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May 3, 2012

By first-class mail and electronic delivery
[*Notice.comments@irscounsel.treas.gov*]

Internal Revenue Service
CC:PA:LPD:PR (REG—115809-11),
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

RE: REG. – 115809-11 - Request for Comments on Notice of Proposed Rulemaking Regarding Longevity Annuity Contracts

Ladies and Gentlemen:

The Employee Benefits and Executive Compensation Committee of the New York City Bar Association ("Committee") is pleased to respond to the request of the Internal Revenue Service ("Service") and the Department of the Treasury for comments regarding a proposed regulation governing the holding of certain longevity annuity contracts by qualified defined contribution plans (the "Proposed Regulation").[1]

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[1] This letter was prepared by a working group of a subcommittee of the Committee on Employee Benefits and Executive Compensation of the New York City Bar Association chaired by Rania Sedhom. The other members of the working group were Judith Bandler, J. Stewart Borrow, J. Burkett McInturff, Rania Sedhom and Vipin Varghese. J. Stewart Borrow, who is a member of both the subcommittee and the working group, was the primary author of this letter. This letter is presented by the Committee on Employee Benefits and Executive Compensation on behalf of the New York City Bar Association, and represents its views as a committee; it does not necessarily represent the views of any individual members of the Committee on Employee Benefits and Executive Compensation or their respective law firms or employer organizations.

In general, the Committee agrees with the approach taken by the Service regarding qualifying longevity annuity contracts ("QLACs"), which are designed to provide a stream of income that is guaranteed to last during the remainder of the primary annuitant's lifetime or over the joint lifetimes of the primary and survivor annuitants. Specifically, the Committee welcomes the position taken by the Service in the Proposed Regulation and Revenue Ruling 2012-3, which treats the annuity contract as an investment option. The Committee believes, however, that this approach could be improved in the following respects to facilitate the adoption of QLACs by employers for their defined contribution plans:

1. Characterization of Contracts for Code Section 411(d)(6) Purposes.

The Committee recommends that the Proposed Regulations be clarified to characterize the treatment of QLACs for purposes of the anti-cutback rule of Code Section 411(d)(6). In this regard, one approach could be to characterize a QLAC permitting a participant to transfer out of the annuity contract and into another investment option offered under the plan at any time prior to the annuity starting date (similar to the scenario presented in Situation 1 of Rev. Rul. 2012-3) as merely an investment option, which could be eliminated by plan amendment at any time without violating Internal Revenue Code Section 411(d)(6). See Treas. Reg. §1.411(d)-4, Q&A-1(d)(6) and (7)[2]. By contrast, a QLAC containing the features described in Situation 2 or 3 of Revenue Ruling 2012-3 could be categorized as an optional form of benefit that a plan participant could elect on or prior to the annuity starting date, and that could be changed by plan amendment, subject to the requirements of Section 1.411(d)-4, Q&A-2(b)(2), (e) of the Treasury Regulations[3]. Adopting this approach would provide greater certainty for plan administrators dealing with issues involved in merging a plan covering the employees of an acquired business that provides for QLACs into the acquirer's plan, which might neither permit nor desire QLACs, as well as in dealing with administrative issues involved in terminating a plan that does provide for QLACs.

2. Clarification of Insurer Responsibility to Administer QJSA/QPSA Rules under Annuity Contract/Plan Documentary Compliance with Code Section 401(a)(11).

The Committee recommends that the Proposed Regulations should be revised to explicitly state the following: (a) if the employer sponsoring a plan described in Code Section 401(a)(11)(B)(iii) permits an employee to elect a QLAC offered by the plan, the insurer issuing the QLAC will, in all events, be responsible for administering the Qualified Joint and Survivor Annuity ("QJSA") and the Qualified Preretirement Survivor Annuity ("QPSA") rules (collectively the "QJSA/QPSA Rules"); and (b) if the employer sponsoring a plan described in Code Section 401(a)(11)(B)(iii) permits an employee to elect a QLAC offered by the plan, the plan document is deemed to be in compliance with the exemption for certain defined contribution plans provided by Code Section 401(a)(11) if it contains language that merely describes the requirements for that exemption and incorporates these requirements by reference (as may be amended from time to time) without having to spell out the full range of QJSA/QPSA Rules.

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[2] Paragraph (6) of this Regulation provides that the right to direct investments is not an optional form of benefit protected by Code Section 411(d)(6). Paragraph (7) provides that the right of a participant to a particular form of investment is not an optional form of benefit protected by Code Section 411(d)(6).

[3] Q&A-2(b)(2) of the Regulation at Section 1.411(d)-4 provides a list of optional forms of benefit that may be eliminated or reduced and the circumstances under which they may be eliminated or reduced. Q&A-2(e) of the Regulation at Section 1.411(d)-4 provides that a defined contribution plan may be amended to eliminate or restrict an optional form of benefit if, after the amendment, the available optional forms of benefit include a single-sum distribution that is otherwise identical to the optional form of benefit being eliminated or restricted.

a. Clarification of Insurer Responsibility to Administer QJSA/QPSA Rules.

The Treasury Fact Sheet ("Fact Sheet") announcing the release of the guidance on lifetime income options under qualified plans, contains the following statement describing the application of the QJSA/QPSA Rules to annuity contracts as clarified by Revenue Ruling 2012-3:

> This guidance may be useful for plan sponsors that wish to offer annuity contracts under their plans but are reluctant to take responsibility for administering the spousal consent rules. The guidance identifies plan and annuity terms that will automatically protect spousal rights without requiring spousal consent before the annuity begins. At that time, the insurance company issuing the annuity would assure compliance with the spousal consent rules.

Because the Fact Sheet was merely a summary of the guidance, it has limited binding effect. Therefore, the rule expressed in the last sentence of the above-quoted statement should be explicitly stated in the final version of the Proposed Regulation (i.e., that the issuing insurance company would be responsible for satisfying all of the QJSA/QPSA Rules with respect to a plan participant who had elected to invest in a QLAC under each of the three situations presented in Revenue Ruling 2012-3). The inclusion of such a statement in the final version of the Proposed Regulation would induce more employers to provide QLACs in defined contribution plans that are otherwise generally exempt from these rules by assuring them that their responsibilities will be deemed satisfied in this manner.

b. Clarification of Plan Documentary Compliance with Code Section 401(a)(11).

Currently, plans that meet the requirements of Code Section 401(a)(11)(B)(iii) generally spell out in the plan document the full panoply of explanation, notice, waiver and spousal consent rules if a participant elects an annuity form of benefit. It is not clear under current authority, however, whether the QJSA/QPSA Rule requirements need to be fully spelled out in the plan document for a plan described in Code Section 401(a)(11)(B)(iii) (whether or not the plan specifically offers an annuity as an optional form of benefit). Therefore, the Committee recommends that the Proposed Regulation be revised to explicitly state that the plan document will be deemed to be in compliance with Code Section 401(a)(11) if it merely lists the requirements needed for the exemption to apply and provides that a participant's designation of a beneficiary in addition to or in lieu of his or her spouse pursuant to a QLAC is subject to these spousal consent requirements. If this was specifically stated in the final version of the Proposed Regulations, it would facilitate the provision of QLACs under generally exempt defined contribution plans because the plan sponsor could rely upon such statement in deciding whether such a plan provision is sufficient to satisfying the requirements of Code Section 401(a)(11)(B)(iii).

3. Responses to Certain Questions for Which the Service Requested Comments.

In the preamble to the Proposed Regulation, the Service specifically requested comments on a number of different issues. The Committee is hereby providing its comments with respect to the following two issues:

a. Whether the Proposed Regulations should be modified to allow alternative death benefits permitting the non-spouse beneficiary to be changed at any time prior to the annuity starting date (subject to applicable lower percentages needed to satisfy the Minimum Distribution Incidental Benefit ("MDIB") requirement).

The Committee believes that the Proposed Regulations should be modified to permit a non-spouse beneficiary to be changed at any time prior to the annuity starting date, subject to the applicable lower percentages needed to satisfy the MDIB requirement. The goal of providing simplicity by having the

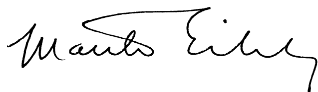
non-spouse beneficiary irrevocably designated as of the required beginning date is to be applauded. In real life, however, there will be situations in which the beneficiary will have predeceased the employee, thus either requiring the non-spouse beneficiary to be changed or having the death benefit payable to the new beneficiary computed by reference to the deceased beneficiary's life expectancy. Therefore, the proposed regulations should be modified to permit the designated non-spouse beneficiary to be changed at any time prior to the annuity starting date.

b. Whether the proposed regulations should be modified to apply the QLAC rules to a Roth IRA or to reduce the availability of the Section 401(a)(9) relief for purchases of QLACs by the amount of assets the individual holds in a Roth IRA.

The Committee believes that the Proposed Regulations should not be modified in this manner. As the preamble to the Proposed Regulations points out, a contract purchased by a Roth IRA is not intended to be a QLAC simply because Roth IRA owners are not subject to the required minimum distribution rules of Code Section 401(a)(9)(A). The advantage to be gained from having a Roth IRA purchase such contracts is that some of the QLAC limitations can be made less restrictive. This is reason enough not to apply the QLAC rules to a Roth IRA and not to reduce the Section 401(a)(9) relief for purchases of QLACs by the Roth IRA's assets.

Members of the Committee would be pleased to answer any questions you might have regarding our comments and to meet with the Service if that would assist your efforts.

Respectfully submitted,



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* Ms. La Londe, an Investigator at the Employee Benefits Security Administration, U.S. Department of Labor, did not take part in the discussion of this letter and neither supported nor dissented from the positions in this letter.