DechertOnPoint

March 2010 / Special Alert

A legal update from Dechert's Financial Services and Employee Benefits and Executive Compensation Groups

DOL/Treasury Request for Information on Lifetime Income Products

The Obama Administration's Middle Class Task Force released on January 27, 2010 a Fact Sheet on its proposals to help support middle class families.[1] The Fact Sheet indicated the Administration was interested in "[p]romoting the availability of annuities and other forms of guaranteed lifetime income, which transform savings into guaranteed future income, reducing the risks that retirees will outlive their savings or that their retirees' living standards will be eroded by investment losses or inflation."

In furtherance of this effort, the U.S. Treasury and Department of Labor (the "Agencies") on February 2, 2010 issued a Request for Information ("RFI") on the use of lifetime income products in retirement plans. In light of the trend away from sponsorship of traditional defined benefit plans toward sponsorship of defined contribution plans and hybrid plans, the Agencies "are considering whether it would be appropriate for them to take future steps to facilitate access to, and use of, lifetime income or other arrangements designed to provide a stream of income after retirement." The questions reflect a policy that such lifetime income products should be encouraged. The deadline for comments is May 3, 2010.

The Agencies are seeking information on current industry practices for lifetime income arrangements, including the types of products offered, cost, and rates of participation. They have also requested suggestions for so-called "behavioral strategies" and/or rule proposals to encourage participation in lifetime income options. They further ask how the Agencies could encourage the education of employees regarding the advantages and disadvantages of lifetime income products.[2]

The Agencies' questions anticipate the potential need for new rules or guidance to encourage the use of lifetime income products. For example, IRS "qualified" pension plans are currently required to offer an annuity form of benefit, while 401(k) plans are not.[3] Adding a similar feature into a 401(k) plan may present difficulties and result in possible resistance from plan sponsors and participants. The required annuity form of distribution under current law also requires that if a participant is married, the standard form of benefit must be a joint and survivor annuity, and if a participant wishes to receive a different form of benefit, such as a lump sum, the participant must elect to waive the annuity and the participant must obtain spousal consent.

---

1 Middle Class Task Force, *Fact Sheet: Supporting Middle Class Families* (January 27, 2010). Vice President Biden released the Task Force's full report on February 26, 2010.

2 The expansion of the Labor Department's guidance on plan participant education, with a focus on information and advice on payout options (Interpretive Bulletin 96-1), was a specific recommendation from the ERISA Advisory Council in 2007 and 2008.

3 Currently, there are three main types of employer-sponsored plans (other than ESOPS and other stock bonus plans): (1) defined benefit plans, which provide a specified benefit at retirement and under which employers are required to provide the funding necessary to ensure that the benefit can be provided, and which are required to offer an annuity form of benefit as the standard benefit; (2) money purchase pension plans, which are defined contribution plans but nonetheless also are required to offer an annuity as the standard form of benefit; and (3) other defined contribution plans, such as 401(k) plans and other profit sharing plans, that are not required to offer an annuity form of benefit and that typically do not do so.

Dechert LLP

The Agencies also want to know whether and to what extent to revise the safe harbor provided by ERISA Section 404 to plan sponsors in connection with the selection of annuity providers for distribution of benefits to plan participants. The Agencies are inquiring whether this safe harbor should be revised or extended beyond distribution annuities, to cover other lifetime annuities or similar lifetime income products.

Commenters are also requested to provide information on current industry practices with respect to (i) the utilization of lifetime income products in "404(c)" (participant-directed) plans, advantages and disadvantages to offering such products in such plans and whether ERISA Section 404(c) could or should be amended to encourage the use of such products; (ii) the current use of default investment alternatives for these plans that include guarantees or similar lifetime income features ancillary to the investment fund, product or model portfolio; and (iii) whether the Agencies could or should encourage the use of lifetime income features in connection with qualified default investment alternatives for these plans.

Finally, the Agencies request commenters' views of the potential costs, benefits and other consequences of offering lifetime income products as an in-plan option, particularly for smaller plans.

Notably, the RFI evidences an interest not only in instruments that provide lifetime income, but also in instruments that can provide a stream of income after retirement. In addition, the RFI requests information regarding both annuity forms of distributions and annuities as investment options during the accumulation phase. However, current plan qualification rules relate to the form of distribution that will be made when a participant retires and takes a distribution from the plan, not to the investment of assets held in the plan's trust for a participant's account. An increased focus on lifetime income products as an investment option, in addition to a payment option, could represent a shift in plan design away from a mostly market-based focus back to earlier plan design approaches to retirement security.

Some commenters note that lifetime income products are insurance products and the insurance industry is currently regulated primarily at the state level.[4] In 2008, the U.S. Treasury Department issued its *Blueprint,*[5] which was critical of state regulation and advocated optional regulation of the insurance industry on a federal level in an effort to increase efficiency and lessen regulatory burdens. Interestingly, the RFI did not seek input on whether some type of federal regulatory framework may be needed to support the increased utilization of lifetime income products the Agencies wish to encourage. Still, one would expect the Agencies to focus on issues surrounding the security of a lifetime payment stream and the solvency of its issuer.

Many in the insurance industry plan to respond to the RFI. Still, annuities have not been that popular as distribution options from retirement plans.[6] Agency officials have been reserved, stating it is too early to predict what form, if any, regulations dealing with lifetime income arrangements might take.

■ ■ ■

This update was authored by Susan M. Camillo (+1 617 728 7125; susan.camillo@dechert.com), Jeffrey S. Puretz (+1 202 261 3358; jeffrey.puretz@dechert.com), Kathleen Ziga (+1 215 994 2674; kathleen.ziga@dechert.com), and Michelle E. Peters (+1 617 654 8617; michelle.peters@dechert.com).

---

4 *See* Comment Letter from Chris B. Tobe, BCAP, February 5, 2010.

5 U.S. Dept. of the Treasury, *Blueprint for a Modernized Financial Regulatory Structure* (2008). *See* June 2008 *DechertOnPoint* "U.S. Department of the Treasury Blueprint for a Modernized Financial Regulatory Structure."

6 Tom Lauricella, "Making Your 401(k) Last," *Wall Street Journal,* March 1, 2010.

Practice group contacts

For more information, please contact the authors, one of the attorneys listed, or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/financialservices and www.dechert.com/employeebenefits.

Karen L. Anderberg
London
+44 20 7184 7313
karen.anderberg@dechert.com

Margaret A. Bancroft
New York
+1 212 698 3590
margaret.bancroft@dechert.com

Richard D. Belford
New York
+1 212 698 3607
richard.belford@dechert.com

Sander M. Bieber
Washington, D.C.
+1 202 261 3308
sander.bieber@dechert.com

Stephen H. Bier
New York
+1 212 698 3889
stephen.bier@dechert.com

Thomas C. Bogle
Washington, D.C.
+1 202 261 3360
thomas.bogle@dechert.com

Julien Bourgeois
Washington, D.C.
+1 202 261 3451
julien.bourgeois@dechert.com

Kevin F. Cahill
Orange County
+1 949 442 6051
kevin.cahill@dechert.com

Susan M. Camillo
Boston
+1 617 728 7125
susan.camillo@dechert.com

Christopher D. Christian
Boston
+1 617 728 7173
christopher.christian@dechert.com

Elliott R. Curzon
Washington, D.C.
+1 202 261 3341
elliott.curzon@dechert.com

Douglas P. Dick
Washington, D.C.
+1 202 261 3305
douglas.dick@dechert.com

Ruth S. Epstein
Washington, D.C.
+1 202 261 3322
ruth.epstein@dechert.com

Joseph R. Fleming
Boston
+1 617 728 7161
joseph.fleming@dechert.com

Brendan C. Fox
Washington, D.C.
+1 202 261 3381
brendan.fox@dechert.com

Robert M. Friedman
New York
+1 212 649 8735
robert.friedman@dechert.com

David M. Geffen
Boston
+1 617 728 7112
david.geffen@dechert.com

David J. Harris
Washington, D.C.
+1 202 261 3385
david.harris@dechert.com

Christopher P. Harvey
Boston
+1 617 728 7167
christopher.harvey@dechert.com

Robert W. Helm
Washington, D.C.
+1 202 261 3356
robert.helm@dechert.com

Richard M. Hervey
New York
+1 212 698 3568
richard.hervey@dechert.com

Richard Horowitz
New York
+1 212 698 3525
richard.horowitz@dechert.com

David F. Jones
Philadelphia
+1 215 994 2822
david.jones@dechert.com

Jane A. Kanter
Washington, D.C.
+1 202 261 3302
jane.kanter@dechert.com

Geoffrey R.T. Kenyon
Boston
+1 617 728 7126
geoffrey.kenyon@dechert.com

Matthew Kerfoot
New York
+1 212 641 5694
matthew.kerfoot@dechert.com

George J. Mazin
New York
+1 212 698 3570
george.mazin@dechert.com

Jack W. Murphy
Washington, D.C.
+1 202 261 3303
jack.murphy@dechert.com

Tram N. Nguyen
Washington, D.C.
+1 202 261 3367
tram.nguyen@dechert.com

John V. O'Hanlon
Boston
+1 617 728 7111
john.ohanlon@dechert.com

Reza Pishva
Washington, D.C.
+1 202 261 3459
reza.pishva@dechert.com

Edward L. Pittman
Washington, D.C.
+1 202 261 3387
edward.pittman@dechert.com

Jeffrey S. Puretz
Washington, D.C.
+1 202 261 3358
jeffrey.puretz@dechert.com

Jon S. Rand
New York
+1 212 698 3634
jon.rand@dechert.com

Robert A. Robertson
Orange County
+1 949 442 6037
robert.robertson@dechert.com

Keith T. Robinson
Hong Kong
+1 852 3518 4705
keith.robinson@dechert.com

Alan Rosenblat
Washington, D.C.
+1 202 261 3332
alan.rosenblat@dechert.com

Kevin P. Scanlan
New York
+1 212 649 8716
kevin.scanlan@dechert.com

Jeremy I. Senderowicz
New York
+1 212 641 5669
jeremy.senderowicz@dechert.com

Frederick H. Sherley
Charlotte
+1 704 339 3100
frederick.sherley@dechert.com

Stephen W. Skonieczny
New York
+1 212 698 3524
stephen.skonieczny@dechert.com

Stuart Strauss
New York
+1 212 698 3529
stuart.strauss@dechert.com

Patrick W. D. Turley
Washington, D.C.
+1 202 261 3364
patrick.turley@dechert.com

Brian S. Vargo
Philadelphia
+1 215 994 2880
brian.vargo@dechert.com

Jennifer O. Wood
London
+44 20 7184 7403
jennifer.wood@dechert.com

Anthony H. Zacharski
Hartford
+1 860 524 3937
anthony.zacharski@dechert.com

Kathleen Ziga
Philadelphia
+1 215 994 2674
kathleen.ziga@dechert.com

Dechert LLP

www.dechert.com

U.S. Austin • Boston • Charlotte • Hartford • New York • Orange County • Philadelphia Princeton • San Francisco • Silicon Valley • Washington, D.C. • **EUROPE** Brussels London • Luxembourg • Moscow • Munich • Paris • **ASIA** Beijing • Hong Kong