In Search of Safe Harbors

By Editor Test *Wed, Sep 15, 2010*

At this week's hearing on in-plan income options, industry executives asked the DoL for several kinds of regulatory relief—especially a safer 'safe harbor.'

Of the many gnarly reasons why so few 401(k) participants have access to 'in-plan' lifetime income solutions, the biggest obstacle may be the plan sponsor's fear of lawsuits from participants if the sponsor's chosen annuity provider ever went broke.

"The fiduciary issue is so daunting that it ends the conversation," said David Wray, the director of the Profit Sharing and 401(k) Council of America, a trade group for plan sponsors. "Sponsors ask, 'We're guaranteeing payments for 30 or 35 years?' It stops the conversation. It's a wall."

It's a wall that executives at many insurers and other financial services firms would love to see breached or demolished. That's why so many of them told a Department of Labor panel Tuesday that the DoL should identify a process or path—a 'safe harbor'—by which they could choose an annuity provider without liability.

"The government has to stand behind us when we stand behind a decision," Wray said. "There has to be confidence that someone will make sure the annuity payments keep coming, and it's not the employer." Lest the panel miss his point, he added, "If one of these programs goes down, the political fallout will be significant."

"Fiduciaries are paranoid and rightly so," says Sheldon Smith, an ERISA attorney and president of ASPPA.

A safe harbor already exists, but plan sponsors and others say it leaves many questions unanswered. Is the fiduciary duty the same for all types of income products, guaranteed and non-guaranteed? How often would the company have to check the strength of the provider? Can companies change their minds and switch providers without exposure to liability?

Insurers say that their strength ratings are available for anyone to see. But, in the wake of the financial crisis, sponsors aren't so sure they can rely on the ratings agencies or the oversight of state insurance commissioners.

Aside from a clearer fiduciary standard, insurers, asset managers and others asked the Departments of Labor and Treasury for the following:

Provide safe harbor for advice about retirement income. Plan sponsors want to see the rules on investment advice broadened, so that sponsors can educate participants about retirement income options without future liability for poor participant choices, and so that sponsors can use plan assets to pay for the education.

Encourage partial annuitization. One of the big obstacles, real or perceived, to the use of income annuities is that participants can't annuitize part of their plan assets or don't know that they can choose to annuitize only a portion of their assets. Witnesses asked the government to work to encourage partial annuitization.

Provide guidance on expressing savings as retirement income in participant statements and websites. Many witnesses argued that showing plan participants how much retirement income their plan assets will buy, instead of just showing them their current account balance, would motivate people to save more and help them appreciate that their account's purpose is to provide retirement income, not wealth accumulation. They requested DoL guidelines for providing such illustrations in a compliant way. Since so many variables go into making projections about retirement income, that won't be easy, however.