The COMMITTEE of ANNUITY INSURERS

ACLI Financial Security for Life

July 29, 2025

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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N–5461
Washington, DC 20210

Re: RIN 1210–AC34 – Removal of 2550.401c-1, Definition of "plan assets" and insurance company general accounts

Dear Sir or Madam:

On behalf of the Committee of Annuity Insurers ("CAI") and the American Council of Life Insurers ("ACLI"),[1] we are writing to strongly oppose the direct final rule ("DFR")[2] that the Department of Labor ("DOL") issued to revoke 29 C.F.R. 2550.401c-1 (the "Regulation"). As explained below, this Regulation is far from obsolete and continues to provide important guidance and protection with respect to billions of dollars in qualified retirement plans for tens of thousands of participants and their beneficiaries. Accordingly, CAI and ACLI urge DOL to withdraw the DFR and retain this longstanding Regulation.

The DFR

On July 1, 2025, the DOL published the DFR to revoke the Regulation as obsolete. The DFR expresses DOL's belief that the Regulation is obsolete because it applies only to certain insurance policies issued before 1999 ("Transition Policies"). The DFR states that because "it is not likely that any Transition Policies remain in effect," the DOL is revoking the Regulation as it "no longer serves any useful purpose, and allowing the regulation to remain on the books only wastes time and resources that could be more productively employed." The DFR states that the DOL is taking this action pursuant to Executive Order 14192 and that its action "improves the daily lives of the American people by reducing unnecessary, burdensome, and costly Federal regulations."

The DFR does not cite any source or other support for its assertion that no Transition Policies are likely still in effect. It does, however, invite public comments on that assertion, as

[1] CAI is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. CAI's current 32 member companies represent approximately 80% of the annuity business in the U.S. ACLI is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. ACLI's current 280 member companies represent 94% of industry assets in the U.S.

[2] 90 Fed. Reg. 28009 (July 1, 2025).

well as on the DOL's reasoning and decision to revoke the Regulation. The DFR further states that unless the DOL receives "significant adverse comments" opposing the DFR and raising "a serious enough issue related to each of the independent grounds for the rule that a substantive response is required," the DFR will automatically revoke the Regulation, effective September 2, 2025.

In that regard, the DOL's assertion about the unlikelihood of any Transition Policies remaining in effect is wrong: many of them are still in force and will remain so for decades to come. As a result, the Regulation continues to serve its original purpose, does not waste time and resources that could be more productively employed, and revoking it will not improve the daily lives of the American people. Accordingly, each of the independent grounds for the DFR is misguided and the DFR should be withdrawn.

The Regulation

Congress directed the DOL to issue the Regulation as part of the Small Business Job Protection Act of 1996.[3] In doing so, Congress was responding to the considerable difficulties that insurance companies otherwise would face in conducting their day-to-day business transactions as a result of the *Harris Trust* case.[4] In that case, the Supreme Court interpreted the phrase "guaranteed benefit policy" in section 401(b)(2) of ERISA as including a contract issued by an insurance company and based on its general account, but only to the extent that the contract allocates investment risk to the insurer. Accordingly, an insurer's general account includes ERISA plan assets to the extent that it contains funds attributable to any nonguaranteed components of a contract with an employee benefit plan, such as providing for participation in the insurer's favorable investment experience.

The Court's decision, which was contrary to the DOL's own longstanding interpretation of ERISA,[5] generated considerable concern within the insurance industry. Under the Court's reasoning, a broad range of activities involving insurance company general accounts could be subject to ERISA's fiduciary standards, including potential violations of ERISA's prohibited transaction and general fiduciary responsibility provisions. Moreover, these consequences could have arisen *retroactively* from the date of the Court's decision.[6]

Congress responded to these concerns by adding section 401(c) to ERISA in order to eliminate the uncertainties created by the Supreme Court's decision and to authorize the DOL to provide relief from its adverse effects. In that regard, the Regulation provides that a Transition Policy, as defined therein, will not result in the insurer's general account containing ERISA plan assets despite *Harris Trust*, provided that certain requirements are met. With respect to those

[3] Pub. L. No. 104-188 § 1460 (1996).

[4] John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 510 U.S. 86 (1993).

[5] *See* Interpretive Bulletin 75-2, 29 C.F.R. 2509.75-2 (1975).

[6] The preamble to the 1997 proposed Regulation contains an excellent summary of these events. *See* 62 Fed. Reg. 66908 (December 22, 1997).

requirements, Congress directed the DOL to design the Regulation to "protect the interests and rights of the plan and of the plan's participants and beneficiaries."[7] Consistently with this directive, the preamble to the Regulation states that the Regulation "is expected to have significant direct benefits to employee benefit plans" and to protect the interests of plans, participants, and beneficiaries "through the requirement of certain disclosure and termination rights."[8] Moreover, the DOL expected that the Regulation's "[d]irect costs should fall nearly exclusively on insurance companies rather than on plans, participants and beneficiaries."[9]

Continued Importance of the Regulation

As indicated above, many Transition Policies remain in force and will remain in force for decades to come. ERISA plans continue to hold and utilize Transition Policies for a variety of reasons. Some are unallocated group annuities under defined contribution ("DC") or defined benefit ("DB") plans. In the case of DB plans, in-force Transition Policies continue to fund plan obligations and will continue to do so until the death of the last retiree or beneficiary covered by the policy. Moreover, in some cases DB plans can add new retirees to an in-force Transition Policy, further extending the policy's lifespan for decades from now. Still other Transition Policies are used as investment options under participant-directed DC plans, which continue to provide valuable investments and, in some cases, lifetime income options for participants and beneficiaries.

In light of the long-term nature of Transition Policies, it is not surprising that they remain in force in substantial numbers and with substantial values. In that regard, an informal survey of CAI and ACLI member companies indicates that hundreds of Transition Policies are still in force, with aggregate values exceeding $10 billion. Such Transition Policies involve multiple hundreds of employee benefit plans and cover tens of thousands of participants, former participants, and beneficiaries. This is based on just a handful of companies that responded to the survey, so we expect these figures actually *understate* the scope of Transition Policies in force today.

Based on the foregoing, it is obvious that the DOL's statement in the DFR about the unlikelihood of Transition Policies still being in effect is wrong. Such policies remain in force in substantial numbers and will continue to do so for many years. Likewise, it is obvious that the Regulation remains very relevant and important to insurance companies, ERISA plans, and their participants and beneficiaries. Accordingly, the DOL should not revoke the Regulation.

Adverse Consequences if the Regulation is Revoked

If the DOL does not withdraw the DFR, adverse consequences will ensue. Insurance companies could suddenly and unexpectedly become subject to ERISA fiduciary liability with

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[7] ERISA § 401(c)(2)(B), as added by Pub. L. No. 104-188 § 1460(a).

[8] 65 Fed. Reg. at 629 (Jan. 5, 2000).

[9] *Id.* at 630.

respect their general account assets, contrary to congressional intent in directing the DOL to issue the Regulation. This could have wide-ranging consequences. For example, if the general account assets of an insurance company become plan assets, the insurance company is put in the impossible position of having to simultaneously manage the account for all of its policyholders consistently with state law *and* meet ERISA's fiduciary and loyalty standards. Opportunistic class action plaintiff firms may attempt to exploit the revocation to bring nuisance suits that allege prohibited transactions or breaches of fiduciary duty solely because of these conflicting duties. In addition, many insurers routinely represent and warrant to counterparties, such as investment subadvisors, that their general account does not include plan assets. Revoking the Regulation could place insurers in breach of such contractual promises, triggering additional exposure.

More importantly, the multitude of plans and participants who currently benefit from Transition Policies could be harmed if the DOL revokes the Regulation. Transition Policies continue to provide important retirement benefits and protections for these plans and participants. For example, Transition Policies can contain plan-friendly and participant-friendly features that are not available under similar contracts in the market today, such as better interest crediting rates, lower expenses, and more favorable annuitization options. Such benefits and protections could be lost if insurers, confronted with the prospect of losing the Regulation, terminate their Transition Policies (if permitted to do so) rather than becoming subject to uncertain and potentially significant risks under ERISA. In addition, if Transition Policies remain in force despite the Regulation being revoked, plans may no longer receive the annual disclosures that the Regulation specifically requires – and that Congress directed the DOL to require – with respect to those policies.

Conclusion

The DOL's DFR to revoke the Regulation is based on the mistaken beliefs that no Transition Policies likely remain in force, that the Regulation therefore no longer serves any useful purpose, and that leaving it on the books would only waste time and resources. To the contrary, many Transition Policies remain in force and the Regulation continues to serve the important purposes that Congress intended when directing the DOL to issue it. Moreover, as the DOL anticipated when issuing the Regulation, its direct costs fall nearly exclusively on insurance companies, rather than on plans, participants and beneficiaries. Insurers are willing to bear these costs in light of the important relief and guidance the Regulation provides. Thus, while we certainly support the general goals of deregulation and burden reduction articulated in Executive Order 14192, and we appreciate the DOL's efforts to respond to that order, the Regulation remains important, useful, and necessary for insurers, plans, participants, and beneficiaries. Accordingly, we urge the DOL to withdraw its DFR on revoking the Regulation.

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We appreciate your consideration of our request. If you have any questions or if we can be of any assistance as you consider our points above, please contact either of the undersigned.

Sincerely,

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