

October 8, 2008

## DOL Publishes Final ERISA Regulations on Annuity Selection for Defined Contribution Plans

On October 7, 2008, the Department of Labor published final regulations (please click [here](#) to view the regulations) providing a fiduciary safe harbor under ERISA for the selection of annuities as distribution vehicles for defined contribution retirement plans. These regulations implement a provision of the Pension Protection Act of 2006. Click [here](#) for a copy of our alert on the proposed regulations.

The final regulations retain the safe harbor approach of the proposed regulations, but with the following refinements and clarifications:

- The final regulation specifically provides that the safe harbor is an optional means for a fiduciary to address its ERISA responsibilities for the selection of annuities used to distribute benefits to participants in defined contribution plans; and that the safe harbor is neither the exclusive means to do so, nor sets a minimum standard of conduct for fiduciaries.
- The safe harbor describes a process under which the fiduciary (i) engages in an “objective, thorough and analytical search” among annuity providers; (ii) inquires as to the future claims paying ability of the providers; (iii) appropriately considers the costs, fees and commissions of the annuity products; (iv) consults with an independent expert, as necessary; and (v) appropriately concludes that the annuity provider is financially able to make future payments and the costs of the product are reasonable in relation to the benefits and services provided. The detailed list of criteria to be considered as to the insurer’s claims paying ability was omitted in the final regulation.
- The final regulation clarifies that it applies only to annuities used as distribution vehicles, not as retirement accumulation vehicles.
- The final regulation also clarifies that the safe harbor can be satisfied either (i) at the point of benefit commencement for a particular participant or beneficiary; or (ii) at the time the annuity product is generally approved for this use, in which case the fiduciary is to periodically refresh its conclusions under the safe harbor, but need not review them as applied to specific participants and beneficiaries.

The final regulations take effect on December 8, 2008.

DOL simultaneously finalized its amendment of Interpretive Bulletin 95-1 (please click [here](#) to view the amendments), limiting the applicability of the so-called “safest available annuity” rule to defined benefit plans effective as of the same date. (Interim guidance published in September 2007 provided the same result effective November 13, 2007.)



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