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Guaranteed Lifetime Withdrawal Benefits: Fiduciary Considerations for Plan Sponsors

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The purpose of this paper is to demonstrate that, as a practical matter, the fiduciary standards applicable to the offering of guaranteed lifetime withdrawal benefit (GLWB) products are not materially different than the standards applied to fiduciaries in connection with the selection of any other investment or guaranteed lifetime income option for an individual account plan. In this regard, there is significant regulatory and case law guidance available to assist plan sponsors and fiduciaries in considering the nature and scope of their fiduciary obligations in connection with offering GLWBs. This article is intended to provide a roadmap of much of the available guidance, which fiduciaries can use to answer most of the questions that would reasonably be expected to arise if GLWBs were added to a plan's menu of investment options. Key subjects addressed by existing guidance include (1) evaluating the reasonableness of GLWB fees; (2) how to address portability concerns; (3) considerations that should be taken into account in selecting a GLWB provider; and (4) educating participants about GLWBs without crossing the line into providing investment advice. Using this roadmap in conjunction with other available guidance, plan fiduciaries should feel confident in their ability to construct a prudent process, consistent with their legal obligations, for evaluating, selecting, and administering GLWBs.

Despite a slowly improving economy, Americans today are more worried about their retirement finances than they were at the end of the 2009 recession.[1] Among other factors, the shift by employers from defined benefit to defined contribution plans,[2] together with continued questions about the long-term reliability of the country's Social Security system,[3] have eroded workers' confidence about their ability to achieve retirement security. Although previous generations often felt safe relying on guaranteed employer pensions to meet their retirement needs, today's workers must increasingly rely on markets and their own financial acumen to ensure their savings are invested and made available in a manner sufficient to last their lifetimes.

This endeavor is complicated by competing worker preferences concerning deferred compensation that are often at loggerheads. On the one hand, workers want guaranteed retirement income (security preference).[4] On the other hand, they also want the potential financial upside that comes from market exposure (upside preference).

The best-known product designed to satisfy security preference is the traditional annuity, which has long been recognized as a theoretically optimal solution for mitigating longevity and investment risk[5] and facilitating consumption smoothing.[6] It is well-documented, however, that individuals purchase annuities far less than theory suggests they should.[7] Academic literature offers several explanations for this so-called "annuity puzzle," including various behavioral economics-based theories that point in substantial part to upside preference as the culprit.[8] In short, potential annuity-purchasers are often: (1) reluctant to relinquish control over access to their savings, and (2) overconfident that they can achieve better returns by assembling and managing an investment portfolio on their own. In addition, rather than viewing annuities as akin to insurance policies, individuals tend to view them as gambles that only pay off if they are able to recoup their full contract value.[9] Virtually all products designed to avoid these objections, however, including mutual funds, do so at the cost of broadly exposing employees nearing or at retirement to the risks of market downturns, which employees also prefer to avoid.

GLWBs are designed to accommodate the competing desires of employees by affording them the opportunity to maintain a degree of control and participate in investment gains, while offering the longevity and downside income protection missing from most other retirement investment products through an opportunity for guaranteed income for life. A GLWB is an insurance-like feature offered in connection with, or that may be purchased as an add-on to, certain investment funds. In short, in exchange for a fee, a GLWB provides a participant the assurance that, regardless of the performance of the underlying investment fund, and so long as the participant does not exceed certain specified maximum annual withdrawal rates, he or she will have access to a guaranteed minimum income stream for life that is based on either the initial amount of the investment or some later

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high-water mark that is achieved through investment gains. If the participant dies before the account is depleted, the guarantee is never invoked and, unlike an annuity, the remainder of the account passes to the participant's heirs.[10] On the other hand, if the participant's voluntary withdrawals fully deplete the account balance despite never exceeding the GLWB's withdrawal rate limitations, the insurer is contractually required to fulfill the income stream guarantee through its own funds.

Despite this innovative combination of features that may be attractive to plan participants, many plan sponsors appear to be reluctant to include GLWBs as part of their plan due to misconceptions concerning the application of the fiduciary rules under the Employee Retirement Income Security Act of 1974 (ERISA). A 2012 survey conducted by Deloitte showed that only 4 percent of 401(k) plan sponsors had included an "in-plan retirement income product" in the menu of options presented to participants, and only 19 percent had even considered doing so.[11] When asked why they were not considering such products, the response from sponsors was eye-opening: one-third reported "concerns about potential liability of this as an investment product."[12] In other words, a significant percentage of plan sponsors may not even consider offering their employees a GLWB option because of perceived fiduciary responsibility and liability issues.

BASIC MECHANICS: A THUMBNAIL SKETCH OF HOW GLWBs WORK

Although there is an increasing diversity of GLWB products available, most GLWBs share certain key features, which we will summarize here. To the extent a specific product considered by a fiduciary has features that vary substantially from the description provided here—as some products inevitably will, given the ever-evolving investment product market—some or all of the guidance referred to in this article may not apply in the manner discussed.

As noted previously, a GLWB is a feature of (and sometimes a contractual add-on to) certain investment funds, which—in exchange for a fee—guarantees a plan participant a specified minimum income stream for life, without regard to the actual returns on the participant's investment, so long as the participant does not exceed a specified annual rate of withdrawal from the account. The amount of the participant's guaranteed income stream is tied to the participant's "benefit base," which begins as the amount of the participant's initial investment, and increases with additional contributions and investment gains. As a function of the contractual guarantee, the "benefit base" operates as a one-way ratchet for the participant: It will increase with additional contributions and with investment gains, but it will never decrease, so long as the participant does not exceed the withdrawal thresholds (discussed in more detail later). The participant's new "benefit base" is calculated on a periodic basis for purposes of crediting investment returns and, because of the one-way ratchet effect of the GLWB, the participant gets to use the high-water mark of all the periodic calculation dates to determine the amount of the guaranteed lifetime income stream.[13]

As noted previously, a GLWB holder's guaranteed annual benefit can be reduced if the holder infringes the GLWB contract's withdrawal thresholds. Unlike annuities, GLWBs allow participants unlimited access to the underlying investment assets (subject, of course, to government-imposed tax and other limitations on the use of retirement investments), of which the participant retains full ownership, including inheritability rights. For this reason, the withdrawal thresholds serve as important conditions on the insurer's promise to pay. These thresholds typically take two forms: an "eligibility date" on which withdrawals may begin, and a "maximum withdrawal rate" that is often expressed as a percentage of the benefit base. If the withdrawal thresholds are infringed, the participant does not entirely sacrifice the insurer's promise to pay minimum benefit amounts. Rather, infringements of the withdrawal thresholds lower the participant's applicable benefit base—and thus lower the amount of the participant's guaranteed annual benefits—in accordance with a formula specified in the GLWB contract. Consumption significantly in excess of the withdrawal thresholds could eventually erode the benefit base to zero.

In addition to these mechanics, fiduciaries need a firm understanding of the value that GLWB holders receive in return for the fees they pay. GLWBs always charge a fee in addition to those fees associated with the underlying investment fund. The value received in return for that fee can be viewed in one of two ways. Compared to an investor in a comparable fund that does not offer a GLWB, the extra fee that a GLWB holder pays buys the guarantee of a minimum annual benefit. Viewed from the other direction, however, and comparing the purchaser of a GLWB to the purchaser of an annuity, the extra GLWB fee instead buys control of the invested assets and the opportunity to participate in the upside potential of the investments. Whereas the purchaser of an annuity forever relinquishes ownership and control of the sums used to purchase the annuity, GLWB holders enjoy access to the full amount of their savings.[14] In addition, as previously noted, the GLWB holder's continued ownership of the underlying investments renders the investments inheritable, whereas an annuity holder has no true "investments" to pass on in the event of his or her death, although annuity contracts may, and often do, provide for a relatively small survivor benefit payment.

In exchange for offering control, liquidity, and upside features that traditional annuities lack, a GLWB provides a lower guaranteed minimum income stream for a given amount of initial investment than a traditional annuity does.[15] Although (unlike traditional annuities) the guaranteed minimum associated with a GLWB can grow if the underlying investments appreciate, to secure a higher benefit base the GLWB holder must achieve a certain level of investment gains, net of the fees charged for the GLWB. Fiduciaries will need to consider the interplay between these various features when assessing the reasonableness of fees.

A FIDUCIARY ROADMAP FOR GLWBs

This paper assumes that the decision to include one or more GLWB options in a plan has been made at the settlor level.[16] Although plan sponsors may be treated as fiduciaries under ERISA to the extent they exercise discretionary authority or control respecting management of a plan or disposition of the plan's assets, the Department of Labor (DOL) has long recognized that "there is a class of discretionary activities," known as "'settlor' functions," relating to "the establishment, termination, and design of plans," that "are not fiduciary activities subject to Title I of

ERISA."[17] The US Supreme Court also has recognized a distinction between those activities that are settlor in nature and those that are fiduciary in nature.[18] But whereas the DOL reached its conclusion, "in light of the voluntary nature of the private pension system governed by ERISA,"[19] the Court's reasoning was based on ERISA's definition of fiduciary: "'[B]ecause [the] defined functions [in the definition of fiduciary] do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.'"[20] Thus, "when employers undertake" the adoption, modification, or termination of plans, "they do not act as fiduciaries … but are analogous to the settlors of a trust."[21]

Here, the settlor/fiduciary distinction is important because it provides a potential means for an employer, acting as settlor, to amend or modify a plan to offer a GLWB as an investment option without implicating ERISA's fiduciary standards. Specifically, when a decision to include a GLWB is made at the settlor level, fiduciary liability is generally limited to claims based on those activities "undertaken to implement the [settlor] decision"—that is, claims based on the selection of a *specific* GLWB product or provider.[22] Indeed, the DOL recognized as much when it provided testimony to the ERISA Advisory Council in 2008 regarding the issues and barriers facing plan fiduciaries who wish to add "plan design/investment options for [defined contribution] plans which provide lifetime income/periodic payments at retirement."[23] Specifically, the Council's report cited testimony by the Director of Regulations and Interpretations for the DOL's Employee Benefits Security Administration, that "it is the Department's view that certain decisions to offer distribution options or choices that are intended to provide or increase the likelihood of lifetime income for retirees are made by a plan sponsor as a matter of plan design and are 'settlor' (as opposed to fiduciary) in nature."[24] "Implementation of such provisions, however, constitutes fiduciary acts governed by ERISA and must be undertaken 'prudently and solely in the interest of the plan's participants and beneficiaries.'"[25]

To maximize its liability-limiting effect, the settlor decision should be properly enshrined in plan documents—either through an amendment to the plan itself, or through an amendment to some other document incorporated by reference into the plan, such as an investment policy statement or trust agreement.[26] Under the latter option, the incorporated document should be one that is created and subject to amendment by the plan sponsor in its settlor capacity.

Much of the current case law regarding plan provisions that require certain investment structures concerns provisions mandating the availability of employer stock as an investment option. Although the analysis in these cases is somewhat clouded by factors irrelevant to GLWB selection,[27] at least one appellate court has suggested that "strong language in [a] [p]lan's documents requiring that fiduciaries offer [employer stock], 'no matter how dire' the circumstances, may … insulate [the employer] from claims of imprudence in any circumstances."[28] Even courts that refuse to go this far recognize that "a fiduciary's failure to divest from company stock is less likely to constitute an abuse of discretion if the plan's terms require—rather than merely permit—investment in company stock."[29]

A provision mandating a GLWB option differs from one mandating an option to invest in employer stock in that the former still allows for discretion regarding which specific GLWBs to make available to participants. Nonetheless, drawing on the case law regarding employer stock, in order to minimize this discretion (and the corresponding potential fiduciary liability arising from it), plan sponsors may consider adopting explicit language *requiring* a GLWB option to be offered—using, for example, verbs like "shall" rather than "may." Because ERISA requires that fiduciaries act "in accordance with the documents … governing the plan insofar as such documents … are in accordance with the provisions of [ERISA],"[30] such plan language should reduce the viability of claims that the generic decision to include a GLWB at all (as opposed to the decision to include a specific GLWB) was imprudent. If a fiduciary is unable to identify any GLWB it could prudently offer as an investment option, the fiduciary's responsibility to "discharge [its] duties with respect to a plan solely in the interest of the participants"[31] could trump its obligation to act in accordance with plan documents.[32]

The analysis that follows assumes that the threshold question of consistency with ERISA has been met, and provides a roadmap to existing guidance fiduciaries can draw from in choosing an appropriate GLWB.

Choosing an Appropriate GLWB-Associated Fund

As previously discussed, GLWBs are offered in association with a variety of different fund types, including target date funds, asset allocation funds, and balanced funds.[33] Most plan fiduciaries will be familiar with how to evaluate fund features, such as the fund's investment "glide path," and how to choose a fund that is appropriate for a particular plan. Fiduciaries will need to conduct a similar analysis when choosing an appropriate GLWB-associated fund.[34]

Accounting for Portability Concerns

Under ERISA, a plan fiduciary has the duty to periodically monitor the selection of service providers and investment options to ensure they continue to be prudent for the plan and its participants.[35] In selecting a GLWB provider, the fiduciary should take into account the possibility that it may become necessary to change providers at some point in the future, and assess how such a change would impact plan participants who have elected, and paid additional fees for, a GLWB benefit that is guaranteed by the chosen provider. To the extent the interests of individual GLWB holders conflict with the interests of the participant base as a whole with respect to a change in service providers, the plan fiduciary will be compelled to place the interests of the participant base as a whole first, without regard to the extra fees the GLWB holders have paid.[36] To avoid or mitigate such tension, we recommend that fiduciaries, when considering a GLWB option, take into account whether, or to what extent, portability issues may arise in the event of a change in providers.

Portability is, as a practical matter, becoming less of an issue because GLWB providers are demonstrating an increasing willingness to work with plan sponsors to develop solutions, and there are thus a number of potential solutions already available on the market. Here are just a few that may minimize or eliminate the impact of a provider switch on GLWB holders:

- If the plan permits, eligible participants may be able to roll their GLWB investment over to an IRA offered by the GLWB provider, retaining the guarantee under the terms of the IRA contract.
- Some GLWB providers are willing to refund the GLWB fees up to three years prior to the contract termination date. Under this option, even though the guarantee would be lost, at least a portion of the fees paid for it would be redeemed.
- Provisions could be made for the GLWB account to remain with the original GLWB provider in the event of a new service provider selection. Under this scenario, participants would still be able contribute to the GLWB, the guarantee would remain in place, and the fees paid for the guarantee would not be lost.
- Some GLWB providers and plan recordkeepers have contracted with "middleware providers" who build technology to connect multiple recordkeepers to multiple GLWB products on a seamless basis. If implemented broadly, such technology could afford plan sponsors greater flexibility than previously existed to replace a recordkeeper or GLWB provider with minimal need to rebuild technology infrastructure.
- Relatedly, some GLWB providers permit plan sponsors to freeze the GLWB option upon switching providers. Even though no new money may be added to the option, participants would neither lose the guarantee nor the fees paid for that guarantee.

No particular solution is mandated, however, fiduciaries should identify one that fits the needs of their particular plan. When considering portability arrangements, cost should also be considered. Fees that might have to be paid by participants in the event of a provider switch should be a factor in determining whether, or to what extent, particular portability features should be adopted.

How Should a Fiduciary Evaluate GLWB Fees?

ERISA Section 404(a)(1)(A) requires that the fees paid by a plan for investments and services be reasonable. As explained below, the safe harbor for annuity-provider selection available to individual account plans, which we believe to be relevant to the selection of GLWB providers and products, requires that a fiduciary "consider[] the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services to be provided under such contract"[37] and "conclude[] that, at the time of the selection, the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract."[38] DOL advice counsels that cost is only one factor to be considered and that "plan fiduciaries are not always required to pick the least costly provider."[39]

With regard to GLWB options specifically, participants typically will pay a charge, in addition to any fees attendant to the underlying investment fund, for the insurer's contractual guarantee of lifetime income. In considering whether the fees of a GLWB are reasonable in relation to the benefits and services provided, a fiduciary should consider whether the fees charged for the underlying investment fund and the fees charged for the GLWB rider are reasonable, both independently and in the aggregate. Because most readers will be familiar with the considerations involved with investment-related fees and expenses, this section will focus on the GLWB-specific cost issues.

As with any investment product, in determining the reasonableness of a GLWB's fees, a fiduciary should examine the GLWB's specific features. Although the list below is not exhaustive, it is indicative of the types of factors that might affect fees.

- **Volatility of the underlying investment.** A fiduciary should expect GLWBs for high volatility investment funds to have higher fees than GLWBs for conservative investment funds.40 In short, the greater the volatility, the greater the downside risk the GLWB provider protects the participant against.
- **Withdrawal rate.** A fiduciary should expect GLWBs with high withdrawal rates to have higher fees than GLWBs with low withdrawal rates. Because withdrawal rates are often linked to the age at which the participant starts paying GLWB-specific fees or locks in a benefit base, sponsors should compare the withdrawal rates offered by different products at various fixed participant ages.[41]
- **Frequency of benefit base step-up.** A fiduciary should expect GLWBs with more frequent step-up opportunities to have higher fees than GLWBs with less frequent step-up opportunities.[42] The more frequently the benefit base is calculated, the more likely the participant is to benefit from an increased account balance.
- **Eligibility date.** The younger the age a participant can begin making withdrawals without reducing his or her benefit base, the higher the fees a fiduciary should expect. The earlier this is allowed, the more likely it is that the participant will eventually deplete the account balance and require the insurer's guarantee.
- **Assessment of fee on account balance or benefit base.** Fiduciaries should consider whether the GLWB fee is assessed on the participant's underlying investment fund account balance or on the benefit base. Because the account balance will generally be less than or equal to the benefit base, all else being equal, fees assessed on the benefit base should be lower than fees assessed on the account balance.
- **Date on which fees begin to be assessed.** When paired with a target date mutual fund, the GLWB-specific fee is not assessed until a specified date. Fiduciaries may initially think options with shorter periods between the target date and the fee assessment date are more valuable to participants, however, this is not necessarily true. Although the fee may not kick in until such a date, the GLWB's guarantee typically does not kick in until that date either. Note that some GLWB products will more slowly integrate into the plan's target date glide path. When the GLWB more slowly integrates into the glide path, the cost will be lower due to the fact that only part of the assets will be subject to the fees (and only part of the assets will have the benefit of the guarantee) while it is integrating into the glide path.
- **Fee hikes.** Fiduciaries should scrutinize the fee

arrangement to determine whether, and by how much, it permits the provider at one or more points in the future to unilaterally increase the fees charged for the GLWB guarantee.

In addition to the above, plan fiduciaries should take into account the fact that GLWB fees pay for control, liquidity, and upside potential that plan participants may value highly but that products such as traditional annuities lack. Finally, it is important to remember that plan fiduciaries are expected to monitor their investment choices, including fees and expenses, at reasonable intervals.[43] This is particularly important for GLWB contracts, which often contain provisions allowing for future fee increases.[44]

The list of factors to be considered is not nearly as daunting as it may at first appear. Fiduciaries should remember that ERISA does not require them to calculate a discrete fee that they consider reasonable. Rather, "for any particular type of investment, there is often a range of fees that are considered reasonable."[45] The various GLWB options we studied had annual guarantee fees ranging between 100 and 150 basis points. In benchmarking GLWB fees, a fiduciary should take care to ensure that the benchmarks provide an apples-to-apples point of comparison, taking into account: (1) the minimum level of income the GLWB guarantees at the initial time of investment; (2) the investment gains, net of fees, the GLWB holder would need to achieve to raise his benefit base; and (3) the value to the GLWB holder of the control over the underlying investment assets that the GLWB provides.

Identifying an Appropriate GLWB provider

As with the selection of any service provider, plan fiduciaries selecting a GLWB provider will be expected to engage in an objective, thorough, and analytical search of providers—assessing experience, quality of services, and costs.[46] However, unlike other providers and investments, the guarantees to plan participants associated with GLWBs are expected to extend many years into the future. This is an area in which the distinction between mutual funds and guaranteed income solutions, such as annuities and GLWBs, is notable. When a participant selects a mutual fund, the investment manager's future solvency is not an issue of particular concern, because the participants' fund units are usually owned by the plan, or held in a special account to which only the plan has access. The income guarantees provided by GLWBs and annuities, on the other hand, are not tangible, but rather are contractual promises made by the providing insurer to the plan and participant. As a result, fiduciaries selecting a GLWB (or annuity) provider should take into account the ability of the provider to satisfy all its financial obligations under the contract.

The DOL provides some insights into its expectations of fiduciaries faced with assessing the reliability of contractual promises to provide participants future streams of income in the form of a "safe harbor" regulation for the selection of annuity providers for individual account plans.[47] While the safe harbor does not specifically reference GLWB providers or products, it clearly establishes fiduciary considerations associated with the selection of an insurer offering lifetime income guarantees in the form of an annuity and, therefore, is highly informative by analogy to the selection of providers of lifetime income guarantees in the form of a GLWB contract.

Specifically, the safe-harbor rule provides that "[t]he selection of an annuity provider for benefit distributions from an individual account plan"[48] satisfies the fiduciary duties under Section 404(a)(1)(B) of ERISA if the fiduciary: (1) "Engages in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities;"[49] (2) "Appropriately considers information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract;"[50] (3) "Appropriately considers the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services to be provided under such contract;"[51] (4) "Appropriately concludes that, at the time of the selection, the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract;[52] and" (5) "If necessary, consults with an appropriate expert or experts for purposes of compliance with the provisions of [these] provisions."[53]

It should be noted that the safe harbor regulation expressly states that it is only an "optional means for satisfying the fiduciary responsibilities under [Section] 404(a)(1)(B) of ERISA," and "does not establish minimum requirements or the exclusive means for satisfying" these responsibilities.[54] Thus, although the safe harbor provides a degree of compliance certainty, the regulation does not foreclose the ability of plan fiduciaries to satisfy their fiduciary duties in connection with the selection of guaranteed lifetime income solutions by other means.

Of significance, the safe-harbor regulation confirms that fiduciaries, in selecting guaranteed lifetime income solutions, are expected to engage in a prudent process that identifies and appropriately weighs all relevant considerations. In general, and as noted earlier, this expectation is no different from those that apply to the selection of any other service provider or investment option and, accordingly, should be a familiar exercise for most plan fiduciaries.

Where the safe harbor may depart from familiar fiduciary practices, however, is the expectation that a fiduciary assess the ability of the annuity provider (insurer) to make all future payments under the annuity contract.[55] As with annuities, it is clear why financial solvency might be an important consideration in the selection of a GLWB provider. From a plan sponsor's and participant's perspective, there is a clear interest in ensuring that the guarantee provider will still be around down the road to honor its contractual commitments. Moreover, the types of risks that GLWB providers must manage are the exact same types of risk that insurers have a long history of managing in connection with annuities: investment risk and longevity risk. For this reason, any product-related solvency issues attendant to considering GLWBs would, in our view, be identical to solvency issues that must be considered by any purchaser of annuities. Thus, fiduciaries should be on firm footing in relying on the factors set forth in the annuity safe harbor regulation generally when selecting a GLWB provider.[56]

Unfortunately, the safe-harbor rule itself provides little in the way of guidance regarding what a fiduciary should take into account in assessing the financial capability of an annuity (or GLWB) provider. However, the discussion that follows should be helpful to most fiduciaries in satisfying their obligation to consider financial capability in connection with the selection of a GLWB (or annuity) product.

Evaluating a Provider's Ability to Make Future Payments Under a GLWB Contract

At the outset, it is important to note that courts have long recognized that an ERISA fiduciary's duty of care "requires prudence, not prescience."[57] Rather than focusing on results, ERISA's duty of care "focus[es] on a fiduciary's conduct in arriving at an investment decision, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment."[58] In conducting a prudent process for the selection of a GLWB provider, fiduciaries may wish to consider the following.

Insurance Ratings

In the preamble to the final safe harbor rule, DOL specifically noted that "although an annuity provider's ratings by insurance rating services are not part of the final safe harbor, in many instances, fiduciaries may want to consider them, particularly if the ratings raise questions regarding the provider's ability to make future payments under the annuity contract."[59] There are currently four major agencies that provide rating information for life insurance companies: A.M. Best, Fitch Ratings, Moody's Investor's Service, and Standard & Poor's.[60] Each of these agencies have criteria for assigning insurers a "financial strength rating," which represents an "independent opinion of [the] insurer's…ability to meet its ongoing insurance policy and contract obligations."[61]

In reviewing ratings, fiduciaries should be careful to determine which company in the insurer's corporate family is responsible for the GLWB guarantees. For example, at least one major insurer's Web site specifically states that "[a]ll references to income certainty and guarantees are backed by the claims-paying ability of the issuing company," lists the multiple subsidiaries that offer annuities in different states, and disclaims that each "is solely responsible for its own financial condition and contractual obligations."[62] In turn, on its ratings page, the insurer lists the financial strength rating assigned to each of the issuing subsidiaries by each of the four major agencies.[63]

When possible, the rating should be considered in conjunction with the actual rating report issued by the rating agency.[64] Often, these reports are made publicly available on the insurer's Web site and include information specific to the lifetime income business that could be of relevance to fiduciaries. To the extent different agencies rate a particular provider differently, the reports may aid fiduciaries in determining whether there is reason to doubt the assessment of the agency providing the higher rating.[65]

Written Representations by the GLWB Guarantee Provider

Unlike mutual fund investments, the providers of annuity and GLWB products are subject to state insurance solvency standards and enforcement oversight. The purpose of these standards is to ensure that the providers are in a financial position to satisfy their short- and long-term contractual obligations—like those made in connection with annuity and GLWB contracts. At least two bipartisan legislative efforts seeking to frame a safe harbor intended to facilitate the inclusion of guaranteed lifetime solutions in 401(k) and similar individual account plans have suggested that fiduciaries might look to state insurance regulatory regimes and a provider's compliance with established solvency and other standards to aid in assessing the solvency of the provider.[66] One of those bills would provide safe-harbor protection to a fiduciary that, among other things, obtained written representations from an insurer that the insurer:

- Is licensed to offer lifetime retirement income contracts;
- At the time of selection and for each of the preceding 10 years, operates under a certificate of authority from the insurance commissioner of its domiciliary state that has not been revoked or suspended;
- Has filed financial statements in accordance with the laws of its domiciliary state under applicable statutory accounting principles;
- Maintains reserves that satisfy all statutory requirements of all states in which the insurer does business; and
- Is not operating under an order of supervision, rehabilitation, or liquidation.[67]

The bill also references a representation that the insurer undergoes, at least every five years, a financial examination by the insurance domiciliary state (or any representative, designee or other approved party).[68]

Media Reports and Information in Possession of Fiduciary

The initial draft of the safe harbor published in the DOL's Notice of Proposed Rulemaking stated that fiduciaries should consider "any [] information that the fiduciary knows or should know would be relevant to an evaluation" of current or future solvency.[69] The preamble provided a commonsense example of such information: "[I]f a fiduciary learned through public indicators, such as the news media, that a corporate event affecting an annuity provider could call into serious question the provider's ability to make future payments under its contracts, or if the provider publicly stated that it was unlikely to survive the event in a manner that would ensure its ability to meet its financial commitments, the fiduciary would have an obligation to consider that information."[70] Consideration of media coverage and other information that is in the possession of the fiduciary is particularly important if the fiduciary intends to rely in substantial part on ratings and insurer representations of the type described above.

Availability and Extent of Protection through State Guaranty Associations

The preamble to the final safe harbor rule identifies the availability and extent of protection offered by state guaranty associations as a possible factor for consideration when selecting an annuity or lifetime income solution provider: "[S]ome information regarding additional protections that might be available through a state guaranty association for an annuity provider would be useful information to a plan fiduciary, *even if limited to that information which is generally available to the public* through such associations, state insurance departments or elsewhere."[71]

According to the National Organization of Life & Health Insurance Guaranty Associations (NOLHGA), "virtually all states offer [protection for] at least … $100,000 in withdrawal and cash values for annuities."[72] In addition, a recent report from the Government Accountability Office provides that officials from NOHLGA have stated that "promises made under GLWBs … are generally covered by state guaranty funds."[73]

Hiring an Expert

The safe-harbor regulation recognizes that some fiduciaries might benefit from consultation with an expert with regard to assessing costs, benefits, and financial capability. When a fiduciary already has access to sufficient information to make informed judgments about the products and providers under consideration, however, no expert is required.

Periodic Monitoring of Providers

An ERISA fiduciary's duties do not end with the prudent selection of a provider. As discussed earlier, to the extent that a particular provider will be furnishing services on an ongoing basis, a prudent fiduciary is expected to periodically monitor the provider selection to ensure the continued prudence of that selection for the plan and its participants on a going-forward basis. These concepts are reflected in the safe-harbor regulation.

If the conditions of the safe-harbor regulation are satisfied, safe-harbor relief is available at the "time of selection" of a provider. For purposes of the regulation, "time of selection" is defined to be either: (1) "The time that the annuity provider is selected for distribution of benefits to a specific participant or beneficiary; or"[74] (2) "The time that the annuity provider is selected to provide annuity contracts at future dates to participants or beneficiaries, provided that the selecting fiduciary periodically reviews the continuing appropriateness of the conclusion."[75]

Because in-plan GLWB options are not limited to "specific participant[s]" and only provide annuity-like features at "future dates," they likely fall into the second category. There is no hard line rule on how frequent this must be; the DOL Web site recommends that "[a]n employer should establish and follow a formal review process at reasonable intervals to decide if it wants to continue using the current service providers or look for replacements."[76]

In conducting a periodic review of a GLWB provider, fiduciaries should determine whether, or to what extent, there have been changes in the information that served as the basis for the initial selection, such as changes in ratings or other factors relied on to assess solvency.[77] Fiduciaries should also take into account whether the provider is complying with the terms of its contract to offer and service a GLWB option for the plan's participants.[78] Of course, if a fiduciary becomes aware of information, through the media or otherwise, that would indicate a significant change in a provider's financial condition or other circumstances that would raise questions concerning the provider's ability to comply with the terms of its contract, a fiduciary should undertake a review of the provider, without regard to when the last review was conducted.

Importantly, the safe-harbor regulation also makes clear that plan fiduciaries have no obligation to monitor any contract purchased for any specific participant or beneficiary.[79]

Educating Participants

GLWB options, like annuity products generally, can, at first blush, appear complicated to many participants. Accordingly, plan fiduciaries should be sensitive to the benefits of assisting plan participants in understanding the product, how it works, what it costs, and the importance of managing investment and longevity risk in retirement. ERISA does not explicitly require plan sponsors or fiduciaries to offer investment-related educational materials and programs to plan participants, but there can be several benefits of doing so, including the possibility that the information provided through educational programs might help ensure the plan qualifies for the ERISA Section 404(c) safe harbor against liability for participant-controlled investment decisions.[80]

In providing education to participants, however, fiduciaries will want to be careful not to provide investment advice that could give rise to liability. Interpretive Bulletin 96-1 provides guidance to sponsors regarding what types of information are deemed educational:

- **Plan information.**[81] Information and materials that inform a participant or beneficiary about the benefits of plan participation, the benefits of increasing plan contributions, the impact of preretirement withdrawals on retirement income, the terms of the plan, or the operation of the plan will not be deemed investment advice. Neither will information on investment alternatives under the plan (*e.g.,* descriptions of investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses).
- **General financial and investment information.**[82] The following information is deemed educational to the extent that it has no direct relationship to an investment alternative available under a plan or to individual participants or beneficiaries: (1) general financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment; (2) historic differences in rates of return between different classes (*e.g.,* equities, bonds, or cash) based on standard market indices; (3) the effects of inflation; (4) estimating future retirement needs; (5) determining investment time horizons; and (6) assessing risk-tolerance.
- **Asset allocation models.**[83] Information and materials that provide a participant or beneficiary with models, available to all plan participants and beneficiaries, of asset allocation portfolios of hypothetical individuals with different time horizons and risk profiles, with certain conditions, are deemed educational.
- **Interactive investment materials.**[84] Questionnaires, worksheets, software, and similar materials that provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income, with certain conditions, are deemed educational.

On the other hand, a person will be considered to be rendering "investment advice" if, among other things, "the person renders advice to the participant or beneficiary as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property."[85]

Some commentators have raised questions concerning the Bulletin's applicability to lifetime income products like GLWBs. The shortcoming most frequently raised is the Bulletin's emphasis on the accumulation phase of retirement planning and its failure to specifically address "information, education, and advice in the de-accumulation stage."[86] Industry groups have recommended to the DOL that the Bulletin be amended to make explicit that "sponsors and service providers may convey the general advantages and disadvantages of various distribution forms without triggering liability."[87]

Although the Bulletin can certainly be improved, we feel it provides adequate interim guidance that fiduciaries can draw upon to establish appropriate lines between educational materials and investment advice when attempting to educate participants about GLWBs. For example, IB 96-1's section on "general financial information" provides safeguards for providing participants information regarding: (1) estimating future retirement needs, (2) determining investment time horizons, and (3) assessing risk-tolerance. In our view, these provisions, combined with other safeguards—particularly those covering the provision of plan information—allow sponsors to explain the features of GLWBs, the risks they help mitigate, and the costs at which they do so, without being considered providers of investment advice. Nevertheless, sponsors may want to stay within the specific educational safe harbor categories set forth in the Bulletin to avoid crossing the line into the provision of investment advice.

CONCLUSION

Although GLWB products are relatively new, they do not raise substantially new fiduciary questions. Because GLWBs combine security, upside, and fee features that already exist in other investment products that are widely used by employee retirement plans, there is significant regulatory and case law guidance available that can be drawn upon by fiduciaries in fulfilling their fiduciary obligations when offering GLWBs. Fiduciaries should feel confident in their ability to use this guidance to construct a prudent process, consistent with their legal obligations, for evaluating, selecting, and administering GLWBs.

NOTES

1. *See* Pew Research, More Americans Worry About Financing Retirement (October 22, 2012), *http://www.pewsocialtrends.org/2012/10/22/more-americans-worry-about-financing-retirement/* (last accessed Nov. 20, 2013).
2. *See generally* Edward A. Zelinsky, "The Defined Contribution Paradigm," 114 *Yale. L.J.* 451 (2004); Samuel Estreicher & Laurence Gold, "The Shift From Defined Benefit Plans to Defined Contribution Plans," 11 *Lewis & Clark L. Rev.* 331 (2007).
3. See generally Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, The 2013 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, May 31, 2012, *http://www.socialsecurity.gov/OACT/TR/2013/index.html* (last accessed Nov. 12, 2013) (projecting insolvency of program by 2033).
4. *See* Bank of America Corp., *2013 Workplace Benefits Report*, *http://benefitplans.baml.com/publish/content/application/pdf/GWMOL/AR1D1838.pdf* (last accessed Nov. 20, 2013) (reporting that 79 percent of respondents in survey were willing to give up 5 percent or more of their salary for guaranteed income).
5. *See, e.g.,* Menahem E. Yaari, "Uncertain Lifetime, Life Insurance, and the Theory of the Consumer," 32 *Rev. Econ. Stud.* 137 (1965) (explaining that under specific assumptions, rational individuals with no bequest motives should convert all of their retirement wealth to an annuity at retirement); Thomas Davidoff *et. al.*, "Annuities and Individual Welfare," 95 *Am. Econ. Rev.* 1573 (2005) (explaining that, even with incomplete annuity markets, rational actors will still annuitize a substantial portion of their wealth).
6. *See generally* Milton Friedman, A Theory of the Consumption Function (1957) (explaining the permanent income hypotheses); Richard Brumberg and Franco Modigliani, Utility Analysis and the Consumption Function: An Interpretation of Cross-Section Data (1954) (explaining the life-cycle hypothesis).
7. *See generally* Shlomo Benartzi, "Annuitization Puzzles," 25 *J. Econ. Persp.* 143 (2011) (quoting famous statement made by Franco Modigliani during his 1985 Nobel Prize acceptance that "[i]t is a well known fact that annuity contracts, other than in the form of group insurance through pension systems, are extremely rare"); Irena Dushi and Anthony Webb, "Household Annuitization Decisions: Simulations and Empirical Analyses," 3 *J. Pension Econ. & Fin.* 109 (2004) (explaining that, even among households that accumulate enough in retirement accounts to make an annuity feasible, an annuity is rarely chosen).
8. *See generally* Wei-Yin Hu and Jason S. Scott, "Behavioral Obstacles in the Annuity Market," 63 *Fin. Analysts J.* 71 (2007); Benartzi, *supra,* n.7; Olivia S. Mitchell, *et al.*, "New Evidence on the Money's Worth of Individual Annuities," 89 Am. Econ. Rev. 1299 (1999) (explaining that the fees and expenses associated with annuities are not large enough to explain the lack of annuitization).
9. *See, e.g.,* Richard H. Thaler, "Annuities and the Puzzle of Income," *N.Y. Times*, June 5, 2011, at BU5.
10. If a spousal benefit is available and elected, the guarantee will instead pass to the spouse. Spousal benefits typically come with lower guarantees, because the provider must account for the longevity risk of two individuals.
11. Deloitte Dev. LLC, Annual 401(k) Benchmarking Survey 17-18 (2012), *http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Consulting/us_cons_hc_401ksbecnchmarkingsurvey2012.pdf.*
12. *Id.* at 17.
13. For example, suppose a participant initially invested $100,000 in a mutual fund for which he elected a GLWB. On the next periodic assessment date, if the account balance has decreased to $50,000 because of investment losses, the benefit base will remain $100,000, assuming no withdrawals were made during the intervening period. On the other hand, if the account balance has increased to $150,000, the benefit base will increase to that amount. When the benefit base rises, so too does the guaranteed income stream.
14. Access to the full amount of one's savings may be limited by the terms of the underlying investment vehicle.
15. Steve Vernon, Are GLWB Products a Good Value?, CBS News (June 1, 2012), *http://www.cbsnews.com/8301-505146_162-57443693/are-glwb-products-a-good-value/;* Steve Vernon, Retirement Income Scorecard, CBSNews (October 9, 2012), *http://www.cbsnews.com/news/retirement-income-scorecard-immediate-annuities-09-10-2012/.*
16. A recent study sponsored by Ibbotson Associates provides some useful insights that plan sponsors may want to consider when thinking about what participants' needs might be met by making a GLWB option available. James X. Xiong, *et al.*, *Allocation to Deferred Variable Annuities with GMWB for Life* (February, 2010), *http://corporate.morningstar.com/ib/documents/MethodologyDocuments/IBBAssociates/VA_GMWB_Allocation.pdf.* The study identified several participant-specific variables that influence the optimum portion of savings a rational individual would allocate to a GLWB product, rather than to a traditional mutual fund.

- **Risk tolerance.** The more risk-averse a participant is, the more likely he or she is to prefer products, like GLWBs, that offer downside protection and guaranteed income.
- **Wealth versus total retirement expenses.** Participants with large amounts of wealth relative to their expected retirement expenses "have little to no need for longevity insurance" like that offered by GLWBs, since "their portfolios can withstand market down turns and longevity risk without threatening their living standard." *Id.* at 13.
- **Existing sources of guaranteed income versus annual income need.** The greater the gap between a participant's annual need for retirement income (*i.e.*, based on expenses during retirement) and other sources of guaranteed income (*i.e.*, from annuities or a defined benefit pension), the greater the need for longevity risk and investment risk mitigation.
- **Subjective life expectancy.** This refers to life expectancy based on the participants' knowledge of their current health status, lifestyle, and family health history. The longer a participant lives, the greater the longevity risk he or she faces. On average, healthy participants "with healthy life styles [and] with relatives that tend to live longer than normal are more likely to benefit from variable annuity products with [GLWB] features." *Id.*
- **Likelihood of meeting contract conditions.** Because of the associated penalties, participants who may lack the discipline to abide by withdrawal thresholds, and to follow other pertinent contract conditions, are less likely to benefit from GLWBs.

17. John N. Erlenborn, DOL Information Letter (Mar. 13, 1986), *http://www.dol.gov/ebsa/regs/ils/il031386.html.*
18. *See, e.g.*, Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 81-83 (1995); Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); and Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 435 (1999).
19. Erlenborn, *supra,* n.17.
20. *Lockheed Corp.*, 517 U.S. at 890 (quoting *Siskind v. Sperry Retirement Program, Unisys,* 47 F.3d 498, 505 (1995)) (alteration in original).
21. *Id.*
22. Erlenborn, *supra,* n.17; *Lee v. Verizon Communications Inc.*, 954 F.Supp.2d 486, 493, (N.D. Tex. 2013) ("Because amending a plan is not a fiduciary function, Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for participants meeting certain criteria.").
23. Advisory Council On Employee Welfare And Pension Benefit Plans, Report on the Spend Down of Defined Contribution Assets at Retirement (Feb. 2009), *http://www.dol.gov/ebsa/publications/2008ACreport3.html.*
24. *Id.* (quoting report's account of testimony).
25. *Id.* (quoting report's account of testimony).
26. ERISA and the DOL regulations promulgated thereunder provide that documents such as investment policy statements and trust agreements may themselves serve as "instruments governing the plan." *See* 29 U.S.C. § 1024 (imposing an obligation on plan administrators to furnish participants, on request, "copies of the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated"); 29 C.F.R. § 2509.08-2 ("Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the 'documents and instruments governing the plan' within the meaning of ERISA Sec. 404(a)(1)(D)."); *see also* DOL Advisory Opinion 97-11A (April 10, 1997) (referencing DOL's conclusions in Advisory Opinions 82-21A, 82-33A, and 87-10A that minutes of trustees' meetings that "establish a claims procedure or do any of the things described in section 402(b) and 402(c) of ERISA would have to be furnished in accordance with section 104(b)(4) as 'other instruments under which the plan is established or operated'"); DOL Advisory Opinion 96-14A (July 31, 1996) (noting that schedules used in determining "usual and customary" charges may be "instruments under which the plan is…operated").
27. Among other things, these cases attempt to balance the well-recognized congressional policy favoring employee ownership of employer stock with the fact that such ownership presents certain inherent risks. *See, e.g., In re Citigroup ERISA Litigation*, 662 F.3d 128 (2d Cir. 2011).
28. *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 997 (7th Cir. 2013).
29. *In re Citigroup*, 662 F.3d at 138 (2d Cir. 2011).
30. 29 U.S.C. § 1104(a)(1)(D).
31. *See* 29 U.S.C. § 1104(a)(1)(A)(i).
32. *See e.g., In re Citigroup*, 662 F.3d at 139. *See also* 29 U.S.C. § 1104(a)(1)(D) (providing that fiduciaries discharge their duties "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter*") (emphasis supplied).
33. *See, e.g.,* Institutional Retirement Income Council (IRIC), Prudential IncomeFlex Target Product Fact Sheet (2011), *http://iricouncil.org/docs/Prudential%20IncomeFlex%20Target*; IRIC, Transamerica SecurePath for Life Product Fact Sheet (March 1, 2013), *http://iricouncil.org/docs/Transamerica%20SecurePath%20Fact%2Sheet%2020130301.pdf*; IRIC, John Hancock Guaranteed Income for Life Select (GIFL Select) Product Fact Sheet (March 1, 2013), *http://iricouncil.org/docs/John%20Hancock%20Fund%20Fact%20Sheet%2020130301.pdf*; IRIC, John Hancock Guaranteed Income for Life Select (GIFL Select) Product Fact Sheet (March 1, 2013), *http://iricouncil.org/docs/Great%20West%20SecFou%20Fact%20Sheet%2020130301.pdf.*
34. As is discussed in greater detail in the section on GLWB fees, the guaranteed benefit that GLWBs offer becomes more valuable to participants—and should thus be expected to be more expensive—as the volatility and investment risk associated with a fund increases.
35. 29 U.S.C. § 1104(a)(1). *See also* DOL, Field Assistance Bulletin 2007-01 (discussing in issue two a fiduciary's duty to "periodically monitor").
36. *See, e.g.*, DOL Field Assistance Bulletin 2006-01, addressing the allocation of market timing proceeds among the plan's participants. The DOL stated in part: '[A] method of allocation would not fail to be 'solely in the interest of participants' merely because the selected method may be seen as disadvantaging some affected participants or groups of participants." *Id. See also Borneman v. Principal*, 291 F. Supp. 2d 935, 946 (S.D. Iowa 2003) ("[A] fiduciary…has a duty to act in the best interests of all plan participants and beneficiaries, not simply a duty to act in the best interests of each individual plan participant or beneficiary.").
37. 29 C.F.R. § 2550.404a-4(b)(3).
38. 29 C.F.R. § 2550.404a-4(b)(4).
39. *See* DOL, Fact Sheet: Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan (May 2004), *http://www.dol.gov/ebsa/newsroom/fs052505.html.*
40. *See* Xiong, *et al., supra,* n.16, at 8.
41. *See generally id.* at 9.
42. *See id.* at 10.
43. *See, e.g.,* DOL, Meeting Your Fiduciary Responsibilities, *http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html* (last accessed Nov. 20, 2013); 29 C.F.R. §§ 2550.404a-4(b)(4), 2550.404a-4(c)(2).
44. *See* Steve Vernon, *Retirement Income Review: GLWB in Retirement,* CBSNews (May 30, 2012), *http://www.cbsnews com/8301-505146_162-57437836/retirement-income-review-glwb-in-retirement/?tag=cbsnewsMainColumnArea* (last accessed Nov. 20, 2013).
45. *Dupree v. Prudential Ins. Co. of America*, No. 99-8337, 2007 WL 2263892, at *20 (S.D. Fla. Aug. 7, 2007).
46. *See* 29 C.F.R. § 2550.404a-4(b)(1). *See also* DOL, *supra,* n.39.
47. 29 C.F.R. § 2550.404a-4.
48. 29 C.F.R. § 2550.404a-4(b).
49. *Id.* at § 2550.404a-4(b) (1).
50. *Id.* at § 2550.404a-4(b) (2).
51. *Id.* at § 2550.404a-4(b) (3).
52. *Id.* at § 2550.404a-4(b) (4).
53. *Id.* at § 2550.404a-4(b) (5).
54. *Id.* at § 2550.404a-4(a)(1)(2).
55. *Id. at* § 2550.404a-4(b)(2).
56. Courts have also provided guidance on annuity-provider-selection.

The case law in this area, applicable by analogy to GLWB-provider-selection, often involves situations in which a plan sponsor decides to terminate a defined benefit plan and purchase an annuity to cover future pension obligations arising under the plan. One notable set of these cases arises from the collapse of the Executive Life Insurance Company. *See, e.g.*, *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286 (5th Cir. 2000); *In re Unisys Savings Plan Litigation*, 173 F.3d 145 (3d Cir. 1999); *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C.), *aff'd*, 83 F.3d 415 (4th Cir. 1996). For example, in *Bussian*, the US Court of Appeals for the Fifth Circuit held that the defendant sponsor was not required to purchase the "safest available annuity." 223 F.3d 286, 298 (5th Cir. 2000). Rather, the applicable standard "focuses [] on the fiduciary's conduct" and the importance of "structur[ing] and conduct[ing] a 'careful and impartial investigation' aimed at identifying providers whose annuity the fiduciary may 'reasonably conclude best promote[s] the interests of participants and beneficiaries' of the plan." *Id.* at 300. Although "[a]s a general matter . . . a proper investigation of potential annuity providers will reveal that each has its own 'warts,'" "the presence of such blemishes, by itself, [is not] sufficient to cause a fiduciary to eliminate those providers from further consideration." *Id.* at 302. "The issue is whether a provider's warts, viewed qualitatively and quantitatively, are such that a prudent person in like circumstances would determine that the purchase of that provider's annuity was not in the best interests of plan beneficiaries and participants." *Id.*

57. *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 465 (7th Cir.1990).

58. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 433 (3d Cir. 1996).

59. Final Rule, Selection of Annuity Providers—Safe Harbor for Individual Account Plans, 73 Fed. Reg. 58448 (October 7, 2008) (codified at 29 C.F.R. § 2550.404a-4). In *Bussian*, discussed above, *supra,* n.56, the Fifth Circuit explained that while "blind reliance on credit or other ratings is inconsistent with fiduciary standards," "[r]eviewing the ratings assigned by different rating agencies may be a good place to begin the [fiduciary] inquiry." 223 F.3d at 301. *See also In re Unisys Savings Plan Litigation*, 173 F.3d at 150-51 (noting use of ratings in affirming judgment in favor of plan sponsor); *Riley*, 890 F. Supp. at 458 (noting use of ratings in granting defendants' motion for summary judgment). However, in the years following the 2008–2009 financial crisis, the reliability of credit ratings from the major ratings agencies has been called into question. Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), required federal agencies to remove references to or requirements of reliance on credit ratings from its regulations. The DOL has proposed amending several prohibited transaction exemptions to replace reliance on credit ratings with "such standards of credit-worthiness as the [DOL] deems appropriate." *See* Proposed Amendments to Class Prohibited Transaction Exemptions to Remove Credit Ratings Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, 78 Fed Reg. 37572 (June 21, 2013).

60. Insurance Information Institute, *How Can I Assess the Financial Strength of an Insurance Company?,* (2009), *http://www.iii.org/individuals/life/buying/strength* (last accessed Nov. 18, 2013).

61. *See, e.g.*, A.M. Best Company, *Best's Financial Strength Rating* (Feb. 17, 2012), *http://www.ambest.com/ratings/guide.asp?l=1&Menu=Ratings+Definitions,Financial+Strength* (last accessed Nov. 18, 2013). It is important to understand that rating systems may differ from agency to agency. For example "an A+ from A.M. Best is the next-to-top rating of its 15 categories, but an A+ from Fitch or S&P is their 5th-highest rating (out of 24 categories for Fitch, and out of 19 categories for S&P)." Insurance Information Institute, supra, n.60.

62. *See, e.g.*, Prudential Financial Inc., *Variable Annuities* (Apr. 2013), *http://www.annuities.prudential.com/view/page/investor/13688* (last accessed Nov. 18, 2013).

63. *See, e.g.*, Prudential Financial Inc., Investor Relations (Nov. 18, 2013), *http://www.investor.prudential.com/phoenix.zhtml?c=129695&p=irol-ratings* (last accessed Nov. 18, 2013).

64. In *Bussian*, *supra,* n.56, the Fifth Circuit noted that the "reports accompanying ratings provide fiduciaries with a means of assessing the basis for the particular rating and of identifying what additional information may need to be considered." 223 F.3d at 302.

65. In *Bussian*, the Fifth Circuit explained that "[a]s with an expert's advice, fiduciaries must determine the extent to which reliance on ratings is reasonably justified under the circumstances." *Id.* at 301. In reversing the district court's grant of summary judgment to the defendant plan sponsor, the court noted the fact that the sponsor did not check why Moody's had given Executive Life a lower rating than other rating services. *Id.* at 304-05.

66. *See* S. 1270, 113th Cong. § 244 (2013) (referred to the Committee on Finance on July 9, 2013); S. 1979, 113th Cong. § 222 (2014) (referred to Committee on Health, Education, Labor, and Pensions on Jan. 30, 2013).

67. *Id.*

68. *Id.*

69. Proposed Rule, Selection of Annuity Providers—Safe Harbor for Individual Account Plans, 72 Fed. Reg. 52021, 52022 (Sept. 12, 2007).

70. *Id.*

71. Final Rule, Selection of Annuity Providers—Safe Harbor for Individual Account Plans, 73 Fed. Reg. 58448 (October 7, 2008) (codified at 29 C.F.R. § 2550.404a-4) (emphasis added).

72. NOLHGA, Frequently Asked Questions, *http://www.nolhga.com/policyholderinfo/main.cfm/location/questions#five* (last accessed Nov. 20, 2013).

73. GAO, Annuities with Guaranteed Lifetime Withdrawals Have Both Benefits and Risks, but Regulation Varies Across States (December 2010), *http://www.gao.gov/assets/660/650739.pdf* (last accessed Nov. 20, 2013).

74. 29 C.F.R. § 2550.404a-4(c)(1).

75. *Id.* at § 2550.404a-4(c)(2).

76. DOL, Meeting Your Fiduciary Responsibilities, *http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html* (last accessed Nov. 20, 2013).

77. *Id*. *See also* DOL Field Assistance Bulletin 2007-01 (discussing in issue two a fiduciary's duty to "periodically monitor").

78. *Id.*

79. 29 C.F.R. § 2550.404a-4(c)(2).

80. *See* Principal Financial Group, Understanding & Managing Fiduciary Responsibility (2004), *http://www.principal.com/about/news/fid_guide.pdf*. *See also* James W. Watkins, A Curious Paradox: Reconciling MPT and ERISA Section 404(c)'s "Informed Decision" Requirement to Protect Plan Fiduciaries and Participants (2012), *http://iainsight.wordpress.com/the-mpt-and-404c-paradox/* (last accessed on Nov. 19, 2013); 29 U.S.C. § 1104(c). To qualify under Section 404(c), a plan must "provide an opportunity for a participant to exercise control over assets in his individual account." 29 C.F.R. § 2550.404c-1(b)(1)(i). But according to DOL—although its authority on this point is interpretive only—the "exercise of control" requirement can only be met when the participant "is provided or has the opportunity to obtain sufficient information to make informed investment decisions with regard to investment alternatives under the plan." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B).

81. 29 C.F.R. § 2509.96-1(d)(1).

82. *Id.* at § 2509.96-1(d)(2).

83. *Id.* at § 2509.96-1(d)(3).

84. *Id.* at § 2509.96-1(d)(4).

85. 29 U.S.C. § 1002(21)(A)(i).

86. *See*, e.g., Dep't of Labor, Report of the Working Group on Financial Literacy of Plan Participants and the Role of the Employer, *http://www.dol.gov/ebsa/publications/AC-1107a.html* (last accessed Nov. 20, 2013).

87. Letter from Mary S. Podesta, Senior Counsel—Pension Regulation, Investment Company Institute, to Robert Doyle, Director, Office of Regulations and Interpretations, DOL, Employee Benefits Security Administration (Feb. 18, 2011), *http://www.ici.org/pdf/24982.pdf*.