

Employee Benefit Plan Review

Guaranteed Retirement Income

BY KATRINA L. BERISHAJ

Q The fiduciary investment committee of our 401(k) plan is hearing a lot about guaranteed retirement income. What is it, and why is it such a hot topic?

A Guaranteed retirement income is a term that generally encompasses in-plan lifetime income annuity products in which an insurance company guarantees the payment of benefit distributions in retirement. These can include lifetime income products that provide for the accumulation of retirement income within a plan, as well as those that provide for distribution payments to participants in a plan.

Historically, fiduciaries of individual account defined contribution plans perceived these products as bearing significant risk because, despite a safe harbor and U.S. Department of Labor (DOL) guidance, fiduciaries were uncertain on how to meet the obligation of assessing carrier financial strength; and the related uncertainty regarding the adequacy of efforts to qualify for the then-applicable safe harbor. Specifically, the DOL guidance required an employer to look at the capital requirements, liquidity and solvency of an insurer for the duration of an annuity contract.

The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 introduced a more robust optional statutory safe harbor for a fiduciary's selection of certain lifetime income options for defined contribution plans. Specifically, the

SECURE Act safe harbor provides fiduciary relief from liability for any losses that may result from an insurer's failure to satisfy its financial obligations under a "guaranteed retirement income contract" in a defined contribution plan. Under the SECURE Act safe harbor, a "guaranteed retirement income contract" is "an annuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant's designated beneficiary as part of an individual account plan."

To meet the terms of the SECURE Act safe harbor, a fiduciary must engage in an objective, thorough and analytical search for the purpose of identifying insurers and conclude that at the time of the selection, the insurer is financially capable of satisfying its obligations under the contract, and the relative cost of the contract is reasonable taking into consideration the benefits, features and administrative services provided under the contract. Under the SECURE Act safe harbor, a fiduciary is deemed to have satisfied its obligations for evaluating the adequacy of the insurer's financial capabilities if the fiduciary receives specific written representations from the insurer. (Provided that, after receiving those representations, the fiduciary has not received notice of any change in the insurer's circumstances or other information

that would cause it to question the representations provided.)

Specifically, the insurer must represent that:

- It is licensed to offer guaranteed retirement income contracts.
- At the time of selection and for each of the immediately preceding seven plan years, the insurer:
 - (1) Operates and has operated under a certificate of authority from the insurance commissioner of its domiciliary state that has not been revoked or suspended;
 - (2) Has filed audited financial statements in accordance with the laws of its domiciliary state;
 - (3) Maintains and has maintained reserves that satisfy all the statutory requirements of all states in which the insurer does business; and
 - (4) Is not operating under an order of suspension, rehabilitation or liquidation.
- At least every five years, the insurer undergoes a financial examination by the insurance commissioner of its domiciliary state.
- The insurer will notify the fiduciary of any change in circumstances after providing the above representations that would preclude the insurer from making such representations at the time of issuance of the contract.

Under the SECURE Act safe harbor, “time of selection” means the

time that the annuity provider and contract are selected for distribution of benefits to a specific participant or beneficiary or, if the selecting fiduciary “periodically reviews” the continuing appropriateness of its conclusions regarding the financial capability of the insurer, the time that the annuity provider is selected to provide benefits at future dates to participants or beneficiaries. A fiduciary is deemed to perform a “periodic review” if it receives on an annual basis the written representations described above from the insurer, unless it receives a notice of a change in circumstances (as described above) or it becomes aware of facts that would cause the fiduciary to question the insurer’s representations.

The SECURE Act safe harbor does not specify the considerations that a fiduciary must evaluate with respect to the requirement that a fiduciary “considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract.” However, the SECURE Act safe harbor specifically provides that a fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer’s financial strength) in conjunction with the cost of the contract, but is not required to select the lowest-cost contract.

In light of the SECURE Act safe harbor, service providers believe that

employers and defined contribution plan fiduciaries are interested in offering their participants in-plan lifetime income options. Consequently, there has been a recent proliferation of new guaranteed retirement income products. For example, a number of investment managers have partnered with insurance companies to offer an in-plan annuity inside a target-date fund. Other forms of guaranteed retirement income products include an annuity that is linked to the retirement plan or a separate, stand-alone annuity sold to participants via the plan. Service providers are also offering additional forms of flexibility, such as in the amount of savings that participants can use and when participants can begin receiving income. As plan fiduciaries continue to become more comfortable with the SECURE Act safe harbor, it is likely that new guaranteed retirement income products will continue to emerge. 🌟

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