Retirement Income Solutions in QDIAs: What Are the Impediments?

BY TED GODBOUT | JULY 11, 2024

RETIREMENT INCOME

Wrapping up a three-day hearing before the ERISA Advisory Council, Bonnie Treichel of Endeavor Retirement and Tom Clark of the Wagner Law Group shared their perspectives on the litigation and regulatory challenges, as well as opportunities underlying the use of retirement income solutions (RIS) as part of a qualified default investment alternative (QDIA).

"Lifetime Income and Qualified Defined Investment Alternatives" is one of the two **study topics[1]** that the 15-member Council is considering for 2024. To that end, the Council is studying the effectiveness of QDIAs in both accumulation and decumulation phases of retirement—starting with the Labor Department's issuance of final rules in 2007 through changes prompted by SECURE (lifetime income fiduciary relief) and SECURE 2.0 (automatic enrollment mandate for new plans).

In addressing the statutory and regulatory safe harbors for RIS, Treichel—who is Founder and Chief Solutions Officer of Endeavor Retirement, and who served as a subject matter expert for NAPA's Retirement Income for 401(k) Plans (RI(k)) Certificate Course and PSCA's development of a retirement-income education program for plan sponsors—shared with the Council that, despite product evolution, there continues to be impediments to the implementation and adoption of RIS by both plan sponsors and participants.

While explaining that there are three main solution types—security-based, insurance-based and hybrid—Treichel focused her testimony primarily on insurance and hybrid solutions, noting that both have an underlying guarantee and have been the source of much innovation in recent years.

"One of the complaints of traditional RIS has been complexity. Some of the solutions remain complicated, but some of the solutions are becoming more straightforward—which will continue to be an opportunity for the adoption of RIS. Some solutions are now available as part of a TDF. They are structured in a way that does not feel like the complexity has dramatically increased for the plan sponsor, nor the participant," Treichel explained.

Portability to move solutions with the retained benefit has also been a historical cha[illegible] further noted. To that end, she suggested that it is important to consider portability [illegible] level, as well as the plan level, which reflects plan fiduciaries' ability to select a new

remains a powerful factor for retirement plan participants. Citing data by AllianceBernstein, she noted that incorporating insurance into a participant's asset allocation may improve sustainable withdrawal rates by 70% or more.

"If the marketplace believes in RIS options to achieve greater participant outcomes, then the ability to access RIS options as a QDIA is critical for adoption," Treichel suggested to the Council. She added that, "[w]hile additional guidance may not technically be required, there is a perception that the current guidance is not enough to make plan fiduciaries feel safe to use RIS as a QDIA."

As to recommendations, Treichel suggested having consistent language and education to assist the retirement plan industry with prudent selection, alongside implementation and adoption of RIS. "Education programs through the American Retirement Association and other objective third-party organizations will continue to support prudent decision-making by plan fiduciaries, but opportunities for collaboration and expansion of education efforts remain," she emphasized.

Transparency in fees to inform plan fiduciaries in their prudent selection and monitoring of RIS is another area ripe for opportunity. "The market demanded transparency [in CITs] and the solution evolved, which may be the case with RIS options. In the absence of such evolution, other avenues or guidance may be required in the future," the Endeavor executive further observed.

Litigation Risks?

For his part, Clark, who is a Partner and Chief Operating Officer of the Wagner Law Group, addressed the litigation risk associated with the use of QDIAs under ERISA, noting that, so far, the safe harbor appears to be a success.

"I was only able to identify three cases addressing the safe harbor since its passage," he explained, adding that in all instances, the courts found that it was available to insulate plan fiduciaries against claims that participants were harmed from a lack of choice over investment allocation.

"The relative low number of lawsuits challenging the applicability of the QDIA Safe Harbor suggests that it has been successful in one of its core goals of protecting plan fiduciaries from liability while also protecting plan participants from overly conservative investments," Clark told the Council.

In contrast, there have been dozens of lawsuits involving the prudence of including both off the shelf and custom TDFs. He added, however, that there has been a recent trend of decisions in favor of plan fiduciaries.

To that end, within the last year, multiple matters have gone through full bench trials that included prudence claims related to offering TDFs (as well as multiple summary judgment decisions), but in each trial, the plan fiduciaries ultimately prevailed, Clark noted. "The common theme has been that plan fiduciaries engaged in a comprehensive and robust procedurally prudent process that resulted in the selection of a substantively prudent investment in the best interests of plan participants."

As for annuity safe harbors for DC plans, he found no matters reported in either Westlaw or Lexis where the safe harbors were at issue. In noting that this is less surprising regarding the recent statu

- participants have not been harmed, and as such, there are no breach cases to bring.

Pointing to Treichel's testimony that the industry is going through a rapid expansion of product and terminology with an array of fee structures, the Wagner Law Group partner suggested this is no different from a litigation perspective than from other difficult decisions that plan fiduciaries must make.

"I believe that as we navigate the challenging issues identified by the Council regarding QDIAs, the employee benefits marketplace will ultimately lead us to prudent and appropriate products and services," Clark stated. "It will weed out those products and services that are too risky or do not meet the needs of plan participants. I caution against any kind of knee jerk reaction of trying to predetermine the balls and strikes and to try and inadvertently insulate plan participants and plan fiduciaries from innovation that may ultimately benefit all," he further emphasized.

As to specific recommendations, Clark suggested that any future guidance should emphasize robust disclosure to plan participants of the fiduciary process itself. "This not only benefits plan participants by demonstrating to them that QDIA vehicles have been selected in a way that is consistent with ERISA's fiduciary duties, it also addresses a major problem present today in ERISA litigation where federal pleading standards under Fed R. Civ. P. 12(b)(6), which governs motions to dismiss, does not allow plan fiduciaries the opportunity to cite to the process they engaged in until much later in the litigation at the summary judgment or trial phase, after expensive and disruptive litigation has occurred," he explained.

What's more, he suggested that any future guidance should seek a disclosure regime that seeks to meet the suggestions from the Supreme Court around circumstantial evidence to prove actual knowledge, as noted in *Intel Corp. Inv. Policy Comm. v. Sulyma*. "Such efforts should increase actual consumption of disclosures by plan participants while also benefiting plan fiduciaries by making the three-year statute of limitations more available as an affirmative defense," Clark stated.

Additional Witnesses and What's Next

In addition to Clark and Treichel testifying, other witnesses at the three-day hearing included Olivia Mitchell with the Wharton School, Michael Finke with the American College, Brad Campbell with Faegre Drinker, Greg Fox with Aon, Preet Prashar with Mercer, and Lew Minsky with DCIIA.

At the conclusion of the series of hearings throughout the year, the Council will then develop and approve recommendations based on the witness testimony, and present those findings to the Assistant Secretary of the Employee Benefits Security Administration for consideration.

Bonnie Treichel's testimony can be **found here**.

Tom Clark's testimony can be **found here**.

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[1] "Making Welfare Plan Claims and Appeals Procedures More Accessible to Participants" is the second topic.

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