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Plan Funding

Senators' De-Risking Letter Adds Weight To Growing Issue, Concerns, Observers Say

A recent letter sent by two Senate Democratic committee leaders asking several federal agencies to develop regulatory policy on de-risking pension plans adds some heft to the issue, but there are already some regulatory provisions in the law addressing their concerns, practitioners said.

''It's an interesting letter. A lot of the participant disclosure they're asking for is already in the law,'' said Rosina B. Barker, a partner at Ivins, Phillips & Barker Chartered in Washington. ''But I don't think anybody thinks it's a bad idea to always revisit the question of whether participants who are asked to decide whether or not to take a lump sum should be given even more information. So I think that those are always good questions for the agencies to be asking themselves, because it's an important decision.''

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—Rosina B. Barker, Ivins, Phillips & Barker

In a letter dated Oct. 22 to the departments of Treasury and Labor, the Pension Benefit Guaranty Corporation and the Consumer Financial Protection Bureau, Sens. Tom Harkin (D-Iowa) and Ron Wyden (D-Ore.) asked the agencies to craft guidance on de-risking in a way that recognizes ''the rights of employers to terminate parts of their plans but in a way that does not increase the risks or reduce the benefits promised to workers and retirees'' (205 PBD, 10/23/14).

Harkin is the chairman of the Senate Health, Education, Labor, and Pensions Committee, and Wyden is the chairman of the Senate Finance Committee.

The senators expressed concern with the ''new forms of de-risking activities that allow employers to off-load their pension risks and liabilities, either onto an insurance company or onto individuals by offering lump-sum buy-outs to retirees who are already receiving monthly benefits for life.''

The suggested guidance should feature provisions that require plans to give advance notice of de-risking moves to participants and the federal government, as well as informing participants of the risks, the loss of ''spousal and PBGC protections,'' and the limitations of state guaranty corporations, the letter said.

The guidance also should look at new guidelines for employers when choosing an annuity provider to ensure that the annuities offered replicate as many protections under the Employee Retirement Income Security Act as possible, the lawmakers said. Such guidance should also require disclosures to participants who are offered a lump-sum distribution that warn them of the risks of outliving their money and the taxes involved in taking the lump-sum distribution, the letter said.

Barker said by law, participants have to be notified of the ''tax consequences of the lump sum distribution'' and a participant's spouse has to consent to the lump-sum distribution as well as acknowledge that he or she is giving up the right to a survivor benefit.

''There's certainly no specific warning required about the risks of outliving assets. Nor is there any requirement to inform participants that an annuity distribution form may not offer adequate inflation protection. These questions about what participants should be invited to think about when asked to make an election are worth revisiting,'' Barker said.

Significant Letter. Karen Friedman, executive vice president and policy director at the Pension Rights Center, said that the letter is significant because it expresses concerns about the impact de-risking has on plan participants.

The letter also ''asks the relevant agencies to provide guidance that protects the interests of workers and retirees when these transactions occur,'' she said. ''We applaud the senators for raising these concerns and asking the agencies to do what is necessary to protect participants, including requiring clear disclosures to participants about the risks of both annuity-transfers and lump sum buyouts, and examining new standards when a company buys an annuity to ensure that retirees have equivalent ERISA protections.''

When asked why the letter was sent now, when the issue has been on the radar of several federal agencies for a few years (216 PBD, 11/7/13; 186 PBD, 9/25/14; 119 PBD, 6/20/14; 40 BPR 2605, 11/12/13; 41 BPR 2030, 9/30/14 ; 41 BPR 1275, 6/24/14), a Wyden spokesman said ''the letter was sent to emphasize that Senators Wyden and Harkin consider this a significant matter and would like to see the agencies move forward

quickly, in addition to outlining several specific characteristics any forthcoming guidance should include.''

The PBGC said in a statement: ''We have been monitoring this issue and are looking into the recommendations provided in the letter.''

The DOL confirmed that it received the letter, but declined to comment. Treasury and the CFPB didn't return requests for comment.

The DOL's ERISA Advisory Council examined de-risking practices during its 2013 meetings, with the council recommending to the agency that defined benefit plans that provide participants with an option of a lump-sum distribution within a specified window—with or without a separate option of an annuity—should provide disclosures with no less than 90 days' notice that are similar to plan termination disclosures (216 PBD, 11/7/13; 40 BPR 2605, 11/12/13).

The PBGC said in a recent notice announcing its intention to request modifications of an information collection that it aims to propose revising the 2015 premium filing procedures and instructions to require ''reporting of certain undertakings to cash out or annuitize benefits for a specified group of former employees'' (186 PBD, 9/25/14; 41 BPR 2030, 9/30/14).

In May, the IRS issued five private letter rulings allowing defined benefit plans to offer lump-sum benefit distributions to participants already receiving benefits. Practitioners said that those rulings are likely to encourage more employers to jump on the de-risking bandwagon, especially at a time when many employers are expressing interest in decreasing the impact of plan risks on their balance sheets (119 PBD, 6/20/14; 41 BPR 1275, 6/24/14).

By Kristen Ricaurte Knebel

To contact the reporter on this story: Kristen Ricaurte Knebel in Washington at kknebel@bna.com

To contact the editor responsible for this story: Sue Doyle at sdoyle@bna.com

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