

December 11, 2024

ERISA Advisory Council
U.S. Department of Labor
300 Constitution Avenue, NW
Washington, DC

Dear ERISA Advisory Council chairs and members:

The Pension Rights Center is writing to express its strong concerns about draft recommendations being considered by the ERISA Advisory Council Subcommittee on Qualified Default Investment Alternatives (QDIAs) that the Center believes would substantially weaken longstanding fiduciary responsibility for the prudent selection and monitoring of participant and beneficiary default investments, and propose unprecedented shortening of timeframes for judicial oversight of fiduciary compliance. The Pension Rights Center is a national nonprofit, nonpartisan consumer organization committed to protecting and promoting the retirement income security of workers, retirees and their families.

As we stated in our October statement to the Council, the Center believes it is generally premature to recommend the incorporation of lifetime income features in retirement plan QDIAs because there are many critical unresolved issues and questions as to the efficacy of defaulting participants into lifetime insurance products. The median 401(k) plan participant account balance is only \$35,286, an inadequate lifetime payment amount for most participants. For the minority of participants with more substantial account balances, the Center believes the Council should consider an initial recommendation that plans offer participants a choice to purchase a full or partial lifetime annuity with adequate consumer protections, including pro and con disclosure and initial employment and retirement age purchase options.

As our statement noted, there are substantial differences between pooled, group defined benefit plans and individualized retirement programs, such as 401(k) plans. In the former, employers generally make contributions on behalf of the general group of employees. In individual account plans, employee earnings compose most or all of the monies that must be invested and thus, require personalized strategies. Different individuals will have different needs in terms of how much of their savings should be annuitized. There is simply too much variation in individual needs to default participants into a single type of annuity product. And shorter-lived individuals, often lower income, disabled, and minorities, will subsidize longer lived participants.

There are dozens of types of commercial annuity products and plan fiduciaries are legally obligated to prudently select and monitor each product, whether selected separately or as part of a pooled investment or QDIA. ERISA requires plan fiduciaries, and their designees, to examine the safety and nature of any annuity arrangement with care and prudence. Most participants will lack the information and skills to assess the safety, value, costs and benefits of such products.

The Center has reviewed the Council's proposed recommendations and supports its proposal that EBSA issue "tips" for plan fiduciaries to consider decumulation options inside and outside of a

QDIA. EBSA tip sheets have been well regarded by both consumers and industry and serve to lessen litigation. The Center also supports additional guidance to plan sponsors, fiduciaries and plan advisers, to improve participant education and disclosure. The Council and EBSA should require that all information be in the form most likely to reach participants and not simply be posted in computer portals that few participants read.

The Center, however, would strongly oppose any recommendation that would permit the mere posting or delivery of a QDIA notice to trigger the statute of limitations for fiduciary breaches. The perceived need to encourage decumulation options in a QDIA does not warrants reduction in participant legal rights. Moreover, the Supreme Court has already made plain that knowledge under ERISA means actual knowledge, not imputed knowledge.

In addition, the sponsor has a continuing duty to monitor any insurance company selected and a statute of limitations short trigger might be construed to limit or eliminate the fiduciary's continuing duty to monitor an annuity provider it selects.

We appreciate the Council's desire to improve the ability of 401(k) type plans to provide lifetime payment options to participants and beneficiaries but do not believe that regulatory or statutory changes are called for at this time. For the same reasons that expanding participant ability to have access to lifetime income options within a plan is desirable, having meaningful fiduciary consideration of such options is critical before they are added to a plan's menu of participant choices. It is too important an area to relax fiduciary standards or to restrict reasonable access to the courts.

Sincerely,

Karen Friedman
Executive Director

Norman Stein
Senior Policy Advisor