United Actuarial Services, Inc.
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BENEFIT NEWS BRIEFS

DOL Guidance On Selecting and Monitoring Under the Annuity Selection Safe Harbor Regulation for DC Plans

The Department of Labor recently released Field Assistance Bulletin No. 2015-02 (*FAB 2015-02* or *FAB*) addressing the *Selection and Monitoring under the Annuity Selection Safe Harbor Regulation for Defined Contribution Plans.* The *FAB* also discusses *ERISA's* statute of limitations on fiduciary liability for the selection of annuity providers and annuity contracts.

Introduction

The *FAB* addressed a 2008 DOL regulation (29 CFR 2550.404a-4) ("*Safe Harbor Rule*") regarding the selection of annuity providers under defined contribution (DC) plans. The *Safe Harbor Rule* provides plan fiduciaries with safe harbor for the selection and monitoring of annuity providers and annuity contracts for benefit distributions. The plan fiduciaries in a multiemployer DC plan are the Trustees.

The *FAB* was issued to clarify the "time of selection" standard in the *Safe Harbor Rule* with respect to annuity selection under DC plans. The "time of selection" principle states that an *ERISA* fiduciary's prudence is evaluated based on the information available at the time the decision was made and is <u>not</u> based on facts that come to light only with the benefit of hindsight.

Along with the fiduciary nature of the original selection, a fiduciary also has a duty under *ERISA* to *monitor* and *review* such fiduciary decisions. A fiduciary's *monitoring* of an annuity provider is judged based on the information available at each periodic review, and <u>not</u> in light of subsequent events.

The Current Safe Harbor Rule

The current *Safe Harbor Rule* describes actions that DC plan fiduciaries can take to satisfy their *ERISA* fiduciary responsibilities in selecting an annuity provider for benefit distributions. Choosing such an annuity provider is a fiduciary function, subject to *ERISA's* standards of prudence and loyalty.

Prepared by Mike Ewing, J.D.
Director of Research
United Actuarial Services, Inc.
(317) 580-8659 • Fax (317) 580-8651
email: mewing@unitedactuarial.com

According to the *FAB*, the *Safe Harbor Rule* requirements are satisfied if the plan's fiduciary:

- Engages in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. This process must avoid self-dealing, conflicts of interest or other improper influence and should, to the extent possible, involve consideration of competing annuity providers;
- Appropriately considers information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract;
- Appropriately considers the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services to be provided under such contract;
- Appropriately concludes that, at the <u>*time of the selection*</u> [emphasis added], the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract; and
- If necessary, consults with an appropriate expert or experts for purposes of compliance with these provisions.

The *Safe Harbor Rule* provides that "the time of selection" means:

1. the time that the annuity provider and contract are selected for distribution of benefits to a specific participant or beneficiary; or
2. the time that the annuity provider is selected to provide annuities as a distribution option for participants or beneficiaries to choose at future dates.

The *Safe Harbor Rule* also provides that the fiduciary must <u>periodically review</u> the continuing appropriateness of the conclusion that the annuity provider is financially able to make all future payments under the annuity contract, as well as the reasonableness of the cost of the contract in relation to the benefits and services to be provided. However, the *FAB* notes that the fiduciary is not required to review the appropriateness of its conclusions with respect to an annuity contract purchased for any <u>specific</u> participant or beneficiary.

Frequency Of Periodic Reviews Under The Duty To Monitor And Review

The *FAB* explains that the *frequency of periodic reviews* under the fiduciary's duty to monitor and review depends on the facts and circumstances:

> For example, if a "red flag" about the provider or contract comes to the fiduciary's attention between reviews (e.g., a major insurance rating service downgrades the financial health rating of the provider or several annuitants submit complaints about a pattern of untimely payments under the contract), the fiduciary would need to examine the information to determine whether an immediate review is necessary, or, depending on the facts and circumstances, the fiduciary may need to conduct an immediate review.

Examples

The *FAB* also includes two examples illustrating these principles.

ERISA's Statute of Limitations on Fiduciary Liability for the Selection of Annuity Providers and Annuity Contracts

The *FAB* also addressed the applicable *ERISA* statute of limitations against plan fiduciaries for breaches of duty in connection with the purchase of annuities, including the imprudent selection and monitoring of annuity providers. Such actions are subject to the applicable limitations periods in *ERISA* Section 413.

ERISA Section 413 which provides that an action for a breach of fiduciary duty may not be brought after the earlier of:

a. six years after the date of the last action which constituted a part of the violation or, in the case of an omission, the latest date on which the fiduciary could have cured the violation, or

b. three years after the earliest date on which the plaintiff had actual knowledge of the breach.

In the case of fraud or concealment of a breach, an action may not be brought later than six years after the breach was discovered.

The *FAB* concludes that absent fraud or concealment a plaintiff must base his or her claims on actions or omissions that occurred within the six years preceding the lawsuit. In the context of claims that the Trustee made an imprudent selection of an annuity contract to distribute benefits to a specific participant, the claim would have to be brought within six years of the date on which plan assets were expended to purchase the contract.

For More Information

Readers with questions about the *FAB* are directed to call Stephanie Cibinic of the Office of Regulations and Interpretations at (202) 693-8500.

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