

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2509

(Interpretive bulletin No. 95-1)

Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974

AGENCY: PWBA, Department of Labor.

ACTION: Interpretive Bulletin.

SUMMARY: This document announces the Department of Labor's (The Department's) view of the legal standard imposed by section 404(a) (1) (A) and (B) of part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA) on a plan fiduciary's selection of an annuity provider when purchasing annuities for the purpose of distributing benefits under an employee pension benefit plan. Under this standard, plan fiduciaries choosing to purchase annuities have a duty to select the safest available annuity provider, unless under the circumstances it would be in the interests of the participants and beneficiaries to do otherwise. The document also provides guidance to plan fiduciaries regarding circumstances when it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity.

The Interpretive Bulletin

The interpretive bulletin explains that, when choosing an annuity provider for purposes of a benefit distribution, whether for purposes of separation or retirement of a participant or upon termination of a plan.

Compliance with ERISA's fiduciary rules requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a potential annuity provider's claims paying ability and creditworthiness because the participants and beneficiaries whose

entitlement to benefits will be transferred to the annuity provider have a paramount interest in the ability of the provider to make those payments. As a result, the interpretive bulletin states that a plan fiduciary choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances, it would be in the interest of the participants and beneficiaries to do otherwise. The department recognizes that, in many circumstances likely to arise under existing law, the interest of that plan participants and beneficiaries may require the selecting fiduciary to consider the cost of the annuity (to the extent that the cost is borne by the participants and beneficiaries) in addition to the annuity provider's claims paying ability.

Cost consideration may not, however, justify purchase of an unsafe annuity. The interpretive bulletin also explains that an annuity provider's claims paying ability and creditworthiness should be evaluated on the basis of a number of factors. Although ratings provided by insurance company ratings services may be a useful factor in evaluating a potential annuity provider, reliance solely on such ratings would not be sufficient to meet the requirement of a thorough and analytical search for an appropriate annuity provider.

2509.95-1 Interpretive Bulletin relating to the fiduciary standard under ERISA when selecting an annuity provider.

Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104-1114, applicable to the selection of annuity providers for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider.

In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C.1104(a)(1)(B), requires, at a minimum, that plan fidu-

ciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

(1) the quality and diversification of the annuity provider's investment portfolio;

(2) the size of the insurer relative to the proposed contract;

(3) the level of the insurer's capital and surplus;

(4) the lines of business of the annuity provider and other indications of an insurer's exposure to liability;

(5) the structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

(6) the availability of additional protection through state guaranty associations and the extent of their guarantees. **Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert.**

A fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.

Conflicts of interest. Special care should be taken in reversion situations where fiduciaries selecting the annuity provider have an interest in the sponsoring employer which might affect their judgment and therefore create the potential for a violation of ERISA 406(b)(1). As a practical matter, many fiduciaries have this conflict of interest and therefore will need to obtain and follow independent expert advice calculated to identify those insurers with the highest claims paying ability willing to write the business.

