Department of Labor Report to Congress on Employee Benefits Security Administration's Interpretive Bulletin 95-1

Julie A. Su
Acting Secretary of Labor

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I. Introduction

The Department of Labor's Employee Benefits Security Administration (EBSA) is issuing this report in accordance with section 321 of the SECURE 2.0 Act of 2022,[1] titled "Review of Pension Risk Transfer Interpretive Bulletin." This section directs the Department to review Interpretive Bulletin 95-1 and consult with the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) to determine whether amendments to Interpretive Bulletin 95-1 are warranted. The Department must then report its findings to Congress, including an assessment of any risk to participants.

The Department issued Interpretive Bulletin 95-1 in 1995.[2] It provides guidance on the Employee Retirement Income Security Act (ERISA) fiduciary duties as applied to the selection of an annuity provider for the purpose of distributing benefits under a defined benefit pension plan. The purchase of an annuity in this context is often referred to as a "pension risk transfer," or a "de-risking" transaction.

II. Process of EBSA's Review and Consultation with the ERISA Advisory Council

EBSA's review of Interpretive Bulletin 95-1 has been broad, given that the SECURE 2.0 Act did not identify an area of focus for the required review. EBSA reviewed background materials including a previous ERISA Advisory Council report on this topic,[3] and it conducted research into historical and legal developments and current market trends.[4]

EBSA also conducted more than 40 stakeholder meetings regarding the Interpretive Bulletin as part of its review. The meeting participants included representatives of organized labor, employer groups, consumer groups, insurance companies, insurance trade associations, other regulators, consultants, academia, and other interested parties. These meetings explored individual stakeholder views on:

- how well the Interpretive Bulletin's guidance has worked;
- whether the guidance should be improved; and

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[1] Consolidated Appropriations Act, 2023, Div. T, Pub. L. No. 117-328, 136 Stat. 4459, 5378 (2022).
[2] 29 C.F.R. § 2509.95-1, 60 Fed. Reg. 12328 (Mar. 6, 1995).
[3] ERISA Advisory Council, U.S. Dep't of Labor, Private Sector Pension De-risking and Participant Protections (2013), www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2013-private-sector-pension-derisking-and-participant-protections.pdf.
[4] *See* Appendix A for a selected bibliography.

- any annuity market trends or developments that they believe EBSA should consider in its review.

EBSA also conducted the required consultation with the ERISA Advisory Council, which held a public meeting on July 18, 2023, regarding the Interpretive Bulletin.[5] Before the meeting, EBSA provided background materials and a consultation paper to the ERISA Advisory Council. Other stakeholders also submitted materials to the Council. EBSA staff and other witnesses provided testimony at the public meeting and Council members then expressed a variety of views regarding possible updates to the Interpretive Bulletin.

The ERISA Advisory Council further discussed the topic at its meeting on August 29, 2023. At this meeting, council members voted to indicate support for various positions related to the Interpretive Bulletin. The council then provided EBSA with a written statement with a variety of viewpoints from the council's membership on whether and how the Interpretive Bulletin should be updated.[6]

III. Background and Relevant Trends

A. Interpretive Bulletin 95-1

Defined benefit pension plans promise participants a specific benefit (e.g., monthly payment) at retirement based upon a formula set forth in the plan. Employers involved with these plans are generally responsible for making contributions so that, between the contributions made to the plans and investment income earned by the plans, the plans can pay the promised benefits.

These plans thus present investment and other risks related to ensuring sufficient funding. Sponsors of defined benefit plans have a number of options to consider when faced with these risks.

One option is to purchase an annuity contract to transfer liability for payments from the plan to the insurance company issuing the annuity. An annuity purchase can involve a total buy-out, in which the plan sponsor terminates the plan in connection with transferring all of the benefit obligations to the insurer. Alternatively, the annuity purchase can involve a partial buy-out (sometimes referred to as a "lift-out") limited to a certain participant population.

These transactions are considered a form of pension risk transfer or de-risking, but they are not the only forms. Other methods of managing risk include restricting participation in the

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[5] *See* ERISA Advisory Council webpage, 2023 Consultation on Interpretive Bulletin 95-1, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council.
[6] *See* Appendix B, Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1 (Aug. 29, 2023).

plan, restricting benefit accruals, liability-driven investing, buy-ins in which a plan's assets are invested in an annuity that remains a plan asset, and lump sum offers to participants.

Interpretive Bulletin 95-1 was issued in 1995 amid concerns about the claims-paying ability of insurance companies offering annuity contracts and the fiduciary decision-making with respect to these transactions. At the time, the high-profile failure of the Executive Life Insurance Companies of California and New York impacted 44,000 retirees and resulted in intervention by state regulators.[7]

The Interpretive Bulletin provides that plan fiduciaries must take steps calculated to obtain the safest annuity available unless, under the circumstances, it would be in the interest of the participants and beneficiaries to do otherwise. It states that fiduciaries must conduct an objective, thorough, and analytical search for purposes of identifying and selecting providers from which to purchase annuities. The Interpretive Bulletin emphasizes that reliance solely on ratings provided by insurance rating services would not be sufficient to meet the fiduciary obligation.

The Interpretive Bulletin sets forth the following six factors that fiduciaries should consider, among other things, in evaluating an annuity provider's claims-paying ability and creditworthiness:

1. The quality and diversification of the annuity provider's investment portfolio.
2. The size of the insurer relative to the proposed contract.
3. The level of the insurer's capital and surplus.
4. The lines of business of the annuity provider and other indications of an insurer's exposure to liability.
5. The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts.
6. The availability of additional protection through state guaranty associations and the extent of their guarantees.

Interpretive Bulletin 95-1 also provides that plan fiduciaries should obtain the advice of a qualified, independent expert unless they themselves possess the necessary expertise to evaluate such factors. It further provides that a fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.

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[7] *See* Interpretive Bulletin 95-1, 60 Fed. Reg. 12328 (Mar. 6, 1995); U.S. General Accounting Office, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened 2 (1993), www.gao.gov/assets/hrd-93-29.pdf.

B. Plan Sponsor Pension Risk Transfer Activity

EBSA's review indicated that plan sponsors have several reasons for engaging in pension risk transfers. Some may want to avoid or reduce the cost of maintaining the plan, the administrative responsibilities, or the impact and uncertainty that the plan's funding may have on the contributing employers' corporate balance sheets. Various factors can affect plan funding, including interest rates, market volatility, plan asset allocation, etc.

Another reason plan sponsors may consider pension risk transfer is to avoid or reduce the cost of premiums payable to the Pension Benefit Guaranty Corporation (PBGC).[8] The PBGC protects participants in single-employer defined benefit plans by paying benefits up to limits set by law if a plan is terminated and does not hold sufficient assets to pay all benefits. A lift-out pension risk transfer that involves an annuity purchase covering a participant's entire benefit under a plan eliminates the per-participant PBGC premiums for the participant.

EBSA reviewed PBGC data to evaluate how many participants are impacted by pension risk transfers and found the following:

- Approximately 32,500 single-employer defined benefit pension plans filed for standard terminations in the 2000 to 2022 period.[9]
- About eight percent of PBGC-covered single-employer plans conducted some form of partial pension risk transfer during a 2015-2022 study period.[10]
    - Almost 32 percent of the plans that engaged in a partial pension risk transfer purchased annuities for an estimated 2.2 million participants.
    - The number of plans purchasing annuities annually more than doubled over the observation period.

In 2022, defined benefit pension risk transfer annuity purchases reached an all-time high with transactions totaling $52 billion in premiums. While lift-out activity constituted around 43 percent of transactions, it represented nearly 80 percent of the total transaction value for the year.[11]

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[8] PBGC, Premium Rates: Current and Historical Information, https://www.pbgc.gov/prac/prem/premium-rates (last updated Oct. 13, 2023).
[9] PBGC, 2021 Pension Insurance Data Tables, Table S-3, https://www.pbgc.gov/prac/data-books.
[10] PBGC, Updated Analysis of Single-Employer Pension Plan Partial Risk Transfers (June 2024), https://www.pbgc.gov/sites/default/files/documents/2024-pension-risk-transfer-analysis.pdf .
[11] Aon, U.S. Pension Risk Transfer: Market Insights (Mar. 2023), https://www.aon.com/insights/reports/2023/us-pension-risk-transfer-market-insights (follow "Download Whitepaper"; complete form for access to whitepaper). Compare to 2011, when there were less than $1 billion in total premium and 194 transactions. Aon, 2021 U.S.

C. Private Equity Involvement in the Life Insurance Industry

There has been a documented increase in private equity involvement in the life insurance industry in recent years.[12] Private equity involvement includes private equity firms buying insurance companies or interests in them, as well as private equity firms entering into investment management agreements to manage insurance company investments.[13]

According to the National Association of Insurance Commissioners (NAIC), private equity-owned insurance companies held $534 billion in cash and invested assets in 2022. $509 billion of these assets were held by life insurance companies, accounting for 9.6 percent of the life insurance industry's total asset holdings.[14] Another report in 2022 noted that "[a]ll five of the largest private equity . . . firms by assets have holdings in life insurance, representing 15 to 50 percent of their total assets under management."[15]

In March 2022, U.S. Senator Sherrod Brown wrote to both the NAIC and the Federal Insurance Office (FIO) of the Department of the Treasury expressing concern about alternative asset managers such as private equity firms being involved in pension risk transfer transactions. Senator Brown asked both NAIC and FIO to evaluate concerns regarding risks to policyholders as well as the broader economy associated with private equity-controlled insurers.[16]

The Department of the Treasury's response described a shift in the business model of private equity firms, as follows:

Pension Risk Transfer Annuity Settlement Market Update 3 (Mar. 2021), https://insights-north-america.aon.com/pension-risk-management/aon-us-pension-risk-transfer-annuity-settlement-market-update-whitepaper.

[12] *See e.g.,* Eileen Appelbaum, Beware of Private Equity Gobbling Up Life Insurance and Annuity Companies, Ctr. For Econ. And Pol'y Res. (Jan. 2022), https://cepr.net/wp-content/uploads/2022/01/2022-01-PE-and-Life-Insurance-Appelbaum.pdf; Matt Wirz & Leslie Scism, Private Equity Taps Insurers' Cash to Speed Up Growth, Wall Street Journal (Jan. 31, 2023, 5:30 AM), https://www.wsj.com/articles/private-equity-taps-insurers-cash-to-speed-up-growth-11675128742.

[13] *Id.*

[14] These numbers were calculated by the Department from NAIC data provided in the NAIC Capital Markets Report on Private Equity (PE)-Owned U.S. Insurers' Investments. The calculations provided are exclusive to life insurance. The reports can be found here: https://content.naic.org/capital-markets-bureau.

[15] Ramnath Balasubramanian et al., Why Private Equity Sees Life and Annuities Companies as an Enticing Form of Permanent Capital, McKinsey & Company (Feb. 2, 2022), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/why-private-equity-sees-life-and-annuities-as-an-enticing-form-of-permanent-capital.

[16] Letter from The Honorable Sherrod Brown, U.S. Sen. to Steven Seitz, Director, Federal Insurance Office and Dean L. Cameron, President, Nat'l Assoc. of Ins. Comm'rs (Mar. 16, 2022), www.banking.senate.gov/imo/media/doc/brown_letter_on_insurance_031622.pdf.

> Previously, the focus of private equity was largely on buy-outs. Now, some private equity firms are increasingly pivoting their business objective to the private credit market and to raising more "permanent" capital to support this business. To that end, some private equity firms have increased their access to books of annuities and life insurance through purchases of insurers. With their steady cash flows, annuity and life insurers can provide private equity firms an opportunity to scale the growth of private credit strategies, to obtain a reliable long-term source of capital, and/or to have an in-house customer that provides a consistent stream of fees.[17]

The Treasury Department's response identified issues for further consideration, including:

> 1. Whether a potential misalignment may exist between the shorter-term objectives/strategy of the alternative asset manager investment model and the long-term commitment necessary for fulfilling annuity/life insurance policyholder interests.
>
> 2. Whether policyholder interests are sufficiently protected from the effects of potential conflicts of interest within private equity organizational structures (such as management/investment fees; operating strategies that result in highly levered balanced sheets; use of third-party asset managers; and sourcing from affiliated origination platforms).
>
> 3. Whether inadequate levels of transparency regarding the risks inherent in the highlighted investment strategies may contribute to insufficient requirements for reserving of liabilities and capital held for unexpected losses, potentially exposing the state guaranty system in the extreme case of insurer failure and potential contagion risk. The involvement of private equity firms could also complicate any future resolutions in case of such failures. Relatedly … in the case of pension risk transfer transactions, further examination regarding trade-offs from the loss of PBGC backing may be warranted.

[17] Letter from Jonathan Davidson, Assistant Sec'y for Legisl. Affairs, U.S. Dep't of the Treasury, to The Honorable Sherrod Brown, U.S. Sen. (June 29, 2022) (citing Sebastien Canderle, "Permanent Capital: The Holy Grail of Private Markets," *CFA Institute Enterprising Investor*, June 1, 2021, https://blogs.cfainstitute.org/investor/2021/06/01/permanent-capital-the-holy-grail-of-private-markets/), www.banking.senate.gov/imo/media/doc/fio_85.pdf.

4. Whether there are implications for the safety and soundness of insurer obligations in view of the offshore domicile of affiliated and unaffiliated reinsurers involved in the private equity-owned insurance business, which in some instances have resulted in large capital releases following insurers executing affiliated reinsurance transactions. This type of activity suggests that these deals could be motivated by regulatory arbitrage opportunities (such as allowing reduced reserves to back policyholder obligations).

The Treasury Department stated that it is monitoring developments and particularly focusing on liquidity, credit risk and capital adequacy, offshore reinsurance, and conflicts of interest.

In its response to Senator Brown, the NAIC reported taking steps as early as 2013 related to the increased private equity involvement in the life insurance industry. It also described 13 recommendations currently being worked on by the NAIC Macroprudential Working Group that are intended to "identify where existing disclosures, policies, control and affiliation requirements, and other procedures should be modified or new ones created, to address any gaps based on the increase in the number of [private equity] owners of insurers, the role of asset managers in insurance, and the increase of private investments in insurers' portfolios, among other reasons."[18]

IV. Issues Identified in EBSA's Review

At EBSA's stakeholder meetings, attendees expressed a range of opinions as to whether changes to the Interpretive Bulletin are warranted. On one end, some said that the Interpretive Bulletin identifies the appropriate considerations for plan fiduciaries and has worked well over time, and therefore, no changes are warranted. On the other end, some stakeholders asserted that significant changes to the Interpretive Bulletin are needed to protect annuitants' interests.

Some stakeholders who wanted EBSA to retain the existing Interpretive Bulletin without change said that state insurance regulators will provide effective oversight of insurance company solvency issues, including any that private equity involvement may pose. Relatedly, some attendees said that plan fiduciaries are not likely to have the experience or expertise to evaluate some of the complex practices that insurers engage in.

Stakeholders also argued that an annuity purchase is an important tool for plan sponsors and may be preferable to a lump sum offering in maintaining participants' retirement security.

[18] Letter from Dean L. Cameron et al., Nat'l Assoc. of Ins. Comm'rs, to The Honorable Sherrod Brown, U.S. Sen. (May 31, 2022), www.banking.senate.gov/imo/media/doc/naic_may2.pdf.

They warned EBSA against placing restrictions on annuity purchases in the pension risk transfer context. A stakeholder also cautioned EBSA against placing increased emphasis on independent fiduciaries or consultants due to the extra cost that would impose on plan sponsors.

The stakeholders who believed significant changes are necessary were often concerned by the trend of private equity involvement in the life insurance industry. Some believed the Interpretive Bulletin should be amended to focus plan fiduciaries' attention on risks related to the life insurance company's ownership structure and the extent to which the insurer relies upon non-traditional and potentially riskier investments and liabilities as well as offshore and/or captive reinsurance, among other things.

Some attendees suggested more targeted changes to the Interpretive Bulletin. One frequent suggestion was that the Interpretive Bulletin should be revised to note that the life insurance company's administrative capabilities should be considered. Another common suggestion was to eliminate state guaranty association protections as a fiduciary consideration.

Other stakeholders wanted EBSA to use the Interpretive Bulletin's guidance to address the continuation of certain rights provided by ERISA to the people who are no longer participants covered under the ERISA plan because of the pension risk transfer annuity purchase.

Some meetings also included discussion of whether any revisions to the Interpretive Bulletin should include guidance to help plan fiduciaries evaluate material considerations, such as benchmarks or rankings. While some stakeholders thought additional guidance to assist plan fiduciaries would be helpful, others stated that each transaction is different and that EBSA should allow plan fiduciaries to determine how each factor should figure into the overall analysis. Several stakeholders said the Interpretive Bulletin should continue to be "principles-based" rather than more specific, so as not to become outdated or to allow parties to work around the specific provisions while evading the spirit of them.

The following discussion further details the issues that stakeholders raised:

A. Ownership Structure

In addition to concerns about certain specific life insurer practices that are discussed in later sections, some stakeholders identified overarching issues related to a life insurance company's ownership. These stakeholders had a global concern that private equity-owned insurers may not intend to be in the insurance business for the long term and, by definition, annuities are long-term commitments. These stakeholders questioned whether private equity firms would have policyholders' interests at the forefront.

Several stakeholders raised a related point that the distinction between mutual insurance companies (which essentially are owned only by policyholders) and publicly traded insurance companies (which are owned by investors such as stockholders) is important for plan fiduciaries to understand and consider when selecting an annuity provider. In the 1990s, U.S. life insurers started demutualizing (becoming stock companies or mutual holding companies) to gain access to capital markets, incentivizing changes to investment practices and organizational structure.[19] In the view of at least some stakeholders, mutual insurance companies are managed to support policyholders while publicly traded companies must consider investors' interests, which can sometimes lead to activity that favors investors over policyholders. However, other stakeholders asserted that publicly traded insurance companies are safer for annuity holders based on their access to capital.

Another issue within the broad category of ownership structure concerns holding company structures that have multiple lines of insurance and non-insurance businesses inside the structure. Some stakeholders stressed that fiduciaries must ensure they are aware of the available capital and surplus of the insurer writing the annuity, as presented in the insurer's annual sworn statement to insurance regulators. They stressed this because the insurer is the entity that is legally obligated to pay the annuity and a policyholder has a cause of action only against the insurer and not any affiliates of the insurer. These stakeholders suggested that referencing capital held by the insurer's affiliates might mislead fiduciaries as to the financial health of the insurer.

Other stakeholders indicated more generally that the Interpretive Bulletin should emphasize the importance of transparency regarding the insurance company's parent. Stakeholders who want parent or group capital included as a factor in the Interpretive Bulletin noted that these holdings can alleviate an insurer's need to sell assets for reduced value to cover unexpected costs and prevent a liquidity crisis. One stakeholder said that a parent entity's financial support of an insurer's operations may take different forms that may or may not be formalized or reduced to contract.

Stakeholders also focused on specific business dealings between insurance companies and their affiliated entities, with the main concern being potential misalignment and conflicts of interest. Some stakeholders indicated that business relationships between an insurance company and affiliated entities can be important considerations for a fiduciary, especially if the management of these parties is not sufficiently independent to ensure that dealings are at arm's length. As one example, stakeholders expressed concern about the danger that the insurance

[19] Barbara Remmers, Life Insurer Demutualization in the Current Era+, 22 J. of Ins. Reg. 1 (2003); Lal Chugh & Joseph W. Meador, Demutualization in the Life Insurance Industry: A Study of Effectiveness, 27 Rev. of Bus. 10-17 (Working Paper No. 1014, 2006), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1006&context=financialforum_pubs.

company's assets would be invested in investment funds managed by affiliates and subject to high fees.

In its letter to Senator Brown, the NAIC discussed how state insurance regulators focus on risks at the level of the individual insurer as well as the group. The NAIC noted that only insurers can sell or administer policies, and therefore, risk-based capital requirements are enforced at the insurer level. However, states collect financial disclosures at the group level to allow them to monitor the group's access to insurer assets, including as part of services agreements. The NAIC explained that larger insurers must file an "Own Risk and Solvency Assessment" which reports on all risks posed to an insurance group. The NAIC has also introduced a Group Capital Calculation, which it says can give regulators insight into capital allocation throughout the group.[20]

B. Increase in Non-Traditional/Risky Investments

Several stakeholders drew EBSA's attention to what they described as the rise in risky investment strategies in the insurance industry. They said that industry's increasing investment in asset-backed securities, such as collateralized loan obligations (including the riskier tranches) and private credit possibly overexposes insurers to investment and liquidity risk that could lead to solvency issues to the potential detriment of annuitants. One stakeholder cited literature calculating that insurers' collateralized loan obligation exposures are comparable to their holdings of nonprime residential mortgage-backed securities just before the 2008 financial crisis.[21] Other types of risky assets that stakeholders mentioned were subordinated debt and stock of affiliated companies.

Many of these stakeholders asserted that private equity-backed insurers have a greater tendency towards high-risk investment strategies,[22] but others said that this is an industry-wide phenomenon of pursuing greater yield in a low-interest rate environment, and is not necessarily attributable to private equity affiliation. One stakeholder asserted that "If an insurer is quoting a significantly lower price than others, it is critical to understand the drivers for that lower price

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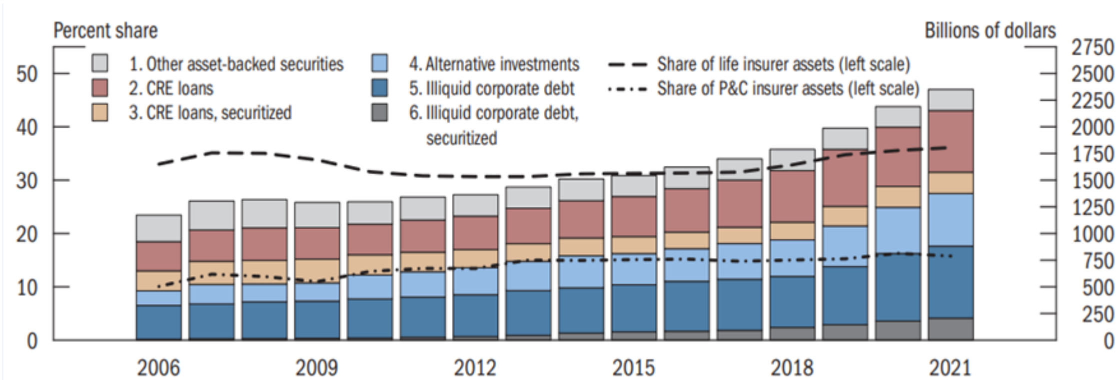
[20] Letter from Dean L. Cameron et al., Nat'l Assoc. of Ins. Comm'rs, to The Honorable Sherrod Brown, U.S. Sen. (May 31, 2022), www.banking.senate.gov/imo/media/doc/naic_may2.pdf.
[21] See Nathan Foley-Fisher et al., Are US Life Insurers the New Shadow Banks? (Apr. 20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534847.
[22] For example, one stakeholder cited to literature finding that "PE-backed insurance firms take on greater asset risk by moving out of highly rated corporate bonds and into poorly rated private-label asset-backed securities (ABS), increasing their holdings of private-label ABS by two-thirds the industry average." Divya Kirti & Natasha Sarin, What Private Equity Does Differently: Evidence from Life Insurance, U of Penn., Inst. for L. & Econ. Res. 2-3 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538443.

and whether those drivers add material risk"; the stakeholder stated that this is usually connected to risks in the investment portfolio and the sufficiency of capital holdings.[23]

Figure 1 is taken from the May 2023 Federal Reserve Financial Stability Report, which illustrates the Federal Reserve's observed trends of life insurers shifting their investment activities to riskier assets.[24] The report specifically highlights the increase in asset illiquidity, combined with the slow increase in the liquidity of liabilities, as a potential threat to the life insurance and annuity industry's health as the mismatch may result in assets being sold at an otherwise less favorable price to service unanticipated liability demands.[25]

Figure 1, Life Insurers Held More Risky, Illiquid Assets on Their Balance Sheets



Source: Staff estimates based on data from Bloomberg Finance L.P. and National Association of Insurance Commissioners Annual Statutory Filings.

Differences in approaches to investing are most apparent with respect to investments in bonds. Twenty-nine percent of the investments in bonds at private equity-owned life insurance firms are composed of asset-backed securities, compared to 10.6 percent at non-private equity-owned life insurance companies. Corporate bonds make up only 50.3 percent of the bond portfolios at private equity-owned life insurance firms, compared to 64.1 percent of the bond portfolios at non-private equity-owned life insurance companies.

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[23] James Walton, Private Equity and Alternative Asset Managers in the U.S. Pension Risk Transfer Market, Agilis (Dec. 5, 2022), https://agilis.llc/private-equity-and-alternative-asset-managers-in-the-us-pension-risk-transfer-market/.

[24] Board of Governors of the Federal Reserve System, Financial Stability Report, p. 57, (May 2023), https://www.federalreserve.gov/publications/files/financial-stability-report-20230508.pdf.

[25] *Id*. ("Over the past decade, the liquidity of life insurers' assets steadily declined, and the liquidity of their liabilities slowly increased, potentially making it more difficult for life insurers to meet a sudden rise in withdrawals and other claims.").

As detailed in Table 1, private equity-owned life insurance firms also hold a smaller proportion of U.S. government bonds, municipal bonds, bank loans, and agency-backed residential mortgage-backed securities, while holding a larger proportion of private label residential and commercial mortgage-backed securities.[26]

Table 1: Bond Mix of Private Equity and Non-Private Equity-Owned U.S. Life Insurance Firms (2022)

Bond Type	Private-Equity Owned	Non Private-Equity Owned	Point Difference
ABS and Other Structured Securities	29.0%	10.6%	18.5%
Agency-backed CMBS	0.3%	1.2%	-0.9%
Agency-backed RMBS	1.5%	3.3%	-1.8%
Bank Loans	1.7%	2.7%	-1.1%
Corporate Bonds	50.3%	64.1%	-13.8%
ETF-SVO Identified Funds	0.0%	0.1%	-0.1%
Foreign Government	0.8%	1.4%	-0.6%
Hybrid Securities	0.0%	0.0%	0.0%
Municipal Bonds	4.6%	6.1%	-1.6%
Private-label CMBS	6.2%	4.3%	1.9%
Private-label RMBS	3.9%	2.0%	1.9%
US Government	1.8%	4.1%	-2.2%
Total	100.0%	100.0%	
Source: NAIC. EBSA Calculations			

Irrespective of these trends, several stakeholders said that the first factor in Interpretive Bulletin 95-1—"the quality and diversification of the annuity provider's investment portfolio"—is already sufficient to make fiduciaries aware that they need to evaluate an insurer's investment practices. Some insurer stakeholders said the asset mix diversity of their portfolios provided greater protection to policyholders, venturing that the 2008 financial crisis had a greater negative

[26] These numbers and Table 1 were calculated by the Department from NAIC data provided in the NAIC Capital Markets Report on Private Equity (PE)-Owned U.S. Insurers' Investments. The calculations provided are exclusive to life insurance. The reports can be found here: https://content.naic.org/capital-markets-bureau.

impact on investors who were too reliant on a limited mix of assets (e.g., a high concentration of highly rated corporate bonds). One stakeholder argued that concern about the risk of asset-backed securities is due to misconceptions that do not recognize regulatory changes implemented in the Dodd-Frank Act and other laws enacted after the 2008 financial crisis.

Several stakeholders also said state regulators are keenly aware of investment trends across the insurance sector, including trends with respect to collateralized loan obligations, and the regulators closely scrutinize investments and investment portfolios. They also said asset portfolio quality is a measure under applicable risk-based capital standards, resulting in increased capital charges to reflect increased asset risk. In this regard, they noted that the NAIC is considering changes to its model risk-based capital standards to address concerns with collateralized loan obligations.[27]

C. Non-Traditional Liabilities

Stakeholders who expressed concern about "non-traditional" liabilities did not provide a uniform definition of "non-traditional," but a common theme was that these liabilities are not structured around mortality and morbidity risk.[28] These stakeholders said these liabilities can have a significant effect on an insurance company's cash flows and risk profile that plan fiduciaries should understand, particularly the possibility that the non-traditional liabilities may result in a "run" on an insurance company's assets.

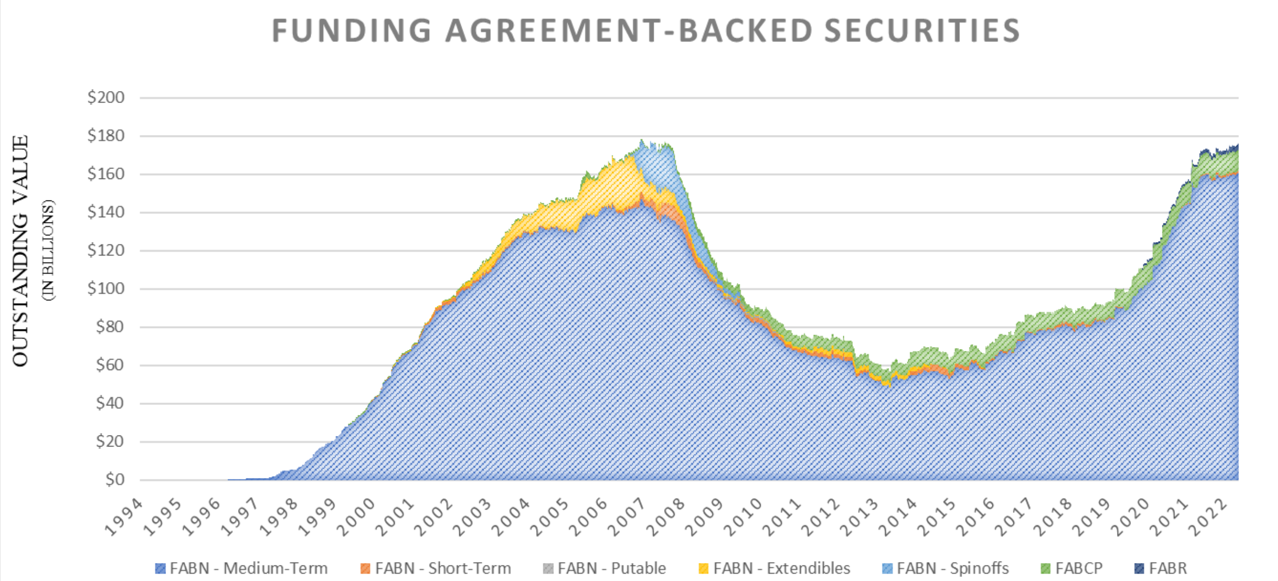
Some stakeholders associated "non-traditional" liabilities with specific types of insurance company activities that obligate the company to counterparties, who may exercise their rights to payment at unexpected times. Examples raised by stakeholders included funding agreements, funding agreement-backed securities, Federal Home Loan Bank advances, repurchase agreements, and securities loans.

Many stakeholders were particularly concerned by trends in funding agreement-backed securities, which are securities that are backed by a funding agreement issued by a life insurer. While funding agreement-backed securities have existed for decades, their use rapidly accelerated through the early 2000s before dropping around the time of the 2008 global financial crisis. Recently, the aggregate outstanding value of funding agreement-backed securities grew to

[27] *See* Risk-Based Capital Investment Risk and Evaluation (E) Working Group, https://content.naic.org/cmte_e_rbcire.htm.
[28] *Cf.* Nathan Foley-Fisher et al., FEDS Notes, Assessing the size of the risks posed by life insurers' nontraditional liabilities, Bd. of Governors of the Fed. Reserve Sys. (May 21, 2019) ("In contrast to life insurers' traditional liabilities that make payments conditional on the health of the holder, nontraditional liabilities have neither mortality nor morbidity contingencies."), https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-size-of-the-risks-posed-by-life-insurers-nontraditional-liabilities-20190521.html.

nearly $180 billion outstanding, returning to their highest levels recorded. As a percentage of the insurance industry's aggregate liabilities, the amount represents approximately 2 percent, as compared to 3.6 percent prior to the global financial crisis; but in each case, still higher than the years immediately following Interpretive Bulletin 95-1's publication. According to stakeholders, the risk of a "run" on an insurance company's assets that may be associated with these type of non-traditional liabilities is important because it may diminish a company's ability to pay annuitants.

Figure 2: Funding Agreement-Backed Securities Outstanding Value



Source: Federal Reserve Enhanced Financial Accounts, (Accessed 09/08/2023, last updated June 16, 2023).

Other stakeholders believed that non-traditional liabilities may already be adequately addressed by the fourth enumerated factor in the Interpretive Bulletin, "the lines of business of the annuity provider and other indications of an insurer's exposure to liability." They also questioned what would be considered a "non-traditional" liability for purposes of any new requirement that might be added to the Interpretive Bulletin.

In this regard, some suggested that they would not be considered to have "non-traditional" liabilities because their businesses predominantly involve writing insurance policies. One insurance company recognized that some of its liabilities could hypothetically contribute to a "run" but indicated that it conducts stress tests and takes steps to manage its liability risks.

Some also indicated that the NAIC may be examining concerns related to "non-traditional" liabilities that have been raised in connection with private equity-affiliated insurers.[29]

D. Reinsurance

The NAIC describes reinsurance as a contract between a reinsurer and an insurer, in which the insurance company—called the cedent—transfers risk to the reinsurance company, and the reinsurance company assumes all or part of the risk under one or more insurance policies issued by the cedent.[30] Stakeholders cited literature explaining that the four basic motives behind life and annuity reinsurance are risk transfer, underwriting assistance, capital management, and tax management.[31] Insurers are ultimately responsible for all liabilities they issue, even those that they cede to reinsurers.[32]

Reinsurance activity appears to have grown rapidly across the life insurance industry in recent years, rising from less than $200 billion in 1999 to $1.7 trillion in 2022. This quadrupled the share of life insurance obligations being reinsured from 6 percent to 24 percent of total obligations. [33]

Most of this growth in reinsurance activity involved either U.S. captive reinsurers or affiliated reinsurers in foreign countries. In 1999, these types of reinsurance accounted for 14 percent of life reinsurance, with the share growing to 48 percent by 2022.[34] Stakeholders indicated that use of captive reinsurance can provide capital, tax, and financial disclosure benefits without necessarily transferring assets outside of the holding company.

A significant amount of reinsurance in the life insurance industry involves off-shore reinsurers. According to ALIRT Insurance Research, of the $1.7 trillion in total reserves ceded

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[29] *See* https://content.naic.org/article/naic-announces-2023-regulatory-priorities.
[30] NAIC, Ctr. for Ins. Pol'y and Res., Reinsurance, https://content.naic.org/cipr-topics/reinsurance (last updated May 9, 2024).
[31] Ralph Koijen & Motohiro Yogo, Shadow Insurance, Nat'l Bureau of Econ. Res. 4 (Working Paper No. 19568 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320921.
[32] John J. Pruitt, Insurance and Reinsurance in the United States: Overview (2023), https://uk.practicallaw.thomsonreuters.com/9-501-3187?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a159591. For the transferring insurer to be released from direct liability to the insured, a novation must occur, which requires the policyholder's consent. Depending on the state, such consent must be express or can be implied by conduct. Most U.S. states have detailed requirements for notices to policyholders that are necessary for consent.
[33] Michael Batty, FEDS Notes, Accounting for Reinsurance Transactions in the Financial Accounts of the United States, Bd. of Governors of the Fed. Reserve Sys. (Oct. 12, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/accounting-for-reinsurance-transactions-in-the-financial-accounts-of-the-united-states-20181012.html. Additional analysis from 2017–2022 was calculated by the Department from Federal Reserve data.
[34] *Id.*

by the life insurance and annuity industry in 2021, approximately $651 billion was ceded to foreign domiciled reinsurers, with 83 percent of this amount ($539 billion) sent to Bermuda.[35]

A number of stakeholders raised concerns that life insurers are using reinsurance to move liabilities to less regulated reinsurers. They mentioned less stringent reserving requirements and accounting arbitrage as reasons for their concern. Concerns about reinsurance are reflected in the Treasury Department's letter to Senator Brown discussed above. The Department of the Treasury noted in its letter that the speed and scale of the growth of offshore and affiliated reinsurance "suggests the need for regulators and policymakers to better understand the role of offshore reinsurers and whether regulatory capital arbitrage opportunities, tax advantages, and other potential gaps that are not under the oversight of U.S. regulators are obscuring (or even amplifying) the level of risk stemming from these activities."[36]

Several stakeholders also indicated that one type of reinsurance contract—called "modified coinsurance"—is a special concern. In a "coinsurance" arrangement, the cedent transfers both assets and liabilities (reserves) to the reinsurer. However, in a modified coinsurance arrangement, the cedent transfers only liabilities and keeps the assets on its books, while paying a portion of the interest from the retained assets to the reinsurer.

Stakeholders are concerned that in modified coinsurance arrangements, insurers may have strategic reasons under applicable risk-based capital standards to hold on to riskier assets longer than optimal because the true investment risk has been ceded to the reinsurer. According to ALIRT, a total of $384 billion was ceded under modified coinsurance contracts to foreign domiciled reinsurers in 2021, with 86 percent ($333 billion) of those reserves being sent to Bermuda.[37] Kirti and Sarin found in a 2023 study that private equity-backed firms are much more likely to utilize, and are substantial drivers of, the issuance of affiliated modified coinsurance.[38]

Other stakeholders told EBSA that reinsurance is an essential tool for insurance companies to manage risks and the amount of capital they must hold to support those risks. In

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[35] ALIRT Insurance Research, U.S. Life Insurers' Bermuda Reinsurance Exposure (Oct. 18, 2022), https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/fiVNWhYt6dyc0E-kUV87KA9Id20.pdf. Bermuda is considered a Qualified and Reciprocal jurisdiction by the NAIC, which means that reinsurance transactions in this jurisdiction do not require collateral. This is a commonly cited reason for the popularity of Bermuda amongst foreign reinsurance transactions.

[36] Letter from Jonathan Davidson, Assistant Sec'y for Legisl. Affairs, U.S. Dep't of the Treasury, to The Honorable Sherrod Brown, U.S. Sen. 5 (June 29, 2022), www.banking.senate.gov/imo/media/doc/fio_85.pdf.

[37] ALIRT Insurance Research, U.S. Life Insurers' Bermuda Reinsurance Exposure (Oct. 18, 2022), https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/fiVNWhYt6dyc0E-kUV87KA9Id20.pdf.

[38] Kirti & Sarin, What Private Equity Does Differently: Evidence from Life Insurance, The Review of Financial Studies, (2023), https://doi.org/10.1093/rfs/hhad055.

addition, they asserted that offshore reinsurance entities offer tax efficiencies that attract capital and reduce the effective tax rate of the reinsurer and its holding company. While recognizing that the level of regulatory oversight of offshore reinsurance differs by jurisdiction, some stakeholders argued that Bermuda is well recognized as a credentialed international reinsurance jurisdiction.

Most stakeholders agreed that whether and the extent to which an insurer cedes liability to a reinsurer—as well as the reinsurer's jurisdictional, financial, and ownership characteristics—is or should be part of a fiduciary's analysis when selecting an insurer. A few stakeholders believe that captive and offshore reinsurers may warrant more scrutiny than unaffiliated domestic reinsurers licensed in the United States, due to the difference in regulatory requirements. Importantly, the stakeholders emphasized that any analysis of the reinsurer's financials should be done using statutory accounting principles (SAP) or both SAP and generally accepted accounting principles (GAAP), but not just GAAP.

E. Risk-Based Capital and Other Methodologies

State insurance regulators use risk-based capital requirements to identify life insurance companies that are weakly capitalized and may need regulatory intervention.[39] The NAIC developed the risk-based capital requirement for life insurers and describes it as "a statutory minimum level of capital that is based on two factors: 1) an insurance company's size; and 2) the inherent riskiness of its financial assets and operations. That is, the company must hold capital in proportion to its risk."[40] The NAIC developed the *Risk-Based Capital (RBC) for Insurers Model Act* that states must adopt in substantially similar form for accreditation purposes.[41]

An insurer's risk-based capital ratio—generally described as the insurer's total adjusted capital divided by its authorized control level risk-based capital—is a metric that came up frequently in stakeholder discussions and in EBSA's research.[42] Several stakeholders suggested that an insurer's risk-based capital ratio should be specifically identified in Interpretive Bulletin

[39] *See* NAIC, Ctr. for Ins. Pol'y and Res., Risk-Based Capital, https://content.naic.org/cipr-topics/risk-based-capital (last updated Jan. 31, 2024).
[40] *Id*.
[41] NAIC, Financial Regulation Standards and Accreditation Program (Aug. 2021), https://content.naic.org/sites/default/files/inline-files/FRSA-Pamphlet-8-2021.pdf.
[42] NAIC, Ctr. for Ins. Pol'y and Res., Risk-Based Capital, https://content.naic.org/cipr-topics/risk-based-capital (last updated Jan. 31, 2024); Am. Council of Life Insurers (ACLI) Life Insurers Fact Book 2022 33 ("Risk-based capital, calculated according to an NAIC model law, is considered the minimum amount of capital an insurer needs to avoid triggering regulatory action. The [risk-based capital] ratio is total adjusted capital divided by risk-based capital, for a threshold ratio of 100 percent."), https://www.acli.com/-/media/acli/public/files/factbook/2022lifeinsurersfactbook_v2.pdf.

95-1 as a consideration for fiduciaries evaluating an insurer's claims paying ability and creditworthiness.

One stakeholder suggested that the risk-based capital ratio should be added to the Interpretive Bulletin's third factor, "the level of the insurer's capital and surplus." Some other stakeholders agreed that it would be reasonable to identify the risk-based capital ratio as one factor for fiduciary consideration, though they said EBSA should ensure it is not treated as the only factor.[43]

Other stakeholders, without disputing the relevance of risk-based capital requirements, presented downsides to identifying risk-based capital ratios in the Interpretive Bulletin. One said the risk-based capital ratio is not intended as a tool for comparing companies to one another or ranking them. According to the stakeholder, the important fact is whether an insurer's risk-based capital ratio exceeds the level at which regulatory intervention is warranted. In their view, once that threshold is met, comparing higher or lower ratios is not meaningful. The stakeholder also said insurers are not permitted to advertise their risk-based capital ratios.

Another stakeholder suggested that it may be preferable to retain the more principles-based reference to "capital and surplus," which many believe encompasses the risk-based capital ratio, thereby avoiding the Interpretive Bulletin becoming outdated if there are changes to the state regulatory framework in the future.

A few stakeholders presented other approaches to evaluate insurers' solvency and creditworthiness. One methodology is to focus on the ratio of the sum of the insurer's "higher-risk assets" and "opaque reinsurance" to surplus held (as reported on its sworn statutory annual statement). Another methodology involves review of market spreads on bonds (specifically, spreads on funding backed-agreement notes) issued by life insurance companies. The latter methodology uses the bond market's ability, and incentive, to holistically assess the insurer's creditworthiness.

F. Separate Accounts as a Protection

Group annuity contracts used in pension risk transfer annuity purchase transactions can be supported by either the insurance company's general account or by a separate account (which can be dedicated to a single employer's pension risk transfer or commingled). Separate accounts are protected from the liabilities of the insurer's general account, yet they generally benefit from

[43] The NAIC website likewise cautions that the risk-based capital calculation is a regulatory tool and is "not designed to be used as a stand-alone tool in determining financial solvency." *See* https://content.naic.org/cipr-topics/risk-based-capital.

support from the general account.[44] The fifth Interpretive Bulletin 95-1 factor currently provides that fiduciaries should consider "the structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts."

In EBSA's stakeholder meetings, some stakeholders said that separate account protections are valuable due to their structure, lack of exposure to general account liabilities, and additional backing by the insurance company's general account. Several stakeholders explained that, in the event of insolvency, annuitants would have a claim on the insurer's general account after the separate account's assets are depleted.

However, a few stakeholders questioned the protections that separate accounts offer. They said the insurer's investment strategy for the separate account is the more important determinant of the risks. More than one stakeholder expressed the view that a very safe general account investment strategy is more protective than a separate account, if the separate account is invested in riskier assets. Several of these stakeholders urged EBSA to revise the fifth factor to help plan fiduciaries evaluate separate accounts.

G. Administrative Capabilities and Experience

Several stakeholders said the insurer's administrative capabilities and experience are factors that fiduciaries should, and do, consider in selecting an annuity provider.[45] Stakeholders identified several areas of inquiry related to the administrative capabilities of the entity providing the services, including the adequacy of payment systems for administering annuities, record-keeping, necessary election forms, information technology capabilities and cybersecurity practices to safeguard annuitant information, call centers and websites for annuitants to obtain information, and overall experience with pension risk transfer annuity purchase transactions of similar size and characteristics. Stakeholders said fiduciaries could ask about internal surveys the entity may have conducted regarding its administrative services, including, for example, an evaluation of response time to phone calls.

[44] Timothy Geddes et al., Pension Risk Transfer, Evaluating Impact and Barriers for De-Risking Strategies, Society of Actuaries 26 (2021), https://www.soa.org/resources/research-reports/2021/pension-risk-transfer/; *see also* NAIC, Ctr. for Ins. Pol'y and Res., Pension Risk Transfer, https://content.naic.org/cipr-topics/pension-risk-transfer (last updated Jan. 31, 2024).

[45] Ability to administer the payment of benefits is a relevant consideration. In the Department's experience, administrative and recordkeeping failures following pension risk transfer annuity purchases can result in risks to policyholders. *See, e.g.,* Press Release, New York State Department of Financial Services, January 28, 2019 (Department of Financial Services Superintendent Vullo announcing that MetLife will pay a $19.75 million fine and provide $189 million in restitution to policy holders for failures related to pension benefit transfers), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1901282.

H. Spousal Protections

The Internal Revenue Code (Code) and ERISA include provisions designed to protect a pension plan participant's spouse with respect to the participant's plan benefits. In general, these provisions require that distributions from a defined benefit plan be made in the form of a qualified joint and survivor annuity unless the spouse waives the right to that form of benefit.[46]

The main issue raised by stakeholders regarding spousal protections following a pension risk transfer annuity purchase is whether there is any applicable law that would prohibit the annuitant from converting the annuity's remaining value into a lump sum without obtaining spousal consent. Another issue mentioned was that sometimes spouses are inadvertently omitted from coverage under an annuity contract because of incomplete records or inattention at the time of the transaction. Other stakeholders believe that the applicable Department of the Treasury regulations comprehensively address spousal protections after pension risk transfer annuity purchases.

EBSA consulted with the Internal Revenue Service (IRS) and the Department of the Treasury, which advised that Treasury Regulation § 1.401(a)-20 provides that a defined benefit plan would be disqualified if an annuity contract distributed from the plan failed to satisfy the spousal benefit protections in sections 401(a)(11) and 417 of the Code. In addition, EBSA consulted with the PBGC, which advised that spousal protections must be contained in annuity contracts purchased under section 4041 of ERISA in the case of standard plan terminations.

In the view of both the Department and the PBGC, if a participant or spouse was inadvertently omitted from an annuity contract as part of a pension risk transfer, the plan would remain liable for the payment of any benefits to which the individual is entitled under the terms of the plan.[47] Further, and more generally, the Department notes that circumstances surrounding omissions of this type may indicate fiduciary breaches by the plan administrator prior to and concurrent with the pension risk transfer, involving recordkeeping and implementing the settlor's decision to engage in a pension risk transfer. However, the Department does not believe it needs to amend the Interpretive Bulletin to clarify these principles.

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[46] *See* Code sections 401(a)(11), 417 (26 U.S.C. §§ 401(a)(11), 417) and ERISA section 205 (29 U.S.C. § 1055).

[47] *See* PBGC Advisory Opinion 91-4 (May 3, 1991) ("If a participant did not receive his or her full plan benefit, or was simply missed in the distribution of plan assets, the plan, and therefore the plan sponsor, would continue to be liable. And in the event the error remained uncorrected, the PBGC would ultimately be responsible. See ERISA § 4041(b)(4).").

I. Anti-Alienation Rules: Protections Against Creditors and Division of Benefits on Divorce

In general, ERISA and the Code prohibit a participant or plan from assigning or alienating the participant's interest in their retirement plan.[48] These "anti-assignment and alienation" rules are intended to ensure that a participant's retirement benefits are available to provide financial support during the participant's retirement years. ERISA and the Code also contain an important exception to the general anti-alienation rules through an established framework for permitting a court-ordered division of a pension benefit upon separation or divorce, through a domestic relations order, called a Qualified Domestic Relations Order (QDRO).[49]

Some stakeholders wanted clarification that fiduciaries have a responsibility to negotiate annuity contract provisions that replicate ERISA protections, including those under ERISA and the Code's assignment and alienation provisions. They believe that once the obligation to provide pension benefits is transferred to an insurance company, the continued application of these protections is unclear and the application of anti-assignment and anti-alienation rules may be determined by state law, which can vary significantly. Stakeholders also expressed concern that, without ERISA's framework for dividing benefits on divorce, it may be difficult and costly for former spouses to obtain a court-awarded share of the annuity. Stakeholders from the insurance industry maintain that ERISA's strong creditor protections do not go away merely because an annuity is purchased on behalf of an ERISA plan participant.

In an effort to reconcile the conflicting positions, EBSA consulted the IRS and the Department of the Treasury, as the assignment and alienation provisions in ERISA and the Code are under their interpretive jurisdiction. The IRS and the Department of the Treasury confirmed that a distributed annuity contract must be nontransferable in order to satisfy section 401(g) of the Code. As support, they cited Treasury Regulation section 1.401-9(b)(1), which provides that, to satisfy the requirement to be nontransferable, the distributed annuity contract "must expressly contain the provisions that are necessary to make such . . . contract not transferable within the meaning of this paragraph." For this purpose, Treasury Regulation section 1.401-9(b)(3) provides that a contract is transferable "if the owner can sell, assign, discount, or pledge as collateral for a loan or as security for the performance of an obligation or for any other purpose his interest in the certificate or contract to any person other than the issuer thereof."

[48] ERISA section 206(d)(1) (29 U.S.C. § 1056(d)(1)) and Code section 401(a)(13) (26 U.S.C. § 401(a)(13).
[49] ERISA section 206(d) (29 U.S.C. § 1056(d)); Code sections 401(a)(13) and 414(p) (26 U.S.C. §§ 401(a)(13), 414(p)); *see* EBSA publication, QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders (2020), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/qdros.pdf.

In addition, one stakeholder asserted that section 522 of the U.S. Bankruptcy Code protects annuities from creditors in bankruptcy proceedings. EBSA consulted with the U.S. Department of Justice, Office of the U.S Trustee Program (USTP), as it has interpretive jurisdiction over this section of the Bankruptcy Code. USTP confirmed that section 522 of the Bankruptcy Code conditionally protects certain retirement funds from creditors.

EBSA also consulted with the PBGC in response to one stakeholder who asserted that PBGC has previously addressed annuity providers' obligations to comply with ERISA and the Code's QDRO rules. PBGC advised that under section 4041 of ERISA, a standard termination has no effect on the ability to obtain a QDRO or on benefits received under a QDRO. PBGC also advised that under section 4041, plan administrators and annuity providers must comply with the terms of a QDRO.[50]

J. Disclosures

Stakeholders said there may be insufficient disclosure to participants about partial buy-outs (so-called "lift-outs") and their implications for participants and beneficiaries. In the case of total buy-outs in which the plan is terminated in a standard termination, ERISA contains a detailed reporting and disclosure structure.[51] However, no structure exists under ERISA for partial buy-outs when, according to these stakeholders, one should.

Stakeholders representing plan sponsors and insurers said that they dedicate significant resources to ensuring that participants and retirees understand the annuity purchase, how they are affected, and the consequences of any decision they may make with respect to their rights under the annuity contract. These stakeholders asserted that compelling business reasons, such as brand reputation and human relations, justify comprehensive and understandable disclosures. For example, advance disclosures inviting participants to review and verify the accuracy of all personal information, such as age, dates of employment, salary, and elected spousal benefit, reduce the likelihood of transition errors and post-annuity purchase recalculations.

A few stakeholders highlighted a different disclosure issue following a pension risk transfer annuity purchase. After the purchase, nothing comparable to the annual funding notice required under section 101(f) of ERISA is required to be furnished to policyholders, which may leave them uninformed as to the insurer's solvency and safety, these stakeholders said. However,

[50] *See* 62 Fed. Reg. 60,424, 60,426 (Nov. 7, 1997); *see also* 29 C.F.R. § 4041.28(c)(1) ("The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.").
[51] ERISA section 4041 (29 U.S.C. § 1341); 29 C.F.R. §§ 4041.23, .24, .27, .28.

other stakeholders said that outcome is logical, because once a participant is no longer a participant under the plan, they are no longer entitled to nor would they have any practical need for the types of funding disclosures required under ERISA.

K. Loss of PBGC Protections

The PBGC protects participants in defined benefit plans by paying benefits up to limits set by law if a plan is terminated and does not hold sufficient assets to pay all benefits.[52] As a result of a pension risk transfer annuity purchase transaction, the benefits of the individuals who were formerly defined benefit plan participants become insured by state guaranty associations (SGAs) rather than the PBGC. SGAs provide coverage up to state law limits in the event the issuing insurer becomes insolvent.[53]

Several stakeholders said the removal of the PBGC guarantee is a significant loss for participants, asserting that the PBGC offers a higher level of guarantee than the SGAs. Stakeholders also expressed other concerns about SGAs, such as the fact that they are not pre-funded, raising the possibility that a systemic failure could lead to multiple insolvent insurance companies that could collapse the system. A stakeholder further asserted that the loss of PBGC protections exacts an emotional toll on plan participants and beneficiaries that plan fiduciaries should consider. A few stakeholders suggested that the Interpretive Bulletin should be revised to provide that fiduciaries engaging in a pension risk transfer annuity transaction must consider obtaining, or requiring the annuity provider to obtain, independent reinsurance of the annuity.

Another stakeholder alternatively asserted that there are more risks under the PBGC program than under annuity contracts backed by SGAs. The stakeholder cited a PBGC study of guarantee limitations set by law and regulation as applicable to 500 single-employer plans trusteed by the PBGC between 1988 and 2012. While 84 percent of the participants received 100 percent of their vested benefits, 16 percent had their benefits reduced by one or more of the

[52] *See* https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc.
[53] Nat'l Org. of Life & Health Ins. Guaranty Associations, https://nolhga.com/.

limitations considered in the study.[54] Other sources suggest that comparing the two systems does not lead to an outright conclusion that one is superior to the other.[55]

Another view presented was that the fiduciary implementing the settlor decision does not need to consider the loss of the PBGC guarantee, because it is a direct and unavoidable consequence of the settlor decision to engage in the pension risk transfer annuity purchase transaction.

L. State Guaranty Associations

Several stakeholders raised a different issue related to SGAs. These stakeholders noted that the Interpretive Bulletin's sixth factor identifies "the availability of additional protection through state guaranty associations and the extent of their guarantees" as a factor for fiduciary consideration. However, these stakeholders questioned whether SGA guarantees are relevant when identifying a provider for the safest available annuity, and suggested it should be removed as a consideration.

These stakeholders opined that SGA coverage is not relevant when analyzing whether any particular insurer is safer or more solvent than any other competing insurer because every state (and consequently every licensed insurer doing business in the state) has some form of SGA protection. These stakeholders further suggested that the extent of SGA guarantees may be difficult to evaluate as it will usually depend on the policyholder's domiciliary state, a factor the purchasing plan fiduciary has no control over.

[54] American Benefits Council, Annuity Purchases by Defined Benefit Plans Enhance Participant Protections: Data Shows That Any Restrictions on Such Purchases Would Place Participants at Greater Risk 2 (Apr. 2023), www.americanbenefitscouncil.org/pub/?id=176CFD9B-1866-DAAC-99FB-5894C9EF628C (citing PBGC, PBGC's Single-Employer Guarantee Outcomes (May 2019), https://www.pbgc.gov/sites/default/files/2016-single-employer-guaranty-study.pdf). The report found that 89 percent of the reductions in the value of plan benefits were concentrated in 10 plans.

[55] National Organization of Life and Health Insurance Guaranty Associations, Consumer Protection Comparison - The Federal Pension System and the State Insurance System 2 (May 22, 2016) ("An objective comparison of those protections—which are delivered through two different protection systems that have similar objectives but are very different in application—compels the conclusion that participants are strongly protected in both cases: the resolution and safety net mechanisms of the two systems would fully cover the vast majority of all benefit claims, and the small minority of benefit claims not fully covered would have marginally different outcomes, sometimes slightly favoring one system or the other for some individuals, depending on the specific circumstances of a particular case."), https://www.nolhga.com/resource/code/file.cfm?ID=2559; ERISA Advisory Council, U.S. Dep't of Labor, Private Sector Pension De-risking and Participant Protections 12 (2013) (stating that Josh Gotbaum, then-Director of the PBGC, indicated that "he did not think that a defined benefit plan with a PBGC guarantee was necessarily safer than an insurance company annuity backed by a state insurance guaranty association"), www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2013-private-sector-pension-derisking-and-participant-protections.pdf.

More fundamentally, some stakeholders even asserted that the Interpretive Bulletin's sixth factor may have a counterproductive effect on a fiduciary's solvency analysis. They argued that some fiduciaries may engage in a less rigorous analysis than they would if the Interpretive Bulletin did not contain the provision. They said this is because fiduciaries may take a more casual approach to selecting the insurer with the comfort of knowing that, regardless of the quality and diligence of their effort and analysis, the SGA coverage will ultimately backstop the insurer.

M. Impact of Partial Pension Risk Transfer Annuity Purchases on Residual Funding Status of Plans

As mentioned earlier, partial buy-outs involve plans transferring a portion of their liabilities while the plans continue operating. Some stakeholders discussed how a partial buy-out might impact a plan's ability to fund the liabilities that remain in the plan. While purchasing annuities from large, diversified insurers with appropriately conservative investment policies can benefit the group the annuities are being purchased for, these stakeholders believe that the transaction can leave the remaining participants worse off by removing assets underpinning their promised benefits.[56]

Other stakeholders drew EBSA's attention to an Aon finding that, in retiree lift-out transactions Aon led in 2022, plan fiduciaries chose the lowest cost annuity in 78 percent of transactions.[57] To some, this statistic suggested that the chief driver of annuity selections is cost, rather than a rigorous process aimed at choosing the safest available annuity, at least in this context.

In light of the above, stakeholders suggested there is uncertainty as to whether, and precisely how, the Interpretive Bulletin's factors apply to situations when a partial pension risk transfer annuity purchase materially reduces the plan's funding percentage. Further, some questioned whether there may be any circumstances in which a plan fiduciary might conclude under the Interpretive Bulletin or ERISA section 404 more generally that the fiduciary is unable to implement the settlor's decision to de-risk because of the negative effect the partial buy-out would have on the plan's funding status. Moreover, one stakeholder suggested that if the plan sponsor does not maintain pension funding levels of at least 80 percent, the plan sponsor may

[56] For instance, stakeholders explained that for a plan that is less than 100 percent funded, purchasing an annuity for some participants means that those participants are expected to receive their full benefits (that is 100 cents on the dollar). Given the overall funding coverage of the plan's liabilities was less than 100 cents on the dollar, the participants for whom an annuity was not purchased will have a reduction in the plan's funding coverage of their liabilities following the partial buy-out.
[57] Aon, U.S. Pension Risk Transfer: Market Insights (Mar. 2023), https://www.aon.com/insights/reports/2023/us-pension-risk-transfer-market-insights (follow "Download Whitepaper"; complete form for access to whitepaper.

find that its ability to modify the plan in certain ways is limited.[58] Depending on the funding level, the plan sponsor may find that it must restrict the plan's ability to engage in pension risk transfer annuity purchases, the stakeholder added.

V. Findings

Based on its review of Interpretive Bulletin 95-1, including consultation with the ERISA Advisory Council, EBSA finds that Interpretive Bulletin 95-1 continues to identify broad factors that are relevant to a fiduciary's prudent and loyal evaluation of an annuity provider's claims-paying ability and creditworthiness. EBSA also finds that it is desirable for guidance in this area to remain principles-based.

At the same time, EBSA has not concluded that changes to the Interpretive Bulletin are unwarranted. Further exploration into developments in both the life insurance industry and in pension risk transfer practices is necessary to determine whether some of the Interpretive Bulletin's factors need revision or supplementation and whether additional guidance should be developed.

In this regard, EBSA's review has found that some stakeholders are very concerned about developments in the life insurance industry that may impact insurers' claims-paying ability and creditworthiness. As set forth above, some stakeholders urged EBSA to update the Interpretive Bulletin to focus fiduciaries' attention on issues such as insurers' ownership structures; exposure to risky assets and non-traditional liabilities; and use of affiliated and offshore reinsurance. While at least some industry participants view these issues as fully addressed by the existing Interpretive Bulletin, EBSA finds that further consideration should be given to whether the Interpretive Bulletin's guidance should be amended to enhance fiduciary decision-making on these issues. These issues—separately or in combination—may expose annuitants to excessive risk.

Some stakeholders attributed concerning developments in these areas to private equity firms' increased involvement in the industry. They said that private equity-affiliated insurers tend to engage in riskier practices than traditional insurers. Stakeholders were also concerned that private equity firms do not have a long track record of managing life insurance obligations and may lack a commitment to policyholder interests. However, others say the concerning practices are employed on a more widespread basis in the industry.

EBSA is not prepared at this time to propose amendments to the Interpretive Bulletin to address this area of potential risk. The issues raised by stakeholders are complex and there were

[58] *See* Code section 436 (26 U.S.C. § 436), and ERISA section 206(g) (29 U.S.C. § 1056(g)).

few, if any, areas of consensus. As just one example of this, six ERISA Advisory Council members supported no changes to the Interpretive Bulletin, while the other nine members supported different positions on different issues.

Broader public input is an important next step in determining how the Interpretive Bulletin might be amended to address this area of potential risk to participants and beneficiaries. It is important that any changes to the Interpretive Bulletin do not have unanticipated consequences, particularly as related to insurance regulation. Any such changes will be preceded by public notice and comment.

It is also appropriate to further consider the issues some stakeholders raised about disclosure following a partial buy-out as there are significant consequences to plan participants and beneficiaries of such transactions as well as significant concern regarding whether all affected participants and beneficiaries uniformly receive sufficient and timely disclosure. EBSA's further consideration of these recommendations will include coordination with the PBGC, and any next steps will involve public notice and comment.

Regarding some of the other issues stakeholders raised about specific phrasing or weighting of the Interpretive Bulletin's factors, EBSA notes that the Interpretive Bulletin does not state that the enumerated factors are the only factors for fiduciary consideration or that they must be given equal weight. EBSA agrees with stakeholders who asserted that plan fiduciaries must apply the factors based on the individual circumstances of each plan and transaction.

Further, with respect to loss of PBGC protections in connection with the selection of an annuity provider, EBSA rejects the view that the settlor's decision to engage in a pension risk transfer means that the plan's fiduciary, in implementing that decision, may be indifferent to the substitution of PBGC coverage with SGA coverage or the extent of the state guarantees.

Likewise, EBSA is not persuaded that additional guidance is needed regarding a fiduciary's duties in connection with a partial buy-out's impact on the plan's funding status. The safest available annuity standard applies equally in the context of a partial buy-out. The fiduciary implementing the buy-out has a duty of impartiality to all of the plan's participants. If the fiduciary is not able to implement a pension risk transfer without breaching its duty of prudence and loyalty to all participants, the fiduciary may be compelled to seek additional funding from the plan sponsor.[59]

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[59] *See*, *e.g.,* U.S. Dep't of Labor Field Assistance Bulletin 2002-01 (Sept. 26, 2002) ("Further, we note that the fiduciary has a duty of impartiality to all of the plan's participants, and may appropriately balance the interests of

Finally, a number of concerns stakeholders raised related to preserving ERISA rights and obligations following a pension risk transfer annuity purchase appear to be addressed in whole or in part by regulations of the Department of the Treasury or the PBGC, or by industry practice, as discussed above. EBSA will continue to monitor these issues.

different classes of participants in evaluating a proposed refinancing, including the potentially varying interests of present and future participants."). *See also Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) ("The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries."); Restatement (Third) of Trusts § 79 (2007) (discussing duty of impartiality)).

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Appendix B

Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1

This statement from the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans (Council or EAC) provides further points of view of the Council on whether and how Interpretive Bulletin 95-1 (IB 95-1) should be updated by the U.S. Department of Labor (DOL or the Department). These views of the Council are in addition to perspectives shared orally with the Department by the Council at the EAC's July 18, 2023, meeting. The Council's views were formulated in response to DOL's request that the Council do so in order that DOL could fulfill its obligations under the SECURE 2.0 Act of 2022. Sec. 321 of that law directs DOL to "review [IB 95-1] and consult with the Advisory Council on Employee Welfare and Pension Benefit Plans…to determine whether amendments to [it] are warranted" and "report to Congress on the findings of such review and consultation, including an assessment of any risk to participants" not later than Dec. 29, 2023.[1]

IB 95-1 requires fiduciaries to evaluate the insurer's claims paying ability and creditworthiness. In IB 95-1, DOL states that in completing this evaluation a fiduciary must consider: 1)The quality and diversification of the annuity provider's investment portfolio; 2) the size of the insurer relative to the proposed contract; 3) the level of the insurer's capital and surplus; 4) the lines of business of the annuity provider and other indications of an insurer's exposure to liability; 5) the structure of the annuity contract and guarantees supporting the annuities such as the use of separate accounts; 6) the availability of additional protections through state guaranty associations and the extent of their guarantees. Subsection (d) of IB 95-1 also requires fiduciaries to consider "the ability to administer the payment of benefits."

DOL further states that unless the fiduciary possesses the necessary expertise to evaluate the above factors, fiduciaries would need to obtain the advice of a qualified, independent expert. The DOL also addresses the consideration of cost and cautions against conflicts of interest.

Recommendations and Discussion Related to Making No Changes

Six members of the Council recommend DOL make no changes to IB 95-1.

IB 95-1, issued on March 6, 1995, in the wake of the failure of Executive Life Insurance Companies of California and New York, provides guidance to pension plans considering the purchase of annuities "to transfer liability for benefits purchased under the plan to [an] annuity provider." IB 95-1 emphasizes the fiduciary responsibility owed to plan participants in the selection of the "safest annuity available" and makes it clear that "[c]ost consideration may not … justify the purchase of an unsafe annuity;" nor is it appropriate to rely solely on insurance

[1] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, § 321, 136 Stat. 5275, 5356.

rating services. Instead, IB 95-1 enumerates a number of factors to be taken into consideration in evaluating an annuity provider's claims-paying ability and creditworthiness.

Despite the passage of nearly 30 years, IB 95-1's guidance has stood the test of time. IB 95-1's success has been proven by the absence of a single default or failure of any annuity since its issuance. Despite massive changes that have occurred in the world of finance since IB 95-1's issuance, the factors to be considered in the selection of annuity providers remain relevant and continue to mandate a high level of due diligence yet offer plan sponsors flexibility in selecting an appropriate annuity provider.

IB 95-1 identifies a number of factors that must be taken into consideration in selecting an annuity provider consistent with the fiduciary obligations enumerated in ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). The factors listed in IB 95-1 are not exhaustive, nor would they necessarily afford a safe harbor to employers who choose an annuity provider that subsequently defaults on its payment obligations if a fiduciary breach has nonetheless occurred.

SECURE 2.0 required DOL to review IB 95-1 to determine whether updates are needed. During this review the below concerns were raised by interested parties. However, as outlined below, these concerns already appear to be adequately addressed by IB 95-1 and the state Department of Insurance (DOI) regulatory framework. What follows is additional detail around how these concerns are addressed by existing law or guidance.

1. Ownership Structure. Interested parties have expressed concern that the ownership structure of insurance companies, engaging in Pension Risk Transfer (PRT) transactions, is not being properly considered. However, this is already accounted for by the requirement in IB 95-1 that requires the fiduciary to consider the insurer's lines of business and other liability exposure generally.

   In addition, the current insurance regulatory framework accounts for and manages the risk related to ownership structure and affiliated entities. Annuity insurance entities are not permitted to share assets with entities that are not in the annuity business and that it may be affiliated with. In fact, any arrangements involving the exchange of services between an entity providing annuity coverage and an affiliate must be approved by the domiciliary DOI.

2. Assets. Increase in non-traditional/risky investments by insurers. Again, this is regulated by the relevant DOIs and is covered by items 1 and 3 in the current IB 95-1. Consideration number 3 in the existing IB, requires an evaluation of the level of the insurer's capital and surplus. This capital and surplus is directly impacted by the investments held by writing insurance companies. Insurance company capital and surplus is calculated taking into consideration their liabilities and assets (including investments). If an investment is particularly risky, the insurer may be limited in their ability to invest

there, because the charge of that investment to their capital may outweigh any potential return. Therefore, when a fiduciary looks at the capital and surplus of an insurance company, they can be certain that the amount of capital and surplus already takes into consideration the riskiness of investments that insurer is holding. Further, consideration number 1 requires fiduciaries to consider the quality and diversification of the insurer's investments, which clearly covers the riskiness of those investments.

3. Liabilities. Existence of non-traditional liabilities. Same comment as above. All of this is considered when determining the insurers capitalization and surplus levels. Consideration number 4 also directly requires review of an insurer's liabilities.

4. Reinsurance. Reinsurance is a risk management tool used by insurers to spread risk and manage capital. Reinsurance transactions must meet specific regulatory conditions. An insurer's decision to reinsure an annuity that was part of a PRT does not relieve the annuity issuer of their obligation to pay certificate holders. The annuity issuer selected by the plan fiduciary remains 100% liable for all annuities payments and reinsurance does not change that obligation. An insurer's reinsurance arrangement would likely be included within an examination of its "exposure to liability" as required by IB-95. Consideration number 5 also requires review of the guarantees supporting an annuity contract which includes reinsurance guarantees.

5. Risk-Based Capital and Other Methodologies. Risk-Based Capital (RBC) is one tool used by insurance regulators to evaluate an insurer's financial solvency and whether regulatory intervention is warranted. Insurers are subject to RBC requirements that require them to maintain capital proportional to risk. RBC requirements consider the riskiness of an insurer's investments to determine capital requirements (e.g., riskier assets have higher capital charges) and determine if an insurer is holding sufficient funds to make good on their financial promises to customers. It appears that the same factors that are used to evaluate RBC are already also evaluated under IB 95-1. All of these factors are taken into account under IB 95-1, as described above.

6. Separate Accounts as a Protection. Separate accounts generally provide greater protection for certificate holders. It was unclear from witness testimony what the concern is with separate accounts. EBSA's summary states that some stakeholders said that separate accounts offered extra protection, while others questioned the protections offered by separate accounts, it is important to note that IB 95-1 already requires an evaluation of the structure of the annuity contract and guarantees supporting the annuities such as the use of separate accounts. This is very appropriately listed as a consideration under IB 95-1.

7. Administrative Capabilities and Experience. This is an inherently low risk item. Market competitiveness drives the need to provide good customer experiences and the DOI complaint framework also mitigates against this concern. Further, the Council has not

received any examples of situations in which participants did not receive the pension benefits they were promised because the Insurer did not provide sufficient administrative and customer experience support. Finally, this factor is already explicitly recognized as relevant under IB 95-1.

8. Spousal Protections. To remain qualified and meet the definition of "annuity" at Code section 401(g), the contract must conform to the Code requirements under Code section 401(a). See Treas. Reg. section 1.401(a)-20, Q&A 2, which provides that qualified joint and survivor annuity (QJSA) requirements extend to payments under the annuity contract, not simply the distribution of the annuity contract. No witness provided any data or evidence to illustrate or prove that spousal protections have been an actual problem subsequent to a PRT.

9. Anti-Alienation Rules: Protections Against Creditors and Division of Benefits on Divorce. To be and remain qualified, the contract must satisfy Code section 401(g) and conform to the Code requirements under Code section 401(a). A contract issued after Dec. 31, 1962, must be non-transferrable. Thus, group annuity certificates issued to participants to provide qualified plan benefits are required to follow the plan provisions and form of benefit rules, and therefore do not permit assignment to creditors or any other party unless exempted under Code section 401(a). Additionally, distributed annuities from qualified plans are exempt under Code section 401(g). Consequently, they must receive the same treatment under the law as ERISA plan benefits, because they are treated as a section 401(a) trust under Code section 401(g). Finally, no witness provided any evidence or data to illustrate or suggest that anti-alienation issues have been an actual problem for individuals subsequent to a PRT.

10. Disclosures. Concerns about the needs for additional disclosure appear to be outside of the scope of 95-1.

11. Loss of PBGC Protections. NOHLGA's 2016 study of this topic shows that there is no material difference between the PBGC protection and SGAs. In addition, one additional point is important. The state guaranty systems are rarely triggered, so that over the past 30+ years, no one has lost a penny under a PRT annuity. At the same time, a very limited PBGC study showed $8.5 billion of participant losses. Further an assessment of this risk is already covered by consideration 6 of IB 95-1.

    Additionally, some members of the Council felt PBGC has insurance programs for single-employer and multiemployer defined benefit pension plans that guarantee benefits for plan participants if their plan becomes insolvent and unable to pay benefits. The two programs differ significantly in the guaranteed level of benefits. The guaranteed level of benefits for multiemployer plans is significantly lower than PBGC's single-employer guarantee.

Our understanding is that most participants of insolvent single-employer plans would receive 100% of their benefit under the PBGC guarantee, unless the plan has very rich benefits or heavily subsidized early retirement benefits. For multiemployer plans, generally PBGC does not guarantee 100% of the benefit unless the plan has very small benefits. Therefore, if a multiemployer plan goes insolvent and receives PBGC assistance, most participants will see a significant reduction in their benefit to the PBGC guarantee level. (Note - PBGC's special financial assistance program for financially troubled multiemployer plans under the American Rescue Plan Act generally restores any benefits that were reduced to the PBGC guarantee level after receipt of the assistance.)

The loss of PBGC protection is certainly an important factor for plan fiduciaries to consider. However, this is a factor that plan settlors and fiduciaries may consider when deciding whether to engage in a pension risk transfer ("PRT") transaction at all. Once the decision has been made to engage in a PRT, the loss of PBGC protection is not a criterion that is relevant for the evaluation and selection of an annuity provider since PBGC protections are not applicable to annuity providers.

IB 95-1 already directs plan fiduciaries to consider factors that do apply to annuity providers in the event of their insolvency. Specifically, Criteria 5 and 6 provide that plan fiduciaries should consider the use of separate accounts and state guaranty association protections, which provide protections for participants.

12. State Guaranty Associations. See comments above in 11 (Loss of PBGC Protections).

13. Impact of Partial Pension Risk Transfer Annuity Purchases on Residual Funding Status of Plans. The decision to do a pension risk transfer (partial or full) is a settlor decision. The effect of a particular annuity contract on all participants is already required to be taken into account under current law.

Additionally, some members of the Council felt the purpose of IB 95-1 is to guide a plan fiduciary on the proper selection of the "safest available annuity" for the purpose of pension plan benefit distribution where the plan intends to transfer liability for benefits to the annuity provider. The impact on the plan's funded status is often a key component of the analysis by the employer when determining if they will conduct a PRT and to what extent. Any concerns regarding the impact of a PRT on a plan's funded status should be addressed when deciding if a PRT should take place.

Once an employer decides to go forward with a PRT, the impact on the funded status should not be a key consideration in the selection of the annuity provider as it could create unintended consequences. For example, if a plan is well funded, it could lead the fiduciary to consider spending more for the transaction. Conversely, if a plan is not as well funded, it may unnecessarily lead the fiduciary to focus too much on lowest cost annuities. Additionally, it is unclear how the potential impact on the funded status would be measured by the employer – would it be the funded ratio, the gap in funding on a dollar basis, or whether it affects plan administration?

The Council received examples of PRT scenarios that had a negative impact on plan funded status, and Department provided a simplified example of how the remaining participants in the plan after the PRT were worse off. Other stakeholders raised the Verizon PRT as an example. Due to how funding liabilities are determined vs the cost of annuities, an annuity purchase can reduce a plan's funded status, but whether this reduction is advisable should be part of the decision as to whether a transfer should take place, not in the selection of the annuity provider.

For the reasons stated above, IB 95-1 should not be updated to reflect the impact of a decreased funding level for remaining plan participants. If it is determined that this is a concern, it should be addressed in the decision as to whether a PRT takes place.

IB 95-1 was also drafted broadly enough to remain highly effective despite inevitable and unpredictable new influences on the annuity market, such as the entry of private equity into the annuity market, which may raise particular concerns in the selection of an annuity provider. New industry standards for selection of an annuity provider that go above and beyond the specific requirements in IB 95-1 may add an additional layer of protection to plan participants and likely further mitigate any risk that may exist as a result of the annuitization of an existing pension plan. As the saying goes, "if it ain't broke, don't fix it." Because IB 95-1 continues to serve ERISA's primary goal of protecting participants' retirement assets, there is no need to amend it.

Recommendations and Discussion Related to Ownership Structure

Council members have expressed a variety of views about whether and how the Department should update IB 95-1 to provide for the consideration of ownership structure in assessing an annuity provider's claims paying ability and creditworthiness.

Five members of the Council recommend DOL amend IB 95-1 to clarify that in selecting an annuity provider, a fiduciary should consider the ownership and control of an annuity provider.

During the public comment period on July 18, 2023, individuals from the public representing retirees and employee organizations voiced their concerns regarding the role of private equity firms in the pension risk transfer industry. Individuals representing insurers and employers noted that since IB 95-1 has been issued, no retiree has failed to receive their annuity payments from insurers, while others noted that there have been changes in the ownership structures of insurers in recent years. While specific viewpoints on whether changes to IB 95-1 are needed may have varied, there was some common ground between the various members of the public. Specifically, there was broad acknowledgement that insurance companies, like many other corporations, have complex ownership structures and this factor is evaluated by at least some plan fiduciaries, or their advisors, as part of a pension risk transfer transaction as part of their due diligence process – even though it is not explicitly required by IB 95-1 – in selecting the "safest annuity available." With that in mind, the Department should consider clarifying the criteria in IB 95-1 to include the ownership and control of the annuity provider.

Four members of the Council, while supportive of formalizing the annuity provider's ownership structure as a factor, caution, however, against any guidance that disqualifies insurers solely on the basis of their ownership structure. Overly prescriptive guidance regarding an annuity provider's ownership structure (i.e., public vs. private vs. mutual) could potentially limit the options available to retirement plan fiduciaries. Greater consideration should be given to the specific types of investment strategies pursued by annuity providers and the specific ways they manage risk through reinsurance, rather than the ownership structure of the insurer in isolation. Further, an assessment of the insurer's financial strength ratings should include a review of financial strength ratings of both the parent company and the life insurance issuing company.

Two members of the Council, while agreeing that an insurer should not be disqualified solely on the basis of having any particular ownership structure and that overly prescriptive guidance regarding an annuity provider's ownership structure could potentially limit the options available to retirement plan fiduciaries, recommend DOL provide more specific guidance on aspects of ownership structure that should be considered by a fiduciary. Considerations regarding an insurer's ownership structure should include (1) whether it is a mutual or for-profit business; (2) whether it is part of a holding company structure, including one that has offshore or other components that may be subject to regulatory schemes that are not as strict as those in the vast majority of U.S. states; (3) whether there has been a shifting of liabilities into any such component (e.g., subsidiary) and the effect of that on the annuity provider's statutory surplus; and (4) any elements that increase complexity, such as captive reinsurance entities, commitments or obligations to affiliates or counterparties, or sidecar investment vehicles.

Among members of the Council who are against making any change in IB 95-1 related to the consideration of ownership structure, some share various viewpoints and concerns in response to such proposals, including those described here. Some believe considerations such as those described in the preceding paragraph could constitute picking one insurance business model over another and believe the Council should avoid making any such recommendation. With respect to the proposal made in the preceding paragraph regarding consideration of mutual and for-profit status, they note that all relevant insurers are for-profit and that the National Association of Insurance Commissioners deems stock and mutual insurance companies to be equivalent for all intents and purposes. With respect to concerns about offshore reinsurers, especially those located in Bermuda, they note that Bermuda is the leading jurisdiction for international reinsurance and one of the few jurisdictions recognized by both the European Union and the U.S. for the comprehensiveness and quality of its regulation. Further, they note that Bermuda is a tax efficient jurisdiction for raising foreign capital to support U.S. insurers. With respect to considerations of complexity, they note that complexity is a subjective concept that has nothing to do with an insurer's claims paying ability.

Recommendations and Discussion Related to Assets: Increase in Non-Traditional/Risky Investments

Five members of the Council recommend DOL amend IB 95-1 to clarify that in assessing the quality and diversification of an annuity provider's investment portfolio, fiduciaries should consider additional aspects of the insurer's portfolio related to investments in alternative assets and the insurer's ability to meet long-term commitments to annuities.

Section 404(a)(1) of ERISA, as amended, requires that a plan fiduciary discharge his or her duties with respect to the plan solely in the interest of participants and beneficiaries. Although not explicitly stated therein, IB 95-1 seems to acknowledge that when a plan engages in a PRT transaction, participants and beneficiaries lose the protections afforded to them under Section 404 of ERISA. Therefore, IB 95-1 clarified and emphasized that the selection of the "safest annuity available" is a fiduciary duty under Section 404(a)(1).

IB 95-1 was issued by the Department in the wake of the well-publicized failure of the Executive Life Insurance Companies of California and New York, whose substantial investments in high-risk bonds led to its insolvency. Consequently, it is no surprise that IB 95-1 focuses on the evaluation of an insurer's financial position. Indeed, the preamble to IB 95-1 states: "In conducting such a search, a fiduciary must evaluate a potential annuity provider's claims-paying ability and creditworthiness because the participants and beneficiaries whose entitlement to benefits will be transferred to the annuity provider have a paramount interest in the ability of the provider to make those payments." With that in mind, IB 95-1 requires a fiduciary to consider, among other factors: (1) the quality and diversification of the annuity provider's investment portfolio; (2) the level of the insurer's capital and surplus; and (3) the lines of business of the annuity provider and other indications of an insurer's exposure to liability.

As the variety and complexity of investment products has continued to evolve, the Department has responded to such developments by issuing guidance to plan fiduciaries, such as Compliance Assistance Release No. 2022-01 on cryptocurrencies and the various rules on ESG investing. Accordingly, the Council recommends that the Department update its guidance in IB 95-1 to clarify that fiduciaries should consider the following:

- Generally, an insurer's ability to fund the long-term commitment of annuities, as opposed to short-term strategies mismatched with the duration of annuity liabilities.
- Whether the insurer invests in riskier and/or less liquid assets to support benefit payments, including private credit, structured credit (CLOs), asset-backed securities, private fixed income placements, subordinate debt or the stock of affiliated companies.
- Whether a higher level of reserves is appropriate for insurers with significant allocation of their investment portfolios to alternative investments that come with greater risk and/or are less liquid, compared to insurers that do not have such allocations or as great an allocation.
- The risks created by potential self-dealing or conflicts of interest when an insurer is owned by a private equity firm or at least some of the insurer's portfolio is managed by a private equity firm, such as whether insurance assets are used to shore up the finances of funds operated by the private equity firm or are at risk of exposure to related party investments.

Like the criteria currently listed in IB 95-1, the above are simply intended to be criteria that plan fiduciaries should consider when evaluating insurers; any guidance should make clear that plan fiduciaries are not prohibited from considering annuity providers that are invested in non-traditional or risky investments. Insurers should be permitted, like plan fiduciaries are permitted, to invest in alternative or riskier asset classes, provided it is prudent to do so.

Among members of the Council who are against making any change in IB 95-1 related to consideration of the quality and diversification of an annuity provider's investment portfolio, some share various viewpoints and concerns in response to such proposals, including those described here:

- It would be inappropriate to single out elements like use of affiliated asset managers because the focus should be on the quality and safety of the asset manager, regardless of whether they are affiliated with the insurer. Across the insurance industry, the use of affiliated asset management is the norm. Allianz, Ameriprise Financial, Assured Guaranty, Athene, Guardian, Mass Mutual, MetLife, Nippon Life, Prudential, Sun Life, and TIAA all use affiliated asset managers.
- It would be inappropriate for DOL to discourage the selection of annuity providers who use "non-traditional" investments. Historically, DOL has not opined on whether specific investments are prudent.
- Structured credit as a key positive example of that evolution enabling structural protections and diversification of collateral to improve portfolio and therefore participant security. IB 95-1 clearly requires fiduciaries to consider asset selection, credit quality and structural protections in its determination that the annuity provider is safe and appropriate.

- Insurers' allocation to IG Structured securities represents incremental diversification to their existing allocations in a manner that typically improves the credit profile of the insurer. Anchoring fiduciaries to a requirement that insurer portfolios remain unchanged over time would cause insurers to avoid diversifying, constrain them from reacting to market developments and improving portfolios and prevent the natural progression that investments regarded as non-traditional become traditional over time.
- Retirement plans already have exposure to all the investment types that have been identified as "non-traditional." In fact, plans may use products like investment grade collateralized loan obligations for the same reason that some insurers do, because they have provided a safer investment than similar corporate bonds.
- To the extent some asset classes may be riskier, that is already considered by insurance regulators in the rules surrounding calculation of risk-based capital requirements. Imposing a different standard or requiring plan fiduciaries to ignore the work of insurance regulators would overstep DOL's authority and would be disruptive to insurance industry operation.
- IB 95-1 has worked because it has allowed for investment selection and portfolio allocation to evolve instead of requiring the specific investment philosophies that were in place when ERISA was enacted in 1974. It has stood the test of time and will continue to do so because of, not in spite of providing fiduciaries the flexibility to consider investments in an evolving context.
- With respect to conflicts of interest and self-dealing, investment advisers are subject to substantial regulations covering fiduciary obligations and mitigation of conflicts of interest. The manager's compliance with these regulations serves to address conflicts of interest that the DOL may be concerned with in asset portfolios as they require the manager to disclose all material conflicts of interest. Ultimately such laws require the manager to always act in the best interest of its clients. In addition, where the asset management firm and insurance company are wholly owned, there is a complete alignment of interest because assets that are allocated by the asset manager to the insurer are owned by the holding company. If the asset manager selects investments that lose money for the insurer, the loss is borne by the common parent, so in these structures, alignment mitigates any perceived conflict of interest.
- NAIC's risk-based capital framework is already being updated to reflect the use of different investments and securities being used in the insurers' investment portfolios over time.

<u>Recommendations and Discussion Related to Liabilities: Existence of Non-Traditional Liabilities</u>

Three members of the Council recommend DOL consider amending IB 95-1 to provide that in assessing the lines of business of an annuity provider and other indications

of an insurer's exposure to liability that a fiduciary consider an insurer's non-traditional liabilities and the extent to which they might pose added risk in some circumstances.

DOL should consider amending IB 95-1 to provide that in considering an annuity provider's lines of business and other indications of an insurer's exposure to liability as part of a fiduciary's assessment of an insurer's claims paying ability and creditworthiness, a fiduciary should consider an insurer's non-traditional liabilities and the extent to which they might pose added risk in some circumstances. Since 95-1 was promulgated, experiences with nontraditional liabilities, such as funding agreement backed securities, have shown that these liabilities can in some cases carry significant liquidity risks that may threaten the financial health of insurers. Given this, it would be appropriate to explicitly call for consideration of these kinds of liabilities to ensure all fiduciaries, not just those following best practices, are aware of the need to do so.

Among members of the Council who are against making any change in IB 95-1 related to consideration of an insurer's non-traditional liabilities, some share various viewpoints and concerns in response to such proposals, including those described here:

- It would be unprecedented for a fiduciary to successfully argue that they had satisfied their responsibility where they excluded known risks from their analysis of an investment's safety. As a result, it would be foolish for DOL to place a thumb on the scale of directing fiduciaries to consider certain liabilities. Prudent fiduciaries already consider factors like credit spreads as part of considering the lines of business of the annuity provider and other indications of an insurer's exposure to liability. Calling out specific liabilities will lead to overweight of them as factors.
- Non-traditional liabilities can include a range of liabilities ranging from FABNs to long-term care insurance, variable annuities with living benefits and universal life with secondary guarantees. FABNs are a particularly low risk liability as they have a fixed-term and no longevity risk.
- Changing IB 95-1 to identify specific liabilities would convert IB 95-1 from the principles-based guidance that has worked and convert it into one where DOL would have to repeatedly overrule insurance regulators on what evolving insurance practices work best for annuitants.

Recommendations and Discussion Related to Reinsurance

Seven members of the Council recommend DOL consider amending IB 95-1 to incorporate reinsurance as a factor in evaluating an insurer's claims paying ability and creditworthiness.

Reinsurance can provide valuable additional security for promised annuities and therefore should be considered by fiduciaries. As part of that evaluation, a fiduciary should assess how the reinsurer's domicile or the relationship between the reinsurer and insurer impacts the reinsurance protections. The increasing use of offshore reinsurers and captive/affiliated reinsurers by life insurers, however, highlights the need for fiduciaries to understand any meaningful differences between reinsurers that may be standing behind an annuity provider's promises. This includes an understanding of the substance, not merely the form of the relationship with the reinsurer.

Among members of the Council who are against making any change in IB 95-1 related to incorporating reinsurance as a factor in evaluating an insurer's claims paying ability and creditworthiness, some share various viewpoints and concerns in response to such proposals, including those described here:

- Reinsurance provides insurers with broad access to capital, including from global jurisdictions. That access to capital supports the stability and safety of insurers and participants.
- IB 95-1 requires consideration of guarantees supporting annuities. Reinsurance is one such guarantee; it provides an additional layer of protection for annuitants. Fiduciaries consider reinsurance in a handful of ways, including types, collateral levels and other aspects. When a fiduciary examines reinsurance, a fiduciary frequently asks if the reinsurer is in a state or country that has been approved by the NAIC as a Reciprocal Jurisdiction or as a Qualified Jurisdiction.
- The quality of different jurisdictions for reinsurance is governed by treaties and through NAIC review, and it would be disruptive and inappropriate for DOL to interfere with those regulations.
- Requiring reinsurance or even a specific type of reinsurance would go beyond the text of the statute which expressly provides that a participant's status as a participant can be terminated through the purchase of an annuity.

<u>Recommendations and Discussion Related to Risk-Based Capital and Other Methodologies</u>

One member of the Council recommends DOL update 95-1 to provide for the consideration of additional factors in assessing an annuity provider's level of capital and surplus as it relates to its claims paying ability and creditworthiness.

DOL should update IB 95-1 to provide that in evaluating a potential annuity provider's level of capital and surplus, as well as its claims paying ability and creditworthiness, a fiduciary should evaluate additional issues, including the insurer's risk-based capital (RBC) ratio; how reinsurance or modified coinsurance agreements with offshore affiliates or affiliates in states that have less strict requirements than the majority of U.S. states might affect the reported ratio, especially with respect to significant allocation of their investment portfolios to alternative investments that come with greater risk; and whether the insurer is properly reserved under statutory accounting principles ("SAP").

Among members of the Council who are against making any change in IB 95-1 related to considering the level of capital and surplus in evaluating an insurer's claims paying ability and creditworthiness, some share various viewpoints and concerns in response to such proposals, including those described here:

- IB 95-1 already requires consideration of the level of an insurer's capital and surplus, which is heavily regulated.
- Insurance regulators set how risk-based capital ratios are calculated and incorporate reinsurance, modified coinsurance, affiliated insurance, portfolio composition, and the accounting principles that may be used. Requiring plan fiduciaries to use a different formula or ask that insurers calculate their risk-based capital using a non-NAIC approved formula would harm participants as it would minimize the ability of fiduciaries to compare the safety of annuity providers using well-developed and regularly updated formulas that have been approved by regulators myopically focused on annuity safety.
- IB 95-1 should not be amended to restate or to second-guess the rules put in place by insurance regulators. Issues of (1) how risk-based capital (RBC) ratios are calculated; (2)) the rules regarding how various types of reinsurance or modified coinsurance agreements impact the reported ratio; (3) reserving requirements for insurers who allocate to alternative investments; and (4) whether the insurer is properly reserved under statutory accounting principles ("SAP") are all fundamental issues of insurance regulation. If there are concerns about the framework of insurance regulation, those issues should be raised with insurance regulators. Adding a separate framework for insurer risk would be disruptive, likely cause fiduciary confusion and could lead to conflicting regulatory standards.

Recommendations and Discussion Related to Separate Accounts as a Protection

Council members are not providing any recommendations or discussion on this topic, other than what is described in the no changes recommendation above.

Recommendations and Discussion Related to Administrative Capabilities and Experience

A majority of eight members of the Council recommend DOL update 95-1 to expand on its existing language addressing how a fiduciary should consider an annuity provider's administrative capabilities and experience.

IB 95-1 briefly mentions the annuity provider's ability to administer the payment of benefits to the participants in the discussion of "Costs and Other Considerations." We recommend the Department expand on the current language about the annuity provider's administrative capabilities as a factor for consideration. Specifically, an assessment of the annuity provider's capacity to administer benefits effectively and efficiently should be formally included as a factor that fiduciaries consider. This could include both an assessment of what the annuity provider's administrative capabilities are and also the quality of the annuity provider's administrative capabilities relative to other annuity providers. Factors of quality that are generally considered today by independent fiduciaries and experts include the accuracy and timeliness of payments, response time answering phone calls, participant web access capabilities and any concerns about customer service or data accuracy (e.g., losing participants). It could also include an assessment of an annuity provider's cybersecurity practices.

Recommendations and Discussion Related to Spousal Protections & Anti-Alienation Rules: Protections Against Creditors and Division of Benefits on Divorce

Council members have expressed a variety of views about whether and how the Department should update IB 95-1 with respect to ERISA's spousal protections and anti-alienation requirements.

Five members of the Council view spousal protections and anti-alienation rules as being outside the scope of IB 95-1 and recommend DOL address these issues within the context of the existing regulations defining what an annuity contract must provide for the contract to terminate an individual's rights under the plan.[2] DOL should clarify these rules to address whether annuity contracts must include spousal protections or the anti-alienation rules to satisfy the conditions of this rule. Adding spousal protections as a factor to consider under IB 95-1 could imply that annuity contracts are not required under existing regulations to include spousal protections. Adding anti-alienation rules to IB 95-1 also raises risks insofar that it is unclear whether benefits in pay status could be subject to legal action, such as the imposition of a constructive trust by state courts. DOL also should consult with the U.S. Treasury Department regarding current Treasury rules requiring annuity contracts purchased and distributed to a participant or spouse by a plan to protect survivor rights.

Six members of the Council recommend DOL provide guidance on requirements related to spousal benefit elections by annuity providers and Domestic Relations Orders (DROs) issued after the pension risk transfer, whether as part of IB 95-1 or in separate guidance or rulemaking. Several members of the public who provided comments to the Council and EBSA's report to the Council on the IB 95-1 consultation indicate that there have been problems with annuity providers accepting DROs and deficiencies in annuity providers' dealing with spousal benefit elections. Although Treasury regulations and an opinion from the IRS General Counsel indicate that the Internal Revenue Code requires annuity providers to apply ERISA provisions pertaining to one or both of these situations, courts have repeatedly held that employee benefit plan participants and beneficiaries have no right to sue to enforce provisions of the Tax Code and, in any event, once annuities have been purchased, they have no right to sue under ERISA. DOL has not issued guidance or any regulation as to these issues.

[2] 29 C.F.R. § 2510.3-3(d)(2)(ii)(A) (2022).

Recommendations and Discussion Related to Disclosures

Seven members of the Council recommend IB 95-1 be updated to provide a model statement that plans would be required to be sent to participants and beneficiaries with relevant information prior to and at the time of transfer of obligation to pay benefits from the pension plan to a new annuity provider.

To alleviate confusion or concern of impacted participants, developing a standard model statement that would describe why the transition is occurring, clarify the protections of future benefits that participants do and don't have, describe what is staying the same vs. changing, and provide contact information for both the current plan sponsor as well as the annuity provider's customer service team. Having a model statement will ensure that all impacted participants receive similar information that has been deemed important in their transition to an annuity provider.

Two members of the Council recommend IB 95-1 be updated to add to IB 95-1 that selection of the safest annuity provider includes (1) preservation of documents sufficient to demonstrate the prudence of the selection and (2) making such documents available upon written request to a participant, beneficiary or annuitant, or their authorized representative.

Fiduciaries, as part of exercising prudence in their decisions, already should be preserving such documents. However, given that many de-risking transactions involve full plan terminations, that may not always be happening. Additionally, given that the annuitants are no longer participants and beneficiaries under current law, they have no right under ERISA to request and obtain documents from the plan or plan sponsor after the transfer.

Three members of the Council recommend IB 95-1 be updated to encourage plan fiduciaries to negotiate/contract with the insurance company to add standard contract holder and certificate holder disclosures upon annuity purchase and periodically after purchase.

State law disclosure requirements for annuities and notices of change regarding those annuities may be inconsistent and certain disclosures may only apply to contract holders, not certificate holders. Disclosures are not likely to be the same as ERISA's mandated disclosures for pension plans. Prior to the annuity purchase, participants were able to rely upon ERISA's mandated disclosures, and DOL enforcement. Post purchase, the annuity certificate holder's relationship becomes contractual.

A single notice to participants/certificate holders is suggested, so that any changes will be highlighted, and so that the annual notice will confirm current provisions.

- No less than 60 days prior to the purchase, issue a Summary of Benefits & Coverage (SBC) Side by Side individual illustration which identifies not only what has changed with the annuity purchase, but also what has not changed. Included should be everything the participant needs to know to claim and maintain the annuity.
- Post purchase, an updated SBC should be issued no less than 60 days in advance of the effective date of any change to the terms of the SBC.
- Where there are no changes to the SBC, the SBC should be issued no less frequently than once every 12 months.

Recommendations and Discussion Related to Loss of PBGC Protections

Council members are not providing any recommendations or discussion on this topic, other than what is described in the no changes recommendation above.

Recommendations and Discussion Related to State Guaranty Associations

Council members have expressed a variety of views about whether and how the Department should update IB 95-1's provision for the consideration of the availability of additional protection through state guaranty associations (SGAs) and the extent of their guarantees in assessing an annuity provider's claims paying ability and creditworthiness.

A majority of eight members of the Council consider the current SGA assessment to be relevant for fiduciaries and strongly oppose removing them from the guidance. The availability of additional protections protection through SGAs and the extent of the guarantees are an important factor in determining the appropriate structure of the annuity contract, such as purchasing an annuity from a single insurer or annuities from multiple insurers, and guarantees supporting the annuities, such as the use of separate accounts.

Three members of the Council recommend DOL consider enhancing IB 95-1 to include guidance that the analysis of an annuity provider start without regard to any SGA protections and recommend DOL clarify further that SGA guarantee levels relative to the benefit amounts of potential annuitants are appropriately considered when deciding whether to purchase more than one annuity for a participant from more than one annuity provider. This allows a fiduciary and their expert advisers to review each provider and solution on its merits alone. When the evaluation of a provider focuses on SGA protections, it opens a backdoor for lower creditworthy insurers to be considered "safest available" or acceptable. While SGA protections are important to participants and beneficiaries, including the analysis diverts attention from the differences among providers.

<u>Recommendations and Discussion Related to Impact of Partial Pension Risk Transfer Annuity Purchases on Residual Funding Status of Plans</u>

Council members are not providing any recommendations or discussion on this topic, other than what is described in the no changes recommendation above.

<u>Recommendations and Discussion Related to More than One Annuity Provider Satisfying the Safest Available Annuity Standard</u>

Three members of the Council recommend DOL update 95-1 to reinforce the concept that more than one annuity provider can meet the "safest available" criteria.

DOL should reinforce the concept that more than one annuity provider can meet the "safest available" criteria. When evaluating insurers, it is often the case that certain insurers will appear strongest against some of the criteria, while other insurers appear strongest against other criteria. Therefore, it is not uncommon to have a situation where two or more insurers have overall financial strength profiles that are similar enough that a fiduciary might reasonably be unable to definitively determine whether one is "safer" than the other. In that case, the fiduciary might reasonably determine both insurers meet the "safest available" criteria, in that there is not one insurer demonstrably "safer." While the "more-than-one-safest" annuity provider is generally accepted by most fiduciaries and independent experts, we encourage the Department to codify the position that there can be more than one "safest" available annuity provider in its report.

Among Council members who did not support this recommendation, some noted that this change is unnecessary because IB 95-1 already states clearly that a fiduciary may conclude "that more than one annuity provider is able to offer the safest annuity available."