

Legislative and Regulatory Update

The webcast will begin shortly.

Agenda

- Legislative recap
- SECURE Act guidance and proposals
- Developments on Pooled Employer Plans (PEPs)
- Fiduciary investment advice
- Proposed rules on investment duties
- Lifetime income illustrations

SECURE Act guidance – IRS Notice 2020-68

Qualified birth or adoption distributions (QBADs)

- Notice confirmed optional, per parent/per child, and defined “eligible adoptee.”
- Plan sponsors can rely on reasonable representations re: eligibility unless they have actual knowledge to the contrary.
- Individuals can claim benefits on their individual tax returns for termination distributions that would otherwise qualify even if their plan does not offer QBADs as an in-service withdrawal.
- If a plan offers as an in-service withdrawal, it must accept repayments from individuals who received a QBAD from that plan and who would otherwise be eligible to roll over a contribution at that time.
- Otherwise-applicable distribution restrictions don’t apply (e.g., distribution of elective deferrals from 401(k) plans before age 59½), but there is no waiver of money purchase plan restrictions.
- Notice addressed some issues related to tax reporting and treatment of repayments and indicated more guidance will be forthcoming on those and possibly other issues.
- Other issues (e.g., placing a time limit on repayment or setting minimum amounts) were not addressed.

SECURE Act guidance – IRS Notice 2020-68

Counting vesting for long-term, part-time participants – Pre-2021 service not counted for purposes of eligibility but is counted for vesting credit (must grant a year of vesting credit for *any* plan year a LTPT participant works \geq 500 hours).

Tax credit for adding an Eligible Automatic Contribution Arrangement (EACA) – \$500 credit for each of 3 years applies per employer, not per plan, and the 3 consecutive years must be in the same plan. Available to participating employers in multiple employer plans.

Post-age-70½ contributions to IRAs – Optional to offer but if do must amend IRA contract and send updated contracts and disclosures to IRA holders. Also clarified that Required Minimum Distributions (RMD) are not reduced by amount of any post-age-70½ contributions and explains how the exclusion from tax for charitable contributions made from IRAs is impacted by post-age-70 ½ contributions.

Amendment deadlines – Confirmed that the amendment deadlines for pre-approved plans are the same regardless of whether the amendment is mandatory or discretionary (i.e., by last day of 2022 plan year generally and by end of 2024 plan year for collectively bargained or governmental 457(b) plans).

Developments on Pooled Employer Plans (PEPs)

DOL publishes Request for Information (RFI) on potential need for new prohibited transaction exemption

Seeks information on a number of topics, including:

- The types of entities that likely act as Pooled Plan Providers (PPPs) or Multiple Employer Plans (MEP) sponsors and whether they are likely to hire affiliates and/or offer proprietary investment products.
- Categories of fees PPPs are likely to receive and whether they will be able to unilaterally impact their compensation.
- The role PPPs or their affiliates are likely to play in selecting investment for a PEP.
- Whether existing prohibited transaction exemptions will sufficiently address the unique issues in PEPs and whether those same issues exist in MEPs.
- The number and size of employers likely to join a PEP.
- Whether prohibited transactions are likely to occur when spinning off noncompliant employers in a PEP or MEP.

Final rule on registration of PPPs

- Rule and draft form (Form PR) would satisfy both DOL and IRS filing requirement - available 11/25/20
- One registration per PPP, but must ID each PEP offered
 1. Initial registration – information re: the PPP – due 30 before beginning operations as a PEP (signed participation agreement or, if earlier, receipt of trust assets). Transition rule waives 30 days if file before February 1, 2021.
 2. Supplemental filing – identifying information re: each PEP offered by the PPP – due before plan begins operations
 3. Reportable event filing – due within 45 days (or, if later, 30 days after the end of the quarter in which the event occurred) of any change in previous filings or the initiation of any action by state or federal agencies or courts for wrongdoing
 4. Termination filing – due when all PEPs covered by the registration have terminated (i.e., a termination resolution has been adopted, all assets have been distributed and a final Form 5500 has been filed)

Information on initial registration

Identifying information – name, address, phone number, EIN, website, contact information for responsible compliance officer, agent for service of legal process

Date operation as a PPP expected to commence

Disclosure of previous convictions or ongoing proceedings related to any employee benefit plan

Identification of administrative, investment or fiduciary services or investment products offered by the PPP or an affiliate

Investment advice

Background:

In 2016, DOL issued the Best Interest Contract (BIC) Exemption providing investment advice fiduciaries with prohibited transaction relief.

In 2018, the U.S. Court of Appeals for the 5th Circuit vacated the 2016 rule.

Also in 2018, DOL issued FAB 2018-02 providing temporary prohibited transaction relief for transactions that would have been covered by the BIC.

On June 29, 2020, DOL released a regulatory package regarding fiduciary investment advice.

Investment advice – five-part test

Render advice as to the value of securities or make recommendations investing in, purchasing, or selling securities or other property.

On a regular basis.

Pursuant to a mutual agreement, arrangement or understanding with the plan, plan fiduciary or IRA owner.

The advice will serve as a primary basis for investment decisions with respect to plan or IRA assets.

The advice will be individualized based on the particular needs of the plan or IRA.

Investment advice – preamble to proposed PTE

Rollover recommendations:

- Overturns Advisory Opinion 2005-23A (the Deseret Letter).
- A rollover recommendation may be investment advice if the planks of the five-part test are met.

The regular basis plank may be met if the advice is given in anticipation of an ongoing relationship.

Mutual agreement is based on the reasonable understanding of each party. Written disclaimers are not determinative.

Recommendations made pursuant to the SEC Regulation Best Interest should reasonably be viewed as meeting the primary basis plank.

Investment advice – proposed PTE

Allows “investment professionals” and “financial institutions” to receive reasonable compensation as a result of their investment advice.

Financial institutions include broker-dealers, registered investment advisers, insurance companies and banks.

Investment professionals include the employees, agents and representatives of financial institutions.

Investment advice – proposed PTE

Covers advice to “retirement investors,” which include:

- Participants of ERISA-covered plans
- IRA owners
- Fiduciaries of IRAs and ERISA-covered plans

Does not cover:

- In-house plans
- Named fiduciaries
- Pure robo-advice

Investment advice – proposed PTE

Investment advice fiduciaries must adhere to the impartial conduct standards

Impartial conduct standards include:

- Must provide advice in the **best interest** of the retirement investor.
- The advice fiduciary may only receive **reasonable compensation**.
- Must seek the **best execution** of any investment transaction.
- The investment fiduciary must not make any **materially misleading statements**.

Investment advice – proposed PTE disclosures

Acknowledgement of fiduciary status under ERISA and the Internal Revenue Code.

Description of services.

Description of any material conflicts of interest.

Disclosures are not intended to create a private right of action.

Investment advice – proposed PTE procedures

Documentation of any rollover recommendations

Minimized impact of any incentives-associated investment advice

Proprietary products and limited menus:

- May be used.
- Must give complete and clear disclosure of any material conflicts of interest.
- Must adopt policies and procedures to minimize any conflicts of interest.

Annual retrospective review to detect and prevent violation of impartial conduct standard

Compliance records maintained for six years.

Final rule on investment duties

Clarification of investment duties under ERISA §404

Amends existing safe harbor for satisfying the duty of prudence: Must give appropriate consideration to relevant factors (diversity, liquidity, projected returns); compare to reasonably available alternatives; and determine the investment is reasonably designed to further the purposes of the plan.

Adds minimum standards for satisfying the duty of loyalty: Decisions must be based solely on pecuniary factors (i.e., factors *that a fiduciary prudently determines are expected to have a material effect on risk or return consistent with plan objectives and investment horizons*).

Cannot subordinate the interests of participants and beneficiaries to unrelated interests, including interests of the fiduciary. Acknowledges that ESG or other considerations may be considered pecuniary. The weight given to any pecuniary factor must appropriately reflect a prudent assessment of its impact on risk and return.

Final rule on investment duties

Tie Breaker Test: Non-pecuniary factors can be considered only if the fiduciary documents why pecuniary factors alone were not sufficient to support a decision, how the selected investment compares to reasonably available alternatives with respect to diversification, liquidity and projected returns, and how the non-pecuniary factor(s) are consistent with the interests of participants and beneficiaries.

If the above standards are satisfied, a fund with non-pecuniary factors can be selected as a designated investment alternative in a participant directed plan.

Funds that have an objective, goal, or principal investment strategy that includes the use of non-pecuniary factors cannot be a component of a QDIA.

General effective January 12, 2021. Effective date for QDIA restriction is 4/30/22.

Private equity investment

DOL published an informational letter providing its views on the use of private equity investments in asset allocation funds (e.g., target date funds) in participant-directed plans. Such investments can be offered if consistent with ERISA. Some identified considerations:

- Impact on diversification and returns net of fees on a long-term basis
- Experience and capabilities of fund manager in overseeing private equity investments
- Whether an investment consultant is needed to evaluate and monitor the fund
- The percentage of the fund invested in private equity
- Liquidity and valuation features allowing distributions and fund changes
- Alignment between long-term nature of investment and any liquidity restrictions with the needs of the particular participant population
- Adequacy of participant disclosures – compliance with ERISA Sect. 404c

Proposed rule on proxy voting

- Duty to vote: Plan fiduciaries *must vote* if matter would have an economic impact on their plans and taking into account the costs involved in determining how to vote. Fiduciaries *must not vote* if no economic impact or if costs of research, etc. outweigh benefits of voting.
- Proxy voting policies/permitted practices: The proposal lays out practices that can be included in a proxy voting policy, including refraining from voting when the plan's holding of that security is below a quantitative threshold.
- Standards of care: The proposal details the application of fiduciary standards of care in the context of proxy voting, including a duty not to subordinate the interests of participants to any non-pecuniary objective. Records must be kept of how proxies were voted and the reason for the vote.
- Oversight of third parties: If a fiduciary delegates authority for voting proxies to a third party or accepts recommendations from a proxy advisory firm, there is an obligation to prudently select and monitor their activities, including review of documentation regarding the rationale for any proxy voting decision.

Lifetime income illustrations

Interim Final Rule (IFR) released August 18

60-day comment period

Effective 12 months after publication in Federal Register

Department of Labor (DOL) expects to issue final rule prior to effective date, "with an adoption date that is sufficiently in advance of the effective date to minimize compliance burdens."

Lifetime income illustrations

The illustration and disclosures may be integrated into the regular statement or may be a separate supplement to the statement using DOL's model. The illustration statement will contain four key pieces of information:

1. The beginning and ending dates of the statement period
2. The value of the participant's account balance as of the last day of the statement period, without projections for future earnings or contributions and excluding the value of any deferred income annuity actually purchased under the plan
3. The amount above expressed as a single life annuity
4. The amount above expressed as a qualified joint and survivor annuity with 100% survivor benefit

Lifetime income illustrations – assumptions

The first payment date is the last date of the statement period.

The participant is assumed to be 67 unless older.

No future earnings or contributions are projected.

The participant is married, with a spouse the same age.

The interest rate for the annuities is the 10-year constant maturity Treasury securities yield rate for the first business day of the last month of the period to which the benefit statement relates.

Lifetime income illustrations – assumptions

The mortality table used to convert the account balance into the annuities is the unisex mortality table under section 417(e)(3)(B) of the Internal Revenue Code in effect for the calendar year that contains the last day of the statement period.

The account balance includes the outstanding balance of any participant loan unless in default.

No insurance load.

No inflation protection.

Lifetime income illustrations – liability relief

The plan sponsor will not be liable under Title I of ERISA solely by reason of providing the lifetime income stream.

The illustration must be calculated in accordance with the required assumptions.

The statement must include the explanatory language using the model language or language that is “substantially similar in all material respects.”

Other lifetime income projections may be provided, but they are not eligible for liability relief.

Lifetime income illustrations – plans with annuities

If the plan offers an annuity form of distribution, the plan may, but is not required to, use the annuity contract terms in providing the illustrations.

If the plan provides deferred income annuities (DIAs), the illustration must disclose the amounts actually payable under deferred annuity. The terms of the DIA must be disclosed, including:

- The date payments are scheduled to commence and the age of the participant on such date.
- The frequency and the amount of such payments payable as of that commencement date as determined under the terms of the contract, expressed in current dollars.
- A description of any survivor benefit, period certain commitment or similar feature.
- A statement whether such payments are fixed, adjust with inflation during retirement or adjust in some other way, and a general explanation of how any such adjustment is determined.

Q & A

Please ask your question using the online Q&A feature.





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