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SECURE Act and Guaranteed Income (Part 1)

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There are two parts of the SECURE Act that I believe will have the greatest impact on plan sponsors and service providers.

- The first part includes the provisions on retirement income, including the safe harbor for selecting a guaranteed income provider, the ability to distribute guaranteed income investments if a plan no longer want to offer those products, and a new requirement to give participants projection of their retirement income.
- The second impactful part is the authorization of Open MEPs (Multiple Employer Plans), which the law calls "PEPs" (or Pooled Employer Plans). That change will allow plans that can be adopted by multiple unrelated employers, transferring much of the fiduciary responsibility onto the sponsor of the PEP, which could be, *g.*, a financial institution, a recordkeeper or an advisory firm.

This article discusses the fiduciary safe harbor for selecting the provider (*e.g.*, insurance company) for a guaranteed retirement income product. The other provisions will be discussed in future articles.

The SECURE Act amends ERISA to create a fiduciary "safe harbor" for the selection of the provider of the guaranteed retirement income (that is, the insurance company). To qualify for the safe harbor, plan fiduciaries must satisfy three steps:

- **Identify the Insurer**. Conduct a search to identify insurers for "guaranteed retirement income contracts." While there isn't any guidance on the extent of the search, an evaluation of several insurance companies who provide competitive products should be enough to inform fiduciaries of the available products, pricing, etc.
- **Insurance Financial Strength.**Consider the "financial capability" of the insurer to satisfy its obligations under the guaranteed retirement income contract. This is the consideration that many believe has limited the use of insurance products in retirement plans. As a result, the new rule provides a safe harbor for this step. This is accomplished through a checklist approach. The SECURE Act says that the fiduciaries can satisfy that requirement by obtaining "written representations" from an insurance company that:

1. The insurer is licensed to offer guaranteed retirement income contracts;
2. The insurer satisfies the following at the current time and for the preceding seven years:
    - operates under a valid certificate of authority from its State insurance commissioner;

    - has filed compliant audited financial statements;
    - has maintained adequate statutory reserves for all States where the insurer does business;
    - is not operating under an order of supervision, rehabilitation, or liquidation;
3. The insurer undergoes, at least every five years, a financial examination by its State insurance commissioner; and
4. After receiving those representations, the plan fiduciaries have not received any subsequent notice that the insurer is under supervision, rehabilitation, or liquidation and the fiduciaries do not have any other information which would cause them to question the representations.

That's it . . . the fiduciaries need to get a letter or other document from the insurer with those representations. There isn't a requirement to evaluate the information. The fiduciaries just need to make sure that the representations match up with the requirements in the statute. That creates a fiduciary safe harbor for selecting the insurance company.

- **Consideration of Fees and Costs**. The third requirement is that the plan fiduciaries consider "the cost (including fees and commissions) of the guaranteed retirement contract" in relation to the product features, benefits and administrative services under the contract. Based on that analysis, the fiduciaries must decide if the costs and fees are reasonable. However, there is not an obligation to choose the lowest cost product.

Generally stated, the reasonableness of costs is determined by the competitive marketplace. For example, in my experience the costs of GMWBs (Guaranteed Minimum Withdrawal Benefits) in 401(k) plans—one form of a guaranteed retirement income contract—fall within a range of 60- to 100-basis points per year. It's also my experience that the features of the more expensive GMWBs are more robust than the lower cost ones, justifying the cost difference.

In any event, the fiduciaries—probably with the assistance of their consultants or advisors—will need to gather and evaluate information about the costs of the retirement income products (and determine that the costs are reasonable) before including the contracts on the plan's recordkeeping platform for participant selection.

- **Consideration of Contract Features**. While the new rules don't specifically require that fiduciaries consider the features of the contract and determine whether they are appropriate for the participants, such a review would be consistent with general fiduciary principles. The rules do require, though, that the fiduciaries evaluate the cost in light of "the benefits and product features of the contract," which, at the least, requires that the plan fiduciaries examine and understand the product benefits and features.

Concluding Thoughts

This change provides a safe harbor for fiduciaries in the selection of providers (*i.e.*, insurance companies) for retirement income guarantees for participants. That is welcome relief. Hopefully, it will lead to more plans offering guaranteed retirement income for participants who need and want that protection.

However, plan fiduciaries will still need help in complying with their responsibilities under these rules. They will need help in determining if the information from insurance companies satisfies the "checklist" and in evaluating costs. Plan consultants and advisors should provide that service.

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