


DC Plans Encourage Lifetime Participation Through Individual Retirement Advice

by | **Corey Wirth, CEBS**, and **Jim Singer**

Recognizing a need among their participants, the boards of trustees for a group of retirement funds in Missouri and Illinois have implemented a program that provides individual retirement advice to participants.



One of the most important decisions retirement plan participants face when they retire is what to do with the money they hold in their defined contribution (DC) plans—money they have earned over their working lives.

Should they leave it in their plan (with the ability to make periodic withdrawals), cash it out, invest it in an individual retirement account (IRA) or buy an annuity?

This decision can be complicated by the investment sales pitches plan participants may receive from the retail financial services industry. These pitches can include exaggerated or misleading advertising claims, unsuitable recommendations or even fraudulent information.

Participants who are nearing retirement age are a frequent target of the “retirement seminar industry,” described in a recent *New York Times* article¹: Invitees were treated to a free steak dinner during which the virtues of an “equity indexed annuity” were marketed. The presentation included an annuity product that was no longer offered by the insurance company and a chart that significantly misstated the historical performance of the S&P 500. The reporter concluded that while the steak dinner might not be a con game, “it is a bit of a psychological dance” where “you eat free food” and “feel that you owe a salesperson a one-on-one meeting” and “then you’re on the hook.”

benefits

MAGAZINE

Reproduced with permission from *Benefits Magazine*, Volume 56, No. 4, April 2019, pages 26-31, published by the International Foundation of Employee Benefit Plans (www.ifebp.org), Brookfield, Wis. All rights reserved. Statements or opinions expressed in this article are those of the author and do not necessarily represent the views or positions of the International Foundation, its officers, directors or staff. No further transmission or electronic distribution of this material is permitted.

A 2007 Securities and Exchange Commission report that followed its examination of “free lunch” investment seminars in Florida was alarming: 100% of the investment seminars were sales presentations, 59% reflected weak supervisory practices, 50% featured exaggerated or misleading advertising claims, 23% involved possible unsuitable recommendations and 13% appeared to be fraudulent.²

The Department of Labor (DOL) pursued a two-pronged approach to address this problem. First, the final DOL fiduciary rule extended Employee Retirement Income Security Act (ERISA) fiduciary duties of loyalty and prudence to retail broker-dealers (retail brokers) and insurance agents who sold investment products for rollovers from plans covered by ERISA.³ Second, while much less publicized than the fiduciary rule, DOL engaged in efforts to encourage and provide the tools to plan sponsors to expand upon lifetime DC plan participation.

DOL directed its ERISA Advisory Council⁴ to engage in three fact-finding studies that resulted in reports,⁵ all related to encouraging plan sponsors to expand upon lifetime participation in DC plans.

Fiduciary Protections

In a traditional defined benefit (DB) retirement plan, participants who retire under the plan retain ERISA fiduciary protections after retirement for the rest of their lives and the lives of their spouses. Participants who remain in a DC plan after retiring also maintain the protection of ERISA fiduciary standards.

However, participants who withdraw their balances and invest the money into a new retail investment

product no longer have these ERISA protections.

Barriers to Lifetime Participation

There are significant impediments to encouraging lifetime participation. The well-financed marketing efforts (sales pitches) of the retail industry that focus on participants who are nearing retirement age is a difficult challenge for plan fiduciaries to counter.

Many fiduciaries, whether they serve on corporate plans or joint boards of trustees, may welcome being relieved of fiduciary responsibilities for a participant and spouse when the participant is no longer actively employed or an active member of a labor union. Many employees assume that when they retire, they are expected to take a distribution or rollover from the plan.

ERISA Advisory Council Reports

In spite of and/or in recognition of these challenges, at the direction of DOL, the ERISA Advisory Council issued reports in 2014, 2015 and 2016, all on the general topic of encouraging lifetime participation in DC plans. The November 2014 report *Considerations Surrounding Facilitating Lifetime Plan Participation* states: “The council recommends DOL develop educational materials for Participants and Sponsors on the value of lifetime plan participation and educate Plan Sponsors on various plan features that may encourage such participation.”

The November 2015 report *Model Notices and Plan Sponsor Education on Lifetime Plan Participation* included sample participant notices and educational materials for plan sponsors for plan design features that encourage lifetime plan participation.

In the November 2016 report *Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation*, the council made recommendations for dealing with the challenges of plan-to-plan transfers and account consolidations.

Status of the Fiduciary Rule

The Fifth Circuit Court of Appeals vacated the DOL fiduciary rule in 2018 and said that DOL could not regulate retail “sales pitches” to plan participants under ERISA fiduciary rules.⁶

The Securities and Exchange Commission (SEC) has issued proposed regulations establishing a standard of conduct for broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer.⁷ However, many uncertainties remain about the proposed SEC regulation and whether a future SEC final regulation will be a meaningful substitute for the DOL fiduciary rule. In addition, most indexed annuities of the type reported on by *The New York Times* and fixed annuities are not regulated by SEC.⁸

After 12 years of government studies and efforts to address a well-documented problem of protecting participants in DC plans, little progress has been made. For the time being, it will be up to plan sponsors and fiduciaries, not the government, to protect DC plan participants as they consider retiring and leaving DC plans.

Lifetime DC Plan Participation

The lessons learned from the DOL fiduciary regulation, the SEC proposed regulation and the reports of the ERISA Advisory Council are that participants may be well-served by lifetime partici-

pation in DC plans and that participants likely need individual investment advice.

By staying in an ERISA plan after retiring, participants have the advantages of receiving nonconflicted investment advice that meets ERISA standards of loyalty and prudence and paying significantly lower institutional costs for investment service.

To encourage participation by retirees, many ERISA plans have been amended to provide retirement distribution options that offer the participant flexibility in changing distributions similar to an IRA. Some participants decide to leave a plan after retirement for legitimate reasons such as a preference for an individual retail investment advisor, a preference for investment options that are not available within the plan, or a desire to purchase an annuity with all or a portion of the account balance.

The Missouri/Illinois IBEW-NECA Solution

The trustees of four large DC plans established by Missouri and Illinois locals of the International Brotherhood of Electrical Workers (IBEW) and the St. Louis and Illinois chapters of the National Electrical Contractors Association (NECA) took an innovative approach to provide individual investment advice to plan participants, protect participants from misleading sales pitches and continue to encourage lifetime participation.

The plans have approximately 9,000 participants and \$2.1 billion in combined assets. The DC plans are the primary retirement plan for their participants, although the participants also have two DB plans that provide significantly smaller benefits to supplement the DC plans.

Only one of the DC plans is a 401(k) plan that is funded solely by wage deferrals. The three non-401(k) plans, which include two money purchase plans and one profit-sharing plan, are funded by a mandatory contribution negotiated in collective bargaining agreements. The size of the current asset base is attributed to the fact that the mandatory contribution represents a significant portion of the employees' total wage and benefits package, and the plans have experienced years of favorable investment returns.

For many years, plan trustees heard troubling stories from retired participants that when their accounts were rolled out of the plan at the time of retirement, the participants put the money into high-cost or otherwise inappropriate retail investments and suffered the consequences.⁹

learn more

Education

Trustees and Administrators Institutes
June 24-26, San Francisco, California

Visit www.ifebp.org/trusteesadministrators for more details.

ERISA Fiduciaries: Current Refresher on Who They Are, What They Must Do
On-Demand Webcast

Visit www.ifebp.org/webcast for more information.

From the Bookstore

A Closer Look: What's Working in Workplace Financial Education

International Foundation. 2017.

Visit www.ifebp.org/books.asp?7877E for more information.

The trustees decided that participants needed nonconflicted, individual investment advice, and the only way to ensure they had access to it was to provide such advice in the plan. In addition, trustees believed this service would further motivate participants to stay in the plan after retirement.

This decision meant that the trustees *increased* rather than minimized their fiduciary responsibilities.

ERISA itself is structured to motivate DC plan fiduciaries to minimize fiduciary exposure by avoiding individual investment advice to participants. This policy may encourage the employers that are fearful of the risk of violating ERISA fiduciary standards to voluntarily establish DC plans, but it leaves participants without individual investment advice, even though they are responsible for making individual investment decisions.

ERISA Section 404(c) provides generally that, under circumstances described in regulations, plan fiduciaries are not liable for losses resulting from investment decisions made by participants in DC plans that allow participant-directed investment of assets in their own account.¹⁰ The two basic requirements in the DOL regulations implementing ERISA Section 404(c) are: (1) The plan must provide participants with the opportunity to exercise independent control over investments of plan assets in their accounts and (2) participants must in fact exercise independent control.¹¹

In a similar vein, in Interpretative Bulletin 96-1,¹² DOL drew a distinction between investment *education* and investment *advice*. According to DOL, the key to avoiding investment education becoming investment advice is to maintain

the participant's independent judgment to make his or her own decision on plan investments.¹³ Again, to minimize fiduciary obligations, many DC plan fiduciaries typically avoid crossing the line between investment education and investment advice.

To provide necessary services to plan participants, the trustees of the IBEW/NECA plans were willing to go against the conventional wisdom of minimizing fiduciary exposure in their DC plans.

Key Features of the IBEW/NECA Plans

Beginning in April 2017, all participants had access to individual investment advice at institutional rates, which are far lower than retail rates for similar services. The trustees concluded that contracting with a provider to provide the services for a lump-sum fee was the best way to achieve institutional economies of scale, which were available because of the large asset base in the plans.

The plans removed a significant barrier to participation in the advice by not

charging a direct fee to participants. A recent T. Rowe Price survey identified a direct charge to the participant's account as an impediment to the participant accessing investment advice.¹⁴ According to the survey, 43% of responders identified "fees too high, too expensive" as the most common reason they did not seek financial advice.

Consistent with this study, the IBEW/NECA trustees were concerned that conditioning investment advice on a fee elected by the participant and paid directly from the participant's account would discourage participants from seeking investment advice. Instead, the advisor's fee is a direct administrative expense of the plan similar to the plan's regular investment consultant.

Participants receive the same level of personal service that they would receive from an attentive retail broker or insurance agent. Most providers of individual investment advice offering services on a planwide basis either use a website and/or a toll-free number.

While the trustees wanted these standard features, they also wanted to make available both face-to-face, on-site seminars (usually held at a union hall) and face-to-face, one-on-one meetings between the investment advisor and the participant and the participant's spouse.

Participants also can visit an online learning center that includes articles, courses calculators and videos.

The funds publicized the program through the plans' website and mailing to plan participants' homes. In addition, the trustees coordinated with the participating labor unions to publicize the new program at union meetings, member retirement programs, apprenticeship classes and health fairs.

The individual investment advice must meet ERISA fiduciary standards, and the provider cannot have a conflict of interest. The trustees followed DOL guidelines of issuing a request for proposal (RFP) for individual investment advice service, and the trustees' regular investment consultant assisted the boards in evaluating the proposals both in terms of price and services provided.

The provider agreed by contract with the trustees to serve as an ERISA fiduciary and is prohibited by contract to accept rollover accounts. The provider's compensation is not based on the investment decisions made by plan participants. The trustees' regular investment consultant monitors the investment performance of the investment advisor in the same manner as other plan investments and assists the board in periodic monitoring. The provider submits written quarterly reports to the boards on both investment performance of its model portfolios and on participant utilization.

takeaways

- When they retire, defined contribution (DC) plan participants must decide whether to leave their savings in the plan, cash it out or invest it in another retirement savings vehicle such as an individual retirement account (IRA) or an annuity.
- The Department of Labor (DOL) has engaged in efforts to encourage and provide the tools to plan sponsors to expand upon lifetime DC plan participation because it offers the protection of Employee Retirement Income Security Act (ERISA) fiduciary standards.
- Barriers to lifetime participation include sales pitches participants often receive from the retail investment industry. Many fiduciaries also may wish to be relieved of fiduciary duties for participants who are no longer actively employed, and many workers assume they are required to take a distribution or rollover from a plan.
- Four large DC plans established by Missouri and Illinois locals of the Brotherhood of Electrical Workers (IBEW) and the St. Louis and Illinois chapters of the National Electrical Contractors Association (NECA) are addressing the problem by providing individual investment advice to plan participants.
- Plan participants can access services including face-to-face meetings with an investment advisor, retirement planning seminars, webinars and more.

All participants can access investment advice—not just those close to retirement. While the trustees were concerned about participants being taken advantage of by “free lunch” seminars as they approached retirement age, the trustees realized that the need for individual investment advice was not limited to the touchpoint of retirement. Investment and financial decisions made at the beginning and throughout a working career are also important.

The program gives participants access to nonconflicted investment advice to consider rollover investment options outside of the plan. For example, if a participant is considering a rollover and the purchase of an annuity, the advisor is available to review the pros and cons of the annuity quote provided by an insurance agent or broker.

The program is still new, but the trustees have received favorable response from participants and spouses. In the first year of the service, the provider held 18 retirement planning seminars for participants, hundreds of one-on-one participant meetings and two webinars. There is regular participation in all facets including the website, the toll-free number and attendance at investment seminars at the union halls.

Conclusion

By providing individual investment advice in the plan, the IBEW/NECA trustees have met the key need for nonconflicted individual advice as identified by DOL and SEC and are further encouraging lifetime participation. The unions and employers have peace of mind through the knowledge that participants have access to nonconflicted advice. Ultimately, plan trustees believe they have put plan members on a better path to a secure retirement. 📍

Endnotes

1. “A Steak Dinner and a Pitch? There’s Cause for Concern,” *The New York Times*, December 1, 2018.
2. See www.sec.gov/news/press/2007/2007-179.htm. The full November 2007 Securities and Exchange Commission (SEC) report is available at www.sec.gov/spotlight/seniors/freelunchreport.pdf.
3. The final fiduciary rule was published in the Federal Register on April 8, 2016. See 81 Fed. Reg. 20945 and codified in the Code of Federal Regulation in 29 CFR Section 2510.3-21 titled “Definition of Fiduciary.”
4. Section 512 of ERISA, 29 USC 1142 provides for the establishment of an Advisory Council on Employee Welfare and Pension Benefit Plans, known as the ERISA Advisory Council. The duties of the council are to advise the Secretary and submit recommendations regarding the Secretary’s functions under ERISA.

bios



Corey Wirth, CEBS, is executive director of the IBEW-NECA Service Center, Inc., which administers four large defined contribution pension plans that cover participants in eastern and central Missouri and southern and central Illinois. He is a past member of the International Foundation Board of Directors, former Chair of the Administrators Committee and a regular presenter at International Foundation programs.



Jim Singer is a partner at the St. Louis law firm of Schuchat, Cook and Werner and has served as legal counsel to multiemployer plans since 1980. He is a past co-chair and member of the senior editorial board of *Employee Benefits Law*, which is published by the ABA and BNA/Bloomberg. From 2012 to 2015, he served a term on the Department of Labor’s ERISA Advisory Council. He is currently adjunct faculty at St. Louis University Law School, where he teaches a course on employee benefits law.

5. The reports of the Department of Labor ERISA Advisory Council are available to the public on the council’s website: www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council.
6. See www.leagle.com/decision/infco20180315114.
7. 83 Fed. Reg. 21574 (May 9, 2018).
8. As SEC states on its website, “most indexed annuities are not registered with the SEC.” See www.sec.gov/fast-answers/answersannuityhtm.html.
9. Confirming the trustees’ experiences, Missouri and Illinois were in the “north central region,” which had a higher incidence of solicitations to attend retirement seminars than other parts of the country. 2009 AARP Report at page 9.
10. 29 USC Section 1104(c)(1).
11. 29 CFR Section 2550.404c-1.
12. 29 CFR Section 2509.96-1.
13. “Issues relating to the circumstances under which information provided to participants and beneficiaries may affect a participant’s or beneficiary’s ability to exercise independent control over the assets in his or her account for purposes of relief from fiduciary liability under ERISA Section 404(c)(2) are beyond the scope of this interpretative bulletin.” 29 CFR Section 2509.96-1 at note 2.
14. *Focus on Workers: Retirement Savings and Spending 4: Behaviors and Attitudes Toward Financial Advice*. Available at [/www3.troweprice.com/usrps/content/dam/b2bdx/resources/RetirementForAll/Press%20Release%20deck%20for%20Advice_FINAL.pdf](http://www3.troweprice.com/usrps/content/dam/b2bdx/resources/RetirementForAll/Press%20Release%20deck%20for%20Advice_FINAL.pdf).

