The ERISA Industry Committee

Submission To

The Employee Benefits Security Administration
Department Of Labor

And

The Internal Revenue Service
Department Of The Treasury

In Response To

Their Request For Information
Regarding Lifetime Income Options
For Participants And Beneficiaries
In Retirement Plans

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I. INTRODUCTION

The ERISA Industry Committee ("ERIC") is pleased to respond to the Labor and Treasury Departments' request for information regarding lifetime income arrangements for participants and beneficiaries in retirement plans (the "RFI"). The RFI seeks views, suggestions, and comments on the question whether the retirement security of participants in employer-sponsored retirement plans and IRAs can be enhanced by facilitating access to, and use of, lifetime income or other arrangements designed to provide a lifetime stream of income after retirement. The RFI was published in the *Federal Register* on February 2, 2010. The *Federal Register* notice states that comments must be submitted no later than May 3, 2010.[1]

ERIC is a nonprofit association committed to advancing the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals that affect its members' ability to deliver high-quality benefits cost-effectively.

ERIC commends the Agencies for issuing the RFI. ERIC and its members have a deep and long-standing interest in the issues raised by the RFI. ERIC's members sponsor a number of the largest and most successful DB and DC plans in the nation. ERIC participated actively in the notice-and-comment process preceding the 2000 and 2005 amendments to the regulations under Code § 411(d)(6), allowing optional forms of benefit to be deleted from a DC plan under certain conditions.[2] ERIC appreciates the attention that the Internal Revenue Service and the Treasury Department gave to ERIC's prior comments, and ERIC looks forward to working with the Agencies on the issues that they have identified in the RFI.

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[1] The following acronyms and short-hand expressions are used in this submission:

- "Agencies" -- the Department of Labor and the Department of the Treasury,
- "Code" -- Internal Revenue Code,
- "DB plan" -- defined benefit retirement plan,
- "DC plan" -- defined contribution or individual account plan,
- "DOL" -- the Department of Labor,
- "ERIC" -- The ERISA Industry Committee,
- "ERISA" -- Employee Retirement Income Security Act,
- "IRA" -- individual retirement arrangement,
- "LIA" -- lifetime income arrangement, and
- "RFI" -- the Agencies' February 2, 2010 request for information.

[2] *See* T.D. 9176, 70 Fed. Reg. 3475 (Jan. 25, 2005); T.D. 8900, 65 Fed. Reg. 53,901 (Sept. 6, 2000).

Given the breadth and significance of the issues raised by the RFI, the interval between the issuance of the RFI and the deadline for comments is relatively short. In view of the abbreviated comment period, ERIC regards this submission as a preliminary response to the RFI and reserves the right to supplement this submission.

II. BACKGROUND

A. ERISA'S OBJECTIVES

In enacting ERISA, Congress sought to create an environment that was hospitable to the voluntary creation and continuation of employee benefit plans. Congress elected not to require employers to provide employee benefit plans and chose instead to allow employers to decide what benefits they will provide and to encourage employers to offer such benefits voluntarily.[3]

Congress recognized that participants would not benefit if ERISA made it inefficient for employers to maintain or administer benefit plans for their employees or if Congress narrowly restricted employers' freedom to design their plans. Congress concluded that providing employers with the freedom to administer and design their own plans was "vital" to the willingness of employers to provide such plans voluntarily and therefore sought to preserve "flexibility in the design and operation of [employee benefit] plans."[4]

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[3] *Conkright v. Frommert*, 559 U.S. ___ (2010) (slip op. at 9) ("ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is [not] so complex that administrative costs or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place") (citations and internal quotation marks omitted).); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) ("ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."); H.R. Rep. No. 779, 93d Cong., 2d Sess. 8-9 (1974) ("A fundamental aspect of present law, which the committee bill continues, is reliance on voluntary action by employers (and employees under contributory plans) for the establishment of qualified retirement plans. The committee bill also continues the approach in present law of encouraging the establishment of retirement plans which contain socially desirable provisions through the granting of tax inducements. In other words, under the new legislation as under the present law, no one is compelled to establish a retirement plan."); *id.* at 14-15 ("[T]he committee is aware that under our voluntary pension system, the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted, and that unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, in the case of those requirements which add to the cost of financing retirement plans, the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits. . . . [S]ince these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.").

[4] H.R. Rep. No. 533, 93d Cong., 1st Sess. 9 (1973).

B. MAJOR EMPLOYER PLANS

Major employers sponsor a wide variety of DB and DC plans. Many major employers sponsor both a DB plan and a DC plan, while others sponsor only DC plans. Some employees participate actively in both a DB plan and a DC plan, while others participate actively only in a DC plan. Most of these plans are tax-qualified, although restrictions imposed by the Code have caused an increasing percentage of the workforce to participate in nonqualified plans as well.

In recent years, a number of major employers announced that they were freezing their DB plans or closing their DB plans to new entrants. As a result, the percentage of plan participants who derive all or most of their retirement benefits from a DC plan can be expected to increase in the years ahead. At the same time, employees of many major employers continue to participate actively in both DB and DC plans.

Because major employers operate in diverse and highly competitive economic environments and seek to design their retirement plans to meet both their own business needs and the needs of their employees, major employers' retirement plans are extremely diverse. Although DB plans and money purchase pension plans are required to provide that an annuity is the default form of distribution under the plan,[5] many of these plans offer participants a lump-sum distribution option.

Under nearly all major-employer DC plans (other than money purchase pension plans), the default form of distribution is a lump sum. The overwhelming majority of DC plans (other than money purchase pension plans) do not offer an annuity as a distribution option under the plan. By contrast, a significant number of DC plans offer installment distribution options. Some of these plans offer one or more installment payment options (for example, distributions scheduled to be made over a 5-year or 10-year period), while others offer only "self help" installment options (*i.e.*, they allow participants to make ad hoc withdrawals whenever they want).

There are numerous reasons why the percentage of DC plans offering installment distribution options exceeds the percentage of DC plans offering annuity distribution options by a wide margin. In many cases, offering an installment distribution option does not require the addition of a new investment alternative to the plan's existing array of investment alternatives; installment payments can be made by the plan's current administrator or fund-provider; and installment payments can be made without triggering the application of ERISA's joint and survivor annuity requirements. In addition, because installment distributions are made for a finite period of time, plan fiduciaries are often more comfortable overseeing installment distributions than annuity distributions.

Many of the plan participants who take lump-sum distributions roll over the distributions (directly or indirectly) into IRAs. However, ERIC's members are not in a position to know how the participants in their retirement plans dispose of those funds after they are rolled into an IRA.

A small number of DB plans permit participants to make DC-to-DB transfers at or after retirement. These arrangements allow a participant in the employer's DC plan to elect to transfer the participant's account balance under the DC plan to the employer's DB plan where it is converted into an actuarially equivalent life annuity under the DB plan. The potential advantages of this arrangement

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[5] ERISA § 205; Code §§ 401(a)(11) & 417.

to participants include (a) favorable annuity conversion factors, (b) the security provided by the employer's DB plan, (c) participant confidence in the employer and the fiduciaries of the DB plan, (d) the comfort provided by the employer's on-going oversight of the DB plan, (e) reduced need to "shop" among annuity providers, (f) PBGC insurance coverage of benefits under the DB plan, and (g) consolidation of the participant's benefits under the DC plan with the participant's benefits under the DB plan.

C. RETIREE SPEND-DOWN ISSUE

Employees' retirement assets are derived from a variety of sources, including their employers' DC plans, payouts from their employers' DB plans, IRAs, and personal savings. For a variety of reasons, including the aging of the baby-boom generation, the popularity of § 401(k) and other DC plans, and the decline of DB plans, increasing numbers of employees are now retiring and will retire in the future without having a guaranteed lifetime retirement income other than the old-age benefits they have earned under the Social Security program.

Many employees will live for another 20 or 30 years or even longer after they retire, and many are understandably concerned that, regardless of the total amount they have saved for retirement, they will exhaust (or "spend down") their retirement savings before they die. Retirees are actually subject to two complementary risks: (1) the risk of overspending and outliving their retirement savings and (2) the risk of underspending and "doing without."

A growing body of research indicates that some employees would be well advised to address both of these risks by including one or more annuity contracts in their investment portfolio.[6] The May 2010 issue of *Kiplinger's Personal Finance* magazine explains how a retiree might benefit from the purchase of an immediate annuity:

> "An immediate annuity is based on a simple concept: You give an insurance company a lump sum, and it promises to send you a monthly check for the rest of your life. . . . For example, a 65-year-old man who invests $100,000 in an immediate annuity today could collect $8,112 per year for the rest of his life -- about twice as much as he could safely withdraw from his savings each year if he followed the widely accepted recommendation to limit initial withdrawals to 4% of your portfolio to avoid outliving your savings."[7]

Mortality gains help to explain why the size of the annuity payments exceeds the amount available under the "4%" approach alluded to in the *Kiplinger's* article: annuitants who die early

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[6] *See, e.g.,* Pension Research Council, "Managing Retirement Payouts: Positioning, Investing and Spending Assets," Pension Research Council Working Paper 2007-16 (July 2007); Jason S. Scott, John G. Watson, & Wei-Yin Hu, "Efficient Annuitization: Optimal Strategies for Hedging Mortality Risk," Pension Research Council Working Paper 2007-09 (undated); David F. Babbel & Craig B. Merrill, "Investing your Lump Sum at Retirement," Wharton Financial Institutions Center Policy Brief: Personal Finance (August 14, 2007); Olivia S. Mitchell & David McCarthy, "Annuities for An Ageing World," Pension Research Council Working Paper 2002-12 (June 2002).

[7] Kimberly Lankford, Lock in Your Retirement, *Kiplinger's Personal Finance* (May 2010).

(producing "mortality gains") subsidize the payments to the annuitants who live longer. Of course, the risk of dying early discourages some prospective annuity purchasers from buying annuities in the first place. To address this concern, some annuity providers offer annuity contracts with death benefit features. The size of the annuity payments under such contracts is reduced to reflect the cost of the death benefit feature.

A prospective annuity purchaser also might be concerned about inflation (that is, the risk that the real value of the fixed monthly payments under an immediate annuity will decline over time). Some annuity contracts address this concern by providing inflation adjustments. The size of the annuity payments under such contracts is also reduced to reflect the cost of the inflation-adjustment feature.

Another technique that a retiree can use to address the risks of overspending and underspending is "longevity insurance":

> "In its purest form, longevity insurance allows you to buy an annuity now and begin receiving a generous payout for life starting in about 15 to 20 years -- assuming you live long enough to collect it. For example, invest just under $200,000 at age 65 and you could receive $50,000 every year for life starting at age 80. . . .
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> "Because your investment portfolio needs to last for only 15 years in this example -- until you can start collecting benefits from your longevity insurance at age 80 -- you can afford to take larger withdrawals than you could from a portfolio designed to last for the rest of your life." [8]

Although the economic arguments in favor of annuitization appear to be very strong, there is no consensus among economists on the age at which a retiree should purchase, or begin to purchase, annuities:

> "[D]espite the preponderance of theoretical arguments in favor of annuitization -- we are hesitant to advocate a single optimal age at which an investor should convert his or her savings account into an irreversible income annuity. Given the many trade-offs involved in this decision and numerous sources of uncertainty, we *are* comfortable with suggesting that prior to age 60 is too early whereas waiting until the age of 90 is too late. . . . .
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> "For these reasons, a body of literature is emerging that suggests that investors should annuitize slowly, as in a dollar-cost-averaging (DCA) strategy. Depending on contract and policy features, this process would start at, for example, age 65-70 and continue until age 80 or 85, until the entire amount of desired annuity income was actually annuitized.

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[8] *Id.*

> Milevsky and Young (2007) provide the optimality of a staggered purchase option that annuitizes a small fraction on an ongoing basis."[9]

D. PARTICIPANTS' ELECTIONS

Many employees of ERIC's members participate in DB plans that offer an annuity as the default form of distribution as well as a lump-sum distribution alternative. Many ERIC members that sponsor such plans report that roughly 80% to 90% of the employees who are eligible to take lump-sum distributions elect to do so -- with spousal consent where required. Similarly, ERIC members sponsoring DC plans that offer annuity and installment distribution options report that the vast majority of the participants in such plans elect lump-sum distributions rather than annuities or installments. These reports appear to be consistent with the findings of the Government Accountability Office.[10]

In view of the advantages of extended forms of distribution to many participants, it is reasonable to ask why so many of them elect lump sums. Although the reasons vary from individual to individual, the following are among the principal reasons that plan participants have for not electing LIAs. We identify them without expressing any judgment as to whether we think that each reason is equally valid, and no inference should be drawn from the order in which the reasons are listed.

- **Lack of Information.** Although some participants understand what annuity contracts are and what they can provide, other participants are unaware of them, do not understand them, and/or are concerned that they don't know enough to make informed decisions.

- **Unfamiliarity with Providers.** Some participants believe that they do not understand the financial condition of providers well enough to justify investing a significant portion of their retirement savings in that company.

- **Unfamiliarity with LIA market.** Some participants do not feel competent to survey the LIA market and to compare the products offered by the insurance companies, mutual funds, and banks that provide LIAs.[11]

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9 Ibbotson, Milevsky, Chen, & Zhu, Lifetime Financial Advice: Human Capital, Asset Allocation, and Insurance at 71-72 (2007) (footnote omitted).

10 GAO, "Private Pensions: Alternative Approaches Could Address Retirement Risks Faced by Workers but Pose Trade-offs," at 19-20 (July 2009) (GAO-09-642) ("[A]nnuities are generally not offered as an option in DC plans. According to one study, estimates suggest that about one-fifth or less of DC plans offer an annuity option. . . . While DB plans are required to offer benefits in the form of an annuity, many DB plans also offer workers the option of taking benefits as a lump sum. One study found that when offered a lump-sum distribution the majority of DB participants chose this option over an annuity" (footnotes omitted).); GAO, "Private Pensions: Participants Need Information on Risks They Face in Managing Pension Assets at and during Retirement," at 15-16 (July 2003) (GAO-03-810) ("Our analysis of recently retired workers with pensions indicates that while most received annuities, many received other types of payouts. . . . While three-fifths of all retirees took annuities, over time an increasing percentage of more recent retirees received other types of payouts.").

11 Kimberly Lankford, Lock in Your Retirement, *Kiplinger's Personal Finance* (May 2010) ("”Deferred variable annuities are complex products that try to do a lot at once.").

- **Early Mortality.** Some participants are concerned about the risk that they might die soon after buying a life annuity -- with little or nothing to show for the funds they invested in the LIA.

- **Cost.** Some participants believe that it is costly to buy a life annuity or that the cost exceeds the value of the benefit that a life annuity provides.

- **Inflation Risk.** Some participants believe that inflation will erode the value of a fixed annuity payment.

- **Fixed-Income Investment.** Some participants believe that a life annuity contract is a fixed-income investment and that their investment portfolio should not be heavily weighted toward fixed-income investments.

- **Diversification.** Some participants are concerned that investing their retirement savings in an LIA will expose them to the risk of under-diversification.

- **Illiquidity.** Some participants are reluctant to make what they regard as an irrevocable long-term commitment of a substantial portion of their retirement savings. They believe they need liquidity to address emergencies and other events requiring substantial cash expenditures.

- **Credit Risk.** Some participants lack confidence that insurance companies will always be able to meet their commitments to make annuity payments.

- **Deferral.** Some retirees may conclude that there is no rush -- that they can buy annuities later without any real increase in cost.

Insurance companies have developed, and are continuing to develop, products with features that are designed to address participants' concerns. For example, some annuity contracts now offer one or more of the following features: CPI-indexed annuities, separate account guarantees, guaranteed withdrawal rights, and return of premium guarantees. Plan participants are not necessarily aware of the availability of contracts with these features, however.

E. EMPLOYER PRACTICES

There are numerous reasons why employers have not amended their DC plans to offer LIAs. The principal reasons are listed below.

- **Fiduciary Liability.** Employers are concerned that if their DC plans offer annuities, the employers and their plan fiduciaries will be exposed to claims that the fiduciaries did not have the expertise required to select (and to review periodically) annuity providers in accordance with ERISA's duty of prudence and that the fiduciaries did not do so.

- **Litigation Risk.** Employers anticipate that if there is ever dissatisfaction with an LIA, they will be drawn into costly and time-consuming litigation -- regardless of the strength of their position on the merits.[12]

- **Lack of Perceived Need.** For a variety of reasons, employers perceive no need to offer annuities under their DC plans. Among the reasons are (1) the fact that many DC plans supplement the employer's DB plan and (2) the availability of annuities through IRA rollovers.

- **Lack of Participant Acceptance.** Participants have shown remarkably little inclination to elect LIAs.

- **Cost.** It is costly to add an LIA to a plan. LIAs and LIA-providers must be evaluated and compared; employee communications materials must be prepared and distributed; and administrative and recordkeeping systems must be established.

- **Choice Overload.** Some employers do not wish to overload plan participants with too many benefit distribution options -- especially when there is a track record that makes it clear that very few participants will elect some of the options on the plan's menu.

- **Difficult to Evaluate Insurer.** It is difficult to evaluate the financial condition of an insurance company.

- **Difficult to Evaluate State Guaranty Associations.** State guaranty associations are funded after the fact by assessment, rather than in advance, and it is difficult to evaluate, as the DOL's annuity provider "safe harbor" regulation appears to require, the financial condition of State guaranty associations.

- **Uncertainties Regarding State Guaranty Associations.** Opinions differ over the effectiveness of the state guaranty associations. For example, the National Organization of Life and Health Guaranty Funds states that "After recovering assets from the estates of insolvent companies, [life and health insurers'] guaranty associations contributed over $5.5 billion to ensure that obligations to covered policyholders were met." On the other hand, some critics of the current system say that it is inefficient, slow, parochial, and fragmented.[13]

- **Difficult to Evaluate Annuity Contract.** Annuity contracts -- especially deferred annuity contracts, contracts providing for inflation adjusted payments, and separate account contracts -- are typically opaque, dense documents that are difficult for those outside the insurance industry to evaluate.

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[12] *See, e.g., In re Unisys Sav. Plan Litig.*, 1997 U.S. Dist. LEXIS 19198 (E.D. Pa. Nov. 24, 1997). *aff'd* 173 F.3d 145 (3d Cir. 1999) (claim that fiduciaries of DC plan breached their fiduciary duties under ERISA by investing in Executive Life Insurance guaranteed investment contracts).

[13] *See, e.g.,* Congressional Research Service, Insurance Guaranty Funds at CRS-5 & -6 (Nov. 20, 2003).

- **Lack of Plan Portability.** It is unclear how or whether a plan may transfer assets accumulated under one LIA with one insurer to an LIA with another insurer.

- **Lack of Participant Portability.** It is unclear how or whether a participant may transfer an LIA from one employer's plan to the plan of another employer.

- **Less Costly and Less Risky Alternative.** There is a practical alternative to providing an LIA *inside* the plan: an employee who wants an LIA can enter into an LIA *outside* the plan by making a rollover into an IRA and making appropriate arrangements with the IRA sponsor.

Employers are also reluctant to educate DC plan participants about LIAs for a variety of reasons. A number of the principal reasons are listed below. We identify them without expressing any judgment as to whether we think that each reason is equally valid, and no inference should be drawn from the order in which the reasons are listed.

- **Fiduciary Liability.** Major employers are keenly aware of the adage that "No good deed goes unpunished," and are reluctant to engage in educational efforts without assurance from the DOL that such efforts will not expose employers or plan fiduciaries to fiduciary liability claims.

- **Cost.** Some employers view the cost of such an educational program as disproportionate to any benefits it would confer on plan participants.

- **Paucity of Participant Interest.** Some employers are concerned that few participants will take advantage of any educational opportunities regarding LIAs that are offered to them.

- **Lack of Expertise.** Some employers believe that they do not have the expertise required either to conduct an educational program themselves or to engage a third party to conduct such a program.

- **Core Business Focus.** Some employers wish to focus exclusively on their core businesses and regard educational efforts regarding LIAs as a peripheral matter.

III. RECOMMENDATIONS

A. ERIC OPPOSES ANNUITY MANDATES ON DC PLANS

ERIC opposes any requirement that DC plans offer LIA distribution options. The experience under DB plans that offer lump-sum distribution options demonstrates that participants overwhelmingly favor receiving their benefits in a lump sum rather than under an LIA.

ERIC's concerns regarding LIA mandates apply across the board to (1) a mandate that DC plans offer LIAs as the *only* form of distribution, (2) a mandate that DC plans offer an LIA as the *presumptive* form of distribution, (3) a mandate that DC plans offer LIAs as the *default* form of distribution, and (4) a mandate that DC plans provide (similarly to Code § 401(a)(31)) for a *direct rollover* to an LIA-provider as the *default* form of distribution. A mandate that DC plans offer LIAs in any fashion would subject plan fiduciaries to potential liabilities, and plans to great expense, for very little or no gain. Plans would incur substantial costs in evaluating and selecting LIA-providers, and in establishing and maintaining the disclosure, communications, processing, and recordkeeping systems that an LIA would require, in return for no additional benefit for the overwhelming majority of plan participants. A mandate that DC plans offer LIAs would thus subvert one of Congress's chief objectives in enacting ERISA: to enable employers to administer their voluntarily-adopted benefit plans on a cost-effective basis.

Moreover, under most DC plans, the costs of complying with an LIA mandate would be borne by plan participants, since most DC plans pay the plan's administration expenses, and costs borne by a DC plan are ultimately borne by the plan's account-holders.

Finally, the absence of an LIA *inside* the plan (or via a direct rollover to an IRA-sponsor designated by the plan or the plan's fiduciaries) would not deprive participants of the ability to invest their account balances in LIAs without involving the employer or the plans' fiduciaries in the selection of the LIA. A participant can enter into an LIA *outside* the plan by rolling over his or her account balance into an IRA of the participant's own choosing and making appropriate arrangements with the IRA-sponsor.

B. ERIC SUPPORTS AGENCY EDUCATIONAL INITIATIVES

ERIC recognizes that there are strong arguments that some DC plan participants will be better off if some of their retirement savings is invested in one or more LIAs. ERIC believes that the interests of DC plan participants as a whole group will be best served by educating employers and participants regarding LIAs rather than by imposing an unwelcome mandate on all DC plans. By educating employers and DC plan participants, the Agencies can have a positive influence on plan design, participant perceptions, and ultimately participant behavior, without imposing unnecessary and unproductive costs on DC plans and plan participants. Possible topics for an educational initiative include the following:

- Investing in an LIA.
    - Potential Benefits to Participant.
    - Potential Risks to Participant.
    - Potential Benefits to Employer from DC Plan's Offer of LIAs.
    - Potential Risks to Employer from DC Plan's Offer of LIAs.
- How a Participant or a Fiduciary Can Evaluate the Issuer's Financial Condition.
- How a Participant or a Fiduciary Can Evaluate State Guaranty Associations.
- How a Participant or a Plan Fiduciary Can Compare LIAs:
    - Longevity Risk.
    - Overspending Risk.
    - Underspending Risk.
    - Early Mortality Risk.

  - Inflation Risk.
  - Investment Risk.
  - Insolvency Risk.
  - Cost of an LIA.
- How to Obtain More Information About LIAs.
- Self-Funding (Non-Annuity) Option.
  - Potential Benefits to Participant.
  - Potential Risks to Participant.
  - Potential Benefits to Employer from DC Plan's Offer of Self-Funding Option.
  - Potential Risks to Employer from DC Plan's Offer of Self-Funding Option.
- How a Participant or a Plan Fiduciary Can Compare LIA and Self-Funding Options.

C. ERIC SUPPORTS GUIDANCE ON FIDUCIARY LIABILITY

Although some participants understand what annuity contracts are and what they can provide, many participants are unaware of them, do not understand them, are concerned that they don't know enough to make informed decisions, are discouraged by the cost of buying annuity contracts, and/or are apprehensive about the risks associated with annuity contracts.

A number of major employers would like to raise their employees' awareness of the potential value of annuity contracts and would like to help their employees to learn more about annuity contracts. These employers are concerned, however, that any assistance they provide will expose them to fiduciary liability under ERISA. The flood of ERISA litigation in recent years has made many employers reluctant to subject themselves unnecessarily to even a remote risk of fiduciary liability. The costs of defending class action litigation are so substantial that employers do not wish to incur any risk of litigation that is avoidable -- even if they believe that a court would ultimately find that they have done nothing wrong.

These employers wish to furnish information to former DC plan participants (and possibly to certain current participants as well) that will help to educate them about annuity contracts. However, the employers do not want the furnishing of such information to increase the scope of the employer's responsibility as a fiduciary within the meaning of ERISA § 3(21)(A).

We believe that there are at least two reasons why an employer will not be a fiduciary within the meaning of ERISA § 3(21)(A) to the extent that the employer provides information to individual plan participants. First, the employer will not provide services to an employee benefit plan within the meaning of ERISA § 3(3). Second, even if the employer is deemed to provide services to an employee benefit plan within the meaning of ERISA § 3(3), the employer will not act in the capacity of manager, administrator, or financial adviser to an employee benefit plan within the meaning of ERISA § 3(3). ERIC urges the DOL to issue guidance concluding that an employer will not be a fiduciary for one or both of these reasons.

No services provided to a plan. Under ERISA § 3(21)(A), a person is deemed to be a fiduciary only if it "act[s] in the capacity of manager, administrator, or financial adviser to [an employee benefit] plan . . . ."[14] If the employer provides information directly to plan participants, the employer will not provide services to an employee benefit plan.

Moreover, to the extent that the employer's activity relates to the disposition of plan assets, it will do so only *after* the plans have distributed those assets. Once the assets have been distributed by a plan, the plan will cease to have any property interest in the assets, and the management of the distributed assets will not be governed by ERISA.[15]

This is readily apparent with respect to *former* plan participants, many of whom will have received full distributions of their benefits from the plans many years, or even decades, before the educational program is implemented. We can conceive of no basis for believing that ERISA will apply to the management of those assets – years or decades after they were distributed by the plans.

The same analysis applies to *current* DC plan participants. The educational program will not relate to their *current or future* benefits under the plan, to the assets *currently* held by the plan, or to assets to be held by the DC plan in the future – which are, or will be, governed by ERISA. To the contrary, the educational program will relate to the disposition of plan assets only *after* the DC plan has distributed those assets to participants. Once the assets have been distributed by the plan, the plan will cease to have any property interest in the assets, and the management of the distributed assets will no longer be governed by ERISA.

Employer will not act as manager, administrator, or financial adviser. Under ERISA § 3(21)(A), a person is a fiduciary with respect to a plan only to the extent that it (i) exercises discretionary authority or control over the management of the plan or exercises any authority or control over the management or disposition of the plan's assets, (ii) renders investment advice for a fee with respect to any property of the plan or has any authority or responsibility to do so, or (iii) has any discretionary authority or responsibility for administration of the plan.

The question raised by the statutory definition of "fiduciary" is whether the employer acts in a fiduciary capacity under an educational program. As the Supreme Court has observed:

> "[T]he statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan. 29 U.S.C. § 1002(21)(A). In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."

Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000).

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14 *See Pegram v. Herdrich*, 530 U.S. 211, 222 (2000).

15 *See* DOL Adv. Opinions 99-08A (May 20, 1999), 94-31A (Sept. 9, 1994), & 92-24A (Nov. 6, 1992).

There would be no basis for any claim that the employer's role under the program falls under clause (i) or clause (iii) of the definition of "fiduciary." The employer's role is limited to providing information; it has no discretionary authority or control over the management or administration of any plan or plan assets.

Nor will the employer provide "investment advice" within the meaning of clause (ii) of the definition of "fiduciary." The DOL's "investment advice" regulation provides that a person is deemed to render investment advice *only* if it

> (i) renders advice as to the value of property or makes recommendations as to the advisability of investing in or purchasing or selling property, *and*
>
> (ii) either directly or indirectly (A) has discretionary authority or control with respect to purchasing or selling property for the plan *or* (B) renders any investment advice (as described in clause (i)) to the plan on a regular basis pursuant to a mutual understanding that such services will serve as a primary basis for investment decisions *and* that it will render individualized advice to the plan based on the particular needs of the plan. *See* 29 C.F.R. § 2510.3-21(c).

The employer will not provide "investment advice" within the meaning of the regulation. The employer ***will not*** (1) provide advice regarding the value of annuities, (2) make recommendations regarding the advisability of purchasing an annuity contract, (3) have discretionary control over annuity purchase decisions, or (4) be a party to any understanding that its services will serve as a primary basis for investment decisions *and* that it will render individualized advice to the plan based on the particular needs of the plan.

In IB 96-1, the DOL concluded that investment education is not investment advice. The DOL should likewise conclude that distribution education is not investment advice.

D. ERIC SUPPORTS REFORM OF MINIMUM DISTRIBUTION RULES

The complexity of the minimum distribution rules in Code § 401(a)(9), together with the draconian 50% penalty tax on any distribution shortfall,[16] discourages employees from accumulating their savings until their later years. Some employees elect to withdraw their entire account balance from a DC plan in a lump sum, rather than deal with the complex rules that apply to LIA distributions.

The Agencies should consider working with Congress to make the following changes to § 401(a)(9):

- **Repeal or Targeted Approach.** The vast majority of plan participants have no interest in unduly delaying the distribution of their retirement savings. To the contrary, a more pertinent concern is that they might withdraw their savings *too early* -- a concern that is adequately addressed by the 10% penalty tax on early distributions.[17] Insofar as employer-

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[16] *See* Code § 4974.

[17] *See* Code § 72(t).

sponsored plans are concerned, we recommend that the minimum distribution rules either be repealed or applied only to "key employees" within the meaning of Code § 416(i).

- **Alternative Methods of Compliance.** As we have explained, there is considerable debate regarding the optimal age for purchasing an annuity. The current minimum distribution rules require annuity distributions to begin at age 70-1/2 (or at retirement, if later). ERIC recommends that the rules be amended to permit alternative methods of compliance so that, for example, a participant employee can make arrangements to have a life annuity begin at age 85.[18]

E. ERIC SUPPORTS GUIDANCE ON DC-TO-DB TRANSFERS

The Agencies should facilitate the efforts of employers that wish to offer participants in their DC plans the opportunity to transfer their DC plan account balances to the employer's DB plan, under which the participant will be credited with an additional annuity benefit that is actuarially equivalent to the transferred account balance. The Agencies could facilitate such arrangements by resolving the issues that such arrangements raise, including following:

- **Actuarial Assumptions.** The Agencies should recognize "safe harbor" actuarial assumptions that a DB plan may use to convert an amount transferred from a DC plan to a life annuity.

- **Code § 415 Limits.** The Agencies should make clear that if the DB plan uses "safe harbor" assumptions to convert a participant's account balance under the DC plan to a life annuity under the DB plan, the additional benefit credited to the participant as a result of the conversion will not be taken into account under Code § 415.

- **Vesting Standards.** The Agencies should make clear that if the DB plan uses "safe harbor" assumptions to convert a participant's account balance under the DC plan to a life annuity under the DB plan, the conversion of the participant's account balance under the DC plan to a life annuity under the DB plan will not cause either the DC plan or the DB plan to violate ERISA's vesting and benefit accrual standards.

- **Section 4044 Status.** The Agencies should work with the PBGC to clarify the priority assigned by ERISA § 4044 to the additional benefits credited to the participant under DB plan as a result of the conversion.

- **PBGC Insurance.** The Agencies should work with the PBGC to clarify that the additional benefits credited under the DB plan as a result of the conversion will be eligible for termination insurance.

- **Spousal Consent.** The Agencies should clarify whether a participant can make a transfer from a DC plan to a DB plan without his or her spouse's consent.

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[18] *See* PLR 200951039 (Sept. 21, 2009) (required minimum distributions determined under individual account plan rules during "Phase I" period and under defined benefit plan rules during "Phase II" period).

- **Disclosure Issues.** The Agencies should develop a "safe harbor" notice that a plan administrator a may give to a participant before the participant elects to make a DC-to-DB transfer.

F. ERIC SUPPORTS A GENUINE SAFE HARBOR

In 2008, the DOL issued a regulation providing what the DOL characterized as a "safe harbor" under the duty of prudence for the selection of an annuity provider and contract for benefit distributions from a DC plan.[19] Under the purported safe harbor, the selection of an annuity provider for benefit distributions from a DC plan satisfies the duty of prudence if the fiduciary-

(1) Engages in an objective, thorough and analytical search;

(2) Appropriately considers information that is sufficient to assess the annuity provider's ability to make all future payments;

(3) Appropriately considers the cost of the contract in relation to the benefits and services to be provided;

(4) Appropriately concludes, at the time of the selection, that the annuity provider is financially able to make all future payment and that the cost of the annuity contracts reasonable in relation to the benefits and services to be provided; and

(5) If necessary, consults with an appropriate expert or experts.

The regulation does not provide a genuine safe harbor, however.[20] A genuine safe harbor provides assurance that the requirements of the law will be satisfied (or deemed satisfied) if specified steps are taken. For example, the DOL recently established a safe harbor that provides "a higher degree of compliance certainty" regarding when an employer has timely deposited participant contributions to employee benefit plans with less than 100 participants.[21] The DOL's purported safe harbor for the selection of an annuity provider offers no such assurance. The regulation is laced with critical undefined terms requiring subjective judgments[22] and that therefore prevent the regulation from providing the compliance certainty that a genuine safe harbor provides.

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[19] 29 C.F.R. § 2550.404a-4.

[20] The regulation states that it sets forth an optional means, rather than the only means, for satisfying the duty of prudence. *See* 29 C.F.R. § 2550.404a-4(a)(2). This is a description of an alternative method of compliance, not a safe harbor.

[21] 75 Fed. Reg. 2068, 2069 (Jan. 14, 2010), *amending* 29 C.F.R. § 2510.3-102; s*ee also* Code § 401(k)(12); Treas. Reg. § 1.410(b)-4(c)(2).

[22] The critical undefined terms include "thorough," "appropriately considers," "sufficient," "appropriately concludes," "reasonable," "necessary," and "appropriate expert."

IV. CONCLUSION

We appreciate the opportunity to respond to the RFI. We reserve the right to supplement this submission.

If the Agencies have any question about this submission, or if we can otherwise be of assistance, please let us know.

THE ERISA INDUSTRY COMMITTEE

By

Mark J. Ugoretz, President