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Lifetime Income

Groups Say Lifetime Income Guidance Should Be Flexible, Provide Protections

Any guidance promulgated by the Department of Labor's Employee Benefits Security Administration on lifetime income illustrations should be optional for retirement plans and provide fiduciary protections, retirement and financial industry groups say in comment letters.

"The current voluntary [retirement] system has been very effective in encouraging innovation in retirement plans. This has been critical given the diverse nature of workers that are covered by the system. The Department should continue to foster this innovation instead of imposing a mandate on plans. Furthermore, we are concerned that the method by which the Department would impose a mandate . . . exceeds the Department's statutory authority," an Aug. 7 comment letter from the ERISA Industry Committee in Washington said.

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—ERISA INDUSTRY COMMITTEE

The American Benefits Council in Washington also expressed concern in an Aug. 7 letter about the prospect of requiring a lifetime income projection on retirement benefit statements, saying its members "remain concerned about mandates rather than voluntary disclosures, and [ABC] would instead recommend that the DOL encourage this disclosure by, for example, providing models and on-line resources such as the on-line calculator created by the DOL as part of this project."

On May 7, DOL announced in an advance notice of proposed rulemaking that it was considering a proposal that would require that pension benefit statements for defined contribution plans include lifetime income illustrations (89 PBD, 5/8/13; 40 BPR 1150, 5/14/13). Under DOL's contemplated proposal, a pension benefit statement for defined contribution retirement plans would show the current balance of a participant's retirement account, as well as a projected account balance at retirement. The statements also would include two lifetime income illustrations that would be based on the current balance of a participant's retirement account and the participant's projected account balance "at normal retirement age."

The comment deadline was initially July 8, but DOL later extended that to Aug. 7 (125 PBD, 6/28/13; 40 BPR 1574, 7/2/13).

J.P. Morgan Retirement Plan Services and Boston-based Fidelity Investments also had reservations about making mandatory the inclusion of lifetime income projections on tax code Section 401(k) statements. An Aug. 5 letter from J.P. Morgan said that "[i]mposing a mandate that participant statements include a lifetime income projection could have the unintended consequence of limiting the use and effectiveness of many of the industry tools currently available. . . . J.P. Morgan suggests that the Department take steps to encourage rather than require illustrations on pension benefit statements."

Fidelity's Aug. 1 letter questioned DOL's authority to "mandate the additions to benefit statements proposed" in the advance notice. Fidelity also reflected on its recent experience with DOL's participant disclosure requirements under Section 404 of the Employee Retirement Income Security Act, saying that "information provided in a static format does not promote participant engagement. As an equally important consideration, the disclosures that would need to accompany the projections and illustrations would greatly add to both the length and complexity of participant statements, increasing the risk of reader disengagement from any of the information provided on the statement."

Fiduciary Concerns. Several groups also worried that regulations requiring lifetime income projections and calculations might open up employers and plan sponsors to fiduciary liability if plan participants did not achieve a projected account balance upon retirement.

A July 31 letter from the SPARK Institute in Simsbury, Conn., asked DOL to "issue guidance that expressly states that offering, making available or providing lifetime income illustrations, in accordance with such guidance (1) is participant education, (2) will not constitute the provision of investment advice or any

other fiduciary act under ERISA, and (3) does not constitute the offering or promise of any benefit under a plan.”

SPARK said that many of its members, including recordkeepers and “lifetime income product providers,” indicated that plan sponsors have reservations about providing lifetime income illustrations to plan participants. DOL guidance explicitly stating that these illustrations are considered participant education, and not advice, would allay many of the organization’s concerns, it said.

The letter suggested that DOL consider issuing guidance similar to that in Interpretive Bulletin 96-1 concerning what investment-related information may be provided to pension plan participants and beneficiaries without giving “investment advice.”

ERIC also suggested that DOL develop guidance similar to the interpretive bulletin, as did Fidelity. “Plan sponsors could be encouraged to provide these projections by alleviating concerns they may have that doing so increases their fiduciary liability. In Interpretive Bulletin 96-1, the Department provided valuable guidance to plan sponsors and service providers on the distinction between investment education and investment advice,” Fidelity said.

Safe Harbor Concerns. Groups also expressed concern about the safe harbors featured in the advance notice of proposed rulemaking and said they worried that any safe harbor prescribed by DOL would hinder innovation, because plans will want to adhere strictly to the safe harbors and not veer in a direction that could open them up to regulatory enforcement or other liabilities.

The advance notice contemplated a “general rule” that would be combined with a regulatory safe harbor. The general rule would provide that lifetime income projections included on pension benefit statements would “be based on reasonable assumptions taking into account generally accepted investment theories.” The safe harbor in the notice is “narrower and more prescriptive than the general rule” and would provide a set of assumptions for participant contributions, as well as for returns and inflation, DOL said in the advance notice.

SPARK said that any “guidance, requirement or safe harbor should avoid endorsing or appearing to endorse particular approaches, methodologies, variables or assumptions over any others that are reasonable.” The group said it had misgivings about the “approaches, methodologies, variables and assumptions that appear to be favored by the Department” in the advance notice because they may “become the primary, or possibly the only, way that plan sponsors will be willing to provide income illustrations and planning tools.”

SPARK said it feared that plan sponsors will only provide “those illustrations and tools that conform to the Department’s specified approach because of their concerns that doing anything more would subject them to potential liability.”

ERIC suggested that employers and service providers would cling to safe harbors, which would “stifle innovation with respect to participant disclosures in this area. The result will be that the vast majority of companies and service providers will focus on satisfying any safe harbor provided by the Department, instead of continually experimenting with new ways to educate and engage their workers regarding retirement savings.”

J.P. Morgan’s letter echoed SPARK’s and ERIC’s concerns, citing the retirement industry’s past reliance on other safe harbors, specifically those for automatic enrollment in retirement plans. “As the industry’s experience with automatic enrollment has demonstrated, plan sponsors tend to gravitate toward safe harbors. After the Department approved a 3% initial default rate for plans with automatic enrollment, a 3% rate became the industry standard,” it said.

“A mandate and a safe harbor with respect to lifetime income projections could drive plan sponsors away from tools representing current best practices and cause plan sponsors to gravitate toward a safe harbor that may not be as effective in helping participants make informed decisions,” J.P. Morgan said. “There is a risk that the safe harbor would be viewed as the Department’s sanctioned method of calculation. This could give plan sponsors the impression that moving beyond the safe harbor would expose them to greater fiduciary liability, which we do not believe is the Department’s intent,” J.P. Morgan said.

An Aug. 2 letter from the Pension Rights Center and National Women’s Law Center, both in Washington, praised the safe harbor assumptions included in the advance notice, saying DOL chose “reasonable, well-publicized government figures for the safe harbor. This is important to participants who will be on the receiving end of the calculations.” However, the groups said they felt the safe harbor assumptions that DOL suggested for projected account balances were “overly optimistic and thus the average plan participant approaching retirement could find that the actual balance at retirement is much less than anticipated.”

DOL Calculator. Many groups suggested that DOL make the lifetime income calculator it posted when the advance notice came out a more prominent feature of its lifetime income initiative.

“As an alternative to mandating the inclusion of projections on statements, the Department could require those plan sponsors not currently offering projections to include language on the statement directing participants to the interactive online calculator that the Department designed to meet the assumptions under the proposed safe harbor and currently makes available on its website,” J.P. Morgan said.

An Aug. 7 letter from the American Society of Pension Professionals and Actuaries in Arlington, Va., also recommended that DOL’s calculator be a bigger part of the lifetime income initiative, saying benefit statements should “strongly encourage participants to enhance and individualize the calculation assumptions by utilizing the online calculator provided by the DOL or a private service provider.”

BY KRISTEN RICAURTE KNEBEL

The full text of the letters are at: ABC (<http://www.dol.gov/ebsa/pdf/1210-AB20-00097.pdf>); ASPPA (<http://www.dol.gov/ebsa/pdf/1210-AB20-00090.pdf>); ERIC (<http://www.dol.gov/ebsa/pdf/1210-AB20-00111.pdf>); Fidelity (<http://www.dol.gov/ebsa/pdf/1210-AB20-00073.pdf>); J.P. Morgan (<http://www.dol.gov/ebsa/pdf/1210-AB20-00079.pdf>); Pension Rights Center (<http://www.dol.gov/ebsa/pdf/1210-AB20-00077.pdf>); SPARK (<http://www.dol.gov/ebsa/pdf/1210-AB20-00074.pdf>).