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Guaranteed Lifetime Income

Plan fiduciaries have a safe path to offering the products and features.

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Plan sponsors, since the 2009 financial crisis, have increasingly recognized the benefits of adding, to defined contribution retirement plans, lifetime income products and features, which can help keep participants from outliving their retirement savings. And in recent years, a plethora of insured lifetime income products and features have entered the retirement marketplace. They include payout options such as annuities and also often serve as a key component of a participant's investment portfolio by inclusion in the plan's qualified default investment alternative or by otherwise guaranteeing a portion of the participant's account balance, a minimum rate of return on a portion of the account balance, or a minimum payment of retirement benefits even if the account is depleted.

Yet, plan sponsors, fiduciaries and their advisers may have concerns about increased exposure to fiduciary liability under the Employee Retirement Income Security Act by including such products and features in their 401(k) plan. They also may question whether they may remove such products and features from a plan at some point without violating the Internal Revenue Code.

In passing the Setting Every Community Up for Retirement Enhancement Act of 2019, Congress created some assurances for plan sponsors, fiduciaries and their advisers that they may include such products and features in their plans while still meeting certain fiduciary requirements. These SECURE Act provisions, in addition to long-standing fiduciary principles and Department of Labor

guidance, plus IRC provisions and IRS guidance as to lifetime income products and features, provide paths to compliance.

In selecting lifetime income products and implementing their features, a plan fiduciary must comply with his fiduciary duty of prudence under ERISA. Therefore, in the case of an insured lifetime income product or feature, the fiduciary must ensure that the insurance company can meet its obligations now and, possibly, for many years into the future. In this regard, Section 209 in the SECURE Act effectively provides a safe harbor when a fiduciary selects a "guaranteed retirement income contract" on behalf of a DC plan. The definition of GRIC can be broadly interpreted to include many lifetime income products and features.

Congress stated that the purpose of this provision was to alleviate key concerns expressed by plan fiduciaries regarding their fiduciary obligations to select and monitor insurance company issuers of GRICs. Congress reasoned that most plan fiduciaries and their advisers will find meeting the safe harbor's requirements easier than complying with the DOL's Interpretive Bulletin 95-1.

Additionally, when considering whether a plan should include lifetime income options, some plans want assurance that they may stop providing the benefit or feature at some point without violating the IRC. SECURE Act Section 109 addresses this concern, amending the IRC to provide two different mechanisms to address portability should a plan end its lifetime income offering. The first mechanism allows for a direct trustee-to-trustee transfer by a plan of a lifetime income investment option to an eligible retirement plan—e.g., another qualified plan or an individual retirement account. The second permits a plan to allow for the distribution of a lifetime income investment in the form of a qualified plan distribution annuity contract as defined in the statute. Both mechanisms apply even if the participant does not terminate from employment and thus has no distribution event.

While these SECURE Act provisions are helpful, it is also important to recognize that long-standing authorities interpreting ERISA and the IRC support the inclusion of lifetime income products and features in a plan. For example, the fees and other compensation associated with insured lifetime income products

or features embedded in plan investment options may be higher than those charged in connection with other investment options.

Yet, such fees and compensation should not preclude a plan from making such products available. Rather, the plan fiduciary should engage in a process whereby it determines that the compensation and other pertinent fees are reasonable in light of the product's benefits and the comparable costs for competitive products. If fiduciaries lack the necessary expertise to evaluate the fees and other compensation, they may hire a qualified adviser to help them.

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