Section 401(a)(9)'s minimum distribution requirements are not circumvented, and they appear to be well designed to meet that objective.

However, the limits are expressed in terms of mathematical formulas that are in turn dependent upon determining account balances as of the date a premium is paid. We anticipate that, despite best efforts and intentions, mistakes will be made in performing the calculations or in determining the precise account balance on a particular date; mistakes which could cause the premium limit to be exceeded. For example, a participant might calculate a premium limit of $25,000 based upon an account balance as of a specific date of $100,000. If the purchase is inadvertently delayed by one day and the account balance decreases but the premium limit is not recalculated, the $25,000 premium would exceed the premium limit under the proposed rule and the purchased longevity annuity would be disqualified.

Participants should not be penalized for such inadvertent processing errors. Accordingly, the Council recommends that a correction program be developed that would enable participants to avoid disqualifying the entire annuity contract from QLAC status under appropriate circumstances. For example, the correction program could permit QLAC treatment for the portion of the longevity annuity that meets the limitations (instead of disqualifying the entire contract), provided the issuer of the annuity returned the excess premium within a certain time period (in exchange of course for a corresponding reduction in the amount of the annuity stream) and the excess premium was included in the MRD calculation. In this case, it would also be very helpful for guidance to clarify that annuity issuers have an obligation to return excess premiums in exchange for corresponding reductions in annuity value upon a valid request.

This is just by way of example. Other inadvertent errors may arise as well, such as where a premium is inadvertently paid after the participant has reached the age limit, due, for example, to an incorrect date of birth having been recorded in the plan's records. In any event, we envision that a correction program could be established and developed over time and based on experience through the existing EPCRS system or similar program. Without any such program in place, however, even inadvertent, minor mistakes would appear to result in disqualification of a QLAC, leaving the participant with all the risks and difficulties of meeting the MRD rules while holding an ordinary annuity contract in his or her plan account or IRA. We fear that those risks will prove too high for many and could significantly discourage plan sponsors from making QLACs available and participants and IRA owners from purchasing them.

The second recommendation we would like to make today is that the proposal be modified to permit employer plan participants to purchase a QLAC as an IRA annuity rollover, without forcing them to roll over their entire plan account balance to do so. Let me explain what I mean by that. The proposal currently applies the 25 percent limit to employer plan balances separately from IRA balances. If a participant in an employer plan with a $100,000 account balance wishes to purchase a QLAC but, for example, his or her employer plan does not offer a QLAC, he or she may wish to purchase a QLAC through an IRA. To purchase a QLAC in an IRA with a $25,000 premium, however, he or she would have to roll over his or her entire plan balance to the IRA. He or she could not roll over $25,000 to the IRA and use the entire amount to purchase a QLAC in the IRA. There does not appear to be any policy reason for requiring a participant to withdraw his or her entire account balance to an IRA under these circumstances and in fact it would seem to run counter to anti-leakage concerns.

We believe this can be solved by clarifying that the 25 percent limit applies to the plan balance – rather than the IRA balance – in these circumstances. We think this would give participants in plans that do not offer QLACs the same opportunities as participants in plans that do offer QLACs to use up to 25 percent of their account balance to purchase a QLAC and to keep the remainder of their account in their employer plan.

Finally, the third point I wanted to convey today on the Council's behalf recognizes that as employers begin to offer QLACs in their plans, some will naturally decide to change QLAC providers as markets, products and circumstances change. Indeed, many will feel that they have a fiduciary responsibility under ERISA to do so. Similarly, employers may change recordkeeping platforms or the like and find that such a change requires them to select a new annuity provider because their current annuity provider is not available through the new platform. At the same time, some participants will purchase QLACs prior to their retirement date, for example to lock in higher deferred payments at a younger age. It is not clear, however, what would happen under the proposal if an employer changes a QLAC provider after it has issued QLACs that are held by participants under the plan.

We recommend that under these circumstances the regulation should clarify that the change in annuity service providers would not be an impermissible forfeiture under Code Section 411 or a violation of the anti-cutback rules of Code Section 411(d)(6). Moreover, we recommend that the proposal be enhanced to include guidance that would allow the participant to keep the QLAC that he or she had purchased prior to its becoming unavailable under the plan. For example, perhaps guidance could provide that a plan could permit the rollover of a QLAC to an IRA under those circumstances, regardless of whether the plan permits other distributions at that time.

Each of these suggestions – create a correction program; facilitate the purchase of QLACs outside of a plan without leakage; and accommodate changing QLAC options within plans over time – are intended to make QLACs more workable and attractive as a practical matter from the point of view of employer plan sponsors and their participants. This is not a comprehensive list. In the Council's comment letter, which it submitted on May 3, for example, we also point out that it would be useful to obtain guidance on how the QJSA rules interact with previously purchased QLACs when marital status changes. For example, if a 60 year-old single person purchases a QLAC, what happens under the QJSA rules if the participant marries at age 65 or 75? In addition, the Council recommends you consider applying the QLAC rules to cash balance plans since benefits from those plans are often paid in a lump sum payment.

But we believe that these suggestions if adopted and implemented would go a long way to addressing certain practical considerations that will face plan sponsors and participants once the proposal becomes final.

In closing, I would like to make one final, broader point. As you know, the required minimum distribution rules under Section 401(a)(9) are complex and any change to those rules tends to add to that complexity. We think that the proposal does a nice job of minimizing and avoiding complexity given the context in which these rules are being implemented. As you consider our suggestions today and the many other suggestions and comments you receive, we ask that you not lose sight of the need to ensure that the final rules be as simple and flexible as they can be under the circumstances and consistent with the Code's objectives. Complexity can be a strong deterrent to employers and participants alike in making use of a given set of voluntary rules, no matter how beneficial they may ultimately be. Similarly, rules that may become too rigid in application and that do not provide the flexibility needed to address honest mistakes and naturally changing circumstances can be equally discouraging to those who are charged with complying with them.

Thank you for your time. I would be happy to respond to any questions you may have.