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FILED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (Rev. Rul. 2011-1)
Room 5203
POB 7604 Ben Franklin Station
Washington, D.C. 20044

Re: Treatment of Insurance Company Separate Accounts under Revenue Ruling 2011-1

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") to comment on Revenue Ruling 2011-1.[1] The Committee is a coalition of life insurance companies formed in 1982 to participate in the development of federal policy with respect to annuities. The Committee's current 32 member companies represent more than 80% of the annuity business in the United States and are among the largest issuers of annuity contracts in connection with employer-sponsored retirement plans. A list of the Committee's member companies is attached.

Revenue Ruling 2011-1 updates and modifies Revenue Ruling 81-100,[2] which specifies the criteria that a group trust must satisfy in order to be tax-exempt and that a participating plan must satisfy in order to maintain its tax-qualified status. Revenue Ruling 2011-1 requests comments on whether "annuity contracts and/or other tax-favored accounts held by plans described in § 401(a) or § 403(b), such as pooled separate accounts supporting annuity contracts that are treated as trusts under § 401(f), should be permitted to invest in the group trusts described in [the] revenue ruling."[3]

As discussed more fully below, the Committee is puzzled and concerned by the request for comment. Separate accounts underlying annuity contracts purchased by qualified plans described in section 401(a) and either held as an investment by a section 501(a) tax-exempt trust

[1] 2011-2 I.R.B. 251.

[2] 1981-1 C.B. 326.

[3] All section references are to the Internal Revenue Code of 1986, as amended, unless specified otherwise.

or used in lieu of a trust under section 401(f) ("qualified plan separate accounts") have long been permitted investors in group trusts.[4] Indeed, section 401(f) and its implementing regulations treat a contract satisfying the requirements of that section as a tax-exempt trust under section 501(a), and tax-exempt trusts that support qualified plans are permitted investors. It follows that such contracts may invest in group trusts through the separate accounts that support the contracts. A different conclusion would be inconsistent with the statute and would not be supported by the text of the applicable guidance, congressional intent, or tax and retirement policy considerations. Accordingly, we urge the Service to promptly publish guidance confirming that qualified plan separate accounts are permitted investors in group trusts.

I. Participant-directed individual account plans are often funded through group annuity contracts, and pooled separate accounts supporting these contracts frequently invest in group trusts.

Section 401(a) plans are commonly funded through a trust, an annuity contract, or a combination of the foregoing. The use of group annuity contracts to fund section 401(a) plans is particularly prevalent among mid-size and small plans. Group annuity contracts are attractive to these plans because the annuity issuer or its affiliate provide all of the recordkeeping, distribution, and investment services that are necessary to plan administration.

These group annuity contracts are often variable contracts that facilitate participant-investment direction among a menu of investment options (*e.g.*, growth, balanced, fixed income). The investment options correspond to individual separate accounts or discrete investment divisions, called subaccounts, of the separate account that supports the contract.[5] Each subaccount invests in assets consistent with its stated investment objective. The separate account assets are nominally owned by the insurer but the assets are beneficially owned by the plans and insulated from the claims of the insurer's general creditors under state law.[6] The separate account investments may include individual securities or interests in registered investment companies (*i.e.*, mutual funds) or non-registered entities, including group trusts that are intended to be described in Revenue Ruling 81-100.

The group annuity contract may serve as the plan's funding vehicle. In other cases, the annuity contract may be held as an investment of a qualified trust. In both situations, the annuity contract is an integral part of the bundle of services required for plan administration, including

[4] Revenue Ruling 81-100 contemplates that qualified plans, individual retirement arrangements (IRAs), certain section 403(b) plans, and certain governmental plans, including 457(b) plans may invest in a group trust. However, as a practical matter, only qualified plans and governmental plans are permitted investors in group trusts because such trusts are invariably not registered with the SEC and section 403(b) plans and IRAs may not invest in such entities. *See* Section 3(c)(11) of the Investment Company Act of 1940. This letter focuses on section 401(a) qualified plans. However, our comments are equally applicable to governmental 457(b) plans that are funded through group annuity contracts under section 457(g).

[5] The contract may also offer a general account investment option as well, which typically offers a fixed rate of return.

[6] *See, e.g.*, Cal. Ins. Code section 10506 (West 2009); Conn. Gen. Stat. section 28a-433 (2010); 215 Ill. Comp. Stat. section 5/245.21 (West 2006); N.Y. Ins. Law section 4240 (McKinney 2007); Tex. Ins. Code Ann. section 1152.001, et seq. (West 2009).

recordkeeping and distribution services. The annuity contract also serves as a conduit to the separate account investments that comprise the plan's investment menu.

If a separate account invests in a group trust, the group annuity contract that is supported by the separate account is only made available to section 401(a) plans and governmental section 457(b) plans (together, "tax-qualified retirement plans"). This limitation is imposed in part in order to satisfy the requirements of the group trust rulings but also because tax-qualified retirement plans are generally the only type of investor that may invest in a variable annuity contract that is not registered under the securities laws.[7] Thus, the only assets held in a separate account that invests in a group trust are attributable to tax-qualified retirement plans.

The Committee is not aware of any data explicitly cataloging the number of plans or the magnitude of the plan assets that are invested in group trusts through qualified plan separate accounts. However, an informal survey of the Committee's members strongly suggests that qualified plan separate account investments are very substantial. We are aware that as of December 31, 2010, approximately $7 billion was invested in group trusts through qualified plan separate accounts, the separate account investments were attributable to more than 20,000 section 401(a) plans, and at least 100 group trusts were utilized. These figures may very well understate the magnitude of the issue since they represent data from only a few member companies.

II. The treatment of qualified plan separate accounts as permitted investors in group trusts is clearly supported by section 401(f) and the policy underlying Revenue Ruling 81-100.

The widespread use of group trusts as investment options in section 401(a) plans that are funded through group annuity contracts is largely attributable to section 401(f), which treats annuities as qualified trusts under section 401 if the annuity would, except for the fact that it is not a trust, constitute a qualified trust.

The obvious purpose underlying section 401(f) is to create parity between trusts and annuities – a purpose that would be frustrated if qualified plan separate accounts are not treated as permitted investors. In this regard, the legislative history to the Employee Retirement Income Security Act of 1974 ("ERISA"), which amended section 401(f) to treat annuities as qualified trusts, indicates that the change was made "in order to permit the participation of the insurance industry," to "enhance competition" and to "open the field to other types of enterprises that wish to engage in it."[8]

Treasury regulation section 1.401(f)-1(c) states that an annuity contract which satisfies the applicable requirements of section 401(f) "is treated as a qualified trust for all purposes of the Internal Revenue Code" and "as a separate legal person which is exempt from the income tax under section 501(a)." Revenue Ruling 81-100 in turn provides that a trust that is qualified

[7] *See* § 3(a)(2) of the Securities Act of 1933; § 3(c)(11) of the Investment Company Act of 1940.

[8] H.R. Rep. 93-807 at 4826 (Feb. 21, 1974). The predecessor to Revenue Ruling 81-100 – Revenue Ruling 56-267 (1956-1 C.B. 206) – predated the enactment of ERISA and its revisions to section 401(f). However, ERISA effectively added qualified plan separate accounts to the list of permitted investors. *See also, infra* note 13.

under section 401(a) and exempt under section 501(a) is a permitted investor in a group trust. Given the clear statutory and regulatory treatment of annuity contracts described in section 401(f), it was apparent, at least prior to Revenue Ruling 2011-1, that pooled separate accounts were permitted investors in group trusts, provided that the separate account otherwise satisfied the applicable requirements of Revenue Ruling 81-100.[9] This conclusion was strongly supported by numerous favorable determination letters that were issued to group trusts that permitted separate account investors as well as several private letter rulings along the same lines.[10]

The notion that qualified plan separate accounts may invest in group trusts is also entirely consistent with the purpose underlying the group trust rules. Revenue Ruling 56-267, the predecessor to the current rulings, states that the ruling was requested because many plans "are insufficient in size to permit a satisfactory diversification in the investment of their funds. In order to provide such diversification, a number of these trusts have been and are interested in pooling some or all of their funds, solely for investment purposes." Similarly, small plans often utilize a group annuity contract platform for their 401(k) plans in order to pool assets in the insurer's separate account and thereby obtain economies of scale. These economies of scale are obtained by investing in underlying pooled investments, including a group trust. Thus, the very policy reason underlying the group trust ruling is at issue for qualified plan separate accounts.

III. There is no substantive difference between a tax-qualified retirement plan's investment in a group trust through a qualified separate account or through a qualified trust that would support any distinction between trusts and separate accounts.

There is nothing inherent in the structure, operation or legal status of a pooled separate account, or in the relationship between the adopting plan, the separate account and the underlying group trust, that warrants different treatment for qualified plan separate accounts and qualified trusts under Revenue Ruling 81-100. As modified by Revenue Ruling 2011-1, a group trust must satisfy the following eight requirements.

1. The group trust is itself adopted as part of each adopting group trust retiree benefit plan. In our experience, tax-qualified plans that invest in group trusts through qualified plan separate accounts adopt the underlying group trust in a variety of ways. It is not uncommon, for example, for the group annuity contract application to expressly provide that the plan authorizes the investment and that the plan is adopting the group trust in connection with its adoption of the group annuity contract. Another approach is to have the plan separately execute an "adoption agreement," whereby the plan separately adopts the underlying group trust. There is no single method but it is clearly practical for a plan that invests in a group trust through a separate account to adopt the group trust itself, and we believe that the existing approaches taken by insurers clearly satisfy the applicable standard.

[9] We recognize that Revenue Ruling 2004-67 (2004-2 C.B. 28) identified custodial accounts that fund section 401(a) plans, along with trusts, as permitted investors. However, in the complete absence of any reference to annuities treated as trusts under section 401(a) and given the informal guidance (private letter rulings and determination letters), this modest reference to favorable tax treatment for custodial accounts was hardly sufficient to raise a red flag that pooled separate accounts might not be viewed as permitted investors.

[10] I.R.S. Priv. Ltr. Rul. 200303041 (Jan. 17, 2003), 200242047 (Oct. 18, 2002), 9422053 (March 10, 1994).

2. The group trust limits participation to pension, profit-sharing, and stock bonus trusts qualifying under section 401(a) and other similar arrangements. Insurers routinely take appropriate steps to ensure that the only assets that may be invested in a group trust through a separate account are assets attributable to tax-qualified retirement plans. In this regard, insurers only permit pooled separate accounts that are dedicated to tax-qualified retirement plans to invest in group trusts. There are no other assets in the group trust. Thus, for example, these separate accounts do not include seed money and assets attributable to nonqualified contracts cannot be invested in such separate accounts. As described above, such an approach is compelled by the applicable securities laws as well as the group trust requirements.

3. The group trust instrument expressly provides that its assets are held for the exclusive benefit of the adopting plans. Investment by a qualified plan separate account has no effect on the group trust instrument's compliance with this requirement.

4. Each group trust retiree benefit plan entity which adopts the group trust is itself a trust, a custodial account or similar entity that is tax-exempt under section 501(a) or under a similar regime. As discussed in detail above, Treasury regulations treat a section 401(f) annuity contract as a trust described in section 401(a) and as a legal person which is exempt from tax under section 501(a). It is clear that this tax treatment was meant to encompass a separate account that supports an annuity contract described in section 401(f).[11]

   There is no tax advantage associated with a separate account investing in a group trust rather than directly investing in the same type of assets held by a group trust. To the extent that a group trust has unrelated business taxable income ("UBTI"), the trustee of the group trust is responsible for such income tax liability.[12] It is not passed through to the settlor of the trust. Thus, the insurer's separate account could not be used in any way to indirectly exempt income associated with an unrelated trade or business.

   Furthermore, it is important to recognize that independently of section 401(f) none of the income or gains in a life insurance company separate account that contains only qualified retirement plan assets (*i.e.*, a qualified plan separate account) are subject to tax. This is (and has been for almost 50 years) the case under the special rules in sub-chapter L applicable to such separate accounts.[13]

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[11] *See* T.D. 7565 (Sept. 14, 1978) (preamble to section 401(f) regulations discussing an investment in an "insurance contract with a segregated asset account" and noting that such a contract may be described in section 401(f) even if it does not provide annuities.).

[12] *See* I.R.C. § 511(a)(2); Treas. Reg. § 1. 511-2(b)(1) (trustee is subject to the tax on UBTI).

[13] *See* I.R.C. § 801(g) (1954), as added by § 2 of the Life Insurance Company Income Tax Act of 1959, Pub. L. 86-69 (1959), and as amended by § 3(a) of Pub. L. 87-858 (1962); S. Rep. No. 2109 (1962), reprinted in 1962 U.S.C.C.A.N. 3890, 3897 (explaining that in order "to provide tax equality for [variable annuity separate accounts] with the tax-exempt pension trusts, it is necessary that the investment income and capital gains credited to policyholders in these segregated accounts be free of tax in the same manner as is already true in the case of the

Finally, Revenue Ruling 2011-1 explicitly treats a nonqualified governmental plan, such as a retiree health plan, that invests in a group trust as a permitted investor, provided that the governing plan documents provide that the assets of the plan are subject to the exclusive benefit requirement. Thus, even though the tax-exempt status of the plan is derived from some part of the tax law other than section 501(a), such as section 115, the integral part trust doctrine or sovereign immunity, Revenue Ruling 2011-1 treats such a plan as a permitted investor. Thus, even if one were to disregard section 401(f), it is clear that a qualified plan separate account should be a permitted investor so long as no tax is payable on the income of the separate account – which, as discussed above, has been the case for almost 50 years.

5. Each participating plan provides that it is subject to the exclusive benefit requirement. A plan that invests in a group trust through a qualified plan separate account will invariably provide in its governing plan document that it satisfies the exclusive benefit requirement described in Treasury regulation section 1.401(a)-2. This will be true irrespective of whether the annuity is held as an asset of the qualified trust where the qualified plan separate account is functioning as a conduit or where the annuity is issued to the plan and serves in lieu of a trust as contemplated by section 401(f). It seems apparent that the exclusive benefit requirement applies to the underlying assets of the separate account that supports a tax-qualified retirement plan annuity contract that meets the requirements of section 401(f) since section 401(f) treats an annuity as a qualified trust only if it satisfies the rules applicable to such a trust, which would include the exclusive benefit requirement. Such treatment is also consistent with the Department of Labor's plan asset regulations, which state that a plan's assets include an investment in an insurance company separate account and an undivided interest in each of the underlying assets of the separate account.[14]

   We appreciate of course that separate accounts are creatures of state insurance law and that the legal status of a separate account depends on the particular state in which the insurance is issued. As a practical matter, however, insurers invariably issue group contracts that will be used to fund tax-qualified retirement plans under state laws that insulate the separate account assets from the claims of the insurer's general creditors.[15] Thus, the separate account acts in all regards in the same manner as a qualified trust and we are not aware of any barrier to explicitly imposing an exclusive benefit rule on the assets in a pooled separate account as part of the terms of the annuity contract should the Service think this is necessary.

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noninsured pension trusts" and that this treatment is necessary in part to benefit "smaller employers who generally cannot assume the risk or administrative expense of establishing a small pension trust"); I.R.C. § 817 (1986), as added by § 211(a) of the Deficit Reduction Act of 1984, Pub. L. 98-369 (1984); STAFF OF J. COMM. ON TAX'N, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 607 (Comm. Print 1984) (observing that the Deficit Reduction Act of 1984 carried over and continued in section 817 the "special rules for variable annuities and contracts with reserves based on segregated asset accounts" under prior law).

[14] DOL Reg. § 2510.2-101(h)(1)(iii).

[15] *See, supra*, note 6.

6. The group trust satisfies a separate accounting requirement. This should not be an issue for qualified plan separate accounts. The group trust accounts for the separate account's interest in the group trust and the separate account in turn accounts for each plan's interest in the separate account.

   We appreciate that a separate account supporting a group annuity contract is ordinarily itself a pooled vehicle. As a result, an investment in a group trust by a separate account is ordinarily an investment by one pooled vehicle in another pooled vehicle. However, we are not aware of any reason for prohibiting a pooled vehicle from investing in another pooled vehicle.[16] We also note that there is nothing in the group trust rules that prohibits a trust that pools the assets of more than one employer, such as a multiemployer or multiple employer plan, from participating in a group trust and we see no reason participation by a pooled separate account would be problematic.

7. The group trust prohibits assignment by a participating plan of its interest. Investment by a qualified plan separate account has no effect on the group trust instrument's compliance with this requirement.

8. The group trust is created or organized as a domestic trust. Investment by a qualified plan separate account has no effect on the situs of the group trust.

IV. There are important policy reasons for allowing qualified plan separate accounts to invest in group trusts.

Pooled separate account investments in group trusts are an important part of many 401(k) plans that utilize a group annuity contract platform. As mentioned above, group annuity contract platforms are particularly attractive for small and mid-size plans because the contracts provide for a bundle of services. These contracts also allow for the pooling of small plan assets and therefore access to a universe of investments that may not otherwise be accessible to such plans. Many of these investments are nonregistered investments that are offered only through group trusts. One notable type of investment that is frequently accessed through a separate account is a stable value fund. Stable value funds are an extremely popular type of investment in plans and it is often most efficient for an insurer to invest its separate account in an existing stable value fund. Stable value funds are almost invariably structured as 81-100 trusts and, to the extent that separate accounts may not invest in such trusts, many plans and participants would lose access to this type of investment.

It may be that insurers and employers could restructure their plans to access group trust investments, such as stable value funds, outside the pooled separate account, for example, by utilizing a structure whereby the plan is funded through both a trust and an annuity contract. However, such an arrangement would appear to undermine much of the utility and efficiency associated with a group annuity contract. It would clearly involve substantial additional expense.

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[16] The prohibition on feeder trusts in section 502 should be inapplicable since the primary purpose of Revenue Ruling 81-100 appears to be an exemption from the prohibition against feeder trusts.

Unless qualified plan separate accounts are permitted investors, plans will either choose not to make such investments available to participants or will have to incur the additional expense. Neither approach represents sound tax or retirement policy.

Also, as the Service has recognized, encouraging participants to elect to receive a portion of their retirement savings in the form of a lifetime income option such as a life-contingent annuity is an important policy goal, as articulated by the Treasury Department's request for information regarding lifetime income options published on February 2, 2010, and the subsequent hearing held last fall.[17] At a high level, it is apparent that treating trust platforms more favorably than group annuity platforms is inconsistent with encouraging plans to provide lifetime income options for their participants. Group annuity contracts invariably offer annuity forms of distribution while such forms of payout are much less common among trusteed plans. It does not make retirement policy sense to preference trusts over annuities, and such a bias would clearly be inconsistent with the congressional intent underlying section 401(f).

There is also a more specific use of pooled separate account investments in group trusts that is germane to lifetime income. As the Service is aware, it is increasingly common for tax-qualified retirement plans to offer participants access to a guaranteed lifetime withdrawal benefit ("GLWB"). Very generally, a GLWB is an annuity contract feature that promises that a participant will be eligible to withdraw from the contract a specified amount, for example, 5% of a notional balance, such as premiums paid plus a fixed interest rate, regardless of whether the cash value in the contract has been exhausted. With this feature, a participant is eligible to receive guaranteed lifetime income if the participant's cash value is depleted as a result of investment experience, longevity, or both. A GLWB can reference a variety of different investment funds and there is increasing interest, particularly in the large plan market, in having an insurer reference an existing plan investment option with a GLWB. These existing options are often collective investment funds that are structured as group trusts under Revenue Ruling 81-100. A practical approach to referencing an existing collective investment fund is for the insurance company separate account to invest in the fund. If, however, pooled separate accounts are not permitted investors, it will be much more difficult to add GLWBs that reference existing investments.

Finally, we note that adverse treatment for qualified plan separate accounts could have enormous implications. If separate accounts are not permitted investors in group trusts, it would mean that each of the group trusts that have permitted separate account investments are not group trusts within the ambit of Revenue Ruling 81-100. Although the precise consequences associated with a failure to satisfy the requirements of Revenue Ruling 81-100 are not clear, it appears that every plan invested in one of these group trusts – whether or not invested through a pooled separate account – would have their tax-qualified status thrown into question. Thus, not

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[17] Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5,253, 5,253 (Feb. 2, 2010) (noting that the Department of Labor and the Department of the Treasury "are currently reviewing the rules under . . . ERISA . . . to determine whether, and, if so, how, the Agencies could or should enhance, by regulation or otherwise, the retirement security of participants in employer-sponsored retirement plans and in individual retirement arrangements (IRAs) by facilitating access to, and use of, lifetime income or other arrangements designed to provide a lifetime stream of income after retirement"); *see also* 75 Fed. Reg. 48,367 (Aug. 10, 2010) (notice of hearing on lifetime income options).

only would the plans that are invested in group trusts through insurance company separate accounts be in jeopardy but every plan that is invested in a group trust with a separate account investor would be potentially tainted. There would also be enormous potential tax liability for the group trust and possibly for the investing plans.

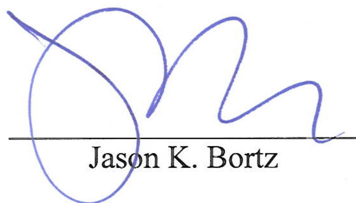
V. Conclusion

For the reasons discussed above, the Committee urges the Service to promptly issue guidance confirming that qualified plan separate accounts may invest in a group trust. The Committee believes that the existing requirements of Revenue Ruling 81-100 currently serve to set appropriate parameters on the types of separate accounts that may invest in a group trust. However, this is obviously a very important issue and we are amenable to additional clarifications that would make clear the application of the existing requirements. For example, we have no objection to the following explicit requirements for qualified plan separate accounts: (i) the assets of the separate account must be insulated from the claims of the insurer's general creditors, (ii) the assets of the separate account must be solely attributable to tax-qualified retirement plans or other permitted investors, (iii) the terms of the arrangement must provide that the assets in the separate account are subject to the exclusive benefit requirement, and (iv) the income tax consequences associated with investment in the group trust through a separate account must be the same tax consequences that would adhere if the plan were funded through a trust rather than an annuity contract. If any such requirements are to be imposed going forward, however, we respectfully request that an appropriate transition period be provided for any necessary amendments to be made to the contracts and related documents so as to avoid the uncertain, but potentially severe, consequences discussed above.

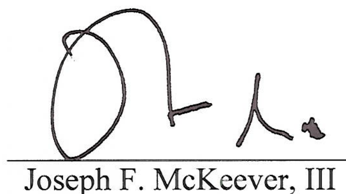
* * *

Should any questions arise in connection with our comments, or if the Committee can be of any assistance to the Service in its consideration of this important issue, please contact Jason Bortz or Joseph McKeever, both of Davis & Harman LLP. They can be reached by phone at 202-347-2230, or *via* electronic mail at jkbortz@davis-harman.com or jfmckeever@davis-harman.com, respectively.

Sincerely,



Jason K. Bortz



Joseph F. McKeever, III

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Commonwealth Annuity and Life Insurance Co.
(a Goldman Sachs Company), Southborough, MA
CNO Financial Group, Carmel, IN
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Great American Life Insurance Co., Cincinnati, OH
Guardian Insurance & Annuity Co., Inc, New York, NY
Hartford Life Insurance Company, Hartford, CT
ING North America Insurance Corporation, Atlanta, GA
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Life Insurance Company of the Southwest, Dallas, TX
Lincoln Financial Group, Fort Wayne, IN
MassMutual Financial Group, Springfield, MA
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
Pacific Life Insurance Company, Newport Beach, CA
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
RiverSource Life Insurance Company (an
Ameriprise Financial Company), Minneapolis, MN
SunAmerica Financial Group, Los Angeles, CA
Sun Life of Canada, Wellesley Hills, MA
Symetra Financial, Bellevue, WA
The Phoenix Life Insurance Company, Hartford, CT
TIAA-CREF, New York, NY
USAA Life Insurance Company, San Antonio, TX

The Committee of Annuity Insurers was formed in 1982 to participate in the development of federal tax and securities law policies with respect to annuities. The member companies of the Committee represent more than 80% of the annuity business in the United States.

April 11, 2011