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Prudent Practices for Retirement Income Solutions

Defining a fiduciary standard of excellence for selecting and monitoring retirement income solutions

Handbook | Retirement Income Solutions

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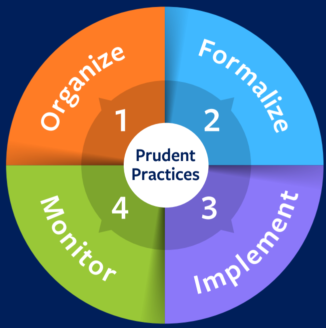

Primary Contributors
Blaine F. Aikin, AIFA®, CFA®, CFP®
Gary Baker
John Faustino, AIFA®, PPC®
Branislav Nikolic, FRM
Michelle Richter, AIF®
Bonnie Treichel, JD

Legal review provided by
Fred Reish
Faegre Drinker Biddle & Reath LLP
1800 Century Park East, Ste. 1500
Los Angeles, California 90067, USA

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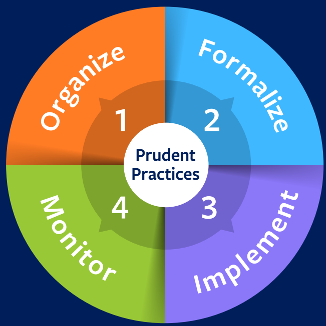

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Preface

Retirement savings plans were created to help the masses live long lives in relative prosperity after they've stopped working. With fewer defined benefit plans available and lifespans increasing, concerns around running out of income in retirement have meaningfully increased. This handbook was created to help expand retirement plan participants' access to, and consideration of, retirement income solutions. We thank members of Broadridge Fi360 Solutions' Retirement Income Consortium for supporting this initiative.

The Employee Retirement Income Security Act of 1974 (ERISA) is the federal law enacted to guard the interests of covered retirement plan participants, in large part by establishing enforceable fiduciary obligations on those most responsible for the management and protection of plan assets. It's worth noting that while the "RIS" in ERISA stands for "Retirement Income Security," most of the attention placed on defined contribution plans has been focused on accumulating retirement assets rather than on how income will be securely distributed from them.

Retirement income solutions are commercially available products and services designed to distribute accumulated plan assets safely, efficiently and economically to participants when they retire. As described in this handbook, these solutions may be insurance-based, investment-based or a combination of the two.

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The regulatory foundation upon which this handbook is built is ERISA Section 404. Sections 404(a)(1)(A) and (B) are the keystone in that they direct that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan; and 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 in the conduct of an enterprise of a like character and with like aims."

The ten Prudent Practices for Retirement Income Solutions (RIS Practices) presented in this handbook are intended to help plan fiduciaries, particularly retirement plan advisors and the plan sponsors they serve, to prudently evaluate, select and oversee retirement income solutions in qualified defined contribution plans. These RIS Practices are intended to reflect the best thinking of Broadridge Fi360 Solutions on processes that should be used when considering retirement income products and services for retirement plan participants. While the RIS Practices were intended to, at the least, meet the fiduciary prudent person standards of ERISA, they are also intended to reflect best practices, which in some cases exceed those imposed by law.

Collectively, the RIS Practices define a prudent process for plan fiduciaries to introduce and manage retirement income solutions in a defined contribution plan. The Practices are interrelated and not strictly sequential. Decisions made and actions taken in performing one Practice often need to be synchronized by making adjustments in the realm of other Practices. Understanding this interconnectedness is essential for the proper application of the all-important prudent process required under ERISA.

Individually, the RIS Practices each comprise four (4) parts: (1) practice, (2) criteria, (3) commentary, and (4) substantiation and resources. Each Practice is supported by more detailed Criteria. Each Practice also includes lengthy commentary to help the practitioner understand the practical application of the Practice and Criteria. Finally, the Substantiation and Resources provide the legal precedent and support for the Practice and underlying Criteria.

> Collectively, the RIS Practices define a prudent process for plan fiduciaries to introduce and manage retirement income solutions in a defined contribution plan.

The Prudent Practices for Retirement Income Solutions and associated criteria are organized under a four-step process. The steps are consistent with the global International Organization for Standardization (ISO) 9000 Quality Management System (QMS), which emphasizes continual improvement to a decision-making process:

Step 1: Organize
During the organize step, the plan sponsor assesses the need to include retirement income solutions in the plan and, in collaboration with plan fiduciaries, amends governing plan documents as necessary to do so.

Step 2: Formalize
During the formalize step, plan fiduciaries ensure that the Investment Policy Statement addresses prudent selection and monitoring of retirement income solutions and consider available safe harbors that may be elected.

Step 3: Implement
During the implement step, plan fiduciaries perform due diligence to select retirement income types and solutions for the plan, identify and address conflicts of interest, and establish appropriate written agreements with solutions providers.

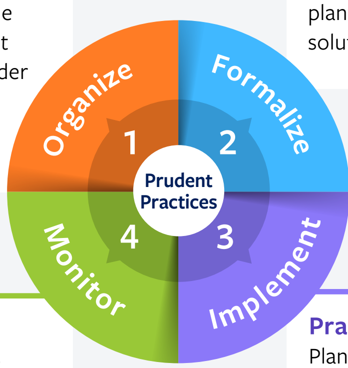
Step 4: Monitor
During the monitor step, plan fiduciaries conduct periodic reviews to ensure that retirement income solutions in the plan continue to meet the needs of the plan and the best interests of plan participants and that the RIS Practices are being effectively applied.

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

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.

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

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



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

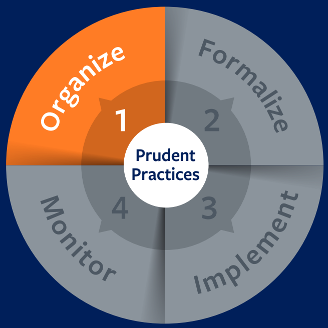
Practice 6
Consistent with the fiduciary duty of care, a prudent due diligence process is followed to select retirement income solutions providers and to choose retirement income solutions for the plan.

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.

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

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.

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



PRACTICE 1

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

CRITERIA

1.1 As a business decision, a settlor may determine that the plan should include a retirement income solution.

1.2 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.

1.3 The plan sponsor may review the demographics of the participants and objectives of the plan in addition to the plan sponsor's business objectives.

1.4 The plan sponsor may direct the fiduciary (or fiduciary committee) to further review retirement income solutions for inclusion in the plan.

Retirement plan sponsors should distinguish between fiduciary decisions and settlor decisions. Settlor decisions are not fiduciary decisions and, unlike fiduciary decisions, are not subject to ERISA. Instead, settlor decisions relate to the business judgments for the organization.

Another way of thinking about it is that settlor decisions often involve those decisions that may have a financial impact on the business or organization. If there is a financial impact, then it is most likely a settlor decision rather than a fiduciary decision. Decisions such as establishing, terminating and making amendments to a plan are all settlor decisions. Subsequently, when others exercise discretionary authority or control to determine how to carry out the settlor decisions on behalf of participants and beneficiaries, they do so as fiduciaries.

In practice, sometimes it may be difficult to distinguish a settlor decision from a fiduciary decision because the same person can make both types of decisions. For example, the Chief Financial Officer (CFO) for an organization might have the authority to make the settlor decision to amend the plan to add hardship distributions. In that capacity, the CFO is acting on behalf of and in the best interest of the organization. The same CFO might also serve on the retirement plan committee as a fiduciary to the plan. When carrying out and monitoring of the plan provision for hardship distributions with the third party administrator (TPA), the CFO is required to act with prudence and a duty of loyalty to the plan participant and beneficiaries.

In the context of retirement income solutions, the plan sponsor should first decide whether to include retirement income solutions in the plan. This can be a business decision that is based upon attracting and retaining talent through additional benefits; ensuring a timely retirement of employees to avoid the costliness of employees not retiring when they otherwise should; and other factors that the business may weigh in its business judgment. To determine whether the plan should include one or more retirement income solutions, the organization might consider factors such as its own employees' demographics (e.g., age, typical age at retirement, savings patterns in the plan, etc.).

The retirement plan advisor or consultant can play an important role in assisting the settlor to evaluate the plan demographics and other considerations to determine if one or more retirement income solutions may be appropriate. The retirement plan advisor or consultant may also introduce information related to the plan's objectives and how various retirement income solutions may help to meet certain objectives. For example, the retirement plan advisor or consultant may gather information from the recordkeeper or TPA to provide to the plan sponsor to make this business judgment. In assisting, the retirement plan advisor or consultant should continue to make clear that these conversations are outside of the fiduciary realm and meetings and are in the settlor context.

The primary decision for a settlor to make is that one or more retirement income solutions shall be included in the plan. Having done so, the settlor may, or may not, choose to make an additional decision specifying that one or more types of solutions shall be represented in the plan.

There are generally considered to be three types of in-plan retirement income solutions:

1. **Insured Income Solutions (guaranteed)** provide guaranteed income from immediate or deferred fixed annuities. These solutions focus upon mitigating longevity risk through a long-term contractual commitment. Those who select these solutions favor certainty of income and relative freedom from ongoing decision-making over control of assets (i.e., liquidity) and the upside potential (and downside risk) of exposure to securities markets.

2. **Investment-based Income Solutions (non-guaranteed)** provide managed payouts (systematic withdrawals) from accumulated retirement account savings and investments. These solutions allow investors (plan participants) to select from a finite range of target payouts designed and implemented by a professional manager. The payouts rely on interest, dividends and capital gains; therefore, the payouts vary based upon market conditions. Those who select these solutions favor access to their assets, the potential for higher returns, and the possibility of having undistributed assets at death for bequests over the downside risk of securities market exposure and the possibility of distributing all accumulated assets before lifetime income needs are met.

3. **Hybrid Income Solutions** provide a combination of insurance-based guaranteed income and access to accumulated assets in retirement account savings and investments. These solutions include variable and indexed annuities procured from insurance companies, often including riders to provide guaranteed lifetime withdrawal benefits (GLWB). These solutions also include managed payout services offered by asset managers who contract with insurers to provide guaranteed minimum withdrawal benefits (GMWB). Those who select hybrid solutions seek to address a broad array of risks, such as longevity, legacy, liquidity and cognitive (management ability) risks and they are willing to pay the added cost of features that may help mitigate those risks.

If the settlor does not specify one or more types of solutions that shall be offered in the plan, the decision as to the type(s) of retirement income solutions to be offered will necessarily need to be made by the fiduciary committee. In this situation, the committee is obligated to follow a sound fiduciary decision-making process to decide upon the type(s) of retirement income solutions as well as to select the providers and specific solutions that will be represented in the plan.

As discussed in Practice 2, settlor decisions generally require amendments to the plan document and other governing documents. Proper documentation is required to clearly differentiate settlor from fiduciary decisions.

The key to understanding Practice 1 is to recognize that decisions made in the settlor capacity are business decisions that are not subject to ERISA. Therefore, they do not invoke the rigorous obligations of fiduciary decision-making. The employer makes the decision to include retirement income options as a part of the plan, amends the plan accordingly and directs the fiduciary committee to proceed with its work based upon the direction it has provided.

Practice 1 Substantiation and Resources

Employee Retirement Income Security Act of 1974
§402(a), §404(a)(1)(A) and (B), §3(21).

The Setting Every Community Up For Retirement Enhancement Act of 2019
§204.

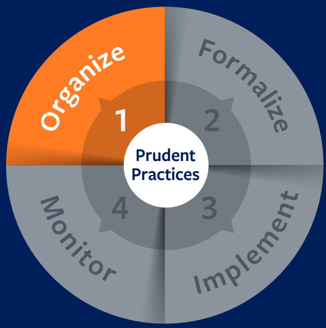
Regulations
Default Investment Alternatives Under Participant Directed Individual Account Plans; 29 CFR 2550.

DOL Guidance
DOL, Target Date Retirement Funds—*Tips for ERISA Plan Fiduciaries,* available **here**.

Other Resources
Government Accountability Office, *401(k) Plans: DOL Could Take Steps to Improve Retirement Income Options for Plan Participants,* (2016) available **here**.

Institutional Retirement Income Council, *Exploring the Process of Adding an Income Solution to Your Retirement Plan* (2021).

Munnell, Wettstein, and Hou, *How Best to Annuitize Defined Contribution Assets?* (2019).



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.

CRITERIA

2.1 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.

2.2 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.

2.3 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.

2.4 Plan fiduciaries should update communications such as the Summary Plan Description and other participant communications that necessitate revisions to accommodate retirement income solutions.

2.5 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.

The documents governing the operation and administration of a plan (governing documents) provide direction to fiduciaries as to how the plan is designed and how they are to carry out their obligations.

Though not defined in ERISA, for purposes of these RIS Practices, governing documents shall refer to the plan document, the investment policy statement (IPS), the committee charter (or other delegation document) and any other documents established for purposes of directing the plan fiduciaries with respect to how to carry out their obligations in accordance with the plan document. Provided that such documents are consistent with applicable laws and regulations, fiduciaries are expected to follow instructions provided by governing documents. Consequently, plan fiduciaries must take care to collect, organize and analyze all documents that are relevant to the responsibilities of plan fiduciaries and service providers. If necessary, the governing documents should be amended to be consistent with a plan sponsor's intent to provide retirement income to participants.

Retirement plans involve multiple governing documents that define roles and responsibilities and set expectations for the principles and practices fiduciaries are to follow. Certain documents may be required by law, such as a retirement plan document that contains provisions specifying how the retirement plan should operate. Other documents are not required by ERISA but help the plan run smoothly. For example, the committee charter may specify and delegate roles and responsibilities while the IPS specifies how plan assets are to be prudently managed.

While the documents that establish the terms of an engagement with a service provider, the plan document, the committee charter and the IPS are typically governing documents, special facts or circumstances may result in the creation of other governing documents that are unique to the specific entity. Consequently, plan fiduciaries must take care to collect, organize and analyze all documents that are relevant to the management of the plan, address the responsibilities of service providers and delineate responsibilities retained by the plan sponsor.

As it relates to retirement income solutions, the delegation and delineation of roles and responsibilities between the settlor and the fiduciary committee may be important (as discussed in Practice 1). The primary decision for a settlor is to determine that one or more retirement income solutions shall be included in the plan. Depending on the level of discretion the settlor chooses to take in further determining one or more types of solutions that shall be represented in the plan, the plan will need to be amended accordingly.

- An example of the plan amendment directing the fiduciary committee, where the settlor has not specified the types of solutions to make available: *The fiduciary committee shall include one or more retirement income solutions that provide for a product or series of services designed to assist the participant in managing the participant's accumulated account balance into a stream of retirement income. The fiduciary committee is directed to review the options available for the plan.*
- An example of the type of language that the fiduciary committee may receive in the form of a plan amendment from the settlor when the settlor has specified the type of retirement income solution to include in the plan: *The fiduciary committee is directed to review and conduct a thorough due diligence process on one or more retirement income solutions, at least one of which should involve an insured or otherwise guaranteed option to receive payments over the life of the participant.*

Once a decision is made to include retirement income solutions and as changes are made to the plan's governing documents for retirement income, fiduciaries should also make changes in the plan's required communications such as the Summary Plan Description (SPD). These required communications should be distributed to participants within the legally required timeframes; for example, the SPD must be furnished to all new participants within 90 days of becoming a participant in the plan and within 210 days after the close of the plan year in which the modification was made to the SPD.

While seasoned plan fiduciaries may be experts in establishing, reviewing and updating governing documents when overseeing investments held to accumulate assets in the plan, many fiduciaries may have little or no experience with plan provisions that enable participants to remain in the plan to receive income through retirement. As such, some adaptations to current practices of plan fiduciaries may be merited when retirement income solutions are added to the plan.

Well-crafted governing documents often state goals and objectives as well as key factors that are to be considered in, or that will impact, the entity's decision-making process for the plan. Governing documents may include the following provisions specific to retirement income solutions:

- Stated intention to provide retirement income options for plan participants
- Plan objectives or plan demographic considerations that are pertinent to the selection of retirement income solutions for the plan
- Obligation to reasonably evaluate the ability of lifetime income solutions providers to pay future income obligations
- Obligation of plan fiduciaries to consider the practices and charges of the plan's providers of retirement income solutions, and those service providers under consideration for selection
- Obligation to monitor providers of retirement income solutions, if required by law, regulations or requirements otherwise imposed upon plan fiduciaries

Fiduciaries should consider creating a fiduciary file to organize and serve as a repository for documents that govern decision-making and demonstrate faithful application of fiduciary best practices. Because retirement plans are diverse in size, demographics and scope, there is no single recommended approach. The fiduciary file should include documents pertaining to retirement income solutions evaluated for inclusion in the plan, including those not selected.

Practice 2 Substantiation and Resources

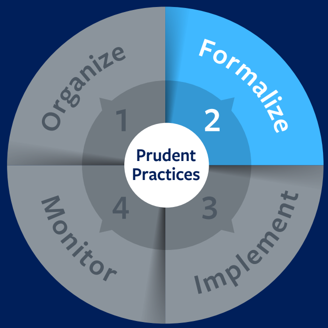
Employee Retirement Income Security Act of 1974
§3(38)(c); §104(b)(4); §402(a)(1); §402(b)(1); §402(b)(2); §403(a); §404(a)(1)(D); §404(b)(2).

The Setting Every Community Up for Retirement Enhancement Act of 2019
§204.

DOL Guidance
Interpretive Bulletin 2016-1 (reinstating the language of Interpretive Bulletin 94-2, with certain modifications), 81 Fed. Reg. 95879 (Dec. 29, 2016).

Case Law
Morse v. New York State Teamsters Conference Pension and Retirement Fund, 580 F. Supp. 180 (W.D.N.Y. 1983), aff'd, 761 F.2d 115 (2d Cir. 1985); Winpisinger v. Aurora Corp. of Illinois, 456 F. Supp. 559 (N.D. Ohio 1978); Liss v. Smith, 991 F. Supp. 278, 1998 (S.D.N.Y. 1998); Dardaganis v. Grace Capital, Inc., 664 F. Supp. 105 (S.D.N.Y. 1987) aff'd, 889 F.2d 1237 (2d Cir. 1989)); White v. Martin, 286 F. Supp. 2d 1029, 1039-41 (D. Minn. 2003); Kirshbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008) Investment Advisers Act of 1940 [IAA] §204(a) Regulations SEC Advisers Act Rule 204-2 [Books and records to be maintained by investment advisers.] Case law In the Matter of Covenant Financial Services, LLC and Stephen Shafer, Investment Advisers Act Release No. 4672 (Mar. 29, 2017); In the Matter of Calvert Investment Distributors, Inc. and Calvert Investment Management, Inc., Investment Advisers Act Release No. 4696 (May 2, 2017); In the Matter of Aisling Capital LLC, Investment Advisers Act Release No. 4951 (June 29, 2018) Other Form ADV and Investment Advisers Act Rules, Investment Advisers Act Release No. 4509 (August 25, 2016); Recordkeeping Requirements For Investment Advisers, NASAA Model Rule 203(a)-2, (Adopted Sept. 3, 1987, amended May 3, 1999, Apr. 18, 2004, and Sept. 11, 2005).

Prudent Practices for Investment Stewards, Practice 1.2.



PRACTICE 3

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

CRITERIA

3.1 The IPS defines the duties and responsibilities of all parties involved in the selection of retirement income solutions.

3.2 The IPS addresses the due diligence process for selection of retirement income solutions for the plan.

3.3 The IPS addresses procedures for controlling and accounting for expenses associated with retirement income solutions selected for the plan.

3.4 The IPS (or an appendix to the IPS) outlines criteria for monitoring retirement income solutions in the plan.

The preparation and maintenance of the IPS are critical functions for plan fiduciaries. The IPS should be viewed as the business plan for managing plan assets. It should be consistent with the terms of governing documents and aligned with the requirements of ERISA.

Plan fiduciaries should be able to demonstrate intentionality and prudence in the selection of products and services to serve the best interests of plan participants and beneficiaries. The IPS is the primary means of establishing this from an asset management perspective. As retirement income solutions become common components of plans, the reasons and methods used to incorporate them need to be more formalized to demonstrate intentionality and prudence. This may be accomplished by addressing retirement income solutions in the IPS.

The IPS serves the important role of delineating roles and responsibilities among the parties involved. It is particularly important for the IPS to specifically exclude responsibility for services that are carved-out from what would otherwise be considered normal responsibilities of the plan sponsor, advisor or other fiduciary and non-fiduciary service providers. For example, if the advisor is not expected to monitor certain assets, the IPS should explicitly state that fact.

Given the complexity of some retirement income solutions, there may be some retirement plan consultants and advisors that will provide education to plan fiduciaries. This can be a valuable and necessary service if plan fiduciaries do not have sufficient knowledge about, and experience overseeing, retirement income solutions. If educational services are important for proper plan oversight, due diligence outlined in the IPS may include this among criteria to be considered in the due diligence process.

Selection and monitoring expectations should also be addressed. In some plans, retirement plan consultants may not be expected to select or monitor retirement income solutions. In other plans, a discretionary advisor may perform both functions. In still other instances, one advisor may select and monitor a investment-based solution (e.g., a target date fund with systematic withdrawal provisions) while a separate consultant evaluates the underlying insurer(s) of a guaranteed solution. These roles and responsibilities should be identified in the IPS to the extent possible, while recognizing that some roles and responsibilities may change depending on the retirement income solution(s) at issue.

Retirement plan consultants and advisors trained in a prudent due diligence framework for the selection and oversight of retirement income solutions may provide template language to include in the IPS. The language should not reference specific retirement income solutions nor specify a solution provider; rather, it should capture the process and selection criteria to be used to select an appropriate solution.

Benefits of Addressing Retirement Income Solutions in an IPS

Having and applying a sound framework for selecting and maintaining retirement income solutions in a plan demonstrates intentionality and prudence by design. By memorializing material aspects of the due diligence process in an IPS, fiduciaries can:

1. Keep focus on the long-term goals and objectives of the plan sponsor.
2. Avoid unnecessary differences of opinion and conflicts among fiduciaries and service providers.
3. Minimize the possibility of missteps due to a lack of clear guidelines.
4. Provide implementation guidance, which can be particularly useful in the case of a disruption in the continuity of decision-makers.
5. Establish a reasoned basis for measuring success, both in terms of meeting plan objectives and evaluating the efforts of service providers.
6. Establish and communicate reasonable and clear expectations between fiduciaries and service providers.

The IPS should have sufficient detail that a competent third party could implement the investment strategy. It should be flexible enough that it can be implemented in a complex and dynamic financial environment. It should not, however, be so detailed as to require constant revisions and updates.

Practice 3 Substantiation and Resources

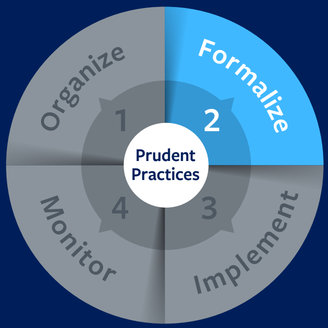
Employee Retirement Income Security Act of 1974
§3(21), §3(38); §402(b)(2); §402(c)(3); §403(a); §404(a); §405(c)(1).

Regulations
29 C.F.R. §2550.404a-1(b)(1); §2550.404a-1(b)(2).

The Setting Every Community Up for Retirement Enhancement Act of 2019
§204, §109.

Case Law
Sacerdote v. New York University, 2018 WL 3629598 (S.D.N.Y. Jul. 31, 2018); In re Unisys Savings Plan Litigation, 74 F.3d 420, 19 E.B.C. 2393 (3rd Cir.), cert. denied, 510 U.S. 810, 117 S. Ct. 56, 136 L. Ed. 2d 19 (1996); Morrissey v. Curran, 567 F.2d 546, 1 E.B.C. 1659 (2nd Cir. 1977); Harley v. Minnesota Mining and Manufacturing Company, 42 F. Supp. 2d 898 (D. Minn. 1999), aff'd, 284 F.3d 901 (8th Cir. 2002); Whitfield v. Cohen, 682 F. Supp. 188, 9 E.B.C. 1739 (S.D.N.Y. 1988); Liss v. Smith, 991 F. Supp. 278 (S.D.N.Y. 1988); Leigh v. Engle, 858 F.2d 361, 10 E.B.C. 1041 (7th Cir. 1988), cert. denied, 489 U.S. 1078, 109 S. Ct. 1528, 103 L. Ed. 2d 833 (1989); GIW Industries, Inc. v. Trevor, Stewart, Burton, & Jacobsen, Inc., 895 F.2d 729 (11th Cir. 1990); Laborers Nat'l. Pension Fund v. Northern Trust Quantitative Advisors, Inc., 173 F.3d 313 (5th Cir. 1999); Lanka v. O'Higgins, 810 F. Supp. 379 (N.D.N.Y. 1992); Jones v. O'Higgins, 11 EBC 1660 (N.D.N.Y. 1989); Katsaros v. Cody, 744 F. 2d 270, 279 (2d Cir. 1984).

Prudent Practices for Investment Stewards, Practice 2.6.



PRACTICE 4

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

CRITERIA

4.1 Available safe harbors pertaining to retirement income solutions are evaluated to determine if any advance the best interests of plan participants and beneficiaries.

4.2 When elected, safe harbors provisions are implemented in compliance with requirements.

“Safe harbors” are provisions within a law or regulation that are highly desired by fiduciaries because they mitigate fiduciary risk and provide clear and certain methods for reducing legal or civil liability.

One common example of a safe harbor sought by plan fiduciaries is qualified default investment alternatives (QDIA) where plan fiduciaries are relieved of liability if the QDIA (or default investment choice) suffers investment losses so long as the plan fiduciary meets certain requirements. Another common example of a safe harbor frequently elected by plan fiduciaries is under ERISA Section 404(c). Again, plan fiduciaries will not be held liable for investment losses suffered by participants who direct their own investments so long as the participants receive certain information to remain informed about the investment options and retain certain rights with respect to their investment options. This is not an exhaustive list of safe harbors available to plan fiduciaries but is exemplary of the types of safe harbors that exist in retirement plans.

There are three important concepts associated with safe harbor procedures.

1. **Safe harbors are voluntary.** A fiduciary choosing not to rely on available safe harbors bears the associated risk and consequences. But with risk often comes rewards. The requirements of safe harbors are deemed to be prudent even when doing so may increase administrative costs to the plan or (rarely) produce adverse and unintended consequences for the end investor. For example, in 2008 and 2009, the QDIA safe harbor, combined with automatic enrollment, produced a surge in contributions to individual account plans covered by ERISA. The safe harbor also restricted the use of cash equivalents to higher risk/return securities as a default investment. The unfortunate timing of the effective date for this safe harbor (just prior to the financial crisis of 2008) resulted in greater equities exposure for many 401(k) plan participants at a time of steep market declines. A judicious fiduciary should thoughtfully consider and weigh the protection that comes with a safe harbor versus potential costs or risks for participants or beneficiaries of the trust. At a minimum, an advisor or consultant to retirement plans should clearly advise the plan fiduciaries of safe harbor opportunities so they can make informed decisions.
2. **Safe harbors may insulate the fiduciary from liability** associated with certain investment-related decisions and acts. The fiduciary should think of safe harbor procedures as a form of “insurance.”
3. **The fiduciary must demonstrate compliance with the applicable requirements to take advantage of the safe harbor.** Safe harbor provisions are prescriptive and any missteps or deviations from its conditions may invalidate any protection from liability. Fiduciaries are strongly encouraged to investigate what safe harbors may be available and to adopt ones that are consistent with the interest of the participants and beneficiaries.

As discussed above, there are multiple safe harbors available to fiduciaries under ERISA. In this Practice, we will focus on the safe harbors created in the Annuity Selection Regulation in 2008 and the SECURE Act safe harbor from 2019. However, plan fiduciaries must recognize that they must go beyond what is required by safe harbors when they conduct due diligence on retirement income solutions. As discussed in Practices 5 and 6, plan fiduciaries should conduct a thorough selection and review process consistent with traditional fiduciary obligations of prudence and diligence. The safe harbors discussed below are one component of the plan fiduciary’s analysis.

In 2008, Congress passed a safe harbor for the selection of annuity providers in individual account plans (Annuity Selection Regulation). This safe harbor applies to participant-directed defined contribution plans and reduces fiduciary risk when plan fiduciaries are selecting guarantees included as part of lifetime income options. However, the safe harbor under the Annuity Selection Regulation required that plan fiduciaries evaluate an insurer’s creditworthiness and claims paying ability without clear guidelines for how to conduct the evaluation. Feeling like the conditions for qualifying for the safe harbor were vague and too burdensome to satisfy, few plan fiduciaries relied on the Annuity Selection Regulation.

In 2019, Congress passed the SECURE Act, which included a new safe harbor to provide protections that were not adequately addressed in the Annuity Selection Regulation. The SECURE Act was meant to remove the plan fiduciary's fears that it would have to make a determination as to the viability of an insurer to provide lifetime benefits, and the concern that it could be liable for the future insolvency of an insurance carrier the plan fiduciary may select. Specifically, the fiduciary will satisfy the safe harbor under the SECURE Act (and be protected from any participant claim related to the future insolvency of an insurance carrier), if it receives written representations from each insurer for a guaranteed retirement income contract that at the time of selection:

(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 seven plan years:

- a. Operates under a certificate of authority from the insurance commissioner of its domiciliary state which has not been revoked or suspended;
- b. Has filed audited financial statements in accordance with the laws of its domiciliary state under applicable statutory accounting principles;
- c. Maintains (and has maintained) reserves which satisfies all the statutory requirements of all states where the insurer does business; and
- d. Is not operating under an order of supervision, rehabilitation, or liquidation;

(iii) the insurer undergoes, at least every five 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.

These representations should be made at the time the insurance company (or companies) is selected. If the plan will continue to make purchases from the same insurer, it will need to obtain these representations annually. Plan fiduciaries must not have received notice of any change in the insurer's circumstances or other information which would cause it to question the representations provided initially or annually thereafter. To help plan fiduciaries satisfy the safe harbor, most retirement income solutions in the market today have these disclosures embedded in the offering materials for plan fiduciaries to review.

It is important to recognize that the loss of a safe harbor does not necessarily mean a fiduciary breach. For example, if the written representations from each insurer for a guaranteed retirement income contract discussed above are not all maintained after the initial year (or collection of information), that doesn't mean a breach has occurred, but rather, the safe harbor and its corresponding benefits are simply no longer available to the plan fiduciary; the plan fiduciary may still be making a prudent selection despite the election of the safe harbor.

Practice 4 Substantiation and Resources

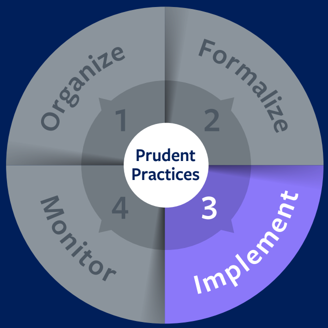
Employee Retirement Income Security Act of 1974
§3(38); §402(c)(3); §404(a)(1)(B); §404(c); §405(c)(2); §405(d)(1); §408(b)(14); §408(g)(10)-(11).

The Setting Every Community Up for Retirement Enhancement Act of 2019
§204.

DOL Guidance
DOL, Field Assistance Bulletin 2015-02.

Regulations
Interpretive Bulletin 95-1; 29 CFR § 2509.95-1.

Prudent Practices for Investment Stewards, Practice 3.2.



PRACTICE 5

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

CRITERIA

5.1 Types of retirement income solutions evaluated by plan fiduciaries are limited to those permitted by applicable provisions of governing documents (see Practice 2).

5.2 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).

5.3 Plan fiduciaries determine whether existing plan platform capabilities can accommodate the types of retirement income solutions under consideration and assess whether any limitations are acceptable or could be overcome by working with existing or new platform providers.

While retirement income offerings are rapidly evolving, most in-plan solutions fall into one of three categories:

1. **Insured Income Solutions (guaranteed):** provide guaranteed income from immediate or deferred fixed annuities. These solutions focus upon mitigating longevity risk through a long-term contractual commitment. Those who select these solutions favor certainty of income and relative freedom from ongoing decision-making over control of assets (i.e., liquidity) and the upside potential (and downside risk) of exposure to securities markets.
2. **Investment-based Income Solutions (non-guaranteed):** provide managed payouts (systematic withdrawals) from accumulated retirement account savings and investments. These solutions allow investors (plan participants) to select from a finite range of target payouts designed and implemented by a professional manager. The payouts rely on interest, dividends and capital gains; therefore, the payouts vary based upon market conditions. Those who select these solutions favor access to their assets the potential for higher returns, and the possibility of having undistributed assets at death for bequests over the downside risk of securities market exposure and the possibility of distributing all accumulated assets before lifetime income needs are met.
3. **Hybrid Income Solutions** provide a combination of insurance-based guaranteed income and access to accumulated assets in retirement account savings and investments. These solutions include variable and indexed annuities procured from insurance companies, often including riders to provide guaranteed lifetime withdrawal benefits (GLWB). These solutions also include managed payout services offered by asset managers who contract with insurers to provide guaranteed minimum withdrawal benefits (GMWB). Those who select hybrid solutions seek to address a broad array of risks, such as, longevity, legacy, liquidity and cognitive (management ability) risks and they are willing to pay the added cost of features that may help mitigate those risks.

In Practice 1, the plan sponsor, as settlor, by amending the plan document, may direct that the plan shall include one or more retirement income solutions. The plan sponsor may also specify which of the three types of solutions will be included. The plan amendment (as addressed in Practice 2) will determine the level of discretion and responsibility fiduciaries will have with regards to retirement income solution type selection.

Fiduciaries must follow direction provided in all relevant governing documents, including the plan document and plan amendments. In some instances, the type(s) of retirement income solutions to be considered will be specified to the fiduciaries; in others, fiduciaries may have a role in selecting the type(s) considered. In the latter case, plan demographic and participant needs (in addition to, and as long as they don't contradict, governing documents) should be factored into decisions on the type(s) selected.

Plan Demographic and Participant Need Impact on Retirement Income Solutions Type Selection

Four major sources of retirement income are Social Security, employer sponsored retirement accounts (including defined benefit and defined contribution), income from saved assets and earnings from employment. The inclusion or exclusion of a defined benefit plan should be a major demographic consideration with regards to retirement income solutions type(s). For plans whose participants don't have access to a defined benefit offering and are not expected to have other income sufficient to reasonably protect against longevity risk, inclusion of a retirement income solution type that provides guaranteed income for life could provide meaningful benefits.

Safe Harbor Decisions and Retirement Income Solution Type Selection

Decisions taken to pursue one or more safe harbors (Practice 4), may insulate the fiduciary from some investment- and insurance-related liabilities; making the type(s) of retirement income solution(s) to which the safe harbor applies more attractive to select.

If the plan's current platform doesn't support one or more of the retirement income solution types plan fiduciaries wish to include, and that limitation would have a material impact on expected participant outcomes, fiduciaries should consider the following:

1. **Request the current platform provider add the missing retirement income solution type(s).**
   Platforms may take direction from plan sponsors and advisors with regards to retirement income solution type additions. Making requests to expand the retirement income type(s) available on the plan's current platform which would materially improve expected participant outcomes is prudent and, therefore, a fiduciary responsibility.
2. **Identify an alternative platform that is able to support the retirement income solution types(s) they wish to pursue if the current platform cannot support the plan's needs.**
   If the current platform provider is unable, or unwilling, to make available the retirement income solution type(s) deemed prudent, plan fiduciaries should consider moving the plan to another platform. Plan fiduciaries should weigh the needs of the plan—taking into account the impact of platform transition—when evaluating whether the benefit of a new retirement income solution type(s) outweighs the cost of transition.

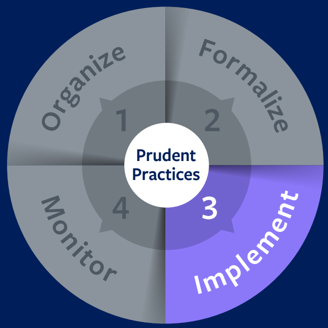
Practice 5 Substantiation and Resources

The Setting Every Community Up for Retirement Enhancement Act of 2019 §204.

Government Accountability Office, *401(k) Plans: DOL Could Take Steps to Improve Retirement Income Options for Plan Participants,* (2016) available **here**.

Munnell, Wettstein, and Hou, *How Best to Annuitize Defined Contribution Assets?* (2019).

Prudent Practices for Investment Stewards, Practice 2.4.



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.

CRITERIA

6.1 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.

6.2 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.

6.3 For lifetime income solutions, the long-term financial strength of the insurer and ability to pay all income obligations must be prudently evaluated.

6.4 The experience of a solutions provider in administering retirement income payments should be considered in the due diligence process.

6.5 The evaluation of retirement income solutions includes consideration of product and service features, benefits, costs, and effectiveness in mitigating material risks.

6.6 The due diligence process followed should be documented, demonstrating fulfillment of fiduciary responsibilities.

A fiduciary must be able to demonstrate that the strategies and products implemented are suitable for the specific client and in line with generally accepted investment theories.

Certain insurance offerings, including those providing lifetime income, are included in generally accepted investment theories. The term “generally accepted investment theories” refers to practices considered to be effective in producing the desired outcomes by academics and the community of professionals in the investment field. Given that the state of the art and science of investing evolves over time, generally accepted theories also change to reflect advances in the field. As an investment fiduciary, suitability is also implied under a duty of care.

It is important for the advisor to be familiar with the universe of retirement income options, prudently select them and document the process, for no one implementation structure is right for all occasions. ERISA’s prudence requirement generally comprises two components—“procedural prudence” and “substantive prudence.” The former refers to the process involved in making decisions for a plan, whereas the latter refers to the merits of the decision made by the fiduciary. The prudence requirement focuses on the fiduciary’s conduct in arriving at the decision, not on its results, and asks whether a fiduciary employed appropriate methods to investigate and determine the merits of a particular decision. However, the failure to investigate alone may withstand scrutiny where the investment decision nonetheless was objectively prudent. That means that even if a fiduciary failed to conduct a sufficient investigation before making a decision (procedural prudence), he or she probably avoids a fiduciary breach if a “hypothetical prudent fiduciary” would have made the same decision anyway (substantive prudence).

Retirement income solutions include those with embedded insurance features, and those offering managed payouts from investments.

Prudent Evaluation of Insurance Providers of Lifetime Income Solutions

As addressed in the introduction to the ten RIS Practices, they are grounded in ERISA Section 404. The SECURE Act of 2019 amends ERISA Section 404 to establish the “Fiduciary Safe Harbor For Selection Of Lifetime Income Providers” by adding new subsection (e) to Section 404. The new safe harbor focuses upon what fiduciaries should consider to be the minimum standard for due diligence on guaranteed retirement income solutions.

A broad understanding of ERISA Section 404 and a more detailed understanding of the new safe harbor are critical to fully appreciate the due diligence requirements for the selection of guaranteed retirement income solutions. The text of the first part of new subsection 404(e) is provided on the next page and is accompanied by explanatory points to help better understand what the component parts of the safe harbor mean.

> It is important for the advisor to be familiar with the universe of retirement income options, prudently select them and document the process, for no one implementation structure is right for all occasions.

SUMMARY AND EXPLANATION OF THE FIDUCIARY SAFE HARBOR FOR SELECTION OF LIFETIME INCOME PROVIDERS	
Section Number and Content	**Explanation**
(e) Safe Harbor For Annuity Selection (1) IN GENERAL—With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of (a) (1) (B) will be deemed to be satisfied if a fiduciary—	The reference to (a) (1) (B) relates to ERISA Section 404(a) (1) (B) that requires fiduciaries to act prudently and solely in the best interest of plan participants and beneficiaries. These responsibilities are met by applying due diligence outlined in Section 404(a) (1).
(A) Engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;	This provision reinforces the obligation to act prudently by engaging in "an objective, thorough, and analytical search" for guaranteed lifetime income solutions providers. Practice 6 frames the elements of a prudent due diligence process covering all types of retirement income solutions.
(B) With respect to each insurer identified under subparagraph (A)-- (i) Considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and	Proper due diligence on insurers providing lifetime income must include evaluation of their ability to meet their obligations under the contract. As explained in Practice 4, this safe harbor allows the fiduciary to rely on certain representations by the insurer regarding compliance with regulatory obligations, maintenance of required reserves, completion of regular financial examinations, and prompt disclosure of material information.
(ii) Considers 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	Proper due diligence requires fiduciaries to consider features, benefits, administrative services and costs. A separate provision in the safe harbor makes clear that there is no obligation to choose the lowest cost retirement income solution; higher cost may be justified based upon features, benefits or services that make the added expense fair and reasonable.
(C) on the basis of such consideration, concludes that— (i) At the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and	The phrase "time of selection" as used (1) (C) (i) is defined in a separate provision of the safe harbor as "(i) the time that the insurer and the contract are selected for distribution of benefits to a specific participant or beneficiary; or (ii) if the fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (1) (C) …the time that the insurer and the contract are selected to provide benefits at future dates to participants or beneficiaries under the plan."
(ii) The relative cost of the selected guaranteed retirement income contract as described in subparagraph (B) (ii) is reasonable."	Costs are clearly a focal point of due diligence associated with the safe harbor. This provision makes clear that competing retirement income solutions must be compared to establish that the relative cost of a selected solution is fair and reasonable for the features, benefits and services provided.

In addition to the requirements associated with initial selection and annual monitoring of representations of providers under the safe harbor, there is a requirement to periodically review the insurer to fully comply. Practice 9 addresses monitoring of retirement income solutions in retirement plans and the providers of those solutions.

The criteria used to select among specific retirement income solutions may vary by type of solution and the unique needs and requirements of the plan. The remainder of the Commentary for Practice 6 will focus on due diligence for all types of retirement income solutions (whereas the discussion above focused on the minimum due diligence required for guaranteed solutions if the SECURE Act safe harbor is elected).

In all instances, the following criteria should be considered when selecting a retirement income solution:

- **Availability Of Data for Initial and Ongoing Due Diligence**
  Comparative data availability is critical to fulfilling one's role as a fiduciary. Only those offerings that provide reasonable access to required due diligence data should be considered for inclusion.
- **Payment Guarantees**
  Separate from the evaluation of the retirement income solution provider's ability to pay, the legal guarantees and obligations associated with each specific solution's payment stream require evaluation.
- **Fees and Expenses**
  Explicit and implicit fees and expenses need to be considered in the context of the benefits being delivered.

Retirement income solution types that include insurance/ guaranteed income may include the following criteria among those used to consider their fit within a given plan:

- Availability of data for initial and ongoing due diligence
- Solution characteristics during benefit accumulation (before income distribution):
  - Fees and expenses—explicit
  - Fees and expenses—implicit
  - Accumulation protection
  - Liquidity
  - Death benefit
- Solution characteristics during benefit payout (after income distribution has commenced)
  - Longevity protection
  - Fees and expenses—explicit
  - Fees and expenses—implicit
  - Accumulation protections
  - Payout adjustments
  - Additional contributions
  - Liquidity and portability
  - Death benefit
- Operational characteristics
  - Platform availability
  - Recordkeeping support (including participant experience)
  - Portability
  - Rollover option

Retirement income solution types that include investments may include the following criteria among those used to consider their fit within a given plan:

- Availability of data for initial and ongoing due diligence
- Regulatory oversight
- Minimum track record
- Stability of the organization
- Assets in the investment
- Expense ratio/fees relative peers
- Risk-adjusted performance relative peers
- Performance relative to peers

Those solutions that include both insurance/annuity and investment offerings may include a combination of the criteria sets noted above. The criteria sets noted above are not meant to be exhaustive, but rather representative of the criteria which may be used to evaluated and compare retirement income solution offerings.

Example approach for evaluating and selecting retirement income solutions within a given type (Peer group)

- As evidenced by the sample criteria noted above, evaluating retirement income solutions for selection can involve both quantitative and qualitative criterion.

- The lens (criterion and criterion weightings) used to evaluate these solutions should be driven by each plan's unique needs and requirements associated with a given type (peer group). When criteria have different levels of importance to the plan, they should be weighed accordingly in the overall evaluation.
  - For example, the following weightings may be assigned to each criterion:
    - **Critical:** If an option fails a critical criterion, the option is removed from consideration.
    - **High:** Criteria weighted high are extremely important to the overall evaluation.
    - **Medium:** Criteria that have a moderate alignment with a plan's specific needs and requirements would be assigned a medium weighting.
    - **Low:** Those criteria that have an alignment with a plan's needs and requirements that is large enough to warrant some consideration, but not large enough to be considered of medium importance would be assigned a low weighting.
    - **N/A:** These criteria have such little alignment with a plan's needs and requirements that they don't warrant inclusion in the evaluation process.

- In addition to the importance of the criteria, and the relative alignment of each option with the criteria should factor into the net score each option is assigned for the criteria.
  - Criteria considered critical would receive a score of pass or fail. If an option fails a criterion considered critical (such as availability of data for initial and ongoing due diligence), that option would be immediately removed from consideration.
  - For those criteria assigned a high, medium or low importance, each option would be assigned an alignment with those criteria of high, medium, low or N/A.
  - Criteria assigned N/A would not be evaluated for option alignment.

- Assigned numerical values to the high, medium and low criteria and alignment weightings can be used to multiply the criteria importance by each option's alignment with the criteria, yielding a weighted score for each option on each criterion.

- The sum of these scores across all criteria will yield a ranking which may be used for validating selections.

- The criteria used for selection must be logically aligned with the plan's needs and requirements. The weighting given each criterion, and the options' assigned alignment with the criterion, must be rational.

Beyond ranking available solutions, fiduciaries need to ensure a minimal threshold of prudence is met even by the best ranking option. If the plan's current platform doesn't include a retirement income solution deemed prudent in each desired solution type, and that exclusion would have a material impact on expected participant outcomes, fiduciaries should consider the following:

1. **Requesting their current platform add one or more retirement income solutions deemed prudent for each retirement income solution type plan fiduciaries wish to include.**
   Platforms may take direction from plan sponsors and advisors with regards to retirement income solution additions. Making requests to expand the retirement income solutions available on the plan's current platform which would materially improve expected participant outcomes is prudent and, therefore, a fiduciary responsibility.

2. **Identifying an alternative platform that includes one or more retirement income solution(s) they wish to pursue if the current platform cannot support the plan's needs.**
   If the current platform provider is unable, or unwilling, to make available the retirement income solution(s) deemed prudent, plan fiduciaries should consider moving the plan to another platform. Plan fiduciaries should weigh the needs of the plan—considering the impact of platform transition—when evaluating whether the benefit of one or more new retirement income solutions outweighs the cost of transition.

Practice 6 Substantiation and Resources

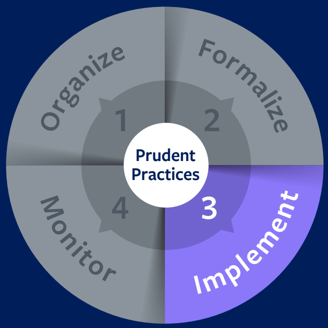
Employee Retirement Income Security Act of 1974
§3(38); §404(a).

The Setting Every Community Up for Retirement Enhancement Act of 2019
§204.

DCIIA, *Retirement Income Solutions: A Guide for Plan Sponsors Considerations and case studies to help employers understand and evaluate retirement income options* (2015).

Munnell, Wettstein, and Hou, *How Best to Annuitize Defined Contribution Assets?* (2019).

Prudent Practices for Investment Stewards, Practice 3.1; 3.3.



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.

CRITERIA

7.1 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.

7.2 Conflicts must be avoided or mitigated in the interests of plan participants and beneficiaries.

7.3 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.

The fundamental duty of plan fiduciaries is to act in the best interest of those they serve, which means that fiduciaries are obligated to be objective and diligent in the performance of their duties.

This also means that fiduciaries must seek to avoid or mitigate conflicts of interest that may arise among others with a relationship to the plan, such as (1) fiduciary investment advisors, (2) non-fiduciary advisors (or salespersons) and (3) product providers.

Plan fiduciaries must identify conflicts and determine where conflicts are material in nature. A good working definition of a material conflict of interest is a circumstance that makes fulfillment of the duty of loyalty less reliable. A conflict is material if awareness of the conflict would reasonably be expected to influence decision-making. It is the circumstance itself that creates a conflict. There is no such thing as a "potential" conflict; the conflict either exists or it doesn't. Whether a conflicted party's conduct changes because of the conflict is a separate matter.

It is critical for plan fiduciaries to be aware of material conflicts of interest and evaluate how each conflict should be handled for each type of relationship. They should examine the nature and scope of each conflict, decide if it is a material conflict, and respond accordingly.

For example, in some cases a recommendation or sale of a retirement income product will involve transaction-based compensation (a commission). Transaction-based compensation is a conflict of interest and in almost all cases will be a material conflict. When there is a conflict, the two basic remedies to a conflict are avoidance or mitigation. Avoidance is generally the preferred solution and is sometimes required, such as when a prohibited transaction would occur in an ERISA account with no available prohibited transaction exemption.

When a material conflict is not avoided, plan fiduciaries must determine the mitigation practices available and determine if they are adequate to protect the interests of the plan and its participants. It is important to keep in mind, however, that mitigation through disclosure, for example, is not always satisfied through delivery and signed receipt of boilerplate language. A conflict that is not reasonably managed is also a fiduciary breach.

Most complaints relate to actions taken in the past and are evaluated in hindsight during arbitration, litigation or a regulatory action. The risk of mitigating a conflict rather than avoiding it is that mitigation may not be deemed adequate in an after-the-fact evaluation of the facts and circumstances giving rise to the conflict at the point in time it was provided.

For recommendation of retirement income solutions, fiduciary advisors should provide disclosures (e.g., 408(b)(2) disclosure, agreement, and Form ADV) related to their services, fees and all compensation received. Non-fiduciary advisors or those acting in an educational or sales capacity as well as product providers may also have disclosures of their services and fees (e.g., 408(b)(2) disclosure and/or agreement) and the products they are providing. Plan fiduciaries must evaluate these disclosures and determine if any conflicts exist.

As a best practice, plan fiduciaries should discuss material conflicts verbally with the parties in interest and not merely rely on previously delivered written or electronic disclosures. A summary of the discussion and ultimate decision should be put in writing and signed, with a copy retained by all affected parties.

Practice 7 Substantiation and Resources

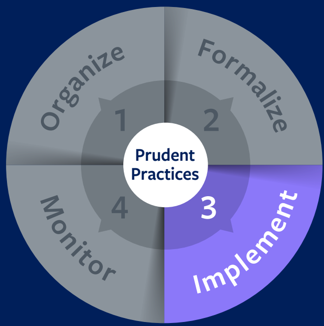
Internal Revenue Code of 1986
§4975.

The Setting Every Community Up for Retirement Enhancement Act of 2019
§109; §203; §204.

Employee Retirement Income Security Act of 1974
§3(14); §404; §406(a) and (b); and §408.

Regulations
29 C.F.R. §2550.408(b)-2(b), (c), and (e).

Prudent Practices for Investment Stewards, Practice 1.4.



PRACTICE

8

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

CRITERIA

8.1 Plan fiduciaries require each retirement income solutions provider to fully disclose in writing all compensation arrangements and affiliations associated with the service agreement.

8.2 Plan fiduciaries must be aware that insured income (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 decided upon the type of retirement income solution(s) to be included in the plan (Practice 5) and conducted the due diligence necessary to prudently select specific retirement income solution(s) to be used (Practice 6), agreements may be established with selected service providers. Fiduciaries must only establish agreements with retirement income solutions providers that are reasonable.

The due diligence process used to select retirement income solutions generally rely upon data sources and provider representations that are believed to be accurate and thorough. However, fiduciaries must review the terms and conditions of agreements that will be used to implement each selected solution to determine that the intended features will be delivered at a reasonable cost and with appropriate accountability. Agreements should directly disclose the information needed by fiduciaries to perform appropriate due diligence or should include references to specific disclosure documents that provide the information.

Many of the most critical disclosures are now mandated by law. Under authority of the Investment Advisers Act, Form ADV, Part 2 requires advisors to disclose business practices, fees, conflicts of interest, disciplinary information and affiliates. Under ERISA, Section 408(b)(2) requires service providers to disclose their fiduciary status, services and fees and non-fiduciary services provided to a retirement plan.

Plan fiduciaries must be aware that insured income (guaranteed) retirement income solutions do not have the same disclosure requirements as investment products and services and 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.). For insured income (guaranteed) retirement income solutions, plan fiduciaries should seek to obtain information that is comparable to disclosures required in the Form ADV, Part 2 and disclosure requirements under ERISA Section 408(b)(2): fiduciary and non-fiduciary services provided, fees and other material information. Plan fiduciaries must also evaluate service agreements and insurance contracts to understand the representations and limitations of income guarantees, portability provisions (if any) and the terms of any other services and insurance riders provided. Ultimately, plan fiduciaries must be satisfied that products and services procured serve the best interests of participants and that the costs involved are fair and reasonable. Consistent with the duty of care, plan fiduciaries who lack the requisite knowledge required to manage plan assets prudently should seek assistance from outside professionals. For example, construction and management of portfolios with complex investments or investment strategies may be delegated to qualified investment fiduciaries or investment managers. Similarly, plans seeking to offer retirement income solutions may delegate responsibility for selection and monitoring of retirement income solutions to qualified experts.

When hiring such professionals, any agreement should be in writing and define the scope of the parties' duties and responsibilities. Written agreements help ensure that the parties have a clear, mutual understanding of their roles and responsibilities and that terms of the agreements can be readily checked for conformity to other governing documents. All such agreements should be prepared or reviewed and approved by knowledgeable legal counsel.

A prudent and appropriately documented process to hire a retirement income solutions provider must be followed by diligent monitoring of the relationship and periodic assessments of whether the service provider should be retained, as addressed in Practice 9. A decision to replace a retirement income solutions provider should be based upon careful consideration of changes in needs, provider capabilities and competing alternatives available in the marketplace, as well as the time and expense of making a change.

Practice 8 Substantiation and Resources

Internal Revenue Code of 1986
§4975(d).

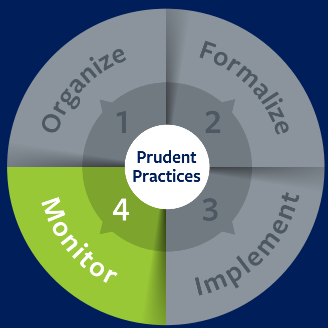
Employee Retirement Income Security Act of 1974
§3(14)(B); §3(38)(C); §402(c)(2); §403(a)(2); §404(a)(1); §408(b)(2).

The Setting Every Community Up for Retirement Enhancement Act of 2019
§204.

Case Law
Liss v. Smith, 991 F. Supp. 278 (S.D.N.Y. 1998); Whitfield v. Tomasso, 682 F.Supp. 1287, 9 E.B.C. 2438 (E.D.N.Y. 1988); Kraft Foods Global, Inc., 641 F.3d 786 (7th Cir. 2011).

Regulations
29 C.F.R. §2550.408b-2; 29 C.F.R. § 2550.408b-2(c).

Prudent Practices for Investment Stewards, Practice 1.5.



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.

CRITERIA

9.1 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.

9.2 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).

9.3 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).

9.4 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.

9.5 Downgrades in the financial strength ratings of insurers guaranteeing lifetime income are promptly identified, assessed and addressed in the best interest of plan participants.

9.6 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.

The Purpose and Timing of Monitoring

Monitoring involves periodically revisiting what was done in the first eight Practices and updating decisions made based upon new material information. The logic is simple: the purposes, considerations and decisions addressed in Practices 1 through 8 defined the path for the prudent selection and management of retirement income solutions for the plan.

Now the task is to keep the plan on the right path, making course corrections as needed to serve the best interests of plan participants. It's all about relying on a prudent process to make consistently sound decisions over the course of time and changing circumstances.

As best practices, the IPS should be reviewed at least annually to ensure it is aligned with current facts, circumstances, regulation, and legislation associated with the provision of retirement income solutions in the plan and service provider agreements should be reviewed approximately every three years to ensure that plan sponsor objectives and the best interests of plan beneficiaries continue to be served. Note that governing documents may specify more frequent reviews or other circumstances that require a review to be conducted. In those cases, the governing documents should be followed.

Service provider reviews should apply sound due diligence to evaluate relevant information about competitive providers in the marketplace. The timing of reviews may be more or less frequent than every three years based upon facts and circumstances. Factors that may influence the frequency of reviews include the following:

- A change in the depth, breadth, or scale of services needed may make a different service provider better suited to the objectives of the plan sponsor or the needs of plan participants than the existing provider.
- Rising competition and falling prices may change marketplace dynamics.
- The range and terms of retirement income solutions offered by the existing provider have changed.
- New technology offers the opportunity to secure improved services and/or lower costs elsewhere.
- New entrants in the market are seeking to expand market share through aggressive pricing and other incentives.
- Changes in applicable laws or regulations, require different services than the current vendor provides.

Reliance on the safe harbor from the SECURE Act will also influence the frequency of reviews for the retirement income solutions provider.

Compliance with Insurance Provider Safe Harbor Requirements (if elected)

Consistent with decisions made in Practice 4, if the safe harbor for selection of an insurance provider was elected, as allowed under the SECURE Act of 2019, the fiduciary must complete the following monitoring to comply:

> *"(B) PERIODIC REVIEW—A fiduciary will be deemed to have conducted the periodic review described in subparagraph (A)(ii) if the fiduciary obtains the written representations described in clauses (i), (ii), and (iii) of paragraph (2)(A) from the insurer on an annual basis, unless the fiduciary receives any notice described in paragraph (2)(A)(iv) or otherwise becomes aware of facts that would cause the fiduciary to question such representations."*

Monitoring as an Extension of the Due Diligence Process

Due diligence responsibilities, as detailed in Practices 5 and 6, are at the heart of Practice 9. Practice 5 involves evaluating the types of retirement income solutions that are available to the plan and choosing among them. Monitoring involves repeating Practice 5 to consider changes in the workplace (shifting plan participant demographics or plan sponsor objectives) as well as changes in the marketplace (product and platform developments that change the competitive landscape).

Monitoring also involves repeating Practice 6. The performance and adequacy of retirement income solutions that are currently represented in the plan are assessed in terms of reasonable service standards and in the context of comparable alternatives that are now available to the plan in the competitive marketplace. The competitive analysis is generally conducted using the same due diligence criteria applied in the previous selection process, adjusted for any opportunities to improve the evaluation (e.g., by considering improved data availability achieved since the last analysis).

Consideration of Qualitative Factors

Monitoring responsibilities extend beyond examination of competitive performance, e.g., current level of promised or projected income. Qualitative reviews should be used to detect warning signs about a retirement income service provider. Plan fiduciaries have a continuing duty to exercise reasonable care, skill and caution when selecting and retaining product and service providers that participants will rely upon for retirement income.

Monitoring should be done at intervals that are appropriate for the particular product or service. The use of a scheduled, periodic approach (e.g., annually) could help ensure that plan fiduciaries fulfill their monitoring responsibilities.

For example, fiduciaries should evaluate:

- Departures from guidelines established by the IPS or service agreement terms.
- Material changes in the solution provider's organization, key personnel or approach to the solutions provided to the plan.
- Legal or regulatory proceedings that may affect the solutions provider.
- A change in the financial strength ratings of insurers providing guaranteed income.

Materiality Standard

The materiality of an occurrence, event or information under the law is generally defined as something that is sufficiently significant to influence the decision-making of a reasonable person acting in a like capacity and familiar with such matters. For example, a downgrade in the financial strength ratings of an insurance company selected to provide a guaranteed lifetime income solution would generally be considered material and would likely warrant a prompt review of whether that solution should be retained or replaced.

Retain, Replace or Add Decision-making

When a retirement income solution fails to meet established service standards and due diligence criteria, fiduciaries must decide whether it is best to retain or replace that solution. The decision should not be made based solely on prior performance; rather, what matters most is having confidence that the solution will meet expectations going forward. One way to manage those decisions is by having established "watch list" procedures. When a retirement income solution fails to meet defined criteria, it is then placed on a watch list for closer scrutiny. There are no established mandates for when a solution should be added to the watch list or removed from a plan line-up. Like so many other areas of fiduciary responsibility, the most important phrase to remember is "sound process, consistently applied." To demonstrate that a sound watch list process is being consistently applied, the fiduciaries overseeing the plan's retirement income solutions should follow a prudent retain or replace decision-making process that includes the five steps listed below.

1. Meet regularly to review the current situation.
2. Collect and carefully evaluate the evidence of whether the solution is serving its intended purposes of meeting the needs of plan participants and the objectives and expectations of the plan sponsor.
3. Consider reasonably available alternatives and assess the costs, benefits and other material facts associated with a decision to replace the existing solution.
4. Act appropriately based upon the evidence and any precedents established through previous deliberations and actions of a similar nature.
5. Document the evidence gathered, the substance of deliberations held and the decisions that were made.

In the rapidly evolving and increasingly competitive retirement income solution marketplace, monitoring doesn't always involve the binary decision to retain or replace an existing position. It may be that plan fiduciaries see the opportunity to serve a broader spectrum of the plan participant population by adding a retirement income solution option of a different type. For example, if the plan has an investment-based option that focuses on flexibility and legacy considerations, fiduciaries may decide that it would be desirable to add a guaranteed option for those more interested in managing longevity risk and reducing involvement in the management and distribution of the assets that produce the income.

Plan fiduciaries should keep abreast of developments in the retirement income solutions marketplace and seek to continuously improve the offerings in the plan to serve the best interests of the overall participant population. This essentially involves taking a fresh look at the plan's offerings by periodically returning to Practice 1 and progressing through all ten practices.

Ultimately, the retain-replace-add decision-making process for retirement income solutions requires judgment and is guided by awareness and careful consideration of alternatives available in the marketplace.

Practice 9 Substantiation and Resources

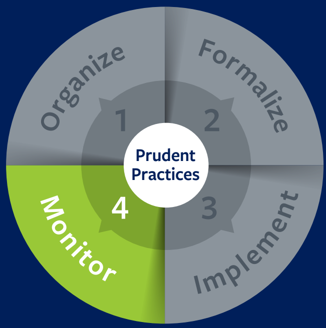
The Setting Every Community Up for Retirement Enhancement Act of 2019
§204.

Employee Retirement Income Security Act of 1974
§3(21); §3(38); §404(a).

DOL Guidance
Department of Labor, Meeting your Fiduciary Responsibilities (2021).

Department of Labor, *Getting it Right: Know your Fiduciary Responsibilities*, available **here**.

Prudent Practices for Investment Stewards,
Practice 4.1; Practice 4.2; Practice 4.4.



PRACTICE 10

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

CRITERIA

10.1 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.

10.2 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.

ERISA sets standards of conduct for plan fiduciaries—those who are responsible for managing an employee benefit plan and its assets. With fiduciary responsibility comes potential liability for those who do not fulfil the required standards of conduct.

One of the most important ways for fiduciaries to limit their liability is to document the prudent processes that are diligently applied to carry out their fiduciary responsibilities. With appropriate documentation, a comprehensive review can be periodically conducted to ensure that all applicable practices are consistently and effectively applied.

Plan fiduciaries should conduct formal reviews of the policies and procedures used to evaluate, select and oversee the plan's retirement income solutions to determine the extent to which they adhere to the practices presented in this handbook. These fiduciary assessments should be conducted at appropriate intervals (typically every one to three years) by trained internal staff or external fiduciary experts. Any performance gaps or opportunities for improvement identified should be addressed in a timely manner.

For retirement income solutions recently introduced to a plan, the most fundamental performance gap for fiduciaries to be on the look-out for is low utilization. This may be indicative of inadequate education and communication of plan fiduciaries and participants, or of inadequate decision architecture in the plan design (e.g., defaults). Low utilization may also prompt a review of the types of retirement income solutions included in the plan, or of the individual solutions currently in use.

Who is a Fiduciary?

As a valuable resource for plan fiduciaries, the Employee Benefits Security Administration (EBSA) of the Department of Labor has published the booklet "Meeting Your Fiduciary Responsibilities." Most relevant to this discussion of retirement income solutions are the booklet's explanations of who is a fiduciary and the significance of serving in a fiduciary capacity. This section and the sections immediately below summarize key points drawn from these sections of the EBSA booklet.

Every ERISA plan must have at least one named fiduciary who is charged with having control over the plan's operation. This may be a person identified by name or office in the organization. It could also be a company's board of directors, or a fiduciary committee established in the company.

In addition to the named fiduciary, plan fiduciaries generally include the trustee, investment advisers, individuals who serve on a fiduciary committee (if there is one) and anyone who exercises discretion in administering the plan. The EBSA booklet notes: "The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan."

Importantly, it is a fiduciary act to appoint members to serve on a fiduciary committee (also known as an administrative committee). Thus, these appointing fiduciaries are obligated to make sure the appointees are aware of their fiduciary duties, know how to perform them and fulfil their responsibilities on an ongoing basis.

As discussed in Practice 1, it is important to note that an employer may make certain business decisions that are not fiduciary actions. These "settlor decisions" include the decision to establish, amend or terminate a retirement plan, or to include features in the plan, such as a type of retirement income solution.

All agreements with product and service providers should be in writing and be specific about the products and services to be provided. A best practice is to have all product and service providers disclose their fiduciary or non-fiduciary status. A fiduciary acknowledgment letter or agreement(s) can also be used to document the fiduciary status of anyone who has not otherwise disclosed their status.

What is the Significance of Being a Fiduciary?

EBSA's "Meeting Your Fiduciary Responsibilities" booklet highlights the following five responsibilities for plan fiduciaries:

1. "Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
2. Carrying out their duties prudently;
3. Following the plan documents (unless inconsistent with ERISA);
4. Diversifying plan investments; and
5. Paying only reasonable plan expenses."

These responsibilities are closely aligned with the RIS Practices in this handbook.

With respect to the second responsibility listed above, the EBSA booklet notes the following:

> *"The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions. Prudence focuses on the process for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions."*

Prudence is required for the evaluation, selection, implementation and oversight of retirement income solutions, just as it for investments. The above admonitions for fiduciaries to apply professional expertise and to document decisions and the basis for them are especially pertinent in the relatively new and rapidly growing retirement income space.

The third fiduciary responsibility listed above—following plan documents—is also particularly relevant to retirement income solutions. Practice 2 covered the importance of aligning governing documents with retirement income solutions decisions made. In Practice 3, and here in Practice 10, the focus is on including guidance on the selection and maintenance of retirement income solutions in the IPS. Diligence in required to properly craft documents and keep them current.

Education for Plan Fiduciaries and Plan Participants on Retirement Income Solutions

EBSA's "Managing Your Fiduciary Responsibilities" booklet calls attention to the importance of investment advice and educational resources for plan participants and provides guidance about how to contract for such services. In relevant part it states:

> *"Employers may decide to hire an investment adviser offering specific investment advice to participants. These advisers are fiduciaries and have a responsibility to the plan participants. On the other hand, an employer may hire a service provider to provide general financial and investment education, interactive investment materials, and information based on asset allocation models. As long as the material is general in nature, providers of investment education are not fiduciaries. However, the decision to select an investment adviser or a provider offering investment education is a fiduciary action and must be carried out in the same manner as hiring any plan service provider."*

Most plan sponsors and plan participants have less experience and expertise in making decisions about retirement income solutions than they do about investment decisions. Consequently, the need for educational services for plan fiduciaries and participants is likely to be even more acute.

As valuable as financial education can be to promote sound participant decision making, education alone is not enough. Research shows that participant education is less effective than using choice architecture in plan design to guide participants towards more successful retirement saving and distribution behaviors. Auto enrollment, default alternatives and auto-escalation have proven to increase savings rates and retirement readiness.

Retirement plan advisors and retirement income solutions providers can help plan sponsors to provide education and plan decision architecture to guide participants through a smooth transition from the accumulation phase to the distribution phase of retirement asset management. For example, a retirement income solution can be embedded in a QDIA to provide a seamless progression from investment to income options within a plan.

Practice 10 Substantiation and Resources

DOL Guidance
Department of Labor, Meeting your Fiduciary Responsibilities (2021).

Department of Labor, *Getting it Right: Know your Fiduciary Responsibilities*, available **here**.

Prudent Practices for Investment Stewards, Practice 4.5.

About the Retirement Income Consortium

The Retirement Income Consortium was founded in 2022 to empower the consideration of guaranteed income options within retirement plans.

Organized by Broadridge, the Consortium is educating the industry on the market need and has chartered this formalized due-diligence process for evaluating offerings. The Consortium's shared goal brings together comprehensive expertise in the retirement space in support of the effort to make financial security a reality for all Americans.

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