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The Retirement Income Consortium

Practices for Providing Retirement Income to Participants in Defined Contribution Plans

A White Paper

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Overview

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The Retirement Income Consortium has published its Handbook "Prudent Practices for Retirement Income Solutions." The Handbook defines a fiduciary standard of excellence for the selection and monitoring of retirement income solutions for tax-qualified defined contribution retirement plans, such as 401(k) plans.

The Handbook's objective is to help plan sponsors and advisors prudently evaluate, select and oversee retirement income solutions. The 10 Practices described in the Handbook define a process that includes both legal requirements and best practices for such a process.

In turn, this white paper discusses the 10 Practices and how those Practices support compliance with the requirements that the Employee Retirement Income Security Act (ERISA) imposes on plan sponsors, fiduciaries and advisors. The paper also discusses best practices—actions and decisions that go beyond what the law requires—that plan sponsors and fiduciaries may choose to apply. Finally, the paper covers the non-fiduciary role of plan sponsors when they act in their capacity as "settlors" of their plans, and how plan sponsors can help implement retirement income solutions while acting in that non-fiduciary capacity.

The adoption of retirement income solutions is best achieved through a collaborative effort by plan sponsors and the plan fiduciaries, supported by consultation with, and advice from, the plans' advisors.

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The law and analysis contained in this white paper are current as of February 2023, are general in nature, and do not constitute a legal opinion that may be relied on by third parties. Readers should consult their own legal counsel for information on how these issues apply to their individual circumstances and to determine if there have been any relevant developments since the date of this paper. The factual descriptions and information in this White Paper are based upon information provided to us, and we have not undertaken an independent review of that information.

Introduction

In the United States over 10,000 baby boomers reach age 65 every day, which means that roughly 10,000 people are retiring each and every day.[1]

Many of those retirees were participants in defined contribution plans, such as 401(k) plans, and many more participants will be retiring from those plans in the years ahead. (The baby boomers will continue to retire in increasingly high rates until the generational end in 2030[2]).

Unfortunately, defined contribution plans, and in particular 401(k) plans, were not designed to provide retirement income security. Deferral-based plans, such as 401(k) plans, were initially intended to be "supplemental" savings plans — supplemental to defined benefit pension plans that provided guaranteed monthly benefits. As 401(k) plans grew in popularity, they eventually replaced pension plans as the primary American retirement plan. However, those plans were designed and operated as accumulation vehicles with little regard to the long-term need for secure income when participants retired.

While those plans have proven to be successful in helping workers accumulate money for retirement, that retirement income "hole" was not filled by legislators, regulators or, for that matter, the private sector, including plan sponsors. In other words, defined contribution plans, despite their success, need to evolve into truly being retirement plans. Fortunately, that process of change has started — change in the laws, practices and products needed to convert "savings" plans into "retirement plans."

Examples of legal changes include the provisions in the SECURE Act to require lifetime income illustrations for participants and to create a fiduciary safe harbor for the selection of insurance companies to provide guaranteed lifetime income products.

Examples of private sector changes include a variety of guaranteed insured income solutions (such as immediate or deferred fixed rate annuities), non-guaranteed investment-based income solutions (such as retirement income mutual funds and collective investment trusts), and hybrid income solutions (such as guaranteed lifetime withdrawal benefits (GLWBs) and fixed indexed and variable annuities).

Many plan sponsors are embracing the need for helping retired participants with the need for institutional quality and priced retirement income products and services.[3]

So, as the Bob Dylan song says, "The Times They Are A-Changin.'"

But one piece is still missing. And that missing piece is a set of clear guidelines for plan sponsors and fiduciaries, and their advisors, to follow in the selection of the type or types of retirement income products and services, and then in the selection and monitoring of the products or services to be offered to the participants.

Fortunately, the Retirement Income Consortium, with the leadership of Broadridge Fi360 Solutions, has developed a set of Practices and Commentary designed to support plan sponsors, fiduciaries and advisors down this new path of providing retirement income. Those Practices support a process that incorporates ERISA's fiduciary requirements and best practices.

This paper describes the 10 Practices and how those Practices support compliance with the legal requirements for plan sponsors, fiduciaries and advisors.

Practice 1

The first Practice covers the decision of whether a plan should offer retirement income solutions to its participants and, if so, which types of retirement income solutions.

Practice 1: The retirement plan sponsor determines, as a settlor function and consistent with the sponsor's objectives and the demographic profile of plan participants, whether the plan should offer one or more retirement income solutions.

1. As a business decision, a settlor may determine that the plan should include a retirement income solution.
2. The plan sponsor, as a settlor, should determine whether to offer one or more options; the plan sponsor may determine the types of solutions that are appropriate for inclusion in the plan.
3. The plan sponsor may review the demographics of the participants and objectives of the plan in addition to the plan sponsor's business objectives.
4. The plan sponsor may direct the fiduciary (or fiduciary committee) to further review retirement income solutions for inclusion in the plan.

Neither ERISA nor the Internal Revenue Code require that participants be provided with retirement income solutions or, for that matter, even with distribution flexibility in retirement. In fact, the plan documents for many defined contribution plans permit only lump sum distributions and required minimum distributions (RMDs).

However, as plan sponsors decide to transition their plans from designs that are suitable for only accumulation of benefits (that is, savings plans) to plans that are designed to provide retirement income (that is, retirement plans), they should engage in a process that considers the demographics of the employees who are participating in the plan and will likely need to amend their plan documents to reflect the decisions made.

In the process of making these decisions and amending the plans accordingly, plan sponsors will be acting as "settlors" as opposed to being fiduciaries. When acting as the settlors of their plans, plan sponsors will be able to make plan design decisions that best reflect the interests and culture of their companies and will not be subject to ERISA's standards of prudence and loyalty. In that regard, this approach could be viewed as a "best practice" that is above and beyond what the law requires. (For clarity, a "plan sponsor" acts through its Board of Directors, officers, partners, or managers, whichever the plan documents specify. If not specified in the plan documents, a plan sponsor likely acts through its Board of Directors or, for larger companies, through the Compensation Committee of the Board.[4])

The settlor decision in this context is whether the plan should offer retirement income solutions and, if so, which types of solutions. For example, a plan sponsor may determine that the plan should offer: (i) securities-based solutions, such as retirement income funds or managed accounts, (ii) pure insurance solutions, such as immediate fixed rate annuities or deferred fixed rate annuities, and/or (iii) hybrid insurance/securities solutions, such as GLWBs (Guaranteed Lifetime Withdrawal Benefits) or variable annuities. The outcome of this process would be a determination by the plan sponsor, in its settlor capacity, to offer one or more of these "types" of solutions. In other words, the plan sponsor could decide, as a non-fiduciary, whether to offer a retirement income solution and which type to offer, but not on the actual product or service to be used to provide that type of retirement income solution.

In some cases, where the plan documents already provide flexibility to the plan fiduciaries (e.g., plan committees) to add retirement income solutions, the fiduciaries can make the decision of whether to offer those solutions without the plan sponsor's involvement. In that case, the fiduciaries would be subject to ERISA's twin duties of prudence and loyalty.[5] However, that may not be a realistic approach since few plan documents actually offer that flexibility and since this decision could be viewed as a major departure from the original design and intent of the plan. In addition, fiduciaries may want the protection of the plan sponsor making the decision, since fiduciaries are generally obligated to follow

the terms of the plan unless it would be imprudent to do so. In that regard, ERISA section 404(a)(1)(D) provides that fiduciaries must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of" ERISA. While it is theoretically possible that the addition of a retirement income solution to a plan could be viewed as imprudent, as a practical matter it is hard to imagine a scenario where that would be true.

As a result, if the plan documents are amended by the plan sponsor, and the direction provided by the plan documents is otherwise consistent with ERISA's provisions (which they ordinarily would be), the fiduciaries are obligated to implement those terms. The implementation must be prudent (e.g., good quality and reasonably priced products and services must be selected), but under those circumstances, the fiduciaries would be legally obligated to implement the plan's direction to add retirement income solutions and to select the type of product or service specified in the plan. In other words, there is a degree of protection for plan fiduciaries.

Also, and as a practical matter, it is almost certain that the plan document would also need to be amended by the plan sponsor, as settlor, for reasons such as: (i) to allow monthly distributions, (ii) to allow special distributions, and (iii) to allow participants to make changes to the amounts and timing of distributions.

In other words, the decision to have retirement income solutions and its implementation requires a collaborative effort by plan sponsors and fiduciaries.

In making that decision, even in its capacity as settlor, a plan sponsor will likely, as a best practice, want to consider the demographics of the work force covered by the plan. The obvious questions are, which types of retirement income solutions will best fit the needs of the participants; which types will be easily understood and used by retirees; should the plan have more than one type of solution because of differing characteristics of the covered workers?

In the past, and in a fiduciary context, the DOL has pointed out the importance of looking at participant demographics. One example is the DOL's "Target Date Retirement Funds-Tips for ERISA Plan Fiduciaries," where it said: "You should consider how well the TDF's characteristics align with eligible employees' ages and likely retirement dates. It also may be helpful for plan fiduciaries to discuss with their prospective TDF providers the possible significance of other characteristics of the participant population, such as participation in a traditional defined benefit pension plan offered by the employer, salary levels, turnover rates, contribution rates and withdrawal patterns."[6]

Similarly, in the Preamble to its Qualified Default Investment Alternative (QDIA) regulation, the DOL said, when discussing the balanced fund alternative: "…the second alternative requires a fiduciary to take into account the demographics of the plan's participants …"[7]

While the DOL's guidance is for fiduciaries, and plan sponsors in their role as settlors are not required to make those considerations, it makes sense that a retirement income solution should be appropriate for the covered workforce, or in other words, for the demographic characteristics of the participants.

Finally, a plan sponsor, after making the decision, will likely need to amend the plan accordingly. The amendment of a plan is a settlor decision and not a fiduciary act. However, once amended, the fiduciaries are obligated to follow the terms of the plan, unless it would be imprudent to do so.

In addition, and while not binding on a plan committee or other fiduciary, the plan sponsor may direct the fiduciaries to consider the inclusion of retirement income solutions in the plan. Those directions can serve to focus the fiduciaries on the issue of retirement income for participants and inform the fiduciaries of the interests of the plan sponsor. In return, the fiduciaries can study the issues and alternatives and report back to the plan sponsor as a part of a collaborative process for reaching a decision about whether to provide retirement income to participants and, if so, what types of retirement income solutions to provide.

Practice 2

The second Practice covers the responsibility of a plan's fiduciaries, in collaboration with the plan sponsor, to review the plan documentation and materials for their consistency with the plan sponsor decision and for appropriate implementation of the plan sponsor's decision.

Practice 2: Plan fiduciaries, in collaboration with the plan sponsor, ensure that applicable documents governing the operation of the plan permit the type(s) of retirement income solutions under consideration to be selected, adjusting as required.

1. Plan fiduciaries should review the plan documents to ensure that their decisions related to selection of retirement income types and solutions will be compliant with ERISA and the Internal Revenue Code.
2. Service agreements and other documentation establishing and governing retirement income solutions in the plan conform to ERISA obligations and the objectives of the plan sponsor.
3. Retirement plan consultants, advisors and attorneys should be able to assist the plan sponsor in identifying any changes in plan documentation that are likely to be necessary to accommodate retirement income solutions.
4. Plan fiduciaries should update communications such as the Summary Plan Description (SPD) and other participant communications that necessitate revisions to accommodate retirement income solutions.
5. Documents pertaining to the selection and oversight of retirement income types and solutions, including records of decisions by plan fiduciaries, are secure and readily and reliably accessible by authorized persons.

When fiduciaries have been informed of the plan sponsor's decision to include retirement income and of the types of retirement income solutions to be considered, and provided with the plan amendment to that effect, the first step is to determine whether the decisions are compliant with ERISA and the Internal Revenue Code. As described in Practice 1, fiduciaries have an obligation to follow the terms of the plan documents, unless it would be imprudent to do so. (Fiduciaries must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of" ERISA.[8])

In other words, the fiduciaries, such as committee members, must determine whether the provisions in the plan "documents and instruments are consistent with the provisions of" ERISA. While that is an explicit legal requirement, it is difficult to imagine a plan requirement that retirement income products or services be provided to participants would be imprudent or disloyal. Similarly, it is highly unlikely that a provision that directs the plan fiduciaries to select a particular type of retirement income product or service would be imprudent. Nonetheless, a plan's fiduciaries should consider both of those issues and make a determination about whether implementation of the directions would be inconsistent with ERISA's standards.

In addition, plan fiduciaries should consider whether a plan provision can be implemented without violating the Internal Revenue Code's tax qualification rules. Generally speaking, if the plan (or, in the case of an amendment to the plan, the amendment) has received a favorable determination letter (or similar IRS affirmation of the plan's qualification), the fiduciaries could proceed with the implementation of its provisions. Otherwise, the fiduciaries should consult with their attorneys.

As a practical matter, a plan's consultants, advisors and attorneys should be able to help plan fiduciaries and sponsors determine whether any changes to the plan documents are needed. For example, the plan may need to be amended to be consistent with the plan sponsor's decision to provide one or more specific types of retirement income solutions. Also, the plan may need to be amended to permit monthly (or other periodic) distributions in retirement, as well as to allow for special, or unscheduled, withdrawals by participants.

Once those steps are completed, the fiduciaries should review existing agreements and arrangements to determine whether

the provisions can be implemented under those agreements and arrangements. For example, does the agreement with the plan's recordkeeper and administrator contemplate that their services will support the type(s) of retirement income solutions being contemplated? If not, the fiduciaries should explore appropriate amendments to the agreements and, if the provider is unwilling, consider whether to change service providers. Similarly, does the agreement with the plan's consultant or advisor contemplate services related to retirement income solutions? If not, should the agreement be amended or is another consultant needed for the retirement income solutions?

Plan fiduciaries should then focus on legally required participant communications, such as the Summary Plan Description and the 404a-5 disclosures.[9] To the extent needed, all such communications and disclosures should be updated and provided to participants at the appropriate times.

Finally, documentation of the information reviewed and decisions made should be retained in a retrievable form for use by fiduciaries, appropriate plan sponsor employees, and service providers, both to support ongoing compliance and to be provided to any regulators when required. While the retention of these materials will obviously facilitate the efficient monitoring of the decisions and administration of the plan, it is also a fiduciary requirement. In the preamble to the Department of Labor's (DOL) regulation on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, the DOL expresses its view that there is an ERISA "generally applicable statutory duty to prudently document plan affairs."[10]

Practice 3

The third Practice covers the process for determining the criteria for selecting and monitoring the retirement income solution(s) for the plan, determining if the existing policies are adequate for that purpose, or if not, for amending the plan's Investment Policy Statement (IPS) for that purpose.

Practice 3: The Investment Policy Statement (IPS) contains sufficient detail to define, implement and (if required) monitor the retirement plan's retirement income solutions.

1. The IPS defines the duties and responsibilities of all parties involved in the selection of retirement income solutions.
2. The IPS addresses the due diligence process for selection of retirement income solutions for the plan.
3. The IPS addresses procedures for controlling and accounting for expenses associated with retirement income solutions selected for the plan.
4. The IPS (or an appendix to the IPS) outlines criteria for monitoring retirement income solutions in the plan.

Once the decision about the type or types of retirement income solutions has been made and the plan documents have been reviewed and appropriately amended, the fiduciaries need to develop defined processes for the selection and monitoring the products or services that will be offered to participants. That process should be compared to the terms of the plan's IPS to determine if the provisions of the IPS are consistent with the fiduciaries' views on a prudent process for that purpose. For example, a plan's IPS may already support a prudent process for the selection and monitoring of an investment management service for retirement income purposes. However, the IPS may not have the provisions needed for the prudent selection and monitoring of an insurance company guaranteed retirement income product (e.g., the IPS may not describe the process of

obtaining the benefit of the fiduciary safe harbor for selecting an insurance company and may not include the criteria for evaluating the features and costs of the insured contract — such as an annuity).

While, as a general matter, fiduciaries are not required by ERISA or the Internal Revenue Code to establish an IPS, the development and implementation of a thoughtful and compliant IPS is considered to be a best practice and provides a pathway to consistent and prudent practices (thus mitigating risk of fiduciary breaches). (Note, though, in at least one case, a Federal District Court has held that the failure to have an IPS was a fiduciary breach.[11])

The objective of the IPS is that it will, if followed, result in an informed and reasoned decision, which is the hallmark of a prudent process.[12] Fortunately, experienced retirement plan advisors can assist fiduciaries in developing their investment policy statements.

A well-drafted IPS will (i) define the responsibilities of the fiduciaries, (ii) describe the selection of an advisor or consultant to advise the fiduciaries, (iii) describe the process for making decisions (e.g., regular meetings, reports from advisor, monitoring), and (iv) specify the criteria to be used for the selection and monitoring of the services or products for participants to use as retirement income solutions. The provisions of the IPS should be specific enough that a third party could reasonably implement those provisions.

While the evaluation of the quality of products and services is obvious and important, the IPS (and the fiduciary process) should also focus on costs of those products and services. In recent years, much of the class action litigation involving retirement plan investments and services providers has been about the expenses of those services and investments. It would be good risk management to have specific provisions in the IPS about the costs and compensation associated with the plan. However, that process should not focus solely on costs. There is not a requirement that fiduciaries select the lowest cost products or services.[13]

As a part of the development of the IPS, fiduciaries may want to engage a consultant who is knowledgeable about retirement income products and services to educate the fiduciaries on the issues and considerations. That is particularly true for insured products, since many plan committees have little prior experience in evaluating insurance companies and products. (If the plan's advisor also has expertise on insured retirement income solutions, he or she could also serve in that role.) In that regard, fiduciaries should be mindful of the requirements for a prudent process. That process requires that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and **familiar with such matters** would use in the conduct of an enterprise of a like character and with like aims;…" (Emphasis added.)[14] In other words, fiduciaries are held to the standard of a person who is knowledgeable about the issues being considered which, in this case, will be about insurance companies and guaranteed income products (e.g., annuities). If the plan committee members lack that knowledge, they should "acquire" it by engaging a consultant to educate them on those matters and the make recommendations about the particular insured products.[15]

To summarize this point, fiduciaries should consider hiring knowledgeable advisors to educate them on the issues and considerations, so that they are in a position to review the recommendations of the advisor and make informed and reasoned decisions. While the recommendations of a knowledgeable advisor can be evidence of a prudent process, fiduciaries cannot "blindly" rely on those recommendations, but instead must understand the reasoning and the factors to be considered.[16]

If a plan's fiduciaries are not comfortable that they have the knowledge to prudently select and monitor insured products, they can hire consultants and give them the discretion to perform those tasks. In most cases, advisors to retirement plan fiduciaries are "nondiscretionary," meaning that they make recommendations, but the fiduciaries make the decisions. (This is sometimes referred to as a 3(21) advisor, referring to a section in ERISA.) But there is an alternative. Plan fiduciaries can also hire discretionary advisors who make decisions, rather than making decisions themselves. This is sometimes referred to as a 3(38) advisor, referring to another ERISA section. In this case, the fiduciary responsibility is

to prudently select and monitor the advisor, as opposed to selecting the insured products.

An important benefit of an IPS is that it aligns the perspectives of the relevant parties (for example, members of a committee, the plan's advisor, and other service providers) on the objectives and goals of the fiduciaries and the plan. In that regard, adherence to the provisions in the IPS should ensure consistent and compliant decisions over time. However, an IPS is not static; circumstances change; objectives change; products and services change. As a result, the retirement income objectives should be reviewed from time to time, as should the available solutions. And as those changes are considered, plan sponsors and fiduciaries may determine that changes in the retirement income types, and in the products and services should also change. In that event, the IPS should be reviewed and appropriately amended.

As a best practice, an IPS should be regularly reviewed — perhaps annually — to determine if it is being correctly applied and whether changes need to be made. Much like the general fiduciary requirement to consider "prevailing circumstances," the IPS should also reflect prevailing circumstances. If the circumstances change, and if those changes impact the requirements described in the IPS (e.g., new products or services become reasonably available), then the IPS should be amended accordingly. Also, laws and regulations change from time to time, and those changes may need to be reflected in the IPS. The Department of Labor's recent amendment on the consideration of relevant factors for selecting investments is an example of that.[17] Another recent example is the fiduciary safe harbor for the selection and monitoring of an insurance company for providing guaranteed income products.[18] In such cases, fiduciaries should consider updating the IPS to reflect the change in requirements, safe harbor compliance, and other laws or regulations that could impact the selection and monitoring of retirement income services, investments and insurance products.

Practice 4

Practice 4 covers the consideration of fiduciary "safe harbors" as they apply to the decisions about retirement income solutions.

Practice 4: Plan fiduciaries consider statutory or regulatory safe harbors that apply to retirement income solutions.

1. Available safe harbors pertaining to retirement income solutions are evaluated to determine if any advance the best interests of plan participants and beneficiaries.
2. When elected, safe harbors provisions are implemented in compliance with requirements.

In an effort to encourage certain conduct by retirement plan fiduciaries, Congress or the Department of Labor may create fiduciary "safe harbors." A fiduciary safe harbor is a protection against claims of fiduciary breach related to the decisions covered by the safe harbor. Generally speaking, a safe harbor requires only compliance with clear and specific conditions, as opposed to the general requirement to engage in a prudent process, which can involve consideration of all relevant factors. For example, the primary regulation of the investment responsibilities of a plan fiduciary say that those ERISA requirements are satisfied "…if the fiduciary…has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the **fiduciary knows or should know are relevant** to the particular investment." (Emphasis added.)[19]

The general fiduciary standard is that fiduciary conduct is measured not by what the fiduciaries know, but instead by what they "should" know. On the other hand, a fiduciary safe harbor is usually a simplified set of requirements. A good example of that is the checklist approach in the SECURE Act[20] for the selection of insurance companies to provide guaranteed retirement benefits to participants, in which the safe harbor requires that plan fiduciaries obtain specified information from insurance companies and that they not have any information that conflicts with what they received. In that regard, section 414(e) of ERISA says: "A fiduciary will be

deemed to satisfy the requirements of [ERISA's prudent man rule and diversification provision] if—

> *(A) the fiduciary obtains written representations from the insurer that—*
>
> > *(i) the insurer is licensed to offer guaranteed retirement income contracts;*
> >
> > *(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—*
> >
> > *(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;*
> >
> > *(II) has filed audited financial statements in accordance with the laws of its domiciliary State under applicable statutory accounting principles;*
> >
> > *(III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all States where the insurer does business; and*
> >
> > *(IV) is not operating under an order of supervision, rehabilitation, or liquidation;*
> >
> > *(iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and*
> >
> > *(iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and*
>
> *(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided."*

In other words, if the insurance company provides fiduciaries with the written representations specified in (A)(i) through (iv), and they aren't aware of conflicting information, the fiduciaries can safely select the insurance company without concern of breaching their fiduciary duties should the insurance company later have financial difficulties and not be able to fully pay benefits.

To make the process on fiduciaries even easier, there isn't a requirement to look behind the representations or to verify their accuracy. However, if the fiduciaries actually have information that could reasonably cause them to question the representations, the safe harbor protection could be lost.

In other words, the SECURE Act safe harbor for selecting insurance companies is based on straightforward criteria and fiduciaries can be comfortable that they can satisfy and be protected by the safe harbor.

Note, though, that the safe harbor does not apply to the features and costs of the insured contract (e.g., the annuity contract or the GLWB contract). Fiduciaries must engage in a prudent process for the evaluation and selection of the contracts (and thereafter must use prudent processes to monitor the contracts). While costs must be considered, ERISA section 404(e)(3) provides: "Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract." In other words, the fiduciary's "job" is to consider the guaranteed income contract in its totality, focusing on costs and value. In that regard, fiduciaries may consider the financial well-being of the insurance company, since more conservative and more highly rated insurance companies may invest their general account assets in a more secure manner, which can mean that the crediting rates will be lower than for other insurance companies.

Another example of a safe harbor is the so-called QDIA regulation.[21] That regulation creates a fiduciary safe harbor for the selection and monitoring of investments selected by fiduciaries for participants who "default," that is, who fail to direct the investment of their accounts. The regulation specifies three categories of investments for that purpose, which can generally be described as: (i) target date funds

(TDFs); (ii) balanced funds; and (iii) managed accounts. Fiduciaries can select one of those types of investments without concern about fiduciary liability. That is, the fiduciaries can decide to use TDFs, balanced funds or managed accounts without concern, but they must still engage in a prudent process to select the particular provider of the investments or services. Even there, though, the regulation provides guidelines to assist with the process.

While these safe harbors protect fiduciaries from liability, they are intended to encourage outcomes that implement public policy for the benefit of participants. As a result, fiduciaries should consider using the safe harbors both for their own protection and for the benefit of the plan and its participants.

Practice 5

This Practice covers the fiduciary process of evaluating the types of retirement income solutions available to the plan in a manner consistent with the plan documents and capabilities of the plan's providers.

Practice 5: Plan fiduciaries evaluate the types of retirement income solutions available to the plan.

1. Types of retirement income solutions evaluated by plan fiduciaries are limited to those permitted by applicable provisions of governing documents (see Practice 2).
2. Plan fiduciaries determine the types of retirement income solutions that will be included in a formal due diligence process to select one or more retirement income solutions for the plan based upon the demographics and needs of plan participants and taking into account any decisions to apply safe harbors (see Practice 4).
3. Plan fiduciaries determine whether existing plan platform capabilities can accommodate the types of retirement solutions under consideration and assess whether any limitations are acceptable or could be overcome by working with existing or new platform providers.

The starting point for evaluating the types of retirement income solutions to be considered for a retirement plan is for the fiduciaries to review the plan document for specific provisions regarding the types of solutions permissible under the terms of the plan. If the plan documents specifically direct the selection of one or more particular types of retirement income solutions, and if the fiduciaries determine that it would not be imprudent to follow those provisions,[22] the fiduciaries should proceed with the implementation of those specific directions.

On the other hand, if the plan generally permits the inclusion of retirement income solutions or does not preclude them, the fiduciaries should consider the types of solutions available to retirement plans and decide to evaluate one or more of particular types of retirement income solutions. For example, if fiduciaries decide to offer a robust set of retirement income solutions, they could consider managed accounts, retirement income funds, guaranteed lifetime withdrawal benefits contracts, and retirement annuities.

In other words, if the selection of particular types of solutions is left to the discretion of the fiduciaries, an initial step would be to determine whether to offer one or more types of solutions. In that process, fiduciaries should consider the demographics of the covered workforce, for example, their needs, ability to understand complex products, and even their preferences.[23] In addition, the fiduciaries could consider the safe harbors provided by the law and by regulation and the public policies those safe harbors are intended to implement.

Fiduciaries should also consider the ability of the plan's recordkeeper (and other providers) to support the types of solutions being considered. For example, can the recordkeeper support the administration of annuity contracts for accumulation of retirement benefits and/or for the distribution of annuity contracts. The fiduciaries should engage with their service providers to ensure that the types of retirement income contracts and services, and related communication and educational materials, can be supported by the plan's recordkeeper and other service providers.

Where fiduciaries are considering several types of retirement income solutions and deem them to be of equivalent value to participants, the inability of the plan's recordkeeper may not be fatal. However, where the fiduciaries have determined that a particular solution is the prudent choice for the plan's participants (or where the plan documents direct the use of specific types of solutions), and the recordkeeper cannot administer that type of retirement income solution, the fiduciaries should consider the relative merits of other solutions as compared to the cost and burden of changing the plan's recordkeeper.

Practice 6

This Practice covers the prudent selection of retirement income solutions consistent with the types of solutions authorized by the plan documents.

Practice 6: Consistent with the fiduciary duty of care, a prudent due diligence process is followed to select retirement income solutions providers and to choose retirement income solutions for the plan.

1. Criteria that are material to sound decision-making must be identified for the due diligence process used to (a) select retirement income solutions providers and (b) choose among alternative solutions.
2. The selection of a solutions provider takes into consideration the range of solutions the provider offers and their alignment to the plan sponsor's objectives and the needs of plan participants.
3. For lifetime income solutions, the long-term financial strength of the insurer and ability to pay all income obligations must be prudently evaluated.
4. The experience of a solutions provider in administering retirement income payments should be considered in the due diligence process.
5. The evaluation of retirement income solutions includes consideration of product and service features, benefits, costs, and effectiveness in mitigating material risks.
6. The due diligence process followed should be documented, demonstrating fulfillment of fiduciary responsibilities.

The starting point for fiduciaries when selecting the retirement income solutions for a retirement plan is to identify the types of solutions to be offered by the plan and then to develop the criteria appropriate for each type of solution. That would have been accomplished during the implementation of Practice 1 (as a settlor decision) or of Practice 5 (as a fiduciary decision). Those decisions then serve as the foundation for the process to be used by the plan's fiduciaries to select the particular product(s) or service(s) and their providers.

The decisions about the types of solutions will be defined by the plan documents, through (i) explicit directions to select particular type(s), or (ii) a general authorization to the plan's fiduciaries to determine which types are appropriate for the covered workforce, or (iii) a broad grant of authority to the plan's fiduciaries to make decisions about plan investments and operations.

The next step — the focus of this Practice — is for the fiduciaries, in collaboration with their advisors and consultants, to develop the criteria and process for selecting the solution for each type to be offered. For example, if one type of solution is a managed account option, the criteria for selecting the investment manager for participants' accounts would focus on factors such as the qualifications, experience, and registration of the investment manager, as well as the costs of the services. On the topic of the selection of investment managers for participant accounts, the DOL has said:

> *"With regard to the prudent selection of service providers generally, the Department has indicated that a fiduciary should engage in an objective process that is designed to elicit information necessary to assess the provider's qualifications, quality of services offered and reasonableness of fees charged for the service. The process also must avoid self dealing, conflicts of interest or other improper influence. In applying these standards to the selection of investment advisers for plan participants, we anticipate that the process utilized by the*

> *responsible fiduciary will take into account the experience and qualifications of the investment adviser, including the adviser's registration in accordance with applicable federal and/or state securities law, the willingness of the adviser to assume fiduciary status and responsibility under ERISA with respect to the advice provided to participants, and the extent to which advice to be furnished to participants and beneficiaries will be based upon generally accepted investment theories."*[24]

The criteria selected by the fiduciaries for performing this evaluation should be described in the plan's IPS in support of a prudent process consistently applied. (As explained in Practice 3, while an IPS is not generally required by ERISA, a well-drafted IPS supports a finding that the fiduciaries engaged in prudent and compliant processes to make decisions.)

On the other hand, the criteria for selecting an insurance company guaranteed income product would be different. As Congress specified in the SECURE Act, fiduciaries must consider: "…the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and…on the basis of such consideration, concludes that…the relative cost of the selected guaranteed retirement income contract …is reasonable."[25]

The SECURE Act goes on to say: "Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract."[26]

In other words, for an insured guaranteed income contract, the criteria for selecting a particular contract should focus on the costs, features and benefits of the contract and the services of the insurance company. For example, fiduciaries should consider the history of the insurer in administering guaranteed income payments and the size of the insurer's business in guaranteed income contracts (which could be an indication of its commitment to providing guaranteed income to annuitants). Once the criteria are determined, they should be incorporated into the plan's IPS.

In addition, the fiduciaries should evaluate the financial strength and claims paying ability of the insurance company issuing the guaranteed contract. The SECURE Act amended ERISA to provide a process and a fiduciary safe harbor for selecting an insurer. That process and the information requirements are described in Practice 4. The IPS should describe the process and the criteria in the plan's IPS. In addition, fiduciaries may, as a best practice, want to further investigate the financial strength of the insurer (through, e.g., obtaining the financial strength ratings by the major insurance rating services). If so, that process and the criteria should also be described in the IPS.

As the plan fiduciaries engage in the process of implementing the IPS, and applying its criteria, they will need to gather information about the products and services, including data about the costs and quality of the products and providers. That information will need to be assessed with "care, skill, prudence and diligence" of a person "familiar with such matters,"[27] which may require the assistance of a consultant or advisor who is experienced in such matters.

The information, deliberations and consultant's recommendations should be documented and retained by the fiduciaries, both to satisfy the general documentation requirements of ERISA and as proof of a prudent process if the decisions are questioned in the future. As explained in Practice 2, the preamble to the DOL's regulation on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights explained the DOL's view that ERISA has a "*generally applicable statutory duty to prudently document plan affairs*."[28]

Practice 7

This Practice covers the fiduciary duty to identify material conflicts of interest and to address those conflicts in a manner consistent with the duty of loyalty, so that participants would not be harmed by the conflicts.

Practice 7: In the process of evaluating and selecting retirement income solutions, plan fiduciaries identify conflicts of interest and address conflicts in a manner consistent with the duty of loyalty.

1. Plan fiduciaries must be aware of and evaluate conflicts of interest that exist due to monetary and non-monetary relationships with and among the (1) investment advisor fiduciary, (2) non-fiduciary advisor (or salesperson) and (3) product providers.
2. Plan fiduciaries should receive full disclosure of material conflicts of interest associated with retirement income products and services so that they can make informed decisions regarding conflicts of interest.
3. Conflicts must be avoided or mitigated in the interests of plan participants and beneficiaries.

The service providers and the providers of products (e.g., investment funds and insurance contracts) often have conflicts of interest in offering their services and products to retirement plans and their fiduciaries. This is true of both fiduciary and non-fiduciary providers.

The most obvious of the conflicts is a commission or other transaction-based compensation resulting from a decision by the fiduciaries to use their retirement income services or products. Since the service or product providers are incented by those compensation conflicts to advance their products and services, even where they may not be in the best interest of the plan and its participants, fiduciaries have a duty to manage or mitigate the conflicts to ensure that the participants are not harmed by the conflicts. The first step in the oversight of conflicts is for the fiduciaries to identify the conflicts, through legally required disclosures and/or disclosures required by the fiduciaries as a part of their prudent processes.

Before discussing the fiduciary process, though, it is important to understand what a conflict is. The Department of Labor has defined a conflict of interest as: " . . . an interest that might incline [a person]—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor."[29] The Securities and Exchange Commission (SEC) has used a similar definition: "Conflict of interest means an interest that might incline [a financial firm or its representatives]—consciously or unconsciously—to make a recommendation that is not disinterested."[30]

To succinctly rephrase those definitions as a question, is there an incentive — cash or non-cash — for a service provider or product provider to put its interests ahead of the plan and its participants? If so, the fiduciaries have a duty to identify and manage those conflicts. In that regard, the DOL has issued some helpful guidance to plan fiduciaries,[31] which explains:

- *"For a service contract or arrangement to be reasonable, service providers must provide certain information to you about the services they will provide to your plan and all of the compensation they will receive. This information will assist you in understanding the services, assessing the reasonableness of the compensation (direct and indirect), and determining any conflicts of interest that may impact the service provider's performance."*
- *"Certain transactions are prohibited under the law to prevent dealings with parties who may be in a position to exercise improper influence over the plan. In addition, fiduciaries are prohibited from engaging in self-dealing and must avoid conflicts of interest that could harm the plan."*

To help fiduciaries with the task of identifying conflicts, the DOL has issued a set of "Tips for Plan Fiduciaries" with guidance on questions to ask plan consultants.[32] The Tips include a number of questions that fiduciaries can ask of their consultants. The questions are also helpful for identifying conflicts of other service and product providers.

Once the fiduciaries have identified the conflicts of interest associated with the investment funds, insurance products and services being considered, they need to take steps to manage or "mitigate" those conflicts. The Department of Labor defined mitigation in a preamble to a prohibited

transaction exemption that it issued: A conflict is properly managed if it mitigates "conflicts of interests to the extent that a reasonable person reviewing the [conflicts] as a whole would conclude that they do not create an incentive for [the provider or consultant] to place their interests ahead of the interest of the Retirement Investor."[33] In other words, the fiduciaries should be able to determine that the limitations or controls that they put in place ensure that the participants' interests will be reasonably protected from the incentives of the service or product providers to put their interests ahead of the participants.

In that regard, fiduciaries should consider asking and answering the following questions about the conflicts of their service and product providers:

- Can the conflicts be managed in a manner that protects the interests of the plan and the participants? If not, then products or services should not be considered.
- If the conflicts can be managed or mitigated with adequate safeguards to protect the participants, what limitations need to be imposed in order to achieve that result?
- Do the agreements with the service or product providers include those safeguards or do they need to be revised for that purpose?

Once the conflicts have been identified, and safeguards are in place to ensure that the conflicts will not adversely affect the interests of the participants, the fiduciaries can proceed to engaging the services and products selected for the plan.

Practice 8

This Practice covers fiduciary practices related to agreements with the issuers, managers and providers of retirement income solutions.

Practice 8: Plan fiduciaries require agreements with retirement income solutions providers to be in writing and consistent with fiduciary standards of care.

1. Plan fiduciaries require each retirement income solutions provider to fully disclose in writing all compensation arrangements and affiliations associated with the service agreement.
2. Plan fiduciaries must be aware that insured (guaranteed) retirement income solutions may require special contracts and agreements beyond the documentation typically required for investments managed in the plan (e.g., annuity contract, participation agreement, service agreement, etc.).

Having conducted prudent due diligence to select the type(s) of retirement income solutions that are available and appropriate for the plan (Practice 5) and specific solutions that are found to meet the objectives of the plan and needs of participants (Practice 6), agreements can be established.

Fiduciaries of ERISA-governed retirement plans must act prudently[34] and cannot use plan assets to pay more than reasonable expenses from plan assets.[35] In other words, the fiduciaries should ensure that the arrangements with the service and product providers are "reasonable." In fulfilling those duties, fiduciaries must evaluate the services and costs of the plan's service providers.[36] In addition, when evaluating investments or guaranteed income products (e.g., annuities), fiduciaries must evaluate the costs, features, associated services, and quality of the investments and products,[37] as well as the conflicts of interest. (See Practice 7 on Conflicts of Interest.)

To ensure that the fiduciaries have the information necessary to prudently evaluate these arrangements, fiduciaries should obtain and review any mandated disclosures, as well as any other information that a "prudent man acting in a like capacity and **familiar with such matters**" would want to review. Then, to ensure that the services or products will be delivered consistent with the representations by the service and product providers, as well as in a manner consistent with the disclosures, the fiduciaries should require that the providers enter into enforceable agreements (or agreement equivalents, e.g., prospectuses) with the plan. The agreements should serve as covenants with the providers and, in that sense, document the "promises" being made.

Written agreements also protect the fiduciaries and participants from misunderstandings in the discussions between the fiduciaries and the representatives of the providers. Conversations are essential to reaching mutual understandings, but verbal communications are ordinarily less specific than written agreements (and discussions can, as a result, lead to "understandings" that are not mutual). In addition, written agreements are more easily enforceable should disagreements occur. It is a good risk mitigation practice to reduce arrangements with a plan to writings that are signed by the parties.

Finally, fiduciaries and plan sponsors should not view their initial decisions as "set in stone." The marketplace of services, investments and insurance products evolves over time. As a result, there should be ongoing, regular reviews of the products and services that have become available to plans and then a comparative analysis of those products and services to the retirement income solutions that are currently in the plan. Monitoring responsibilities are addressed in Practice 9.

Practice 9

This Practice covers the monitoring of the retirement income solutions and providers to ensure that the providers are acting in accordance with their agreements and to re-visit whether the solutions continue to be in the best of plan participants and meet their needs in light of changes in the products and services that are available.

Practice 9: Periodic reviews are conducted to ensure that retirement income solutions included in the plan, and the providers of the solutions, (a) satisfy service agreement obligations and (b) serve the needs and best interests of plan participants relative to available alternatives.

1. Plan fiduciaries regularly evaluate whether the terms of service agreements with retirement income solutions providers are being met and align with the requirements of elected safe harbors.
2. Plan fiduciaries periodically evaluate the types of retirement income solutions reasonably available to the plan based upon directives and limitations in plan documents, the current demographic characteristics and needs of plan participants, and platform capability considerations (see Practice 5).
3. Plan fiduciaries periodically evaluate the performance and adequacy of retirement income solutions currently in the plan relative to alternatives in the marketplace that are reasonably available to the plan based upon criteria that comprise a prudent due diligence process for the selection of retirement income providers and solutions (see Practice 6).
4. Material qualitative and organizational changes of current retirement income solutions providers are evaluated to (a) assess potential adverse impacts on the performance of retirement income solutions in the plan and (b) take appropriate actions in the best interest of plan participants.
5. Downgrades in the financial strength ratings of insurers guaranteeing lifetime income are promptly identified, assessed, and addressed in the best interest of plan participants.

6. Retirement income solutions in the plan should be replaced if it is in the best interest of participants to do so, taking into account costs, benefits, and other material considerations.

As with any fiduciary decisions that continue over time, fiduciaries need to monitor those decisions at periodic intervals that are appropriate for the particular service or product.[38] Comprehensive monitoring involves revisiting the decisions made in carrying out Practices 1 through 8. While arrangements, agreements, services and products only need to be reviewed at intervals that are appropriate for the particular service or product, it is a common fiduciary practice to review the plan's services and products at least annually (or more often if events occur which dictate an interim review).

Agreements that document the expectations of services, investments and insured products are critical to clear understandings of the responsibilities of the providers. Additionally, they are also vehicles for monitoring the performance of the service and product providers. In fact, the Department of Labor expects fiduciaries to regularly review performance and compliance with the agreements. For example, the DOL has said, in the context of participant account investment managers: "Fiduciaries also should take into account whether the investment advice provider is **complying with the contractual provisions of the engagement utilization of the investment advice** services by the participants in relation to the cost of the services to the plan; and participant comments and **complaints about the quality** of the furnished advice." (Emphasis added.)[39]

While that guidance was written for monitoring the services of participant-level investment managers (which is one form of a retirement income solution), the principle applies to the monitoring of all services and products. The fundamental question is whether the service or product, and its provider, are complying with the terms of the controlling agreement or similar documents.

As a part of that monitoring, where there is a fiduciary safe harbor, the fiduciaries should also consider whether the conditions for the safe harbor continue to be met. For example, where the QDIA safe harbor for default investments is being used, the fiduciaries should consider whether the investment continues to meet the definition of a safe harbor eligible investment and whether the required disclosures and notices are being provided to participants.[40] In addition to those conditions for relief, the fiduciaries should generally evaluate the prudence of the investment and how it aligns with the needs and circumstances of the defaulted participants.[41] As another example, in the case of the selection of an insurance company under the SECURE Act's safe harbor, ERISA dictates an annual review (which is based on the same safe harbor approach as the initial selection): "A fiduciary will be deemed to have conducted the periodic review…if the fiduciary obtains the written representations [described in the statute and discussed in Practice 4] from the insurer on an annual basis unless the fiduciary" has received information to the contrary "that would cause the fiduciary to question such representations."[42]

In addition to monitoring compliance with the plan's agreements and satisfaction of the safe harbor conditions, a plan's fiduciaries should also periodically review the types of retirement income solutions reasonably available to the plan. When doing that, fiduciaries should consider the demographics of the covered workforce, the plan provisions regarding the types of solutions that are permissible for the plan to offer, and the capabilities of the plan's service providers, and particularly the recordkeeper, to evaluate and administer.

Importantly, fiduciaries should monitor usage of the plan's retirement income solutions by the participants and consider any complaints from participants. In Field Assistance Bulletin 2007-01, the DOL discussed monitoring of fiduciary advice for participants' accounts and said: "Fiduciaries also should take into account…**utilization of the investment advice services** by the participants in relation to the cost of the services to the plan; and **participant comments and complaints about the quality** of the furnished advice." (Emphasis added.)

The marketplace of products and services is constantly changing, as is the cost of those products and services. Fiduciaries need to be aware of those changes to properly evaluate their previous decisions and to make decisions about whether changes should be made. While those are

the primary drivers of change, it is also possible that the demographics of the covered workforce have changed, or that new products or services are better suited for the characteristics of the workforce.[43]

As a part of the review of the products and services for the retirement income solutions, fiduciaries should evaluate the organizations issuing and/or managing the solutions. Disruptive changes at those organizations can be "red flags", portending future problems in the quality of the products or services and in the administration of those services or products. While there are an innumerable of types of material changes that could indicate potential problems, some of the most common are turnover at senior levels or managers of investments, adverse changes in the financial strength of an insurance company as indicated by the ratings agencies, or major damage to the brand of the organization due to ethical issues. Fiduciaries, either on their own or through their consultants, should make efforts to be aware of, and evaluate, these types of disruptive events. When the fiduciaries learn of events that could affect the quality of the retirement income solution in their plan, the best approach would be to have a special review of the product or service and the "red flag" circumstances that precipitated the review. Where the fiduciaries (e.g., the plan committee members), lack the expertise to conduct a knowledgeable review of those facts, they should include appropriate advisors in the review, for example, a plan's advisor, insurance consultant, and/or attorney in the process. In some cases, the outcome of the review will be that further information is needed to make a prudent and loyal decision. In that case, the fiduciaries should investigate the circumstances needed to properly evaluate the provider of the product or service. It is a common practice to put the investment or insurance product on a "watch list" while conducting the investigation to determine if the changed circumstances will adversely affect the provider.

If the fiduciaries determine, after the investigation is done, that the investment, insurance product or service will likely be adversely affected to the point that it would no longer be a prudent choice, they should remove and replace that retirement income solution from the plan. Assuming that the plan sponsor and the fiduciaries continue to believe that a retirement income solution is the right approach for the plan to reach its objectives, they can engage in a search for a replacement solution. Absent extraordinary circumstances, the removal of the first solution and the addition of its replacement can be coordinated to minimize disruption to the plan and its participants.

Practice 10

This Practice covers monitoring the effectiveness of plan fiduciaries in managing the Prudent Practices for selecting and overseeing the plan's retirement income solutions.

Practice 10: There is a process to periodically review the effectiveness of plan fiduciaries in meeting their fiduciary responsibilities.

1. The roles of all parties responsible for the provision of retirement income solutions to the plan are periodically reviewed to ensure that they are understood and acknowledged in writing.
2. Fiduciary assessments are conducted at periodic intervals to determine whether appropriate policies and procedures relating to the plan's retirement income solutions are in place to address all fiduciary obligations and to help ensure that they are effective in meeting the plan sponsor's objectives and the needs of participants.

The fiduciary standard is principles-based and dynamic, as opposed to rules-based and static. Fiduciary principles adapt to changing circumstances, whereas rules often must be rewritten when they no longer fit evolving situations. As ERISA's prudent man rule explains, a fiduciary must act "with the care, skill, prudence, and diligence **under the circumstances then prevailing** that a prudent man acting in a like capacity and familiar with such matters would use…" [44] (Emphasis added.)

The fiduciary standard is also process oriented. To act with "care, skill, prudence, and diligence" and to consider the "circumstances then prevailing," fiduciaries need to establish

processes, policies, and procedures for the selection and monitoring of the retirement income solutions included in the plan. Collectively, they define how the Prudent Practices for selecting and managing retirement income solutions are implemented. But it is not enough to "set and forget" those processes, policies, and procedures (collectively "practices"). Instead, they need to periodically be reviewed and, if needed, revised. The first step in that process is to consider whether the practices are being properly implemented. Obviously that review is more easily and consistently done if the practices are in writing. The second step is to evaluate whether the practices continue to be appropriate in light of the "circumstances then prevailing". That is, have the relevant circumstances changed enough to warrant changes to the practices of the fiduciaries. If they have, the answer is straightforward…update the practices to reflect current circumstances.

As with any review of practices, it is more easily and consistently done if the lines of responsibility are clearly stated. As a result, it is both a risk mitigation approach and, in most cases, evidence of fiduciary prudence, for the roles of all parties related to the retirement income solutions and their analysis, selection and monitoring — including plan fiduciaries, fiduciary service providers, and non-fiduciary providers — to be clearly understood, and for that understanding to be documented in agreements or similar documents. Written documentation, agreed to by the parties, is important for clear and detailed understandings of the responsibilities of the parties and, if needed, for resolving disputes, including through litigation.

In the process of reviewing their practices related to retirement income solutions, fiduciaries should assess whether their providers are adequately supporting the plan and its participants in services related to those solutions. For example, do the providers of retirement income solutions provide the fiduciaries with the information and descriptions, as well as updates on products, that enables the fiduciaries to effectively perform their oversight responsibility for the retirement income solutions? Do those providers provide the plan with communications and educational materials to support participant understanding and usage of the solutions? Do they provide tools and services (e.g., on their websites) that assist participants in evaluating their needs for retirement income (for example, retirement income calculators)?

The "success" of a retirement income solution is not limited to its prudent selection and monitoring. Another important measure is usage by the participants and yet another is participant satisfaction with the solution. Retirement income solutions are relatively new to the defined contribution scene and some of the solutions, such as insured income products, are products that few defined contribution plans have used in the past. As a result, plan fiduciaries would benefit from provider support in the selection and monitoring process and participants would benefit from education and information to properly select and use the products. It is important for fiduciaries to understand these needs and to select providers who support those needs.

In sum, fiduciary decisions about plan services, investments and insurance products are not static. The decisions need to be monitored periodically and, importantly, the processes, policies and procedures of the fiduciaries need to be continuously evaluated and updated to reflect "prevailing circumstances."

Conclusion

Tax-qualified defined contribution plans were designed for the accumulation of retirement "wealth." They were not intended, nor designed, to distribute money to workers during retirement. For example, 401(k) plans were intended to be savings plans that were supplemental to defined benefit pension plans.

However, 401(k) plans are now the dominant form of private sector retirement plan. The Investment Company Institute reports that there are more than 625,000 401(k) plans holding more than $6.3 trillion in assets.[45] When combined with the impact of the roughly 10,000 people retiring every day in the U.S., the need for sustainable income that lasts for the lifetime of retirees is obvious.[46]

As a result, we are at the early stages of converting 401(k) savings plans into 401(k) retirement plans.

That conversion will require collaboration among plan sponsors, plan fiduciaries, advisors and providers. While the conversion, standing alone would be daunting, the overlay of a fiduciary standard on the selection and monitoring of plan fiduciaries when selecting and monitoring retirement income services and products creates an even steeper hill to climb.

Fortunately, the Retirement Income Consortium has committed to helping plan sponsors, fiduciaries and advisors by developing the Practices described in its Handbook "Prudent Practices for Retirement Income Solutions." The 10 Practices are a roadmap to implementing prudent processes based on ERISA's fiduciary standards, as well as best practices that go beyond the law's requirements.

While plan sponsors are ultimately responsible for deciding whether to design their plans to provide retirement distribution strategies, plan fiduciaries have the responsibility for implement those decisions in a prudent manner and in the best interest of the participants. To help, plan advisors can play a key consultative role in the decision-making. The Practices will inform plan sponsors and fiduciaries, as well as their advisors, of considerations for making the decisions and of the steps to prudently implement those decisions.

This work is a critical step in furthering the retirement well-being of America's workers.

Endnotes

1 See, *e.g.*, United States (aarpinternational.org)

2 See, By 2030, All Baby Boomers Will Be Age 65 or Older (census.gov)

3 Show me the income | Invesco US

4 In re Enron, 284 F. Supp. 2d 511, 553 (S.D. Tex. 2003)

5 ERISA section 404(a)(1)(A) and (B).

6https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds.pdf

7 Default Investment Alternatives Under Participant Directed Individual Account Plans, Regulation §2550.404c-5.

8 ERISA section 404(a)(1)(D).

9 Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, Regulation §2550.404a-5.

10 Preamble to DOL Regulation §2550.404a-1; Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.

11 Liss v. Smith, 991 F. Supp. 278 (S.D.N.Y. 1998); *"ERISA does not contain a specific requirement that a written investment policy be maintained by the trustees. I find, at least in this instance, that such a policy is necessary to insure that the plan investments are performing adequately and meeting the actuarial, liquidity and other needs of the Funds. Support for this proposition is found in Department of Labor regulations."*

12 See, *e.g.*, *Ramos v. Banner Health*, 461 F.Supp. 3d 1067, 1085-86 (2020).

13 See, *e.g.*, ERISA section 404(e)(3).

14 ERISA section 404(a)(1)(B).

15 See, *e.g.*, *Sacerdote v. New York University*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), aff'd, 9 F.4th 95 (2d Cir. 2021), where the Court found that the use of a knowledgeable advisor was evidence of engaging in a prudent process.

16 *Id.*

17 See, *supra*, note x..

18 ERISA section 404(e).

19 DOL Regulation §2550.404a-1(b)(1).

20 More formally called the Setting Every Community Up for Retirement Enhancement Act of 2019.

21 See *supra* note vii.

22 See, *supra*, note viii.

23 For example, DOL Regulation §2550.404a-1(c)(3) says, with regard to the selection of investments: *"The plan fiduciary of a participant-directed individual account plan does not violate the duty of loyalty…solely because the fiduciary takes into account participants' preferences in a manner consistent with the requirements"* of the duty of prudence.

24 DOL Field Assistance Bulletin (FAB) 2007-01, Issue 2.

25 ERISA section 404(e)(1).

26 ERISA section 404(e)(3).

27 ERISA section 404(a)(1)(B).

28 See, *supra*, at note x.

29 Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees.

30 Regulation Best Interest, §240.15/-1.

31 Meeting Your Fiduciary Responsibilities.
https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf

32 Selecting and Monitoring Pension Consultants – Tips for Plan Fiduciaries U.S. Department of Labor, Employee Benefits Security Administration, May 2005. https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/selecting-and-monitoring-pension-consultants.pdf

33 Preamble to DOL Prohibited Transaction Exemption 2020-02.

34 ERISA section 404(a)(1)(B).

35 ERISA section 404(a)(1)(A)(ii).

36 See ERISA section 408(b)(2) and DOL Regulation §2550.408b–2, General statutory exemption for services or office space.

37 See, *e.g.*, ERISA section 414(e)(1)(B)(ii).

38 See, *e.g.*, ERISA section 404(e)(4)(B).

39 See, *supra*, note xxxvi.

40 See, *supra*, note vii.

41 See, Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries, U.S. Department of Labor, Employee Benefits Security Administration, February 2013; *"…general guidance to assist plan fiduciaries in selecting and **monitoring TDFs.**"*

42 ERISA section 404(e)(4)(B).

43 See, *supra*, note xli, where the DOL said: *"It also may be helpful for plan fiduciaries to discuss with their prospective TDF providers the possible significance of other **characteristics of the participant population**, such as participation in a traditional defined benefit pension plan offered by the employer, salary levels, turnover rates, contribution rates and withdrawal patterns."*

44 See, e/g.,, *supra, note xli.*

45 Investment Company Institute, 401(k) Resource Center, at 401(k) Resource Center | Investment Company Institute (ici.org)

46 See, e/g., United States (aarpinternational.org)