

EBSA Presentation to ERISA Advisory Council

SECURE 2.0 section 321 - IB 95-1 Review

1. INTRODUCTION

1.1. This presentation is part of our consultation pursuant to SECURE 2.0 section 321.

2. Background on ERISA & Interpretive Bulletin 95-1.

2.1. Pension Risk Transfers

2.1.1. What is a pension risk transfer?

2.1.2. The purchase transfers the pension plan's legal obligation to the licensed insurance company. As a result, the insurance company assumes the obligation of guaranteeing benefits to the participants. This fully transfers interest rate risk, inflation risk, asset risk, and longevity risk from the plan and employer to the insurance company.

2.1.3. Decision to de-risk by purchasing a distribution annuity is a settlor decision.

2.1.4. Purchasing the annuity is a fiduciary act.

2.1.5. Early concerns about PRT/annuity purchases, including Executive Life, leading to IB 95-1.

2.1.6. 1991 ANPRM

2.2. Interpretive Bulletin 95-1 is an interpretation under section 404 of ERISA.

2.2.1.1. Discussion of section 404(a)(1)(A) of ERISA.

2.2.1.2. Discussion of section 404(a)(1)(B) of ERISA.

2.2.2. IB 95-1, in relevant part, states that these duties require fiduciaries choosing an annuity provider for the purpose of making benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and to do otherwise. 29 CFR 2509.95-1(c).

2.2.3. IB 95-1 also states that these duties require, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for purposes of identifying and selecting providers from which to purchase annuities. 29 CFR 2509.95-1(c).

2.2.4. IB 95-1 also states that in conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

2.2.4.1. (1) The quality and diversification of the annuity provider's investment portfolio.

2.2.4.2. (2) The size of the insurer relative to the proposed contract.

2.2.4.3. (3) The level of the insurer's capital and surplus.

2.2.4.4. (4) The lines of business of the annuity provider and other indications of an insurer's exposure to liability.

2.2.4.5. (5) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts; and

July 5, 2023

- 2.2.4.6. (6) The availability of additional protection through state guaranty associations and the extent of their guarantees.
- 2.2.4.7. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. A fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.
- 2.2.5. A transfer under IB 95-1 terminates the participants' status as participants covered under the plan under ERISA. 29 CFR 2510.3.3.
- 2.3. Defined Contribution Plans
 - 2.3.1. Initial DOL position that IB 95-1 applied to DC plans.
 - 2.3.2. 2008 ERISA Amendment limiting to DB plans/ DOL issues safe harbor for DC plans.
 - 2.3.3. More recently, Section 404(e) added to ERISA contains a fiduciary safe harbor for annuity selection by fiduciaries of defined contribution plans. The terms of the statute do not extend this safe harbor to defined benefit plan fiduciaries.
- 2.4. Enforcement: ERISA Sec. 502(a)(9) provides a cause of action for violation of part 4 or the terms of the plan to obtain appropriate relief, including the posting of security.
- 3. DEPARTMENT'S REVIEW – THE PROCESS**
 - 3.1. SECURE 2.0 section 321 directs the Department to conduct a review. It does not specify which issues in particular Congress would like us to look at. We are approaching our review in a broad way.
 - 3.2. Since March we have conducted approximately 25 stakeholder meetings, covering a broad cross section of stakeholders. We intend to continue these meetings as we continue our review.
 - 3.3. Generally, we explored three questions at these stakeholder meetings.
 - 3.3.1. First: How has the bulletin worked in the experience of the individual stakeholder?
 - 3.3.2. Second: Does the stakeholder have suggestions on how the bulletin should be improved?
 - 3.3.3. Third: Are there trends or developments in the PRT market that should be considered by the Department as part of its review and report to Congress?
- 4. TRENDS REPORTED BY STAKEHOLDERS**
 - 4.1. Trend # 1: Stakeholders indicated that plan sponsors are employing various types of de-risking activities.
 - 4.1.1. Hard, soft, and partial freezes – not a part of the SECURE 2.0 directed review.
 - 4.1.2. Liability-driven Investment – not a part of the SECURE 2.0 directed review.
 - 4.1.3. Shifting from DB plan to DC plan – not a part of the SECURE 2.0 directed review.
 - 4.1.4. Buy-ins – not a part of the SECURE 2.0 directed review.
 - 4.1.5. Lump-sum offerings, transfers risk to participants – not part of the SECURE 2.0 directed review.
 - 4.1.6. Total de-risking annuity purchase – at plan termination, often called “total buy-out” or “total PRT.”

July 5, 2023

- 4.1.7. Partial de-risking annuity purchase – by ongoing plan, often called “lift-out,” “partial buy-out,” or “partial PRT.”
 - 4.2. Trend # 2: Stakeholders indicated a rise in PRTs.
 - 4.2.1. Data showing rise in PRTs.
 - 4.2.2. Some Primary Reasons for PRTs offered by stakeholders.
 - 4.2.2.1. Interest rates.
 - 4.2.2.2. Market volatility.
 - 4.2.2.3. Plan funding.
 - 4.2.2.4. PBGC premiums.
 - 4.2.2.5. Inflation.
 - 4.3. Trend # 3: Private equity firms have increased their ownership in the space.
 - 4.3.1.1. Data showing the magnitude of this trend.
 - 4.3.1.2. Sherrod Brown Letter to NAIC and U.S. Department of the Treasury.
- 5. EXECUTIVE SUMMARY OF RANGE OF RESPONSES TO WHETHER IB 95-1 SHOULD BE CHANGED**
- 5.1. No changes needed. Some stakeholders have expressed that IB 95-1 continues to identify the appropriate considerations and they do not recommend any changes. Some of the stakeholders expressed concern about costs that may be introduced if additional considerations are added to the IB.
 - 5.2. Very significant changes to IB 95-1 are needed to IB 95-1 and perhaps changes in law to govern PRT transactions beyond revisions to IB 95-1 are needed.
 - 5.3. Selective minor changes might be an improvement.
- 6. SPECIFIC ISSUES RAISED BY STAKEHOLDERS**
- 6.1. Ownership Structure.
 - 6.1.1. Stakeholder commentary.
 - 6.1.2. Issue.
 - 6.2. Assets: Increase in non-traditional/risky investments by insurers.
 - 6.2.1. Stakeholder commentary.
 - 6.2.2. Issue.
 - 6.3. Liabilities: Existence of non-traditional liabilities.
 - 6.3.1. Stakeholder commentary.
 - 6.3.2. Issue.
 - 6.4. Reinsurance.
 - 6.4.1. Stakeholder commentary.
 - 6.4.2. Issue.
 - 6.5. Risk-Based Capital and Other Methodologies.
 - 6.5.1. Stakeholder commentary.
 - 6.5.2. Issue.
 - 6.6. Separate Accounts as a Protection.
 - 6.6.1. Stakeholder commentary.
 - 6.6.2. Issue.
 - 6.7. Administrative Capabilities and Experience.
 - 6.7.1. Stakeholder commentary.

July 5, 2023

- 6.7.2. Issue.
 - 6.8. Spousal Protections.
 - 6.8.1. Stakeholder commentary.
 - 6.8.2. Issue.
 - 6.9. Anti-Alienation Rules: Protections Against Creditors and Division of Benefits on Divorce.
 - 6.9.1. Stakeholder commentary.
 - 6.9.2. Issue.
 - 6.10. Disclosures.
 - 6.10.1. Stakeholder commentary.
 - 6.10.2. Issue.
 - 6.11. Loss of PBGC Protections.
 - 6.11.1. Stakeholder commentary.
 - 6.11.2. Issue.
 - 6.12. State Guaranty Associations.
 - 6.12.1. Stakeholder commentary.
 - 6.12.2. Issue.
 - 6.13. Impact of Partial Pension Risk Transfer Annuity Purchases on Residual Funding Status of Plans.
 - 6.13.1. Stakeholder commentary.
 - 6.13.2. Issue.
- 7. CONCLUSION**