FMR LLC Legal Department
82 Devonshire Street, Boston, MA 02109-3605

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SUBMITTED ELECTRONICALLY

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
Attention: Lifetime Income RFI

Re: Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans
RIN 1210-AB33

This letter is submitted on behalf of FMR LLC and its affiliated financial service companies, collectively known as Fidelity Investments ("Fidelity"), in response to the Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans ("RFI") issued by the U.S. Department of Labor and the U.S. Treasury Department (the "Agencies").

Fidelity provides investment management, record keeping and trustee services to more than 18,000 401(k), 403(b) and other individual account plans covering more than 12 million participants and their beneficiaries. Fidelity also provides custodial, investment management and brokerage services to over 8.5 million individual retirement account ("IRA") investors. As a leading retirement services provider, Fidelity offers a number of products and services including annuity contracts offered through a Fidelity life insurance company which are available to provide lifetime income solutions to participants and beneficiaries of employer-sponsored plans and IRAs. Fidelity also offers registered fund portfolios which function as the underlying investments for insurance company variable annuity products. We believe that our extensive experience in servicing retirement plan participants and structuring retirement income solutions for individuals gives us an important perspective on the issues raised by the RFI.

Fidelity's responses to each of the eight categories of questions posed by the RFI are set forth below. As the Agencies consider this information in developing specific reform proposals, we would like to stress the following points:

- As attention turns to lifetime income, we must continue to address the more critical retirement challenges facing American workers – ensuring adequate savings during an individual's working years and an appropriately diversified investment strategy through both the working years and retirement. Accumulating sufficient retirement savings has to be the first priority, because no lifetime income solution can compensate for an inadequate account balance at retirement.

- The regulatory framework should continue to empower individuals to make the necessary trade-offs that must occur in managing the risks inherent in defined contribution plans. While we can encourage behaviors that enhance the likelihood of a successful retirement (e.g., automatic enrollment and QDIA's), the foundation of success of our defined contribution system is based on individual choice.

- Acceptable lifetime income alternatives will include solutions that do not necessarily *guarantee* lifetime income. While high quality, reasonably priced annuities may play an important role, they are not appropriate for many participants, (e.g., those with very small account balances, short life expectancies due to illness or other income sources). In addition, other forms of guaranteed lifetime income such as Social Security and defined benefit plans must be factored into each worker's level of acceptable retirement income risk.

- Financial products that guarantee lifetime income themselves involve significant risks, including credit risk of the insurer and the risk that inflation will erode the value of benefits over time. *Guaranteed* lifetime income is not as secure as it may seem.

- Given the diverse range of retirement income needs and the tailored solutions that must be developed to meet those needs, "out of plan" solutions are most appropriate. The current challenges to "in plan" solutions (including plan sponsor fiduciary concerns, participant behavior and portability) are not easily remedied, and "one-size-fits-all" default solutions cannot meet the diverse and individualized needs of savers.

- Participants need to understand the relationship between their defined contribution plan account balances and their retirement income potential. Without this information, people tend to overestimate the amount of retirement income that the account balance can provide. This lack of understanding results in lower savings rates during a participant's working years and undervaluing income products when they are appropriate. We support efforts that would help educate participants about how to meet their retirement income needs and how their savings could translate into monthly income in retirement.

- Tax preferences for distributions and other such incentives should not be limited to annuities and should apply equally to different types of lifetime income solutions, including systematic withdrawal plans.

We appreciate this opportunity to provide comments to the Agencies on the RFI and would be pleased to answer any questions or provide additional information.

Sincerely,

James Barr Haines
Vice President and Associate General Counsel

Douglas O. Kant

Douglas O. Kant
Senior Vice President and Deputy General Counsel

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Fidelity Investments Response to Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans

Our responses are organized according to the general categories of questions set forth in the RFI, and discussed in the order followed in the RFI. We have tried to address nearly all of the enumerated questions in the RFI in these responses but have not broken out the responses by question to avoid redundancy. If there are questions from the RFI that you would like us to address specifically, please let us know and we would be happy to do so.

(1) General

As pointed out in the RFI, the vast majority of participants elect a lump sum distribution of their retirement plan or IRA account balance. However, many lump sum distributions from plans are rolled over to IRAs, and many lump sum distributions from IRAs are rolled over to different IRAs, or even to new workplace retirement plans, where the individual will initiate a series of periodic payments. Accordingly, the predominance of lump sum distributions from plans and IRAs does not necessarily indicate that individuals do not ultimately use their accumulated account values to provide some type of income stream throughout retirement. Also, it is important to remember that many workers retiring today receive lifetime income from employer-sponsored defined benefit plans and the Social Security system, so they may appropriately use assets accumulated at retirement for purposes other than ensuring a lifetime income stream.

Lifetime Income Options Available

Lifetime income payments are available in a wide variety of forms. These include annuity products that offer income guaranteed by the product's issuer, including fixed income annuities, variable income annuities, guaranteed minimum income benefit annuities and guaranteed minimum withdrawal benefit annuities. Each of these annuity products, in turn, may come with various features which, for example, may permit the level of income to be adjusted periodically, death benefits to be paid, or the like. A participant who rolls over his or her 401(k) account balance to a Fidelity IRA has many low cost, high quality lifetime income options including annuities available to him or her. Fidelity offers an annuity purchase service to help individuals select fixed-payment annuity products from a number of highly-rated carriers, allowing the selection of the product with the best current purchase rate. Fidelity also offers a variable annuity product issued by Fidelity Investments Life Insurance Company and a minimum benefit product issued by Metropolitan Life Insurance Company.

In addition, fixed income funds can provide a stable (but not guaranteed) income stream with the diversification benefits of a mutual fund. Similarly, money market funds provide a stable net asset value and generate income and provide full flexibility to redeem on a daily basis.

Still further, securities that provide income/dividends are available for purchase. Bonds may be used to build a bond ladder to provide a predictable stream of income while preserving principal. Treasury Inflation Protected Securities (TIPS) can generate a bond-based income stream that would keep pace with inflation, and dividend paying stocks may provide a valuable source of continuing income. There are also many varieties of structured products available, for example a market-linked CD is designed to provide principal protection while offering some portion of the return that is tied to the financial market. And many financial services firms, including Fidelity, will offer their investors systematic withdrawal plan (SWP) services to generate a payment stream from their existing assets while allowing their remaining assets to participate in market growth.

Recently, Fidelity launched a new series of funds for participants who have retired and are ready to start receiving periodic distributions. The Fidelity Income Replacement Funds are designed to be used with a designated payout plan know as the Smart Payment Program^{SM}. Each fund is designed to payout the investment (and earnings) over a specified number of years, with the remaining investment paid out at the end of the specified period (the "horizon date").

There are two critical differences between the Income Replacement Funds and an annuity contract in payout status. First, payments stop at the end of the specified period under the Income Replacement Funds. Second, the Income Replacement Fund investor retains the right at any time to withdraw some or all of the remaining balance of his investment in the fund. Of course, such a withdrawal would reduce or end future payments. In the alternative, the investor may cease distributions under the Smart Payment Program^{SM} and keep any earnings in the plan until needed. Investors are reminded that the expectation is that each Income Replacement Fund would be liquidated (that is, will distribute all remaining assets) after its horizon date.

It is unclear whether many plan sponsors would be willing to undertake the due diligence process necessary to add funds to the plan investment menu that are only intended for use by retirees. Many defined contribution plans already provide some form of periodic distribution, to be handled by the plan administrator or plan record keeper. In any case, the expectation is that the primary market for the Income Replacement Funds will be rollover IRAs or other individual accounts maintained by retirees.

Advantages and Disadvantages

The advantages and disadvantages of these options vary based upon a variety of factors, including the form of the lifetime income payment, the particular circumstances of the individual and whether the lifetime income product is in-plan or out-of-plan. In general, however, lifetime income payments can increase the probability that essential expenses will be covered throughout retirement. Purchasing guaranteed lifetime income products with a portion of retirement assets, particularly fixed immediate lifetime annuities with a COLA or an inflation index may increase portfolio longevity – that is the amount of assets needed to safely retire may be reduced. Guaranteed lifetime income products may also increase the investor's confidence, and decrease the need to make withdrawals from investment assets, when equity markets are down. In addition, some forms of lifetime income products may potentially reduce the cost and complexity of portfolio management, e.g., the need to maintain systematic withdrawal or bond laddering strategies. Finally, guaranteed lifetime income products reduce the risk of spending too much in the earlier years of retirement and running out of money – particularly when the individual lives longer than expected.

There are also several disadvantages. The impact of the disadvantages tends to increase as the percentage of retirement assets that are converted to guaranteed lifetime payments increases. In general, Fidelity does not advocate that retirement plan participants receive all of their benefits in the form of guaranteed lifetime payments for the following reasons:

- Decreased ability to fund expenses that grow at high or variable rates of inflation, such as health care.
- Decreased flexibility to respond to changing circumstances and goals in retirement due to lack of access to funds, and low liquidity.
- Decreased opportunity to participate in stock market or other investment gains.
- Increased purchasing-power risk if lifetime payments are not indexed for inflation.
- Risk of default of the guaranteed lifetime income product provider.
- Risk of excess income if all assets are converted to guaranteed lifetime income products, causing many participants to have more guaranteed income than they need to pay essential expenses and resulting in higher taxes and less intergenerational wealth transfer.

Fidelity believes investors should purchase the amount of guaranteed lifetime income that they actually need and no more.

Individual Circumstances

The determination of the appropriate amount of lifetime payments can be generalized across participants to some extent, but must also reflect the specific goals and circumstances of each participant. Fidelity suggests as a general guideline that individuals secure enough lifetime income from guaranteed sources, such as Social Security, defined benefit plans or purchased annuities, to fund essential retirement expenses (i.e. food, shelter, healthcare, and other essential living expenses). By aligning those expenses with guaranteed income, participants can be sure to maintain a minimum lifestyle in any type of market. Other discretionary expenses (such as travel and leisure activities) are more flexible and can vary based on the economy. Different guaranteed product configurations may be needed for essential expenses that are static, that grow predictably with CPI, and that grow at high or variable inflation rates. The general guideline should be adjusted based on unique circumstances, however, including:

- Amount of current assets.
- Amount of retirement expenses relative to assets.
- Amount of other secure income sources or asset sources (e.g., expected inheritances).
- Life expectancy.
- Presence and cost of legacy goals.
- Risk tolerance.
- Comfort level with purchase of lifetime income products.

Indeed, some individuals may not need to purchase any guaranteed lifetime income products at all. These people generally fall into two groups:

- Individuals with high existing guaranteed income relative to essential expenses from sources other than their defined contribution retirement plans (such as Social Security).
- Individuals with very low withdrawal rates from assets, such as 2% to 3% per year, since they may be able to provide near-certainty of income in just about any market condition and no matter how long they live.

Additional circumstances too may make purchasing certain lifetime income products inadvisable. For example, individuals with small account balances or individuals with short life expectancies due to serious illness may not benefit from the purchase of certain annuity products, since the amount or duration of the annuity payment may not provide sufficient income or justify the cost.

In-plan v. Out-of-plan

In addition to the foregoing, there are several advantages and disadvantages to lifetime income payments, depending upon whether they are offered "in-plan" or "out-of-plan". From the perspective of a participant, advantages of "in-plan" offerings may include:

- Education about the value of a lifetime income product where account values are expressed in terms of lifetime income generation.
- Reduced sales costs as compared to out-of-plan annuities.
- Availability of dollar-cost averaging of purchases of income products, which mitigates both interest rate risk and market value risk. Market value risk is the possibility that asset values decline just prior to annuitization, and can be particularly detrimental to a lifetime income plan.

There are also several disadvantages to an in-plan lifetime income option from the participant's perspective, including:

- Lack of competitive pricing once a provider is selected by the employer.
- Lack of portability, especially as the average tenure of employees is approximately four years based on Department statistics.
- Lack of access to a portfolio of lifetime income products, which may perform better than a single product.
- Risk of over-allocating to fixed income assets and under-allocating to higher capital growth assets, which can significantly diminish retirement assets and lifestyle. This risk is particularly high for younger participants.
- Purchasing power risk if the product is not appropriately indexed to inflation.

All of these factors affect usage of lifetime income products by retirement plan participants today. In addition, participant usage is likely affected by a variety of other intangible factors, including:

- Concern about the financial strength of annuity providers (insurance companies), particularly during periods of extreme market conditions.
- Participants may not have an income mindset, meaning that they do not conceive of their retirement plan account balances in terms of the income they can generate, but simply as a lump sum amount.
- Many income products come with complex terms and conditions that are difficult for many investors to understand.
- Some investors over-estimate the amount of liquidity needed in retirement and underestimate longevity risk.

Also, as a rule women are expected to live longer than men. As a result, annuity providers offer lower income payments to women than to men (except in states where unisex pricing is required) such that the actuarial value is the same. If the annuity is purchased under a qualified plan, however, unisex pricing is required under Federal law (following the U.S Supreme Court's *Norris* decision). The result is that men may be better off rolling over the assets into an IRA and then purchasing an annuity with gender specific rates and women may be better off purchasing an annuity under the qualified plan with unisex rates.

Beyond the disadvantages facing participants (which would be of concern to plan sponsors), employers face several challenges if required to offer in-plan lifetime income products, including:

- Fiduciary responsibility for the choice of lifetime income provider and thus exposure to liability based on:
    - The fees associated with the lifetime income product.
    - The financial viability of the lifetime income provider.
    - The appropriateness of the lifetime income product design within the context of the retirement plan.
- Cost of consulting services to select and monitor guaranteed income product providers.
- Increased record keeping costs.
- Compliance with applicable state insurance law requirements such as agent licensing, third party administrator licensing, free look processing and replacement and solicitation regulations.
- Maintenance of accounts for former employees, especially in high-turnover industries.
- Lack of competitive pricing once a provider is selected.
- Limited investment universe of in-plan products and limited ability to have multiple in-plan providers.
- Low participant demand.

Overall, in our experience recordkeeping 401(k) plans, there is low utilization of in-plan guaranteed lifetime income options. Our 401(k) plan clients have more frequently encouraged participants to consider the use of out-of-plan options, including our Annuity Purchase Service. Fidelity's service enables IRA investors to easily compare fixed-payment annuity products from a number of well-rated carriers, allowing the individual to select his or her annuity based on the best current purchase rate and other factors. On a related note, we also see almost no 401(k) plan sponsors using match or employer non-elective contributions to fund lifetime income.

<u>Summary</u>

The final determination of the optimal amount of lifetime income is a critical and often complex decision. It is essential to recognize that there is no single lifetime income option that is appropriate for all individuals. As a result, there should be no mandate to use, or even to make available to participants within a defined contribution plan, a particular lifetime income option or options, especially when out-of-plan options are currently available. Rules should encourage and facilitate variety and innovation and give plan sponsors and participants flexibility in creating a lifetime income portfolio to choose from those specific lifetime income options that are most appropriate to their individual circumstances.

It is also essential to recognize that the availability or selection of lifetime income products is insufficient by itself to ensure adequate income throughout retirement if accumulation savings rates and resulting account balances are too low. This is an issue for both the participant and the plan sponsor in terms of their combined contribution levels. The Agencies should not lose sight of this fundamental truth and should continue to provide guidance that maximizes the opportunity to accrue sufficiently large account balances to serve as the basis for meaningful lifetime income.

(2) <u>Participant Education</u>

In response to increased concerns with respect to the manner in which participants withdraw their plan and IRA account funds in retirement, plan sponsors and their service providers will need to develop additional educational tools for participants (and other investors, including IRA owners) who are near or starting retirement to help them make thoughtful investment decisions with respect to their spend-down phase. To initiate the process, for example, such a tool could solicit the user's preferences on issues such as guaranteed income over a fixed or defined period versus installment payments in fixed amounts.

Corresponding to educational tools that illustrate investment diversification during the participant's active years of participation, new tools could provide the user with a product category allocation that would be intended to reflect the preferences expressed during the initial phase of the tool. Ultimately a user may be shown an illustration with a mix or model of actual funds or income producing products as one possible way to achieve the selected product category allocation given the user's stated preferences. An interactive tool could also give the user an opportunity to change the illustration and substitute with other products and funds.

It appears that the legal framework for such an educational tool should follow the approach provided in Interpretive Bulletin 96-1, although certain aspects, including those unique to investments producing guaranteed income, are not specifically addressed in the Interpretive Bulletin. Amounts allocated to purchase fixed annuity payments, for example, would be irrevocably committed if such an annuity is ultimately purchased by the investor. Nevertheless, the tool would still be intended to assist participants in making their own investment and investment-related decisions appropriate to their particular situation. Of course, such tools would need to include appropriate disclosures regarding the availability of other investments with similar risk and return characteristics and the need to consider non-plan assets in any decision-making by the user.

We do not see anything in the current wording of the Interpretive Bulletin that would prevent its application to this kind of educational tool. However, particularly in light of the increased focus on forms of distribution in retirement we think that that Department of Labor ("Department") confirmation of its application would be beneficial to providers, plan sponsors, participants and IRA owners alike.

(3) Disclosing the Income Stream That Can be Provided From an Account Balance

There are significant benefits to educating participants (as well as plan sponsors) about the income that their defined contribution plan accounts are likely able to generate in retirement. One way to provide that education is by presenting the participant's account balance as a lifetime income stream on the participant's individual benefit statement. By doing so, participants can be encouraged to think of their retirement plan benefit in terms of the income it may actually generate at retirement, rather than simply as a lump sum amount. In other words, an illustrative lifetime income stream can help put participants in an income mindset, rather than an account balance mindset.

If an income stream illustration is provided to the participant, it should be a simplified, generic model illustration prescribed by the Agencies that shows how account balances of various amounts would convert into retirement income based on various assumptions specified by the Agencies and disclosed to participants. For example, the illustration could show the monthly annuity income that certain representative account balances (e.g., $10,000 or $100,000) would generate starting at age 65 based upon assumed interest and mortality factors. The illustration would also be accompanied by a basic caution that actual products may differ substantially in terms of form or amount.

There are several reasons to adopt this approach, as opposed to, for example, using individualized illustrations based upon participants' actual account balances and other participant-specific factors and assumptions. First, a simple, generic illustration would effectively achieve the goal of helping to create an income mindset among participants. If participants were shown, for example, the amount of lifetime income they could generally expect $10,000 to generate at age 65, they could easily apply that information to their own account balance to determine an approximate amount of income that their own account balances might generate.

An individualized illustration (whether on a statement or otherwise) is not likely to be materially more effective at creating an income mindset among participants. The assumptions on which individualized illustrations would be based are so inherently subjective and variable, it is highly unlikely that a participant would in actuality be able to obtain precisely the lifetime income stream shown in the individualized illustration. In addition, attempting to include such information on the statement may give the participant an unrealistic expectation that the illustration will in fact equal the actual amount to be received in the future.

Second, a simple, generic illustration prescribed by the Agencies presumably would not impose the significant costs associated with performing the complex calculations that would be required by individualized illustrations based upon participants' actual account balances and other individualized factors and assumptions. Moreover, individualized illustrations appear likely to subject fiduciaries to second-guessing as to the prudence of the many complex assumptions they may have based the illustration upon, and fiduciaries may be exposed to lawsuits from participants or beneficiaries that were not able to obtain in actuality lifetime income streams that were as generous as those illustrated. A simple, generic illustration prescribed by the Agencies, on the other hand, appears to be far less likely to subject plan sponsors to such potential liabilities.

Third, given the frequency with which participants would receive individual benefit statements, individualized illustrations would present challenges that would not arise with generic illustrations. For example, to the extent individualized illustrations were based on underlying factors, such as interest rate assumptions, which might change with some frequency, it is possible that the resulting lifetime income streams would also vary on a regular basis. Indeed, it is possible for the illustrative lifetime income stream to increase or decrease from quarter to quarter as, for example, the interest rates on which it is based vary, even if the participant's account balance did not itself materially change from quarter to quarter. This phenomenon may call for yet more disclosure to participants, as the average participant may find it confusing, if not discouraging, to see his or her lifetime income stream decline even as his or her account balance remains steady. A simple, generic illustration would not suffer from this risk, and instead would provide a ready means for participants to think about converting account balances to approximate lifetime income streams no matter how frequently presented.

Moreover, as stated above, we do not believe that most participants need to use their entire account balances to generate lifetime income. A generic illustration would enable participants to determine the approximate amount of lifetime income that any portion of their account balance might produce. An individualized illustration, to be effective in this regard, would have to be based upon a percentage of the participant's account balance (which percentage would likely vary from participant to participant) or would have to be based upon the entire account balance but be accompanied with disclosure as to how (and why) participants should further alter the illustration themselves to take into account only the percentage of their account balance that they actually anticipate using to generate a lifetime income stream at retirement.

Finally, we note that in today's marketplace, account statements can be distributed to participants by a variety of legal entities. For example, account statements might be distributed by the administrative record keeper to the Plan or through a broker-dealer, among others. In the case of broker-dealer distributed participant account statements, we bring to your attention Financial Industry Regulatory Authority ("FINRA") requirements concerning the types of predictions or projections that may appear in broker-dealer communications with the public. These requirements generally prohibit broker-dealer communications from predicting or projecting performance, implying that past performance will recur or making any exaggerated or unwarranted claim, opinion or forecast. (NASD Rule 2210(d)(1)(D)). FINRA provides a limited exception to this prohibition on projections of performance in NASD IM 2210-6 – Requirements for Use of Investment Analysis Tools. We encourage that the Agencies consider FINRA rules in connection with any guidance or regulatory requirements in the area of disclosing income streams.

As can be seen, the illustration of a lifetime income stream is itself a complicated matter. We believe that an income replacement ratio would be an even more complicated matter still that depends upon factors that neither the plan administrator, nor the Agencies, could reliably estimate for any particular participant. For one, it would be inappropriate to assume that the defined contribution plan itself is the only source of income replacement for any given participant. Yet, the other sources of income, their relative sizes and reliability, would be wholly inaccessible to plan administrators.

Plan administrators would also need to incorporate compensation data for both active and terminated employees (e.g. ending salary). Projecting estimated compensation at the onset of retirement for terminated employees could also be problematic, especially since actual compensation changes since termination may not be available – resulting in low quality projected income replacement rates. Nevertheless, although an income replacement ratio would be too difficult and costly to provide in a meaningful way, participants may benefit from specific guidance on estimating their compensation at the onset of retirement so that they may more accurately calculate their own income replacement rate estimates.

(4) 401(k) and Other Plan Qualification Rules

The Code qualification rules currently in effect do address various issues confronted by plan sponsors in offering and using lifetime income options. In some cases, however, the rules add significant administrative complexity and in some cases the rules are not sufficiently clear to allow sponsors and participants to confidently make choices related to lifetime income.

The spousal consent rules, for example, add significant administrative complexity insofar as they require additional disclosures and consents to be obtained before participants may choose the form of a distribution, including a lifetime income form. In our experience, moreover, spousal consent is nearly always obtained to choose a non-annuity form of distribution. As a result, while the spousal consent rules might increase awareness among spouses of their rights and distribution options, they do not appear to result in the actual selection of annuity options by married participants and their spouses.

The magnitude of the administrative burden of these rules is also well illustrated by the fact that, in our experience, the majority of sponsors eliminated annuity distribution options when they were permitted to do so as a result of changes to the optional forms of benefit regulations several years ago. So, it is not clear whether the current spousal consent rules result in participants actually selecting annuity distribution options for themselves and their spouses, or at least whether they are furthering that goal at a reasonable administrative cost to plan sponsors and participants.

Clarification of the current spousal consent rules is also called for with respect to their application in certain circumstances, such as the purchase of in-plan annuities during the participant's account accumulation phase. Participant changes in marital status and changes in the contract issuer greatly add to the potential complexity, and record-keepers will be required to build systems to handle the possibility. Managing costs could be a major issue for record-keepers, and thus for plans and plan sponsors. Apart from that, it is unclear whether the purchase of an in-plan annuity during accumulation would trigger the consent requirements in the same manner that a purchase at the point of distribution does today.

Required minimum distribution (RMD) rules most likely affect interests in deferred annuities that begin later in retirement. The objective of such a deferred annuity would be to fund expenses that are unique to later life stages or to provide a degree of longevity insurance. RMD rules would appear to require larger payments in earlier years to offset the value of the deferred annuity that would begin payments at a much later date. This may deplete the account value and diminish the effectiveness of the annuity. To better facilitate lifetime income, RMD rules could be waived on any funds from a qualified account used to purchase longevity insurance, provided the purchase is irrevocable (although legislative action may be necessary to achieve this result). Assuming the funds used to purchase the insurance have no basis, insurance income to the participant starting at the target longevity age, often age 85, would be fully taxable. RMD exemption rules could also apply to traditional IRAs and rollover IRAs.

(5) Selection of Annuity Providers

Section 625 of the Pension Protection Act of 2006 ("PPA") instructed the Department to issue regulatory guidance confirming that the "safest available annuity" standard in Interpretive Bulletin 95-1 does not apply to the selection of an annuity contract as an optional form of distribution from an individual account plan to a participant or beneficiary. The PPA provision also confirmed that all other applicable fiduciary standards of the Employee Retirement Income Security Act of 1974 ("ERISA") continue to apply in such cases.

After confirming that Interpretive Bulletin 95-1 now will only apply to defined benefit plans, the Department issued a new regulation (the "Annuity Regulation") that applies to the selection of an annuity contract provider for the purpose of benefit distributions under an individual account plan. The Annuity Regulation provides a "safe harbor" for the annuity provider selection process. The Annuity Regulation states that the selecting fiduciary must consider financial information to assess the continued ability of the insurer to fulfill its contractual commitments. However, it also provides a balance that was lacking in Interpretive

Bulletin 95-1, acknowledging that the fiduciary should consider the cost (premium) versus the benefits to be provided.

The Annuity Regulation does not appear to apply to the purchase of annuity products prior to a distribution event. Nor does it address situations in which a participant would make the ultimate decision to buy an annuity for his or her account. These areas of uncertainty may well contribute to the reluctance of most plan sponsors to implement an "in-plan" annuity option, and the following section provides at least a partial response.

(6) **ERISA Section 404(c)**

We note that some new lifetime income annuity products have been designed specifically to serve as an investment option during the participant's period of active participation. In this context, the participant can choose (or not choose) the annuity from among a variety of investment options. The regulations issued by the Department under Section 404(c) of ERISA set forth the conditions for relieving plan fiduciaries for the consequences of plan participant investment decisions. The 404(c) regulations do not currently address the sponsor's fiduciary obligations in choosing to offer a particular annuity or lifetime income product under a plan intended to comply with Section 404(c) of ERISA.

The regulations under ERISA section 404(c) impose a quarterly frequency of transfer rule for at least three diversified "core" investment options along with a broad range of other investment alternatives. See 29 CFR 2550.404(c)-1(b)(2)(ii)(C). There is an additional frequency rule under 29 CFR 2550.404c-1(b)(ii)(C) for the most conservative core option. Thus, the liquidity features of a fixed, variable, or fund-based annuity would have to satisfy these rules or the product has to be offered as a "non-core" investment option. In either event, the sponsor's overall fiduciary duties with respect to choosing an annuity option should generally be the same as would be applicable to choosing other core or non-core investment options for the plan.

Some "accumulation" annuity products serve as a single-product stable value fund. In-plan deferred fixed annuities may also offer valuable longevity insurance to some participants. The concerns here mirror those for other investment options. For products with limited liquidity or transferability, one concern is whether the regulation's focus on transferability means that each option subject to Section 404(c) relief, even a non-core option, must allow investment transfers with at least some frequency. The regulation requires frequency "appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject." The preamble to the final regulations includes an example of a limited partnership investment alternative that prohibits transferability of ownership during the first three years. The preamble discussion does not reject the treatment of the limited partnership as a non-core 404(c) option per se, but rather points to the "appropriate" standard quoted above. The same approach would appear to be appropriate for most lifetime income products.

In addition, the Department should address the types of information that needs to be provided to participants who are permitted to select annuity products as a distribution option under their plan. Here the participant needs to understand (1) the irrevocable nature of the decision, depending on the refund features of the annuity product in question, (2) the challenge of determining financial viability far into the future, and (3) any surrender charges if there is a refund feature. These features would appear to constitute necessary disclosure under the 404(c) regulations regarding restrictions on transferability.

(7) Qualified Default Investment Alternatives

An increasing number of 401(k) plans include so-called target date funds in the investment menu offered to participants. Plans frequently use target date funds as the "default" option for participants who do not make investment decisions (particularly for plans with automatic enrollment). The asset allocation in target date funds corresponds to a specified retirement date and becomes more conservative as that date approaches and continuing into the retirement years.

Most target date funds do not provide a lifetime income guarantee. Rather, they are designed to give the investor the benefit of potential investment gains in retirement years, albeit with a more conservative asset allocation than in earlier years. A fixed payment annuity would provide a guarantee, but the assumed rate of interest is low, reflecting a tradeoff in value. On the other hand, the retiree certainly retains the flexibility to annuitize some of his investment in the target date fund if deemed appropriate, or to take advantage of other planning possibilities.

We are not aware of any 401(k) plans recordkept by Fidelity using a default investment alternative that includes an income guarantee.

(8) Comments Regarding Economic Analysis, Regulatory Flexibility Act, and Paperwork Reduction Act

The costs and benefits to a plan sponsor of offering in-plan annuities or similar lifetime income products are discussed in detail in the first section above. In our view, many of the costs take the form of additional burdens on the plan sponsor's or administrator's time and resources, and increases in their fiduciary responsibility and thus potential exposure to liability. In that respect, the costs will have an even greater relative impact on those plan sponsors and administrators that have less time and fewer resources to expend to begin with; that is, small plan sponsors and administrators. Smaller plan sponsors will also not be able to realize some of the benefits discussed above, such as lower institutional level pricing.

Making a lifetime annuity the default form of benefit payment would not seem to drive positive benefits for employers or for their participants' contribution rates. To the contrary, requiring a lifetime income product as a default would have a number of negative effects. First, it would ensure that the administrative burdens of lifetime annuity products are imposed not only on every sponsoring employer, but on every distribution event to every participant in every plan. Considering again the smaller plan sponsors, such additional burdens could result in a decision to either not sponsor a retirement plan or to consider terminating an existing plan. Second, a default is by its nature a single solution, and thus would be incompatible with the high level of individualization that is necessary to match an appropriate lifetime income option with each participant. To the extent a default is applied without regard to a participant's individual circumstances, the default will necessarily have a high likelihood of being inappropriate for the participant.

For the reasons discussed above, many participants appear not to want lifetime income options. In some cases, participants may be misguided in that regard. And, to be sure, improved education and changes to rules might cause many participants to prefer lifetime income options over other distribution options in the future. Nevertheless, defaulting participants on a wholesale basis today would not only result in many participants being put into lifetime income options that are inappropriate for their circumstances, but also contrary to their desires, thereby likely increasing their overall dissatisfaction with the plan itself. This in turn might discourage participants from participating in the plan at all.

Finally, as stated above, no amount of defaulting or otherwise mandating lifetime income products will benefit participants if participants' savings rates are too low and the account balances to be converted to income are too small. We encourage the Agencies to continue to evolve existing guidance to enable employers and participants to maximize savings rates and account balances.