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White paper

Guaranteed lifetime income and the SECURE Act: A closer look

The Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”) is the most comprehensive retirement planning legislation in over a decade. This bipartisan bill was drafted to ease the looming retirement savings crisis, with numerous goals in mind.

Investors are worried about their retirement savings.



72% say the COVID-19 pandemic has had a negative impact on how long they are able to live on current retirement savings.



63% expect to require 20 to 30 years of income in retirement.



47% believe they can live off their savings for that long.

The general goal, of course, is to increase opportunities for participants to save more for retirement. In particular, lawmakers wanted to address one longstanding fear of many retirees today: outliving their retirement assets.

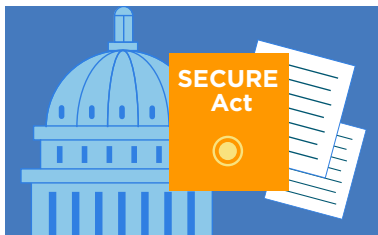
This fear is well founded. Longer life expectancy and market volatility are known to impact not only when (or even “if”) an individual will be able to retire, but also the quality of life post-retirement.

A few key provisions of the SECURE Act, mainly a new safe harbor for the selection of guaranteed lifetime income products, and provisions related to the portability of those products, aim to address that fear by creating new laws that help both plan sponsors and participants more easily utilize these products as an investment option in a retirement plan.

Source: Nationwide Advisor Authority Survey, June 2020

The SECURE Act's new safe harbor for guaranteed lifetime income products

Guaranteed lifetime income products are suited to address the fears of many retirees. As investment options that offer the ability to create a stream of predictable income for life, they can help provide savers with the certainty that they are protected against outliving their savings.



Yet, the availability of these products in most retirement plan investment line-ups today is uncommon. This limited availability can be, at

least in part, attributed to general risk aversion. Most plan sponsors desire to do right by their employees and take their fiduciary responsibility seriously. Unfortunately, numerous lawsuits over the years alleging a breach of fiduciary duty involving plan fund selection have caused plan sponsors to be quite conservative when making decisions regarding their fund line-up.

In an attempt to alleviate the fears of fiduciary liability that may arise in the selection of guaranteed lifetime income products, in 2008 the Department of Labor adopted safe harbor guidelines (the “2008 Safe Harbor”) that included a list of required steps and other provisions for plan fiduciaries to follow if they chose to offer such products within their plan. Unfortunately, based on a few vague phrases and subjective standards in the wording of the 2008 Safe Harbor, many plan fiduciaries remained concerned about the potential for increased liability and consequently remained unconvinced that adding a guaranteed lifetime income product as an investment option was worth the perceived legal risk.

Requirements For The Plan Fiduciary

The SECURE Act addresses concerns surrounding the 2008 Safe Harbor by adding a new safe harbor in section 404(e) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), for a plan fiduciary’s selection of a

guaranteed lifetime income product. In order to rely on the protection offered under ERISA’s new safe harbor, a plan fiduciary must meet the following requirements:

- 1. Engage in an objective, thorough, and analytical search** for the purpose of identifying insurers from which to purchase guaranteed lifetime income products;
- 2. With respect to each insurer identified by the search process:**
 - a. Consider the financial capability of such insurer to satisfy its obligations under the guarantees of the product,
 - b. Consider the cost (including fees and commissions) of the product offered by the insurer in relation to the benefits, product features, and administrative services to be provided; and
- 3. Based on such considerations, conclude that:**
 - a. At the time of selection, the insurer is financially capable of satisfying its obligations under the guarantees of the product, and
 - b. The relative cost is reasonable.¹

Additional safe harbor requirements

Perhaps of greater significance, is another provision in the SECURE Act’s safe harbor that deems the fiduciary to have satisfied the requirements related to the consideration of the insurer’s financial capabilities upon receipt of specified written representations from the insurer that:

- 1.** the insurer is licensed to offer guaranteed lifetime income products;
- 2.** 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 that has not been revoked or suspended,
 - b. has filed audited financial statements in accordance with the laws of its domiciliary state that have not been revoked or suspended,
 - c. maintains and has maintained reserves that satisfy all the statutory requirements of all states in which the insurer does business, and
 - d. is not operating under an order of suspension, rehabilitation, or liquidation;

3. the insurer undergoes, at least every five years, a financial examination by the insurance commissioner of its domiciliary state; and
4. the insurer will notify the fiduciary of any change in circumstances after providing the above representations that would preclude the insurer from making such representations at the time of issuance, and after receiving the representations outlined above and as of the time of selection, the fiduciary must also not have received notice of any change in the insurer's circumstances or other information which would cause it to question the representations provided.ⁱⁱ

Like the 2008 Safe Harbor, a plan fiduciary maintains an ongoing obligation to periodically review the appropriateness of its conclusions regarding an insurer's capability. But the SECURE Act's new safe harbor deems a fiduciary to have performed this periodic review if it

receives written representations (as described above) from the insurer on an annual basis, unless it receives notice of a change in circumstances (also described above), or it becomes aware of facts that would cause the fiduciary to question the insurers representations.ⁱⁱⁱ

So long as plan fiduciaries follow the new safe harbor guidelines outlined above, they should be protected from any fiduciary liability related to the selection of the guaranteed lifetime income product and the insurers who provide them.

Finally, it is worth noting to plan sponsors that the SECURE Act's new safe harbor includes a clarification that a plan fiduciary is not required to select the lowest cost guaranteed lifetime income product. Other attributes, like features and benefits of the products and the financial strength of the insurer, may be considered in conjunction with cost.^{iv}

Portability of guaranteed lifetime income products

Thanks to the SECURE Act's new safe harbor, guaranteed lifetime income products may very well soon be joining the investment line-up in more retirement plans. This should excite many plan sponsors and participants, as the guaranteed lifetime income feature of these financial products specifically addresses the common fear of outliving retirement assets.

As more participants understand the benefits of investing in guaranteed lifetime income products and can do so through their retirement plan, another change in the law brought about by the SECURE Act will make guaranteed lifetime income products easier to administer and maintain, both for plan sponsors and participants.

Potential advantages for plan participants

The SECURE Act now allows defined contribution retirement plans (including 401(k), and governmental 457(b) plans) to permit in-plan "qualified distributions" of such products.^{vii} In other words, so long as the plan provides for these qualified

distributions, guaranteed lifetime income products are now "portable," meaning they can be transferred directly from the trustee of one eligible retirement plan to the trustee of another eligible retirement plan (including IRAs), even if there is no separation from service, like when a plan sponsor changes recordkeepers.



of retirees who have purchased a lifetime income product say that it allows them to worry less, budget better, and spend more.^v



of retirees who purchase a guaranteed lifetime income product recommend it to others.^{vi}

Reducing administrative challenges for plan sponsors

This change in the law addresses what has historically been a separate technical challenge to the administration of guaranteed lifetime income products within retirement plans. As these products can only be supported by a very limited number of platform providers, if a retirement plan ever changed platform providers, the

guaranteed product would usually have to be surrendered, thereby forcing those participants who had invested in that product to lose the lifetime income benefits.

Before this change brought about by the SECURE Act, in order for a plan sponsor to keep a guaranteed lifetime income product in the plan fund line-up when changing recordkeepers, the plan sponsor would have to leave the existing product with the original recordkeeper while moving all other plan investments to the new recordkeeper. This created an administrative nightmare and inefficiencies in plan costs

for the plan sponsor, which further dissuaded plan sponsors from offering guaranteed lifetime income products to retirement plan participants.

Today, thanks to the portability provisions added by the SECURE Act, should plan sponsors choose to offer these products in their plans and adopt the optional portability provisions, participants will be able to keep their investments in these products even when/if plan sponsors later choose to change recordkeepers or otherwise remove the guaranteed lifetime income product from the plan's investment line-up.

Considerations for the future

As new guaranteed lifetime income products become available to retirement plans and their participants as a result of the positive changes from the SECURE Act, all interested parties have some homework to do.

For plan fiduciaries (and those who work with them):

Evaluate these financial products carefully. It will be important to consider the financial credibility and reputation of the insurer and consider which products (if any) offer additional benefits currently missing from the plan's investment offerings. Products available in the market have different features and benefits (e.g., principal

protection guarantees, guaranteed minimum withdrawals, guaranteed minimum income benefits, etc.), and will be offered by different providers with varying degrees of expertise and levels of participant support and education, and at varying cost.

For retirement savers:

Those lucky enough to participate in a plan that adds guaranteed lifetime income products to the fund line-up should consider a number of factors when deciding whether to invest in one of these products (e.g., time horizon, the amount and type of retirement assets already saved, risk tolerance, and product features). A reputable product provider should offer tools and resources to help plan participants in such an analysis, so that more retirement savers are able to better prepare for and live not only in, but throughout, their entire retirement journey.

Four key takeaways

1

Familiarize yourself with the new safe harbor and portability provisions.

2

Consider offering plan participants guaranteed investment options: principal protection and/or guaranteed lifetime income.

3

Find a trusted insurance partner who is financially strong and stable.

4

Learn more about in-plan guarantees by calling your Nationwide representative.



To learn more about In-Plan Guarantees offered by Nationwide, visit nationwidefinancial.com/consultant/in-plan-guarantees or contact your Nationwide Representative.

- i. ERISA § 404(e)(1).
- ii. ERISA § 404(e)(2).
- iii. ERISA § 404(e)(4).
- iv. ERISA § 404(e)(3).
- v. <https://www.brighthousefinancial.com/education/retirement-income-solutions/preparing-for-retirement-with-guaranteed-income/>.
- vi. Id.
- vii. IRC §§ 401(a)(38), 457(d)(1).



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