

## DOL Seeks to Clarify Fiduciary's Annuity Monitoring Obligation

In an effort to increase the availability of lifetime income options in defined contribution plans, the DOL provided guidance to fiduciaries about limitations on their responsibility for annuity products. The DOL explained that a fiduciary's obligation to periodically review an annuity provider ends when the plan stops offering annuities from that provider. The duty to monitor does not continue after discontinuing purchases merely because all benefit payments due under the annuity have not been completed. The DOL's guidance also clarifies the statute of limitations for participants and beneficiaries to sue for alleged fiduciary breaches. The guidance was released in conjunction with the 2015 White House Conference on Aging.

### Background

In [Interpretive Bulletin 95-1](#) (IB 95-1), the DOL provided guidance on the ERISA fiduciary standards for the selection of annuity providers for pension plan benefit distributions, including a general framework to guide plan fiduciaries in their selection process. Among other things, IB 95-1 generally required plan fiduciaries to obtain the "safest annuity available." In [Advisory Opinion 2002-14A](#), the DOL indicated that the principles in IB 95-1 applied equally to the selection of annuity providers for both defined benefit and defined contribution plans.



The Pension Protection Act of 2006 (PPA) directed the DOL to clarify that the selection of an annuity contract as an optional form of distribution from an individual account plan would not be subject to the safest available annuity standard under IB 95-1, but would still be subject to all otherwise applicable fiduciary standards. In 2008, the DOL provided a final rule limiting the application of IB 95-1 to defined benefit plans and creating a safe harbor for selecting annuity providers for defined contribution plan distributions.

Under the safe harbor, a fiduciary is deemed to have acted prudently if he or she does all of the following:

- Conducts an objective, thorough and analytical search to identify and select annuity providers
- Considers sufficient information to assess the annuity provider's ability to make all future contractual payments

- Considers the cost of the annuity contract — including fees and commissions — in relation to the associated benefits and administrative services
- Concludes that, at the time of selection, the annuity provider is financially able to make all future payments under the annuity contract and that the cost of the contract is reasonable for the benefits and services to be provided
- If necessary, consults with an appropriate expert(s) to ensure compliance with these steps

Even with this guidance, many plan fiduciaries expressed uncertainty about their duty to monitor and review certain fiduciary decisions. This created a concern that fiduciaries might avoid offering annuities — a result at odds with efforts by IRS and DOL to expand the availability of lifetime income options.

## DOL Field Assistance Bulletin Explains Review Obligation

In [Field Assistance Bulletin 2015-02](#), the DOL aims to clarify the timeline for a defined contribution plan fiduciary's ongoing duty to monitor annuity products. According to the DOL, a fiduciary's decision to select and monitor an annuity provider is evaluated using the information available at the time a decision is made, and at each periodic review, and not in light of subsequent events. The obligation to perform periodic reviews does not mean that a fiduciary must review the prudence of retaining an annuity provider each time a participant or beneficiary elects an annuity from the provider as a distribution option.

However, the DOL points out that if a "red flag" about the provider or contract comes to the fiduciary's attention between reviews (for example, a major insurance rating service downgrades the provider's financial health rating 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 to conduct an immediate review.

In examples provided to illustrate when the obligation to monitor specific providers stops, the DOL explains that the obligation to periodically review an annuity provider ends when the plan stops offering annuities from that provider. The duty to monitor does not continue after discontinuing purchases merely because all benefit payments due under the annuity have not been completed.

## Statute of Limitations

To clarify further a fiduciary's exposure to liability for breaches in connection with annuity purchases, the DOL explains its view of how ERISA's statute of limitations period for fiduciary breach claims should be applied to the purchase of annuities by defined contribution plans. An action for a breach of fiduciary duty may not be brought after the earlier of:

- Six years after the date of the last action that was a part of the violation or, in the case of an omission, the latest date that the fiduciary could have cured the violation
- Three years after the earliest date the participant or beneficiary had actual knowledge of the breach

If fraud or concealment of a breach is involved, an action may not be brought later than six years after the breach was discovered. Absent fraud or concealment, this means that a participant or beneficiary must base claims on actions or omissions that occurred within the six years before the lawsuit. As an example, if the participant or

beneficiary claims a loss based on the imprudent selection of an annuity contract, the claim would have to be brought within six years of the date the contract was purchased.

## Initiative to Encourage Annuities and Broaden Retirement Plan Access

The field assistance bulletin was one of many announcements made in conjunction with the White House Conference on Aging. [DOL's Fact Sheet](#) emphasized that the bulletin was part of a broader initiative designed to increase awareness and availability of lifetime income options in defined contribution plans. Similarly, the [White House Fact Sheet](#) expressed the expectation that the “guidance should encourage more employers to offer lifetime income annuities as a benefit distribution option in their 401(k)-type plans.” The White House also remarked on last week’s guidance on lump sums to retirees (see our [July 10, 2015 FYI Alert](#)) and shared a long list of government, association and private industry efforts to support the needs of older Americans.

## In Closing

It remains to be seen whether clarity about fiduciary responsibility will spur more offerings of annuities from defined contribution plans. And if more annuity products are made available, it’s unclear whether plan participants will actually opt to lock in a retirement income as is hoped.

### State Initiatives

President Obama also directed the DOL to issue a regulation to support state savings plan initiatives to promote broader access to retirement opportunities for Americans without access to a retirement plan at work. See our [January 15, 2013 For Your Information](#) on one such program, the California Secure Choice Retirement Savings Program. The DOL regulation is expected to help some states that have enacted retirement savings programs determine what measures they can take (if any) to avoid ERISA pre-emption of those programs — most of which are based on automatic IRAs. The DOL’s fact sheet says a proposed regulation should be ready by the end of 2015.

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