May 3, 2012

The Honorable Timothy Geithner
Department of the Treasury
Internal Revenue Service
Attn.: CC:PA:LP:PR (REG-110980-10; Reg-115809-11)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice of Proposed Rulemaking (Modifications to Minimum Present Value Requirements for Partial Annuity Distribution Options Under Defined Benefit Pension Plans (RIN 1545-BJ55); Longevity Annuity Contracts (RIN 1545-BK23); Revenue Ruling 2012-4 (Rollover from Qualified Defined Contribution Plan to Qualified Defined Benefit Plan to Obtain Additional Annuity); Revenue Ruling 2012-3 (Application of Survivor Annuity Requirements to Deferred Annuity Contracts Under a Defined Contribution Plan).

We, the undersigned, are nonprofit, nonpartisan public policy organizations committed to promoting women's retirement security. As such, we firmly believe that ensuring a stream of lifetime income is particularly important, and we are committed to increasing meaningful access to lifetime income options. We commend the Department of the Treasury (the "Department") for taking steps to increase access to lifetime income in retirement through the proposed rules and Revenue Rulings issued on February 2, 2012, and we appreciate the opportunity to comment and respond to the Department's proposed guidance and Revenue Rulings.

Introduction

Women are more economically vulnerable than men in retirement. Because women, on average, tend to live longer than men they need, on average, more retirement assets than men. Unfortunately, even though an increasing percentage of women participate in the workforce, women earn less, spend more time out of the workforce, and have shorter job tenure than men. As a result, women accrue significantly fewer retirement savings than men. Accordingly, women are more reliant than men upon the retirement income of a spouse.

Women's longer life expectancy also make the availability of annuities and other guaranteed lifetime income streams critical to ensuring that women will not outlive their retirement assets. Currently, the employer-based retirement savings system offers the best opportunity for women to obtain lifetime income in retirement, both as workers and as spouses of workers. Defined benefit retirement plans and money purchase pension plans covered by ERISA offer lifelong guaranteed benefits to women as workers and as spouses. While 401(k) and other profit-sharing plans are not required to offer annuities

as a distribution option, employers may design them to do so. Further, annuities offered through employer plans must be calculated without regard to gender.[1]

In contrast, lifetime income options purchased outside the employer-based retirement system (for example, using funds from an Individual Retirement Account or other savings) are generally priced using gender-distinct mortality tables, to women's detriment. Moreover, if an annuity is purchased on the open market, federal law does not protect the interests of women as spouses by requiring spouses to consent if that annuity fails to provide a benefit to the surviving spouse.

Accordingly, we strongly support expanding lifetime income options through the employer-based retirement savings system.[2] Our specific comments on the proposed regulations appear below. We also make some observations regarding Revenue Rulings 2012-3 and -4 at the end of these comments.

1. We generally support the proposed regulation modifying current minimum present value requirements to encourage partial annuity distribution options under defined benefit plans (RIN 1545-BJ55).

Because women as a group live longer than men, the guaranteed lifetime retirement income offered by defined benefit (DB) pension plans is particularly valuable to women. Further, DB spousal (survivor) benefits help lower-income older women avoid poverty.[3] Moreover, data suggest that the stable lifetime income payments provided by DB plans improve the economic security of vulnerable households more generally. [4]

Unfortunately, DB plans are increasingly being supplanted by defined contribution (DC) plans, mostly 401(k) and profit-sharing plans, which are not required to offer an annuity benefit option. Between 1985 and 2009, the number of DC plans increased by 43 percent, while the number of DB plans decreased by

[1] *See, e.g., Arizona Governing Committee v. Norris,* 463 U.S. 1073 (1983); *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978).

[2] Some of the undersigned, further, support changes to annuities available through the private insurance market that would benefit women, including gender-neutral pricing and more spousal protections. See Joint Response of American Association of University Women (AAUW), American Federation of State, County and Municipal Employees, National Consumers League, National Council of Women's Organizations, National Organization for Women (NOW), National Senior Citizens Law Center, National Women's Law Center, Older Women and Economic Security (OWES) Task Force of the National Council of Women's Organizations, OWL - The Voice of Midlife and Older Women, and Pension Rights Center to RFI at 9-10 (May 3, 2010) [hereinafter "Joint RFI Comments"].

[3] Email from Frank Porell, Professor of Gerontology, John W. McCormack Graduate School of Policy Studies, University of Massachusetts Boston, to Jasmine Tucker, Policy Fellow, National Women's Law Center (Sept. 13, 2010) (on file with NWLC).

[4] A 2009 study found that older households receiving DB pension income had lower rates of poverty, were less likely to experience material hardships (such as inadequate food or health care), and were less reliant on public assistance than households without DB pension income. Frank Porell & Beth Almeida, National Institute on Retirement Security, *The Pension Factor: Assessing the Role of Defined Benefit Plans in Reducing Elder Hardships* (July 2009), *available at* http://www.nirsonline.org/storage/nirs/documents/pension_factor_web.pdf.

72 percent.[5] In addition, an increasing number of DB plans offer lump-sum payouts, thereby decreasing the proportion of workers with lifetime income even further.

Offering partial annuities -- the option of receiving some of retirement benefits as a lump sum and some as an annuity -- is a viable policy solution for maintaining traditional DB plan lifetime benefits without eliminating lump-sum options altogether. Both the Federal Thrift Savings Plan and some private-sector retirement plans such as TIAA-CREF allow participants to receive their account balance in the combined form of lifetime income payments and a lump-sum payment. The evidence suggests that many DB plan participants would elect partial annuity options: TIAA-CREF has reported that about 30 percent of its plan participants who chose to annuitize opted to annuitize part of their account balance, compared to approximately 17 percent of participants who elected to fully annuitize.[6]

Several of the undersigned groups have previously recommended that the Treasury Department and the Department of Labor encourage employers to offer employees the opportunity to receive part of their DC account balances in the form of an annuity.[7] Similarly, we support encouraging employers to offer partial annuitization options in DB plans in order to provide participants with choices and flexibility, without foreclosing lifetime income options. We thus support the Department's proposed regulations, because they will encourage employers to amend their plans to make partial annuitization options available to plan participants. In addition, we recommend several minor changes that will make the Department's final regulations more protective of women and lower-income workers.

2. The final regulations should clarify that the generally applicable statutory limits on minimum account balances that may be annuitized would similarly apply to partial annuity options.

Annuity options are particularly important to women, because they have longer life expectancies than men and are thus at greater risk of outliving their assets. We believe that even small monthly amounts of lifetime income, as a supplement to Social Security and other retirement income, could make a difference in women's retirement security, particularly that of low- and moderate-income women. But, as previously mentioned, women have also generally accrued smaller overall retirement benefits than men because of their employment patterns and lower wages compared to men. Thus, it is particularly important that the final regulations establish a minimum "floor" for partial annuities that is not unreasonably high. We thus encourage the Department to modify the proposed regulations to provide expressly that a plan cannot set a partial annuity minimum above the statutory limit applicable to non-elective cashouts from DB plans.[8]

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[5] Employee Benefits Security Admin., U.S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, Table E1 (Dec. 2011), *available at* http://www.dol.gov/ebsa/pdf/historicaltables.pdf.

[6] See TIAA-CREF Response to Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans (April 30, 2010).

[7] Joint RFI Comments at 5.

[8] See 26 U.S.C. § 411(a)(restricting mandatory single-sum distributions to benefits with present value of less than $5,000); 5 U.S.C. § 8435(g)(Federal Thrift Savings Plan must offer annuitized benefits when account balances exceed $3,500.) .

3. The final regulations should clarify that any subsidies that would apply to annuities apply to partial annuities.

Similarly, because partial annuities are likely to be smaller, any reduction in benefits would have a disproportionately negative impact, one that would fall most heavily on women and lower-income workers. Accordingly, we recommend that the final rule clarify that, should a participant elect to partially annuitize, any early retirement, joint-and-survivor, or other subsidies that would apply if the participant took the entire benefit in annuity form would apply, pro rata, to the partial annuity.

4. We generally support the proposed regulation modifying the minimum required distribution rules by excluding certain longevity annuity contracts from account balances (RIN 1545-BK23).

The Department also issued proposed regulations that make it easier for 401(k), 403(a), 403(b), or 457(b) plan participants and IRA owners to access a particular kind of lifetime income product -- "longevity annuities" or qualified longevity annuity contracts (QLACs). Premiums paid for a QLAC (as defined in the proposed regulations) that has not yet become annuitized are exempt from the account balance subject to Required Minimum Distribution rules, so long as the cost does not exceed $100,000 or 25 percent of the account balance.[9]

The Background to the Proposed Rule states that "[p]urchasing longevity annuity contracts could help participants hedge the risk of . . . outliving their retirement savings," as well as "avoid the concern that participants may live beneath their means in order to avoid outliving their retirement savings." The undersigned groups support the goal of this proposed rule.[10] However, as discussed in recommendations 5 and 6 below, we believe that the final rule should be modified to better address women's retirement security.

5. The proposed regulations should be modified to specify that the qualified joint and survivor annuity rules apply to QLACs offered by a qualified plan.

As discussed above, women are more likely to rely on the retirement benefits of a spouse. As a result, robust spousal pension protections tend to benefit women. In particular, ERISA's qualified joint and survivor annuity and qualified preretirement survivor annuities have made an appreciable difference in women's retirement security.[11] The proposed regulations define a QLAC as "an annuity contract (that is not a variable contract . . .) that is purchased from an insurance company for an employee." Because a

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[9]The proposed rules provide that if the premiums are paid from an IRA, the premiums may not exceed 25 percent of the total IRA accounts that the individual owns, not including Roth IRAs.

[10]We also support the disclosure requirements for QLACs set forth in the proposed rule. Given the potential lapse of time between purchase and the annuity starting date, the annual notice will be a particularly helpful reminder for owners of these contracts. However, we recommend that final regulations provide that the annual notice include the names of any beneficiaries.

[11]Porell email, *supra* note 1; U.S. Gen. Accounting Office, GAO/HRD-92-49, Pensions Plans: Survivor Benefit Coverage for Wives Increased After 1984 Pension Law 7 (1992) (examining data from 1984-1989), *available at* http://archive.gao.gov/t2pbat6/146159.pdf.

QLAC is an annuity, if it is purchased under an employer plan, the joint and survivor annuity and preretirement survivor annuity requirements would apply.[12] The regulations refer directly to the application of the preretirement survivor annuity requirements to QLACs, but do not explicitly reference the joint and survivor annuity requirements. Given that many industry and employer groups have advocated weakening, if not altogether eliminating, the joint and survivor annuity requirements, we are concerned that the failure to do so would be interpreted to mean that the joint and survivor annuity protections do not apply to QLACs. We therefore urge the Department to state specifically in the final rules that joint and survivor annuity requirements would apply.

6. <u>The proposed regulations should be modified to require that premiums for QLACs paid with IRA assets be priced on a gender-neutral basis in order for the exception to apply</u>.

Under the proposed regulations, QLACs provided through employer-sponsored retirement plans would be subject to gender-neutral premiums, consistent with Title VII. But the proposed regulations seem to indicate that QLACs purchased by individual IRA owners could be subject to discriminatory pricing and still qualify for the exception to the required minimum distribution rules. Specifically, the Explanation of Provisions states that "[annuity] contracts provided under plans [would be] priced on a unisex basis, while contracts offered under IRAs generally take gender into account in establishing premiums."

For the reasons set forth earlier in these comments, lifetime income is especially important to women's retirement security. But by failing to require sex-neutral pricing for QLACs purchased by individuals using IRA assets, the proposed rules countenance providing fewer annuity benefits to women than similarly situated men, thus undermining the ultimate goal of the proposed regulations. In our view, requiring gender-neutral pricing would be consistent with the required minimum distribution rules, which are gender-neutral. Indeed, the requirement is triggered when an individual reaches age 70-½, without accounting for actuarial differences premised on sex. Accordingly, we recommend that, in order for the exception set forth in the proposed rule to apply, a QLAC purchased with IRA assets must be priced without regard to gender.

7. <u>The proposed regulations should be modified to encourage insurance companies to provide QLACs that would be purchased with IRA assets, that include spousal survivor protections</u>.

In addition, the undersigned encourage the Department to consider extending protections that apply to spouses for QLACs purchased under employer plans to those purchased with IRA assets. The proposed regulations refer to the fact that a pre-retirement death benefit may be paid under a QLAC only to the surviving spouse *of an employee* in the event that ERISA requires the provision of a Qualified Pre-Retirement Survivor Annuity. However, current federal law does not require that spousal protections such as QJSAs or QPSAs apply to IRAs, and therefore the proposed regulations suggest that spousal

[12] 26 U.S.C.A. § 401(a)(11)(B).

protections would not apply to QLACs purchased with IRA assets outside the structure of an employer plan.[13]

As stated previously, women are more likely than men to rely on the retirement income of a spouse, so failing to address the lack of spousal survivor benefits in QLACs purchased with IRA assets will seriously disadvantage women. Moreover, we believe that if the regulations permit IRA holders to purchase QLACs without spousal survivor benefit protections, plan sponsors are less likely to provide QLACs within plans, but rather encourage employees to roll over their assets to an IRA and purchase QLACs from rollover IRA assets.

We therefore also urge the Department to consider providing in the final regulations that only QLACs purchased with IRA assets that offer spousal protections will be exempted from required minimum distribution requirements, at least with respect to rollover IRAs. Alternatively, we strongly encourage the Department to explore other options, whether or not they require legislative changes, to promote spousal protections in annuities purchased with IRA assets, and in IRAs more generally.

8. The dollar and age limits for QLACs should be adjusted for qualified joint-and-survivor annuities.

The proposed regulations provide that, in order for the exception to the required minimum distribution rules to apply, the amount invested in a QLAC cannot exceed either $100,000 or 25 percent of the account balance; and that a QLAC cannot defer the annuity starting date beyond age 85. However, we note that a qualified joint and survivor benefit provides stable lifetime income for the joint life of a couple, and that, consequently, QLACs that offer joint and survivor annuities could be more costly. In addition, because couples have increased longevity risk, they may wish to begin annuity payments after age 85 to hedge against that risk. As a result, we believe that the Department should revise the regulations to provide higher premium limits and later annuity commencement dates for married couples who purchase QLACs that pay benefits in the form of qualified joint-and-survivor annuities. Aside from the equity of doing so, such increases in the limits may encourage greater utilization of QLACs that offer survivor protections than would otherwise occur.

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[13] For federal income tax purposes, IRAs are deemed to be separate property. 26 U.S.C. 408(g). But federal tax law does not abrogate community property rights under applicable state law. *See, e.g.*, Private Letter Ruling 199937055 (June 24, 1999). Specifically, in states that have adopted community property regimes (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin and, to a limited extent, Alaska and Puerto Rico), spouses have rights to IRA assets, even if the IRA is titled in the other spouse's name alone, if the assets were earned or acquired during the marriage (except as an inheritance or gift to one spouse). Accordingly, many IRA providers require spousal consent when an IRA beneficiary other than a spouse is designated and there is a nexus between the IRA owner and a community property state. *See, e.g.,* Wells Fargo, Individual Retirement Account Beneficiary Designation Form, Wells Fargo Advantage, *available at* http://www.wellsfargoadvantagefunds.com/pdf/forms/desig_bene.pdf. As a result, to the extent that a QLAC is purchased with funds from an IRA that are subject to community property laws, and the spouse has not previously consented to the designation of a non-spouse beneficiary, spousal consent may be required if the IRA owner purchases a QLAC that does not provide a spousal survivor annuity.

Comments on Revenue Rulings 2012-4 and 2012-3

1. *We endorse Rev. Rul. 2012-4's facilitation of defined-contribution plan to defined-benefit plan rollovers for the effective purchase of an additional annuity*.

We commend the Department for encouraging employers to permit a DC plan participant to rollover funds to purchase additional annuities from the employer's DB plan (if one is offered by the employer) by simplifying the conversion factors for purposes of calculating the value of the annuity.[14] We believe that annuities offered through DB plans offer more protections (such as sex-neutral pricing and spousal protections like the QJSA and QPSA) than annuities offered to individuals by insurance companies.

In addition, for individuals who might otherwise be intimidated by the higher pricing, multiplicity of options, and lack of transparency and lack of easy comparability of annuity options offered by insurance companies, access to additional annuities offered by the employer's DB plan might increase the likelihood that the individual will avail him or herself of this lifetime income option. Further, annuities offered through employer plans typically result in higher benefits per premium dollar, and are insured, at least partially, by the Pension Benefit Guaranty Corporation. They therefore often represent the best annuity bargain for participants, especially women.

2. *Rev. Rul. 2012-3 should be modified to ensure that a spouse can exercise consent rights at some point prior to the actual annuity starting date.*

Revenue Ruling 2012-3 establishes that certain kinds of deferred annuity contracts (described in Situations 2 and 3), are subject to QJSA and QPSA protections as soon as participants first begin to invest in those contracts. Rev. Rul. 2012-3 (Holdings). We support this holding. However, we are concerned that the Revenue Ruling's failure to specifically address changes in marital status, such as when a participant who is single when he or she first begins to invest in a deferred annuity contract subsequently marries, undermines those protections.

Although 26 CFR § 1.401(a)-20, Q&A 25 addresses changes in marital status for DB plans and DC plans offering annuities, there are significant differences between DB or DC plan annuities and deferred annuity contracts. In particular, DB plans are required to notify participants of the right to elect a form of benefit (which, if a single life annuity, would trigger the right of the participant's spouse to consent, or not, to that election) only 180 days before the initial benefit payments are to begin.[15] The time between the period during which consent can be exercised and the point at which payment of benefits begins is therefore very short. Limiting QJSA rights of spouses who marry during this very short period is

[14] In the Joint RFI Comments, some of the undersigned also recommended that, if employers were required to offer lifetime income options from DC plans, participants should be permitted to roll qualified assets from other DC plan accounts and IRAs, in order to maximize the assets that participants could use to purchase lifetime income. Joint RFI Comments at 7-9. To the extent that employers with both DB and DC plans allowed their DC plan participants to purchase annuities from their DB plans, it would similarly benefit participants to be able to roll other qualified plan amounts into their DC plan account.

[15] 26 U.S.C.A. § 417(a)(6)(A).

reasonable and is consistent with the provisions of ERISA that allow plans to deny benefits to spouses who marry participants less than one year prior to the commencement of benefits.[16]

In contrast, in the situations described in the Revenue Ruling, the point at which a form of benefit is elected – when the participant begins investing in a deferred annuity contract – is much farther away from the commencement of the payment of benefits. If the participant begins investing at 22, it could be more than 40 years before payments under that contract begin. There is, therefore, a much greater likelihood that the marital status of a participant could change. The difference between the time when consent rights are exercised in DB or DC plan annuities and the time when QJSA protections apply to deferred annuities, under the Revenue Ruling, means that deferred annuity contracts provide essentially no QJSA protections to subsequent spouses, even though the contracts remain plan assets.

We are troubled that the Rev. Rul. 2012-3 may thus be read to deny a spouse the right to a QJSA (or the right to consent to another form of distribution) when a participant has invested in deferred annuity contracts in his DC account (for example, under situation 2 of the ruling) and he subsequently marries. It is our view that this interpretation is inconsistent with the underlying purpose of the relevant provisions of the Internal Revenue Code and ERISA. Indeed, the effective inability of a later-married spouse to exercise any kind of meaningful consent over the payment of benefits that may be accrued in large part over the course of the marriage could be read as eviscerating the QJSA requirement put in place by the Retirement Equity Act of 1984.

As a result, unless it is modified, the Revenue Ruling could have the perverse effect of rendering the QJSA protections that it establishes for certain deferred annuity contracts essentially meaningless for a significant number of participants' spouses.

3. *Rev. Rul. 2012-3 should clarify the rights of a divorced spouse to a survivor annuity from a deferred annuity contract.*

Rev. Rul. 2012-3 provides that a deferred annuity contract purchased in a DC plan must include a QJSA for the participant's spouse unless the spouse consents to another form of distribution. The Revenue Ruling is silent, however, on the effects of divorce on the now former spouse's rights to the survivor portion of the annuity. Under ERISA, former spouses may only receive retirement or survivor annuities if a valid Qualified Domestic Relations Order (QDRO) is submitted to the retirement plan.

This is a complex area of the law, prone to attorney error – as indicated by the fact that the Department of Labor issued model QDRO forms to assist practitioners, and that Congress provided in the Pension Protection Act of 2006 that QDROs issued after the date of divorce would not be invalid for that reason alone. We are concerned that confusion may result from this Revenue Ruling, since it does not indicate whether the survivor portion of a deferred annuity contract issued to plan participants belongs to a spouse after divorce or can only be protected through a QDRO. The Ruling should therefore be modified

[16] 26 U.S.C.A. § 417(d).

to clarify whether a QDRO is required in order for the former spouse to receive the survivor annuity under the contract.

Conclusion

We, the undersigned, appreciate the positive steps that the Department of the Treasury has taken to foster the availability of lifetime income options, especially through qualified plans. With the changes proposed here, we believe that the underlying goal of furthering retirement security, especially for women, could be more easily met. Thank you for this opportunity to comment.

If you have any questions pertaining to these comments, please contact Amy Matsui, Senior Counsel, at the National Women's Law Center at (202) 588-7615 or amatsui@nwlc.org.

Sincerely,

American Association of University Women (AAUW)

Feminist Majority Foundation

MANA, A National Latina Organization

National Association for Female Executives

National Council of Women's Organizations

National Organization for Women

National Women's Law Center

OWL-The Voice of Midlife and Older Women

Pension Rights Center