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**Re: Request for Information Regarding Lifetime Income Options (RIN 1210-AB33)**

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to comment on the Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans (RIN 1210-AB33). ASPPA is a national organization of more than 7,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

In responding to the Request for Information, we have provided comments and suggestions on only those questions for which the expertise and experience of our members is relevant and as to which we felt we could provide meaningful assistance to the Department of Labor and the Department of the Treasury (the "Agencies"). In addition, for many questions that have multiple subparts, we have added letter designations to the subparts and have similarly labeled our responses.

## General

### 1. From the standpoint of plan participants, what are the advantages and disadvantages for participants of receiving some or all of their benefits in the form of lifetime payments?

We believe that the advantages are the following:

- Reduced longevity risk for participants
- Investment risk for participants is reduced or eliminated depending on the lifetime income product
- Depending on the product, there is a reduced likelihood (or even elimination of the possibility) of prematurely spending a lump sum on current consumption

We believe the disadvantages are the following:

- For guaranteed lifetime income products generally, there is a level of complexity; that is, it may be difficult to understand the options and the benefits.
- For traditional annuity products, there are a number of issues, including:
  - Less flexibility if annuitization is involved (might be perfectly appropriate to spend down some savings to pay off debt, or to travel, for example, at retirement)
  - Loss of investment opportunities and the loss of potential upside from investment gains
  - The potential loss of the principal amount due to premature death
- For both types of products there are cost factors (*i.e.*, both entail a cost for the guarantee). There is also an inflation risk, in that the monthly payment is generally fixed and is not adjusted for inflation.

### 2. What explains the low usage rate of lifetime income arrangements? Is it the result of a market failure or other factors (e.g., costs, counterparty risk of seller insolvency, etc.)? b) Are there steps that the Agencies could or should take to overcome at least some of the concerns that keep plan participants from requesting or electing lifetime income?

a) We believe there a number of factors for the low usage rate of these arrangements. One is that participants have been acclimated to taking a lump sum at retirement in order to retain control over their own funds. This may in part be a result of the emphasis placed in 401(k) plans on participants exercising control over their own accounts. In addition, we believe the following factors also play a role:

- Lack of marketing emphasis
- Lack of product development
- Lack of education at all levels of the market, including plan sponsors, consultants and participants

- Lack of broad market acceptance of lifetime income products in the adviser community
- Regulatory complexities and hurdles – *e.g.*, disclosure obligations, fiduciary concerns, etc.

b) We believe the Agencies need to address both fiduciary issues and plan qualification issues and remove regulatory impediments (described in more detail in response to Question 25) to facilitate the educational process required to change the behavior of plan participants. Plan sponsors, providers, and investment professionals should be encouraged to educate participants on the benefits and the drawbacks of electing lifetime income.

Additionally, we believe the Agencies should consider the importance of portability of plan assets for plan participants that elect lifetime income solutions within plans. Plan participants should be afforded the option of keeping their lifetime income vehicles in force in the event that the plan sponsor changes providers or undergoes a merger or plan termination. A new distributable event should be created for this purpose. For further information on the latter suggestion, see the response to Question 14.

**3. What types of lifetime income are currently available to participants directly from plans (in-plan options), such as payments from trust assets held under a defined benefit plan and annuity payments from insurance contracts held under a defined contribution or defined benefit plan?**

In our experience, most defined contribution plans, especially 401(k) plans, only offer lump sum distribution options, though some do offer annuity and periodic distribution options. That said, in terms of products in the marketplace, the following are available today:

- Joint and Survivor Annuities (required for pension plans)
- Installments paid out for a specified period of time
- Annuity at retirement
- Guaranteed Minimum Withdrawal Benefit (GMWB) features
- Guaranteed Minimum Income Benefit (GMIB) features

While some plans do have different combinations of these distribution options, the vast majority of participants elect lump sum distributions with systematic withdrawals a distant second.

**4. To what extent are the lifetime income options referenced in question 3 provided at retirement or other termination of employment as opposed to being offered incrementally during the accumulation phase, as contributions are made. How much are such incremental or accumulating annuity arrangements structured?**

Based on the experience of our membership, most defined contribution plans do not offer qualified joint and survivor (“QJSA”) options due to the perceived administrative burdens coupled with the historical lack of interest as participants rarely select it as a form of distribution. Studies have shown that less than 10% of participants that have the option of taking an annuity payment do so. (Hewitt Associates, “The Survey Findings: Trends and Experience in 401(k) Plans,” 2007) Product providers are only recently incorporating lifetime income options during the accumulation phase as demand has risen in the wake of the recent market downturns.

**5. To what extent are 401(k) and other defined contribution plan sponsors using employer matching contributions or employer non-elective contributions to fund lifetime income? To what extent are participants offered a choice regarding such use of employer contributions, including by default or otherwise?**

We do not see many plans offering the opportunity for participants to fund for lifetime income, regardless of the source of funds and regardless of whether the opportunity is included in the plan by default or otherwise. In our experience, if participants have the opportunity to self-direct their accounts, that opportunity generally applies to all accounts in the plan, and employers do not differentiate between elective deferrals, matching contributions or employer non-elective contributions for this purpose. Again, however, because the availability of a lifetime income option is not common, there is no meaningful differentiation among the sources of funds used to purchase the option.

**6. What types of lifetime income or other arrangements designed to provide a stream of income after retirement are available to individuals who have already received distributions from their plans, such as IRA products, and how are such arrangements being structured? Are there annuity products under which plan accumulations can be rolled over to an individual retirement annuity of the same issuer to retain the annuity purchase rights that were available under the plan?**

We are aware of the following types of products designed to provide a stream of income after retirement currently available in the marketplace:

- Variable annuities with living benefit riders (GMIB, GMWB). These products are offered for a period certain, for the lifetime of the participant or on a joint and survivor basis
- SPIA (Single Premium Immediate Annuity)
- “Longevity Insurance,” which is a deferred annuity that begins payment at the attainment of a certain age, such as age 85. It is a relatively new product and not yet widely available in plans.
- Rolling annuitization strategies where, for example, a five-year period certain SPIA is purchased every five years to provide recurring income

- Traditional asset allocation strategies, such as withdrawing a fixed percentage of the account balance (4% - 4.5%, for example) per year. This is the typical approach used in guaranteed minimum withdrawal benefit products.
- Asset-Liability Management – *e.g.*, investing a portion of a participant’s account (or IRA) in a fixed term annuity to pay current living expenses, a portion in relatively stable investments to preserve capital and a portion in more volatile investments (typically, equities) to provide the potential for greater return. This approach requires fairly sophisticated financial planning and tends to be more costly than other alternatives. In our experience, this is rarely if ever available as an in-plan option.

We are aware of a few companies that are setting up IRA rollovers that allow the participant to retain the annuity purchase rights available under the plan.

**7. What product features have a significant impact on the cost of providing lifetime income or other arrangements designed to provide a stream of income after retirement, such as features that provide participants with the option of lifetime payments while retaining the flexibility to accelerate distributions if needed?**

- Level of Benefits. Some hybrid products include “step up” provisions that increase both the amount of monthly income guarantees and the cost of those guarantees.
- Single Life, Period Certain or Joint Life Expectancy Options. If available, joint life and period-certain guarantees increase the cost of the income benefit.
- Investment Alternatives. Many hybrid products restrict the investments available when a lifetime income option is selected. Available options may have differing expenses than other investment alternatives.
- Income guarantees are generally available only within insurance company products. Such products contain expenses that are oftentimes greater than non-insurance investments like mutual funds. Factors such as commissions, mortality and expense fees, contract fees, administrative fees, sub-account expenses, costs of riders and surrender charges all have an impact on the cost of buying these lifetime income products.

Many of these expenses are tied to the level of the guaranteed payment or asset values and may change over time.

**8. What are the advantages and disadvantages for participants of selecting lifetime income payments through a plan (in-plan option) as opposed to outside a plan (e.g., after a distribution or rollover)?**

The advantages and disadvantages of an in-plan option vs. outside-the-plan options may vary by product type, as mentioned in our response to Question 1. With this in mind, we believe that the advantages of an in-plan option are the following:

- Institutional pricing in the plan vs. retail pricing of products available to the participants outside of the plan (especially for larger plans)
- Plan sponsors may be more sophisticated buyers in assessing the benefits and costs of the products than individual participants
- There is a potential for greater retirement income awareness for participants within plan through education offered by the plan and benefit statements with hypothetical projected benefits, etc.
- Under a lifetime income building framework, participants could incrementally build a retirement income base as they contribute to their defined contribution plans over time rather than having to make a point in time decision at retirement. This would have the dual benefit of creating an income mindset for participants (rather than simply evaluating their account balances) and it would allow the income stream to be purchased over multiple business cycles at varying market interest rates similar to dollar cost averaging. When interest rates are low, annuities are relatively expensive, and when interest rates are high, they are relatively cheap.
- The fiduciary standard is applicable to selection of the benefit provider, so that participants presumably receive greater protections through the applicability of these standards.

We believe the disadvantages are the following:

- Lack of flexibility and choice
- Lack of portability
- Credit risk could be greater for an in-plan distribution strategy (potential for underfunding or employer bankruptcy).
- Costs to plan (annual Form 5500 independent audits, other plan administration fees)
- Inability to combine all retirement savings in one place

**9. What are the advantages and disadvantages from the standpoint of the plan sponsor of providing an in-plan option for lifetime income as opposed to leaving to participants the task of securing a lifetime income vehicle after a plan distribution?**

We believe the advantages from the standpoint of the plan sponsor are the following:

- Having an in-plan option may satisfy employee needs more effectively than leaving the participants to their own efforts to secure such a vehicle
- An in-plan option should result in lower cost to participants
- By offering an in-plan option, the plan sponsor is also able to provide employees with information regarding the product
- An in-plan option creates more opportunities for making investment advice and rollover assistance available to the participants.

The disadvantages we perceive are the following:

- The plan sponsor has fiduciary liability exposure for the selection of the provider and the product. For this reason we suggest that the DOL modify or adopt a separate fiduciary safe harbor related to the selection of lifetime income products and providers. For further information on this issue, see our response to Question 32.
- To the extent the guarantee is not portable, participant accounts may remain in the plan, which increases fiduciary exposure with respect to terminated employees (which plan sponsors generally wish to avoid) and may increase plan costs. For example, if participant accounts remain in the plan, the participant count can more easily exceed 100, resulting in mandatory audit of the Form 5500
- The lack of portability of some products creates issues for the sponsor (as well as the participants) in the event of a change in vendors, plan mergers and the like
- There is an increased employee education burden for the plan sponsor

**10. How commonly do plan sponsors offer participants the explicit choice of using a portion of their account balances to purchase a lifetime annuity, while leaving the rest in the plan or taking it as a lump sum distribution or a series of ad hoc distributions? b) Why do some plan sponsors make this partial annuity option available while others do not? c) Would expanded offering of such partial annuity options – or particular ways of presenting or framing such choices to participants – be desirable and would this likely make a difference in whether participants select a lifetime annuity option?**

- a) We do not see this as an option in plans, in our experience.
- b) See disadvantages under our response to Question 9.
- c) It may be desirable from the employee’s perspective. Offering more options to employees could make a difference but it would be difficult to quantify. However, adding more options will complicate plan administration and potentially overwhelm employees unless there is an effective means of educating them on the choices available.

**11. Various ‘behavioral’ strategies for encouraging greater use of lifetime income have been implemented or suggested based on evidence or assumptions concerning common participant behavior patterns and motivations. These strategies have included the use of default or automatic arrangements (similar to automatic enrollment in 401(k) plans) and a focus on other ways in which choices are structured or presented to participants, including efforts to mitigate “all or nothing” choices by offering lifetime income on a partial, gradual, or trial basis and exploring different ways to explain its advantages and disadvantages. a) To what extent are these or other behavioral strategies being used or viewed as promising means of encouraging more lifetime income? b) Can or should the 401(k) rules, other plan qualification rules, or ERISA rules be modified,**

**or their application clarified, to facilitate the use of behavioral strategies in this context?**

- a) These options are not commonly available in the ‘small’ plan arena.
- b) Regarding modification of the 401(k) rules, we have the following observations:
  - If automatic enrollment to a lifetime income option is imposed, there may be expenses to get out of or switch investment options, though many providers of guaranteed minimum withdrawal benefit products are now offering products that allow participants to switch out of the product with no penalty.
  - Products are not yet available to avoid an exit penalty which acts to the detriment of the employee.
  - If an employee takes a lump sum option at retirement or termination of employment, the employee would have paid extra fees for options that ultimately were not utilized.
  - Fiduciary relief for the automatic enrollment would be needed.

**12. How should participants determine what portion (if any) of their account balance to annuitize? Should that portion be based on basic or necessary expenses in retirement?**

This will be up to the unique needs and circumstances of each employee, especially with respect to other employer plans, outside assets, family obligations, health issues and the like. We believe it would be difficult to design products or programs to address these issues except in the most generic way.

**13. Should some form of lifetime income distribution option be required for defined contribution plans (in addition to money purchase pension plans)? If so, should that option be the default distribution option, and should it apply to the entire account balance? To what extent would such a requirement encourage or discourage plan sponsorship?**

- We have concerns about the administrative cost and complexity involved with offering additional forms of distribution, particularly in the small plan environment. We therefore recommend that if the Agencies conclude that inclusion of a lifetime income distribution option in defined contribution plans should be encouraged, it should not in any case be mandated. For example, defined contribution plans could be encouraged to include lifetime income options by permitting a life annuity option without triggering the QJSA requirements and the accompanying administrative burden, or by permitting electronic consent if a QJSA is not mandatory.
- We do not recommend requiring that a lifetime income option be the default distribution option for defined contribution plans. Lifetime income distributions have been the default in pension plans for many years, and the additional cost and complexity have not resulted in substantial take-up of lifetime income options. We



submit that it would be inappropriate to add this burden to defined contribution plans that are not already subject to the QJSA rules.

- Further, the retirement income needs of participants are unique to each person so a blanket solution is unlikely to meet the needs of all participants. Many of the retirement income products available today do not offer the flexibility of transferring to another investment without penalty, so defaulted participants would be at risk of being stuck in an unsuitable investment.
- In the event that future product innovation and regulatory changes makes these products less expensive, easier to administer, and more flexible, the Agencies may wish to reconsider mandating the availability of a lifetime income option in defined contribution plans.

**14. What are the impediments to plan sponsors' including lifetime income options in their plans, e.g., 401(k) or other qualification rules, other federal or state laws, cost, potential liability, concern about counterparty risk, complexity of products, lack of participant demand?**

Key impediments to plan sponsors are lack of products that are compatible with defined contribution plans, unfamiliarity with the products that do exist, concerns with compliance risk under plan qualification rules, concerns with fiduciary risk in selecting and monitoring these products as well as with educating participants about them, and concerns with lack of product portability. The Agencies can address some of these concerns by providing guidance on the following issues:

- Clarifying safe harbor standards for plan fiduciaries to follow when selecting and monitoring lifetime income products.
- Expanding the guidance on what constitutes education versus fiduciary advice so that plan sponsors are comfortable educating participants about these products.
- Amending the joint and survivor annuity rules such that lifetime income products meeting certain criteria are not “life annuities” triggering application of the spousal annuity rules.
- To the extent necessary, harmonizing the required minimum distribution rules with product features in lifetime income products.
- Addressing portability concerns by 1) clarifying the standards a plan fiduciary should follow when evaluating portability at the time of purchase, as well as when evaluating the impact on individual participants of a change in vendors that results in the loss of investment benefits, and/or 2) allowing participants to rollover the portion of their account invested in a lifetime income product in circumstances where benefits or rights of the product will otherwise be lost due to a vendor change.

**15. What are the advantages and disadvantages of approaches that combine annuities with other products (reverse mortgages, long term care insurance), and how prevalent are these combined products in the marketplace?**

We are not aware of products that combine annuities with the types of investment products described above and believe that any such combination would be too complicated for plan sponsors and participants to understand.

## 16. OMITTED

### Participant Education

*The Department of Labor issued Interpretive Bulletin 96-1 (29 CFR 2509.96-1) to clarify that the provision of investment education, as described in the Bulletin, will not be considered the provision of “investment advice” which would give rise to fiduciary status and potential liability under ERISA for plan participants’ and beneficiaries’ investment decisions.*

## 17. What information (e.g., fees, risks, etc.) do plan participants need to make informed decisions regarding whether to select lifetime income or other arrangements designed to provide a stream of income after retirement? When and how (i.e., in what form) should it be provided? What information currently is provided to participants, who typically provides it, and when and how is it provided to them?

With respect to in-plan options, participants are typically offered only one lifetime income investment product selected by a plan fiduciary so the information they need is limited to information that is relevant to the decision of whether, and to what extent, they should invest in that product. With respect to out-of-plan options, participants need the same information as they do for in-plan options, but they also need to understand information relevant to the selection of the product itself.

In order to make informed investment decisions with respect to in-plan options, participants need the following basic information (not all features are relevant to all products):

- A general explanation of how lifetime income products work
- General guidance on how to calculate lifetime income needs
- How lifetime income payments are calculated in the product
- Events that impact the amount of lifetime income payments
- The extent to which investors remain exposed to market volatility – up or down
- The availability of withdrawals from the account at various stages
- The degree of control participants have over the account at various stages
- Information about the underlying investments
- Full disclosure of any fees they will pay related to the investment
- Any restrictions or limitations on the investment
- Distribution methods available

We believe that all of the information described above is important for participants to receive when making decisions about investing in a lifetime income product. Participants should receive this type of information at the time they are making their initial investment decision. Participants should also receive information at all “decision points” relative to the particular product. For example, if they are electing to take a withdrawal from a lifetime income product that will result in a reduced amount of guaranteed income payment; they should receive notice to that effect. Similarly, if there is a guarantee fee or other fee that will be triggered by a date or action, participants should be notified of the application of the fee near the time it is scheduled to commence. Finally, as participants near the date they will be eligible to receive guaranteed payments; they should receive information regarding how the timing of beginning withdrawals will impact the amount of lifetime income payments.

With respect to out-of-plan options selected by the participant, information regarding the issuer of the option should also be reviewed. Participants will generally need the help of an investment professional when reviewing out-of-plan options that are not pre-selected by their employer.

There should be flexibility in terms of the manner in which information is provided to meet the needs of the relevant employee population, but computer modeling tools are essential for planning with these products and should be available to all participants.

**18. Is there a need for guidance, regulatory or otherwise, regarding the extent to which plan assets can be used to pay for providing information to help participants make informed decisions regarding whether to select lifetime income or other arrangements designed to provide a stream of income after retirement, either via an in-plan or out-of-plan option?**

The general guidance on when plan assets can be used to pay for educational expenses is fairly clear. Having stated that, plan fees have received an enormous amount of attention in recent years, and this is an area of great concern to plan fiduciaries. As a result, additional clarity may be helpful, and it may be most useful if included in the fiduciary safe harbor on what constitutes education versus advice. Clarity is particularly necessary in the context of discussing out-of-plan options. Any guidance should be clear about what types of help can be offered in the context of education, but should be flexible in accommodating various methods for providing the education and the people or entities providing it.

**19. What specific legal concerns do plan sponsors have about educating participants as to the advantages and disadvantages of lifetime income or other arrangements designed to provide a stream of income after retirement? What actions, regulatory or otherwise, could the Agencies take to address such concerns?**

Plan sponsors, particularly in the small employer market, are concerned that if they provide education about a specific product they will increase their exposure to fiduciary

risk. In order to address this concern it would be helpful to expand Interpretive Bulletin 96-1, or to provide separate guidance relative to educating participants about lifetime income products. The guidance should allow plan sponsors or service providers to provide general information such as life expectancies, historic investment returns, general features of guarantees and annuities, the impact of an investment loss at or near retirement on retirement income, simulated withdrawal rates, etc. It should also allow for information about general features of annuities or other lifetime income products. Finally, since there is typically only one lifetime income investment option available in a plan, the guidance should allow for a discussion of specific product features as discussed more fully in response to Question 18.

It would also be helpful for the safe harbor to clarify that plan participants can be given the tools and information necessary for them to individualize their investment decision as long as the educator does not recommend any particular investment or level of investment in the lifetime income product. Investing in lifetime income products requires a level of individualized investment planning and analysis beyond what is required for a mutual fund investment and plan sponsors should be encouraged to provide this help as long as they are not making specific investment recommendations.

We believe it is critical for the Agencies to provide this guidance and protection. These products are unfamiliar to many small plan sponsors and require a level of long term commitment by participant investors that is not present in the investment products available in most 401(k) plans today. Plan sponsors will be reluctant to add these products if they do not believe they can help participants make well informed decisions without taking on additional fiduciary risk.

We also note that current efforts to educate participants on the tax effects of distribution through the IRC §402(f) notice and on options regarding distributions from a pension plan may lose their effectiveness because of the length and complexity of the documents. Admittedly, the issues are complex, but it would be most helpful to participants if the Agencies, in conjunction with the private sector, could work on simplifying the disclosures to make them more understandable to the average participant. Otherwise, we are concerned that participants may be implicitly encouraged to elect a lump sum (as they may be now in the case of pension distributions) because lump sum distributions are easier to understand.

**20. To what extent should plans be encouraged to provide or promote education about the advantages and disadvantages of lifetime annuities or similar lifetime income products, and what guidance would be helpful to accomplish this?**

For most plan participants, their retirement plan benefit and their Social Security payments will be their sole sources of retirement income. In the current environment, it is our experience that participants do not calculate what they need for retirement and compare it to what they will receive from Social Security. In addition, they tend to think of their retirement account as a source for lump sum withdrawals rather than as a source

for lifetime income payments. It is critical that we start now to change this way of thinking and get participants to start planning more realistically for retirement and confronting the possibility that they may outlive their assets. Providing education about lifetime income products and how the future might look different with or without such a product is an essential part of making this change and should be strongly encouraged. Guidance that would help facilitate this is described in more detail in Question 19.

## **Disclosing the Income Stream that can be provided from an Account Balance**

### **21. Should an individual benefit statement present the participant's accrued benefits as a lifetime income stream of payments in addition to presenting the benefits as an account balance?**

ASPPA is supportive of efforts to help participants understand the true retirement value of their accounts. Providing this information could be a useful incentive to participants to encourage greater savings. Any such effort needs to be both meaningful and cost effective, not further increasing the cost burden of plan administration. There are also concerns about the potential liability to plan fiduciaries for distributing information to plan participants who may place too much reliance on a projection that may ultimately not be accurate.

We propose that any such mandated benefit statement requirement be provided under a fiduciary safe harbor. The safe harbor should include a simple set of core assumptions and disclose the assumptions and techniques on the statement, which would be uniform for all plans subject to this requirement. This uniformity would enable a meaningful comparison that would not vary as the participant changes employers, and would facilitate financial planning for families and couples who rely upon more than one retirement plan.

It may be useful as well for the Agencies to maintain a set of calculators on their websites, which could also provide valuable information about annuities.

### **22. If the answer to question 21 is yes, how should a lifetime stream of income payments be expressed on the benefit statement? For example, should payments be expressed as if they are to begin immediately or at specified retirement ages? Should benefit amounts be projected to a future retirement age based on the assumption of continued contributions? Should lifetime income payments be expressed in the form of monthly or annual payments? Should lifetime income payments of a married participant be expressed as a single-life annuity payable to the participant or a joint and survivor-type annuity, or both?**

We recommend that the benefit be stated as a single life benefit, provided in two different ways. The first is as a monthly annuity benefit based upon what the current account balance would purchase at normal retirement age, using standardized assumptions. The second is using a projected benefit, based upon the current account balance with

standardized assumptions related to the growth of the account balance, including additional contributions, through the assumed retirement age. It would be useful for a fiduciary safe harbor to be established which would provide the standardized assumptions. We recommend that the number and type of alternatives be limited for the sake of simplicity, with a proviso that there are other alternatives and include directions to participants on how to obtain information about them.

23. **If the answer to question 21 is yes, what actuarial or other assumptions (e.g. mortality, interest, etc.) would be needed in order to state accrued benefits as a lifetime stream of payments? b) If benefit payments are to commence at some date in the future, what interest rates (e.g., deferred insurance annuity rates) and other assumptions should be applied? c) Should an expense load be reflected? d) Are there any authoritative tools or sources (online or otherwise) that plans should or could use for conversion purposes, or would the plan need to hire an actuary? e) Should caveats be required so that participants understand that lifetime income payments are merely estimates for illustrative purposes? f) Should the assumptions underlying the presentation of accrued benefits as a lifetime income stream of payment be disclosed to participants? g) Should the assumptions used to convert accounts into a lifetime stream of income payments be dictated by regulation, or should the Department issue assumptions that plan sponsors could rely upon as safe harbors?**

a) Actuarial or other assumptions would include mortality, interest, retirement age, and expense load. In addition, the amount available (*e.g.*, \$100,000 versus \$1,000,000) will affect what types of products will be available and their expense loads. Also, whether the annuity will be provided in the plan or outside of the plan will affect the calculation.

b) For deferred benefits, currently available deferred insurance rates, including current interest, mortality, etc. would be necessary. For a comparison to defined benefit plans, it would be helpful to do both an accrued benefit calculation (payable at normal retirement date) versus a projected benefit calculation. The accrued benefit would be based on the current account balance, without regard to future contributions. The projected benefit would add in future contributions. The simplest to program would take the current year contributions and assume they are continued to normal retirement date, however adequate disclosure that future contributions are not by any means guaranteed would be absolutely necessary.

The Agencies should establish “standard assumptions” as a safe harbor that could be utilized. The employee benefit statement should contain a disclaimer that the information is based on assumptions that may or may not prove to be accurate. If the plan provides a specific product, the insurance company product rates could be utilized (again with any appropriate disclaimer).

c) Yes, expense loads should be reflected.

- d) There are no authoritative tools that we are aware of. A possible source, PBGC rates, with an added expense load. The PBGC publishes rates monthly to value immediate and deferred annuities. These rates reflect group annuity insurance rates, so will be higher than rates that will be available to small employers.
- e) Yes, in our view it would be essential to include a caveat that the lifetime income payments are merely an estimate.
- f) Yes, disclosure of the assumptions used for the calculation would be essential.
- g) Safe harbor assumptions promulgated through either a regulation or other “safe harbor” would be absolutely necessary.

**24. Should an individual benefit statement include an income replacement ratio (e.g., the percentage of working income an individual would need to maintain his or her pre-retirement standard of living)? If so, what methodology should be used to establish such a ratio, such as pre-retirement and post-retirement inflation assumptions, and what are the impediments for plans to present the ratio in a meaningful way to participants on an individualized basis?**

No. Income replacement ratios are very personal, and rely on matters outside the purview of a 401(k) plan. A requirement to provide this information could create expensive and undue burdens (and potential liability) on the plan and plan fiduciaries. As a result, it would be difficult to provide information that would be meaningful. It may also be beneficial for the Agencies to provide an online calculator to assist individuals with determining their retirement income needs, though we note that there are a number of such calculators already available on the internet. The statement could provide a link to that calculator.

### **401(k) and Other Plan Qualification Rules**

*Income Tax Regulations that apply specifically to lifetime annuities include: 26 CFR 1.401(a)-11, 26 CFR 1.401(a)-20, 26 CFR 1.401(a)(9)-1 through 26 CFR 1.401(a)(9)-9, 26 CFR 1.417(a)(3)-1, and 26 CFR 1.417(e)-1.*

**25. How do the 401(k) or other plan qualification rules affect defined contribution plan sponsors' and participants' interest in the offering and use of lifetime income? Are there changes to those rules that could or should be made to encourage lifetime income without prejudice to other important policy objectives?**

The current 401(k) and other plan qualification rules were all designed to provide plan participants access to their account balances at the time of retirement, and this bias is built into nearly all of the qualification rules. The rules were never designed to support guarantees of any sort. Even the annuity provisions that do exist – especially, the joint

and survivor annuity provisions – were written so that plans with individual account balances could be easily managed in such a way as to avoid the application of such rules.

The primary goal in successfully providing guarantees through the defined contribution plan system is to avoid turning defined contribution plans into defined benefit plans, as then the factors which have caused defined benefit plans to struggle will come into play and undermine annuitization efforts. This goal could be accomplished by focusing on the qualification (and other rules) which relate to treating the guarantees as investments within the defined contribution plan, and the payouts (or other guarantees) as being either a guarantee on the investment or a distribution of the investment (in cash or in kind) from the plan.

The next goal should be to make sure that, whatever regulatory scheme is adopted, it can be implemented by the marketplace using the existing defined contribution infrastructure without imposing significant and costly administrative burdens.

With these points in mind, we believe the follow sets of rules come into play. The list is illustrative and not exhaustive:

- Documents. Rules to determine to what extent, if any, that the underlying contract language is deemed to become part of the plan terms. Many of these guarantees will not work if they must be considered to be part of the terms of the defined contribution plan. This is because the contracts are already subject to state insurance law regulation and any changes made for federal law would need to be signed off on by state regulators, a time consuming and cumbersome process.
- Treatment as an investment. Develop rules which support that the guarantee is an investment and treat it in the same manner as any other investment. For example:
  - Valuing the investments for 5500 purpose.
  - Clarification of fiduciary rules related to the investments
  - Developing appropriate rules related to restrictions which may be applied under the contracts.
- Discrimination under Code §401(a)(4). There may be different types of guarantees which will be available under various products a plan may offer. The “benefits, rights and features” rules will need to be considered, and how they apply to contract features. In particular, the “effective availability” standard of Reg. Section 1.401(a)(4)-4(c) is a facts and circumstances standard which is inherently vague and difficult to apply.
- Spousal consent rules. Regulatory clarification is needed on application of the spousal consent rules to annuitization other than on a joint and survivor basis.



- Definition of annuitization. For a variety of tax and reporting purposes, it will be important to clarify when payments are made as systematic withdrawals from the plan and when they would be considered as annuitized.
- Fiduciary roles. The extent to which the issuer of the guarantee would be considered a fiduciary needs to be clarified.
- Application of Roth rules. Guidance on the impact of purchasing guarantees with Roth contributions is needed.
- Reporting issues. Guidance would be needed on the reporting of the guarantees on the Form 5500, including how to properly value these investments.
- Portability. Formal guidance is required on the in-kind distribution of guarantees from the plan when, and under what circumstances would there be ERISA issues following the distribution (such as with the distribution of an annuity certificate under a group contract held by the plan); whether the current “force out” rules could apply and how; to what extent can mutual fund custodial accounts be used; whether or not such in-kind distribution contracts accept rollovers; the roles of the issuer of the guarantee and the terms for continued “qualification”; and how the reporting scheme should work. We have also recommended elsewhere in this response that there be a new distributable event if benefits to a participant would be lost as a result of a change to a new provider. The participant would only be permitted to rollover the contract to an IRA. (*See* response to Question 2)
- Flexibility in distributions. The distribution rules need to be flexible, so that hybrid programs utilizing both systematic withdrawals and insurance guarantees can be accommodated without negative effect. In addition, they need to be flexible in order to accommodate the development of new lifetime income products.
- Required minimum distribution rules. See our response to Question 28, below.
- Securities laws. There needs to be clarification as to when the distributed products will be subject to the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and FINRA’s regulatory rules. This would include clarification on when these products need to be registered, the extent to which and how the suitability rules on the sale of these products apply and the extent to which registration of brokers and agents who sell the products is required.
- Insurance law and pre-emption. Clarification would be needed on the interplay between ERISA and state insurance laws and the extent to which ERISA preemption applies.
- 403(b). Care should be taken to avoid adversely affecting existing 403(b) annuities. Guidance would be needed on how annuitized 403(b) contracts, outside of the control

of the employer, should be treated, and when an annuitized 403(b) contract for former employees will be considered as having payments made out of the plan or not.

**26. Could or should any changes be made to the rules relating to qualified joint and survivor annuities and spousal consents to encourage the use of lifetime income without compromising spousal protections?**

The rules should be clarified as to whether and when the qualified joint and survivor annuity (QJSA) rules apply to various types of hybrid products. Additionally, to the extent the QJSA rules are applied to these products, consideration should be given to making the spousal consent rules more internet friendly by using electronic disclosure and permitting electronic signatures.

**27. Should further guidance clarify the application of the qualified joint and survivor annuity rules or other plan qualification rules to arrangements in which deferred in-plan insurance annuities accumulate over time with increasing plan contributions and earnings?**

Yes. These products are currently in the marketplace. Guidance is particularly needed on describing the circumstances (*i.e.*, the types of contract terms) that would trigger spousal consent and when, as well as dealing with the portability issue and related fiduciary concerns on putting these types of products into a plan.

**28. How do the required minimum distribution rules affect defined contribution plan sponsors' and participants' interest in the offering and use of lifetime income? Are there changes to those rules that could or should be made to encourage lifetime income without prejudice to other important policy objectives? In particular, how are deferred annuities that begin at an advanced age (sometimes referred to as longevity insurance) affected by these rules? Are there changes to the rules that could or should be considered to encourage such arrangements? In particular, how are deferred annuities that begin at an advanced age (sometimes referred to as longevity insurance) affected by these rules? Are there changes to the rules that could or should be considered to encourage such arrangements? Are there changes to the rules that could or should be considered to encourage such arrangements?**

The current products in the marketplace all strive to comply with the existing required minimum distribution (“RMD”) rules, based on whether the issuer treats these products to be payments as an annuity or not, which constrains offering new, creative solutions within qualified retirement plans. This is of particular concern for hybrid products.

We recommend a review of the rules to ensure that they accommodate the new generation of annuities and other lifetime income products being offered in the marketplace. The key issue is likely to be defining the point of annuitization. For example, if longevity insurance is purchased under the current rules (with payments to begin long after the required beginning date), the value of the contract must be included

in the account balance used to determine the RMD for years before the annuity payments begin. This means the contract itself may have to be distributed to satisfy the RMD rules before the deferred payment date. Regulations could be modified to exclude the value of a deeply deferred annuity, provided the value at purchase did not exceed a certain portion of the account.

**29. Are employers that sponsor both defined benefit and defined contribution plans allowing participants to use their defined contribution plan lump sum payouts to ‘purchase’ lifetime income from the defined benefit plan? b) Could or should any actions be taken to facilitate such arrangements? c) Should plans be encouraged to permit retirees who previously took lump sums to be given the option of rolling it back to their former employer’s plan in order to receive annuity or other lifetime benefits?**

a) In our experience, it is not a common practice in the private sector plan market to allow participants to use their defined contribution plan lump sum payouts to ‘purchase’ lifetime income from a defined benefit plan. We have seen this in governmental plans, but it is difficult to discern how prevalent it is.

b) Most small employers do not have both a defined benefit and defined contribution plan. In our experience, if they do have a defined benefit plan that offers a lump sum distribution option, a very high percentage (i.e., in excess of 90%) of participants elect to receive lump sums. Once a defined benefit plan participant elects the lump sum option, the participant could be given the same “lifetime options” as a defined contribution plan participant, but as part of an IRA rollover.

c) No, a “rollback option” should not be mandated due to the administrative complications as well as the ability of the participant to access these investments outside the plan.

### **Selection of Annuity Providers**

**30. To what extent do fiduciaries currently use the safe harbor under 29 CFR 2550.404a-4 when selecting annuity providers for the purpose of making benefit distributions?**

In our experience, the safe harbor for the distribution of annuities from defined contribution plans is seldom used, because annuities are seldom distributed from plans.

**31. To what extent could or should the Department of Labor make changes to the safe harbor under 29 CFR 2550.404a-4 to increase its usage without compromising important participant protections? What are those changes and why should they be made?**

The most significant difficulty with the safe harbor provision is the issue of insurer solvency. The current economic environment has highlighted the need to allow

participants the opportunity to purchase properly priced lifetime guarantees from defined contribution plans, as well as further demonstrating that the pooling of risk and the undertaking of solvency risks are critical marketplace functions. The ability to provide the lifetime guarantees from defined contribution plans does pose significant fiduciary risks.

In order to do this, we suggest that the safe harbor permit the fiduciaries to rely upon the existing state regulatory structures to protect them on the issue of insurer solvency. The state regulation of the insurance industry is substantial. For example:

- Reserves are required for the risks undertaken;
- The manner in which the reserves are invested is heavily regulated for investment risk and type under the risk-based capital rules;
- Insurance companies are regularly and comprehensively examined by state insurance authorities and must do substantial regular reporting on their liabilities and on the value and types of assets they hold;
- Insurance companies are required to participate in their state guarantee associations to protect the policyholders of all companies within the state;
- Review of marketing material of all insurance products is required, and insurance companies have the duty to supervise the activities of their agents.

The safe harbor should provide that an adequate fiduciary review would have the fiduciaries acknowledge that: the task they undertake is different from the mere investment of account balances; the standard against which they will be judged has necessarily a stronger insolvency risk; and they have addressed that risk adequately by understanding and relying upon the state's regulatory role in managing the risk. As noted in the preamble to the safe harbor, an insurer's rating can be used as an element of this analysis, given the intensive reviews made by the rating agencies including interviews with management. The fiduciaries' reliance would not be on the rating alone, but would need to include a review of the underlying rating report and an understanding of the significance of the rating. Essentially, the fiduciaries should have a "pass" on this risk, as long as the insurance companies from which the guarantees are purchased are subject to participation in the various state guaranty associations.

**32. To what extent could or should the safe harbor under 29 CFR 2550.404a-4 be extended beyond distribution annuities to cover other lifetime annuities or similar lifetime income products? To which productions should or could the safe harbor be extended?**

We recommend the establishment of a separate safe harbor for the purchase of hybrid products (non-annuitized lifetime income benefits) – or at least that the annuity safe harbor be modified to address the purchase of products with insurance guarantees other than lifetime income guarantees. It appears that guaranteed lifetime income products (referred to as GMWBs, GMIBs and various other names) and other hybrid products are not annuities and thus are not covered by the annuity safe harbor. Nevertheless,

fiduciaries need similar guidance and protection for the selection of the provider for such a product.

We believe that a new (or expanded) safe harbor would help facilitate the development and acceptance of new alternatives to traditional annuities, both now and in the future, by eliminating fiduciary uncertainty regarding the selection of such products. The failure to provide such an additional (or expanded) safe harbor could inappropriately favor one form of lifetime income product over others.

As noted above in response to Question 31, we also believe that the more clarity and specific examples the guidance provides, the more helpful it will be to plan fiduciaries.

- 33. To what extent are fixed deferred lifetime annuities (i.e., incremental or accumulating annuity arrangements) or similar lifetime income products currently used as investment alternatives under ERISA 404(c) plans? Are they typically used as core investment alternatives (alternatives intended to satisfy the broad range of investments requirement in 29 CFR 2550.404(c)-1) or non-core investment alternatives? What are the advantages and disadvantages of such products to participants? What information typically is disclosed to the participant, in what form, and when? To what extent could or should the ERISA 404(c) regulation be amended to encourage use of these products?**

In response to the last sub-question only, we believe that it would be appropriate to expand the ERISA Section 404(c) regulation to provide guidance to fiduciaries on the information that must be provided to participants who wish to direct that a portion of their accounts be invested in an investment with a guaranteed lifetime income feature. Again, more specificity will assist fiduciaries that wish to offer these types of investments as options within a 404(c) plan and would, in our view, further encourage the expansion of guaranteed lifetime benefit protection for participants.

- 34. To what extent do ERISA 404(c) plans currently provide lifetime income through variable annuity contracts or similar lifetime income products? What are the advantages and disadvantages of such products to participants? What information about the annuity feature typically is disclosed to the participant, in what form, and when? To what extent could or should the ERISA 404(c) regulation be amended to encourage use of these products?**

As described in our response to Question 33, we believe that clarification of how plans can comply with the 404(c) requirements and thus obtain protection for their fiduciaries would facilitate the adoption of lifetime income products for the benefit of plan participants.

- 35. To what extent are plans using default investment alternatives that include guarantees or similar lifetime income features ancillary to the investment**

**fund, product or model portfolio, such as a target maturity fund product that contains a guarantee of minimum lifetime income? What are the most common features currently in use? Are there actions, regulatory or otherwise, the Agencies could or should take to encourage use of these lifetime income features in connection with qualified default investment alternatives?**

We are not aware of plan sponsors using lifetime income features as default investment alternatives. Indeed, it is our understanding that lifetime income options are not generally offered as QDIA's today due to cost, regulatory and administrative concerns. We believe the Agencies should give careful consideration to this issue and, if it is deemed appropriate, issue detailed guidance on the information that fiduciaries should consider in evaluating such alternatives in a QDIA.

**36. OMITTED**

**37. Are there unique costs to small plans that impede their ability to offer lifetime annuities or similar lifetime income products as an in-plan option to their participants? What special consideration, if any, is needed for these small entities?**

If the legal and regulatory issues discussed in response to Question 25 are not addressed and if a fiduciary safe harbor that is relatively easy for fiduciaries to implement (as discussed in response to Question 31) is not provided, we believe that the cost of offering lifetime annuities or similar products would be prohibitive for small plans. Small plans generally do not use, because they cannot afford, the assistance of consultants to assist them with the fiduciary review necessary to select these products or to wend their way through other regulatory hurdles (or uncertainties) that might exist. Therefore, any steps that the Agencies can take that will simplify the regulatory landscape and provide clear, easy to use safe harbors would be most helpful for small plans.

**38. OMITTED**

**39. OMITTED**

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These comments were prepared by the ASPPA Task Force on Lifetime Income Options for Participants and Beneficiaries, Chair Bruce Ashton. The members of the Task Force are: Mark Dunbar; Scott Hayes; Joan McDonagh; Robert J. Toth; and Craig Hoffman. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ASPPA, at (703) 516-9300 ext. 128, if you have any comments or questions regarding the matters discussed herein. Thank you for your consideration.

Respectfully submitted,

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