GROOM LAW GROUP

Guaranteeing a Secure Retirement

A Practical Guide for Selecting DC Plan Lifetime Income Options

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Executive Summary

- More and more employers are adding lifetime income investment options to their DC plans.
- A plan fiduciary has a duty to prudently select and monitor a lifetime income investment, just as they would with any plan investment.
- The SECURE Act of 2019 sought to make it easier to offer DC plan lifetime income options by creating a fiduciary safe harbor for these investments.
- A lifetime income investment can be used as the default investment for a DC plan, and the investment can qualify as a QDIA, provided certain regulatory conditions are met.

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About Groom Law Group

Groom Law Group solves complicated legal issues for a variety of clients in finance, retirement, health care, and the public sector. Our exceptional level of service has earned us acclaim among clients, consistent top-tier rankings, and our industry's highest awards. With 45 years of experience practicing in Washington, D.C., Groom is widely recognized among the nation's leading benefits, health, and retirement law firms.

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Glossary

Annuity Selection Regulation. The term "Annuity Selection Regulation" refers to the DOL regulation addressing a fiduciary's duties with respect to the selection of an annuity distribution option for a DC plan. The regulations are codified at 29 CFR § 2550.404a-4.

DC plan. The term "DC plan" refers to a defined contribution individual account plan such as a 401(k) plan.

DOL. The term "DOL" refers to the U.S. Department of Labor, which has oversight of the fiduciary provisions of ERISA.

ERISA. The term "ERISA" refers to the Employee Retirement Income Security Act of 1974, as amended.

GRIC. The term "guaranteed retirement income contract" is defined in the SECURE Act Safe Harbor, which is codified at ERISA § 404(e)(6)(b).

Lifetime Income Option / Investment. For purposes of this paper, the terms "lifetime income option," "lifetime income investment," and "lifetime income investment option," which are used interchangeably, refer to investment options offered to participants in DC plans that provide insurer-backed guarantees to support the payment of benefit distributions in retirement.

GLWB. The term "GLWB" refers to guaranteed lifetime withdrawal benefit, which is generally a feature of, or rider to, an annuity contract guaranteeing that, when a participant depletes his or her DC plan account balance, an insurance company will continue to make payments to the participant for at least the life of the participant.

QDIA. The term "qualified default investment alternative" is defined in the QDIA Regulation.

QDIA Regulation. The term "QDIA Regulation" refers to the DOL regulation implementing ERISA section 404(c)(5), which is codified at 29 C.F.R. § 2550.404c-5.

SECURE Act. The "SECURE Act" is the Setting Every Community Up For Retirement Enhancement Act of 2019 (Pub. L. 116-94).

SECURE Act Safe Harbor. The term "SECURE Act Safe Harbor" refers to the fiduciary safe harbor for the selection of GRICs, which was included as section 209 of the SECURE Act and codified as ERISA § 404(e).

Tax Code. The term "Tax Code" refers to Internal Revenue Code of 1986, as amended.

Part I – Introduction

When Congress first passed legislation to create "cash or deferred arrangements" – the original term for 401(k) plans – few people could have predicted that, over the course of a single generation, DC plans would come to dominate the private retirement system. The first generation of DC plans were largely considered supplementary to pension plans and were crude by today's standards. However, over the years, DC plans have undergone a remarkable transformation as policymakers, employers, and labor organizations have worked to improve outcomes for participants.

Today, more people are participating in DC plans than ever before thanks to the proliferation of automatic enrollment and efforts to expand coverage. DC plans have also become considerably more transparent, professionalized, and efficient. However, most of the systemic improvements have focused on helping participants accumulate assets and not on the distribution phase of the participant life cycle.

As the first generation of savers relying entirely on DC plans begins to retire, there is a growing recognition that many plan participants are at risk of outliving their savings. Although Social Security continues to provide people with a basic level of guaranteed income, it is typically not enough to ensure that people can maintain their standard of living when they retire, whether that retirement is voluntary or involuntary.

To address this concern, an increasing number of DC plan sponsors are considering adding lifetime income investment options to their DC plans. In some cases, sponsors are designating lifetime income options as their plans' default investment when they want to provide all participants with guaranteed income. Congress has also recognized the problem and tried to remove real or perceived barriers to offering in-plan lifetime income options by passing the SECURE Act. This has resulted in a blossoming of the number and type of lifetime income options available to plan sponsors and participants.

This paper is intended to provide plan sponsors and other fiduciaries with a practical guide to help in the selection of lifetime income investments. It first explains what it means to be a fiduciary and then discusses the fiduciary duties in the context of providing lifetime income options within DC plans. Although this paper primarily refers to ERISA and 401(k) plans, the general concepts and considerations apply equally to non-ERISA DC plans, including church, 457, and 403(b) plans.

We hope this paper is helpful to all DC plan fiduciaries, but it was not written to address the facts or circumstances of any particular plan sponsor or fiduciary. Therefore, it should not be construed as providing legal opinions, tax advice, or investment advice. Readers should consult their legal, tax, and investment advisers before making any decisions with respect to their plans.

Part II – Demystifying Fiduciary Status

Who is a fiduciary?

Fiduciary status carries a certain degree of mystique, due in no small part to the labyrinth of legal requirements applicable to DC plans, but this is unfortunate because acting as a fiduciary is neither as daunting nor as fraught as some make it out to be. At its core, being a fiduciary means acting with the highest degree of care when managing participants' retirement savings, including selecting the investment options available to them.

It is important to understand who acts as a DC plan fiduciary because fiduciaries have the legal responsibility and liability for the plan's administration and management. ERISA has different types of fiduciaries. Some people become fiduciaries just by holding certain position with respect to a plan (*e.g.*, plan administrators, named fiduciaries, investment managers, and trustees),[1] but many fiduciaries are "functional fiduciaries," meaning they become fiduciaries because of their actions (or inactions). In this regard, ERISA imposes fiduciary status on a person to the extent that he or she –

- Exercises discretionary authority or control with respect to the management of a plan;
- Exercises any authority or control respecting management or disposition of plan assets;
- Has discretionary authority or responsibility in the administration of the plan; or
- Provides investment advice for a direct or indirect fee with respect to money or property of the plan.[2]

DOL takes the position that those responsible for selecting DC plan investments – including any lifetime income options – are acting in a fiduciary capacity and are, therefore, subject to the fiduciary duties discussed below. However, it is important to note that a person is only a fiduciary to the extent that he or she exercises fiduciary authority (or provides fiduciary advice), and a fiduciary typically will only be liable under ERISA when performing fiduciary functions.[3]

What are a fiduciary's duties when selecting DC plan investments?

No particular investment is required or *per se* imprudent under ERISA.[4] Instead, ERISA provides fiduciaries a considerable amount of latitude in designing the investment programs for their DC plans but then imposes on them certain fiduciary duties. Specifically, fiduciaries are required to:

- Carry out their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;"[5]

- Discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries;"[6] and

- Act for "the exclusive purpose of providing benefits and defraying reasonable expenses of administration."[7]

To satisfy these duties when making investment decisions, a fiduciary generally needs to engage in a prudent process.[8] This means giving appropriate consideration to the facts and circumstances that the fiduciary knows (or should know) are relevant to the particular investment and then acting accordingly.[9] Every fiduciary's process varies, but the process generally involves –

- Gathering relevant information;

- Considering available courses of action;

- Consulting experts when necessary or helpful; and

- Making a reasoned decision based on all relevant facts and circumstances.

"The prudence requirement is flexible…," and there is no one-size-fits-all process.[10] However, it is important to have a process in place and to follow it. It is equally important to document the process so that the fiduciary is able to establish that he or she complied with ERISA in the event a decision is ever questioned.

Do fiduciaries have an ongoing duty to monitor plan investments?

It is well established that fiduciaries have an ongoing duty to monitor plan investments under ERISA.[11] For example, the Supreme Court has recognized that ERISA imposes on fiduciaries who select investment options for 401(k) plans a continuing duty to monitor the selections and remove imprudent investment options.[12] A fiduciary can establish that he or she has satisfied this monitoring obligation by engaging in a prudent process, which is often similar to, or a streamlined version of, the original selection process.

Is a fiduciary responsible for participants' investment decisions?

Fiduciaries generally are not liable under ERISA for any losses resulting from the investment decisions of participants or beneficiaries in DC plans that allow participants to direct their own investments, provided the plan meets certain requirements.[13] Specifically, ERISA states that when a participant or beneficiary exercises control over the assets of his or her account in a DC plan "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control…."[14] The statute goes on to list a number of requirements that must be satisfied in order to rely upon the fiduciary relief, and DOL supplemented these requirements with its own regulation.[15]

In 2006, Congress passed legislation intended to increase retirement plan participation by, among other things, expanding this relief to situations in which a fiduciary exercises its own discretion to select a default investment for participants who have not made an investment election (*e.g.*, automatically enrolled participants). The law provided that a fiduciary who selects a default investment for a DC plan will not be liable for losses that result from the investment of the participant's account balance, provided certain conditions are met.

The most important condition is that the investment qualify as a QDIA under DOL's QDIA Regulation.[16] Although there are a number of technical requirements, the QDIA Regulation generally permits fiduciaries to use three types of QDIAs – target date (or life cycle) funds, managed accounts, and balanced funds. Target date funds are the most widely used type of QDIAs, but fiduciaries have increasingly used managed accounts as a way to replicate the simplicity of target date funds while incorporating features unique to the participant, including customized glide paths and the investment in lifetime income guarantees.

Can a plan sponsor "outsource" his or her fiduciary duties?

ERISA allows the named fiduciary of a DC plan to appoint an investment manager to manage some or all of the plan's assets, and the courts and DOL have recognized that a named fiduciary is not liable for the acts of a properly appointed investment manager unless the named fiduciary participated in, enabled, or failed to remedy the manager's breach.[17] To be an investment manager under ERISA, one must –

- Have the power to manage, acquire, or dispose of any asset of a plan;
- Be either a registered investment adviser, a bank, or an insurance company; and
- Acknowledge in writing that he or she is a fiduciary with respect to the plan.[18]

Importantly, the plan's named fiduciary is generally responsible for selecting and monitoring any appointed investment managers.

Part III – Considering Lifetime Income Options

What special fiduciary considerations are there when selecting a lifetime income option?

The selection of a lifetime income option is not fundamentally different from the selection of any DC plan investment option. A fiduciary should engage in and document a prudent decision-making process that gives appropriate consideration to the facts and circumstances that the fiduciary knows (or should know) are relevant to the particular investment and then act accordingly. That includes a careful evaluation of the costs and benefits of the investment. A fiduciary is not required to select the lowest cost investment, but the fiduciary must ensure that the benefits provided justify the costs.

What makes the process of selecting lifetime income investments unique is that the fiduciary will need to evaluate the guarantees being provided by the insurer(s). This requires an understanding of both the explicit and implicit costs of the annuity or annuities and how the underlying insurance contracts work, including the rights of policyholders. It also necessitates an evaluation of the insurer's financial wherewithal to make good on its payments obligations, which can span decades.

Fortunately, fiduciaries need not become experts in the finer points of insurance company operations and regulation as the SECURE Act Safe Harbor (discussed below) now provides a framework for evaluating an insurer's claims paying ability. The SECURE Act Safe Harbor and the DOL's Annuity Selection Regulation (discussed in the next section) provide a detailed roadmap for fiduciaries considering lifetime income investments.

What does DOL think fiduciaries should consider when evaluating lifetime income products?

At the direction of Congress, DOL issued the Annuity Selection Regulation in 2008 to provide the agency's views as to how DC plan fiduciaries should evaluate in-plan annuity providers. DOL had previously issued guidance generally applicable to both defined benefit and DC plans.[19] However, Congress determined that the fiduciary standards applicable to DC plans and defined benefit plans should not be the same.[20] Together with the SECURE Act Safe Harbor, the Annuity Selection Regulation provides a framework for evaluating the guarantees included as part of lifetime income options.

The Annuity Selection Regulation creates a fiduciary safe harbor for the selection of an annuity as a DC plan distribution option. To meet the terms of the safe harbor, a fiduciary must –

- Engage in an objective, thorough, and analytical search to select a provider;[21]

- Appropriately consider information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract;[22]

- Appropriately consider the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services provided;[23]

- Appropriately conclude that, at the "time of selection" the annuity provider is financially able to make all future payments under the contract and that the cost of the contract is reasonable in relation to the benefits and services to be provided;[24] and

- If necessary, consult with appropriate expert(s) for purposes of compliance with the above provisions.[25]

For purposes of the fourth condition, the phrase "time of selection" is defined to mean either the time that the annuity provider -

- Is selected along with the contract for purposes of contemporaneously distributing benefits to a specific participant or beneficiary; or

- Is selected to provide annuity contracts at future dates to participants or beneficiaries, provided that the selecting fiduciary periodically reviews the continuing appropriateness of the conclusion that the provider is financially able to make all future payments under the contract and that the cost of the contract is reasonable in relation to the benefits and services provided, taking into account the conditions of the safe harbor.[26]

DOL indicated that it wanted to clarify that the safe harbor conditions applied only to the decision to purchase an annuity.[27]

While some plan fiduciaries and their advisers believed that the Annuity Selection Regulation provided sufficient guidance for purposes of evaluating lifetime income options, others were not as comfortable relying solely on this guidance from DOL in large part because it was difficult for a plan fiduciary to evaluate an insurance company's claims-paying ability and creditworthiness. To address this concern (and others), Congress created the SECURE Act Safe Harbor in 2019.

How does the SECURE Act Safe Harbor help fiduciaries?

The SECURE Act Safe Harbor is a statutory safe harbor for a fiduciary's selection of certain lifetime income options for DC plans. The purpose of the law is to "…provide[] certainty for plan sponsors in the selection of lifetime income providers…" and, thus, "eliminate[] a roadblock to offering lifetime income benefit options under a [DC] plan."[28]

The SECURE Act Safe Harbor provides fiduciary relief for the selection of a "guaranteed retirement income contract" or GRIC on behalf of a DC plan. A GRIC 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." This broad definition covers a number of different types of lifetime income products, including those that provide for distribution payments to participants and those that provide for the accumulation of retirement income within the plan. Most lifetime income products currently available qualify as GRICs.

One key purpose of the SECURE Act Safe Harbor was to build on and clarify certain aspects of the Annuity Selection Regulation (discussed above). For example, the SECURE Act Safe Harbor adopts modified versions of the conditions of the Annuity Selection Regulation, dispenses with certain others, and most importantly, facilitates satisfaction of conditions related to assessing the insurer's financial strength by deeming those conditions to have been met where the insurer delivers certain written representations to the selecting fiduciary.

What does a fiduciary have to do to comply with the terms of the SECURE Act Safe Harbor?

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 services provided under the contract.

With respect to the first requirement, a fiduciary is deemed to have satisfied his or her obligations for evaluating the adequacy of the insurer's financial capabilities if the fiduciary receives a specified set of 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 which would cause it to question the representations provided). Specifically, the insurer must represent that –

- It is licensed to offer GRICs;

- At the time of selection and for each of the immediately preceding seven plan years, the insurer (i) operates and has operated under a certificate of authority from the insurance commissioner of its domiciliary state that has not been revoked or suspended; (ii) has filed audited financial statements in accordance with the laws of its domiciliary state; (iii) maintains and has maintained reserves which satisfy all the statutory requirements of all states in which the insurer does business; and (iv) is not operating under an order of suspension, rehabilitation, or liquidation;

- The insurer undergoes, at least every five years, a financial examination by the insurance commissioner of its domiciliary state; and

- 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.

Similar to the Annuity Selection Regulation, the "time of selection" under the SECURE Act Safe Harbor means the time that the annuity provider and contract are selected for distribution of benefits to a specific participant or beneficiary or the time that the annuity provider is selected to provide benefits at future dates to participants or beneficiaries, provided that the selecting fiduciary "periodically reviews" the continuing appropriateness of its conclusions regarding the financial capability of the insurer. A fiduciary is deemed to perform a periodic review if it receives the written representation described above from the insurer on an annual basis, unless it receives the notice of a change in circumstances (described above) or it becomes aware of facts that would cause the fiduciary to question the insurer's representations.

As for the requirement that a fiduciary evaluate the reasonableness of the GRIC's costs, presumably this is a requirement familiar to most fiduciaries as it is similar to the cost/benefit analysis conducted for all investment decisions. However, for the avoidance of doubt, the SECURE Act Safe Harbor makes it explicit that a fiduciary is not required to select the lowest cost GRIC. Rather, a fiduciary may consider the value of the GRIC, including the features and benefits of the contract and the attributes of the insurer.

Can sponsors engage investment managers to select lifetime income investments, annuities, and/or insurers?

Plan fiduciaries sometimes engage third parties to assist with the evaluation and selection of lifetime income investments, the insurer(s) providing the guarantees, or both. This can be beneficial where a fiduciary lacks the expertise to evaluate some or all of the aspects of a particular lifetime income investment options. Often fiduciaries engage a third party to provide non-fiduciary information or investment advice.

Fiduciaries who want an additional layer of protection can appoint an investment manager to manage some or all of the lifetime income product.[29] For example, a plan fiduciary could retain responsibility for selecting a target date fund (or setting the glide path of a managed account) while engaging an investment manager to evaluate insurers to provide a GLWB feature.

Can a default investment with lifetime income features be a QDIA?

To qualify as a QDIA, an investment must satisfy the conditions of the QDIA Regulation, which relate to, among other things, investment strategy, management, and liquidity. A lifetime income investment can qualify as a QDIA, provided it meets the regulatory conditions. In fact, the QDIA Regulation confirms that an investment option intended to be a QDIA may be an insurance product or contain features of an insured product.

The QDIA regulations explicitly state that an investment alternative *shall not* fail to constitute a QDIA –

> "*solely because the product or portfolio is offered through variable annuity or similar contracts or through common or collective trust funds or pooled investment funds and without regard to whether such contracts or funds provide annuity purchase rights, investment guarantees, death benefit guarantees or other features ancillary to the investment fund product or model portfolio*."[30]

In the preamble to the QDIA Regulation, DOL further stated that "it is the view of [DOL] that the availability of annuity purchase rights, death benefit guarantees, investment guarantees or other features common to variable annuity contracts will not themselves affect the status of a fund, product or portfolio as a [QDIA] when the conditions of the regulation are satisfied."[31] More recently, DOL issued an Information Letter stating that "[t]he use of unallocated deferred annuity contracts as fixed income investments" would not cause the funds to fail to meet the requirements to be a target date fund under the QDIA Regulation.[32]

Because of this authority, a number of plans currently use default investments with lifetime income features. These lifetime income features often utilize GLWBs and other types of deferred annuities to ensure that the investment meets the liquidity requirements under the QDIA Regulation.

We note that DOL has recognized that the QDIA Regulation is merely a safe harbor and, therefore, not the sole avenue for a fiduciary to satisfy his or her duties under ERISA.[33] In this regard, DOL provided the following guidance for a fiduciary selecting a lifetime income investment:

> "*[I]t would be important to evaluate the demographics of the plan and make a considered decision about how the characteristics of the investment alternative align with the needs of plan participants and beneficiaries taking into account, among other things, the nature and duration of the liquidity restrictions, the level of the guarantees of principal and minimum interest rates, any opportunities for the guaranteed minimum interest rates to be supplemented with additional credited amounts, as well as the expected lifetime income to be provided in retirement.*"[34]

DOL further opined that a fiduciary should also consider "whether the costs (including fees and investment expenses) associated with the investment alternative are reasonable in relation to the benefits and administrative services to be provided" and "what additional notice should be provided to participants of the liquidity and transferability restrictions in advance of their becoming applicable as well as the need for more education for affected participants and beneficiaries regarding the features of the investment alternative."[35]

Part IV – Other SECURE Act Changes

A primary goal of the SECURE Act was to shift the DC plan system from one focused on wealth accumulation to one with an eye toward producing retirement income. To accomplish this, Congress created the SECURE Act Safe Harbor, discussed above. However, it also included provisions addressing the portability of lifetime income investment options and a new lifetime income disclosure provision.

How did the SECURE Act improve the portability of lifetime income investments?

Section 109 of the SECURE Act amended section 401(a) of the Tax Code by adding a new paragraph (38) enabling defined contribution plans to include provisions allowing, on or after the date that is 90 days prior to the date on which a lifetime income investment is no longer authorized to be held as an investment under the plan, either (i) "qualified distributions of a lifetime income investment," or (ii) "distributions of a lifetime income investment in the form of a qualified plan distribution annuity contract."[36] Substantially similar amendments were also made to Tax Code sections 403(b)(11), 403(b)(7) and 457(d)(1) for purposes of extending the same level of portability to tax deferred annuities and custody accounts, and to governmental deferred compensation plans, respectively. For purposes of the amended Tax Code provisions –

- A "*lifetime income investment*" is defined to mean – a plan investment option providing participants with election rights (i) which are not uniformly available with respect to other plan investment options (*i.e.*, election rights that are distinct to that particular option); and (ii) which relate to a lifetime income feature available through a contract or arrangement under the plan;

- A "*lifetime income feature*" is one which (i) guarantees a minimum level of income annually or more frequently for at least the remainder of the life of the participant or the joint lives of the participant and his or her designated beneficiary, or (ii) an annuity payable on behalf of the employee under which payments are made in substantially equal periodic payments over the life of the participant or the joint lives of the participant and his or her designated beneficiary;

- A "*qualified distribution*" is defined as a direct trustee-to-trustee transfer, as described in Code section 401(a)(31)(A) to an "eligible retirement plan" (as defined in Tax Code section 402(c)(8)(B)); and

- A "*qualified plan distribution annuity contract*" means an annuity contract purchased for a participant and distributed to the participant by a plan or contract described in Tax Code section 402(c)(8)(B)(iii)-(vi).[37]

Allowing plans to include lifetime income portability provisions largely solves what has, until recently, been a significant technical challenge to the use of in-plan lifetime income products.

Many such products have features that can only be supported by one or a few investment platform providers. Until the SECURE Act, plans that had adopted and allowed participants to invest in such a product faced a dilemma if they ever wished to move to a new recordkeeping platform that did not support the product. If the plan elected to surrender the lifetime income product for purposes of transitioning to the new platform, the lifetime income benefits associated with the product would typically be lost. In order for the plan to both maintain the accumulated lifetime income benefits and transition to a new recordkeeper, it would often need to "leave behind" its lifetime income product holding with the original recordkeeper. This would leave the plan with two recordkeepers – the original, for purposes of maintaining the lifetime income product, and the successor, for purposes of maintaining records of all other plan investments. Coordinating the two sets of records for purposes of administering the plan often proved difficult and unwieldy.

The SECURE Act's solution for this problem is to permit both in-service trustee-to-trustee transfers of participants' lifetime income product interests to other eligible plans, including IRAs, and the purchase of distributed annuities for purposes of preserving a participant's accumulated benefit, during the 90-day period preceding the plan's discontinuance of the product. Since most insurers that offer lifetime income products in the employer-sponsored plan market also make the same product available through a retail IRA vehicle, plan participants that have accumulated in-plan lifetime income guarantees will be positioned to readily preserve those features to a successor vehicle if the plan decides to terminate the original arrangement.

What else did the SECURE Act do to help participants understand the value of retirement income guarantees and lifetime income investments?

SECURE Act section 203 amended the pension benefit statement rules under ERISA section 105 to require that individual account plans add a "lifetime income disclosure" to at least one pension benefit statement furnished to participants during a 12-month period. This lifetime income disclosure requirement becomes applicable to pension benefit statements furnished more than 12 months following the later of DOL's issuance of (i) interim final rules, (ii) a model lifetime income disclosure, or (iii) assumptions used to convert total accrued benefits to lifetime income streams.

By way of background, ERISA section 105 requires administrators of individual account plans to furnish a quarterly benefit statement to participants and beneficiaries who have the right to direct the investment of their plan accounts, and annually to participants and beneficiaries who lack investment direction rights. The contents of such benefit statements are required to include (i) the total amount of benefits accrued; (ii) the portion of total accrued benefits that are nonforfeitable, if any, or the earliest date on which accrued benefits will become nonforfeitable; and (iii) the value of each investment to which individual account assets are allocated. Benefit statements for self-directed plans must also contain certain explanations about the participant's plan investment rights, the importance of a well-balanced and diversified investment portfolio, and furnish notice of a DOL internet website providing information about investing. The SECURE Act added a new lifetime income disclosure content requirement.

The new lifetime income disclosure must express a participant's total accrued benefits as a "lifetime income stream" (*i.e.*, as the monthly payment amounts that a participant or beneficiary would receive if the account balance were applied to provide a lifetime income stream, based on assumptions to be specified in a future DOL rule.) Two sets of lifetime income stream illustrations are required. The first is a qualified joint and survivor lifetime income stream, based on the assumption that the participant has a spouse of equal age. The second lifetime income stream to be illustrated is a single life annuity.

As required by the statute, DOL has issued interim final rules implementing the lifetime income disclosure requirement.[38] The rules prescribe the assumptions plan administrators are to use when converting total accrued benefits into lifetime income stream illustrations. They also contain model disclosures. Although the interim final rules are effective, DOL has confirmed that the agency is working on permanent, final regulations.[39]

Importantly, plan fiduciaries, plan sponsors and all other persons are relieved from any liability under the fiduciary responsibility provisions of ERISA (*i.e.*, Title I) for providing lifetime income disclosures to participants so long as the disclosures are based upon the assumptions and rules specified by DOL and include the explanations contained in DOL's model lifetime include disclosure.[40]

Endnotes

[1] 29 C.F.R. § 2509.75–8 ("[S]ome offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) [of ERISA]. For example, a plan administrator or a trustee of a plan must, be [sic] the very nature of his position, have 'discretionary responsibility in the administration of the plan'… Persons who hold such positions will therefore be fiduciaries.")

[2] ERISA § 3(21)

[3] ERISA § 3(21)(A); 29 C.F.R. § 75-8, at D-4; *Daniels v. National Employee Benefit Servs., Inc.*, 858 F. Supp. 684, 690 (N.D. Ohio 1994) (individual and insurance consulting firm qualified as fiduciary to plans with respect to investment of plan assets); *Johnson v. Georgia Pacific Corp.*, 19 F.3d 1184, 1199 (7th Cir. 1994) (for purposes of ERISA, a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control); *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1130–32 (7th Cir. 1983) (insurer not a fiduciary in determining its compensation though a fiduciary in deciding benefit claims); *Beddall v. State Street Bank & Trust Co.*, 137 F.3d 12 (1st Cir. 1998) ("fiduciary status is not an all or nothing proposition"); *Moench v. Robertson*, 62 F.3d 553, 561 (3rd Cir.1995), *cert. denied*, 516 U.S. 1115 (1996) (fiduciary status under ERISA is not "all or nothing" concept); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 US 1089 (1987) (trustee's authority in other matters did not make them fiduciaries with respect to matters over which they had no authority); *Arakelian v. National W. Life Ins. Co.*, 680 F. Supp. 400 (D.D.C. 1987) (ERISA ties fiduciary status of an entity to its responsibilities under the plan).

[4] Preamble to ERISA § 404 Regulation, 44 Fed. Reg. 37,221, 37,225 (June 26, 1979).

[5] ERISA § 404(a).

[6] ERISA § 404(a)(1)(A).

[7] *Id*.

[8] *See, e.g., Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (prudence involves an examination of whether the trustees "employed the appropriate methods to investigate the merits of the investment and to structure the investment"); *Donovan v. Walton*, 609 F.Supp, 1221, 1238 (S.D. Fla. 1985), *aff'd sub nom., Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986); *Eyler v. Comm'r of Internal Revenue*, 88 F.3d 445, 454 (7th Cir. 1996); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007).

[9] 29 C.F.R. § 2550.404a1(b)(1).

[10] *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434–35 (3d Cir. 1996).

[11] *See, e.g., Tibble v. Edison Int'l*, 133 S.Ct. 1823 (2015).

[12] *Tibble*, 133 S.Ct. 1823. *See also* DOL Fact Sheet: Target Date Retirement Funds-Tips for ERISA Plan Fiduciaries (Feb. 2013).

[13] ERISA § 404(c)(1).

[14] ERISA § 404(c)(1).

[15] ERISA §§ 404(c)(2) - (4); 29 C.F.R. § 2550.404c-1-4.

[16] 29 C.F.R § 2550.404c–5.

[17] *See, e.g., Harris Bank and Trust v. Saloman Bros.*, 17 EBC 1390 (N.D. Ill. 1993).

[18] ERISA § 3(38).

[19] Interpretative Bulletin 95-1, 29 CFR § 2509.95-1.

[20] Pension Protection Act of 2006 § 625.

[21] 29 CFR § 2550.404a-4(b)(1).

[22] 29 CFR § 2550.404a-4(b)(2).

[23] 29 CFR § 2550.404a-4(b)(3).

[24] 29 CFR § 2550.404a-4(b)(4).

[25] 29 CFR § 2550.404a-4(b)(5).

[26] 29 CFR § 2550.404a-4(c).

[27] *Id*.

[28] The Setting Every Community Up For Retirement Enhancement Act of 2019, Pub. L. 116-94, §§ 101-404, 133 Stat. 3137-3180 (page 4 of section-by-section summary of Richard E. Neal, Chairman, H. Comm. on Ways and Means).

[29] ERISA § 402(c)(3).

[30] 29 C.F.R. § 2550.404c-5(e)(4)(vi).

[31] 72 Fed. Reg. at 60461.

[32] DOL Info Ltr. to M. Iwry (Oct. 23, 2014).

[33] DOL Info. Ltr. to C. Spence (Dec. 22, 2016)(stating that "[t]he use of unallocated deferred annuity contracts as fixed income investments" would not cause the funds to fail to be a target date fund under the QDIA regulations).

[34] *Id*.

[35] *Id*.

[36] A conforming amendment was also made to Code section 401(k)(2), pertaining to qualified plans with cash or deferred arrangements.

[37] Sub-paragraphs (iii) through (vi) of Tax Code section 402(c)(8) describe, respectively, section 401(a) qualified trusts, section 403(a) annuity plans, section 457(b) governmental plans, and section 403(b) annuity contracts.

[38] 85 Fed. Reg. 59132 (Sept. 18, 2020).

[39] DOL, Temporary Implementing FAQs: Pension Benefit Statements – Lifetime Income Illustrations Interim Final Rule (July 26, 2021).

[40] Note that this liability relief applies irrespective of whether the lifetime income stream that is illustrated is required to be provided as part of the participant benefit statement. Hence, the same protections would be available where plan fiduciaries and others providing lifetime income disclosures more frequently than annually or outside of the pension benefit statement, so long as they are computed using the assumptions prescribed by DOL and the explanations required by the model illustration.