



Nestimate

Executive Summary of ERISA Opinion

March 2023

By Marcia Wagner



THE WAGNER
LAW GROUP

EST. 1996

Not to be published or distributed without permission





Nestimate

Contents

- I. Overview of Nestimate's Analytical Framework
- II. Executive Summary of Analysis and Conclusions
- III. Overview of ERISA Fiduciary Standards for Annuity Selection
- IV. Application of Fiduciary Standards for Annuity Selection by Plan Clients
- V. Application of Fiduciary Standards to Fiduciary Annuity Advisors
- VI. Protection for Plan Fiduciaries Against Hindsight Fiduciary Liability





Summary

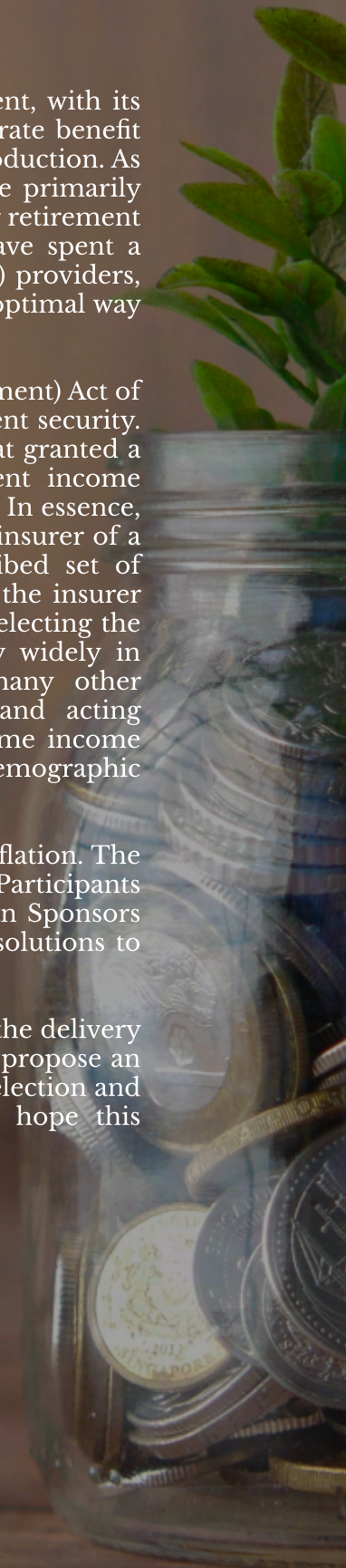
In the big picture, the 401(k) plan is a relatively modern development, with its inception dating back to 1981. While it became a mainstream corporate benefit program in the mid-1990s, it has now been four decades since its introduction. As a result, we are now approaching the first wave of retirees who have primarily relied on their 401(k) plan for retirement savings. The new frontier for retirement is in helping participants efficiently and safely spend what they have spent a lifetime to save. This has presented a challenge for employers, 401(k) providers, asset managers, and insurers as they work together to determine the optimal way for these plans to operate in this new era.

The SECURE (Setting Every Community Up for Retirement Enhancement) Act of 2019 was passed as a massive legislation aimed at improving retirement security. One of the sections in the Act, Section 204, laid out the provision that granted a fiduciary safe harbor for the selection of a “guaranteed retirement income contract” (also therein referred to as an annuity) and its requirements. In essence, it granted fiduciaries a safe harbor provision for the selection of the insurer of a guaranteed retirement income contract if they followed a prescribed set of procedures. While it explicitly gave safe harbor for the selection of the insurer providing the product, it provided little protection to fiduciaries in selecting the product itself. The types of retirement income products can vary widely in structure, performance, risk profile, fees, guarantees, and in many other mechanisms. Therefore, the safe harbor leaves plan sponsors and acting fiduciaries wanting. This presents a hurdle to the adoption of lifetime income solutions, which are needed now more than ever due to the massive demographic shift set to retire at a pace we have not seen prior.

Today, the greatest risk to a retiree is not the stock market, nor is it inflation. The greatest risk is running out of money before you have run out of life. Participants want and need help navigating the complexity around longevity. Plan Sponsors are uniquely positioned to provide institutional retirement income solutions to help them navigate these waters.

Lastly, plan advisors and consultants offer an influential value-add in the delivery of these income solutions. To help plan advisors and consultants, we propose an objective analytics tool to simplify the due diligence process for the selection and monitoring of these innovative retirement income solutions. We hope this endeavor proves helpful in securing the financial lives of Americans.

Kelby Meyers, CPFA, AIF
Chief Executive Officer
Nestimate, Inc.



Nestimate's Analytical Framework

When exploring lifetime income product solutions that are tailored for Plans, Plan clients may find it challenging to identify the relevant insurance carriers that offer such products and to evaluate the many different types of annuities that are issued by the multiple carriers. Each solution can vary widely in their product features such as growth accumulation, fees, exposure to the market, liquidity, and guaranteed income payout. As a result, indiscriminately running a straight comparison of different lifetime income products, without distinction as to their materially different product features, may lead to unfair comparisons on an "apples to oranges" basis as well as inaccurate assessments.

Given the demands of evaluating lifetime income solutions, many Plan clients will engage Financial Professionals for assistance with the selection of annuity solutions for their respective Plans. But in order to provide such assistance properly, Financial Professionals must have specialized knowledge of the particular types of lifetime income products that are suitable for Plans (e.g., institutional annuity contracts designed for Plans). Obtaining this product knowledge may be challenging even for experienced Financial Professionals, especially in light of the rapid innovation in the area of "In-Plan" annuity solutions and lifetime income products.

The Analytics Tool is designed to produce a repeatable, scalable due diligence review process that can support Financial Professionals as they assist Plan clients in the selection of lifetime income products. This software tool may be utilized by both Fiduciary Advisors and Non-Fiduciary Professionals alike. The Analytics Tool is designed to guide the Financial Professional through a comparative due diligence review

of annuity products whose results may be shared with their Plan clients. With ERISA's prudence standard in mind, this review process is designed to mirror the objective, procedural steps that a hypothetical Plan fiduciary might follow to identify and review potential annuity solutions for a Plan in a prudent manner.

Although the summary analysis generated by the Analytics Tool provides valuable data and information that is designed to assist

"Retirees do not have an accurate understanding of their true retirement risks ... (this) highlights the need for more education and provides unique insight into the need for lifetime income, either through Social Security or annuities, which hedge both longevity and market risks."

- Center for Retirement Research



Plan clients in making annuity selection decisions in a prudent manner, the Analytics Tool itself does not undertake to give advice of any nature, including fiduciary investment advice. The data analysis provided by the Analytics Tool is not intended to serve as the primary basis for an investment decision or otherwise constitute fiduciary investment advice for ERISA purposes.

After the relevant information has been entered into Nestimate and it has completed its comparative annuity product analysis, the Financial Professional that is using the Analytics Tool will be asked to make a product choice for the Plan's potential lifetime income solution based on such data results, which will then be presented to the Plan client for its consideration. Specifically, the Analytics Tool will generate a Lifetime Income Proposal featuring the product choice made by the user for presentation by such Financial Professional to his or her Plan client. Although the Lifetime Income Proposal generated by the Analytics Tool will include the Financial Professional's product choice, this product choice is not reviewed or endorsed by Nestimate as disclosed in the Lifetime Income Proposal.

The Lifetime Income Proposal that is generated will disclose all material information that is gathered and generated by the Analytics Tool. Thus, even though the Plan client is not the direct user of the Analytics Tool, the Plan client will have a clear, transparent view of how the Analytics Tool made its comparative analysis of the various lifetime income products as well as the related data results.



Executive Summary of Analysis and Conclusions

Application of Fiduciary Standards for Annuity Selection by Plan Clients. Based on the information and analysis provided herein, in our view, the Analytics Tool including the related Lifetime Income Proposal is reasonably designed to assist Plan clients in making annuity selection decisions that comport and are consistent with their duty of prudence as Plan fiduciaries under ERISA Section 404(a)(1)(B).

Further, in our view, the making of annuity selection decisions with the support of a software-based analytics tool such as Nestimate may be an evolving best practice for Plan clients seeking annuity solutions. These views assume the following: (i) the Financial Professionals using the Analytics Tool are entering information into the Analytics Tool that is factually accurate, and (ii) the Lifetime Income Proposals (as defined below) generated by the Analytics Tool are presented to such Plan clients for their review and evaluation. We note that ERISA does not expressly approve of any particular type of interactive tool alone to satisfy the Duty of Prudence, and the mere fact that a Plan fiduciary has relied on the analysis generated by the Analytics Tool would not automatically guarantee the prudence of the Plan fiduciary's investment conduct for ERISA purposes.


Application of Fiduciary Standards to Fiduciary Annuity Advisors. Based on the information and analysis herein, in our view, the Analytics Tool is reasonably designed to assist Financial Professionals who are Fiduciary Advisors to their Plan clients in providing annuity selection advice (i.e., annuity product recommendations) to their respective Plan clients that comports and is consistent with their Duty of Prudence as Plan fiduciaries under ERISA Section 404(a)(1)(B). Further, in our view, the use of a software-based analytics tool such as Nestimate may be an evolving best practice for Fiduciary Advisors engaged to provide annuity selection advice to Plan clients. As noted above, the mere fact that a Plan fiduciary has relied on the analysis generated by the Analytics Tool would not automatically guarantee the prudence of the Plan fiduciary's investment conduct for ERISA purposes.

Protection for Plan Fiduciaries Against Hindsight Fiduciary Liability. ERISA generally imposes personal liability on any Plan fiduciary who breaches its duties under ERISA. However, the courts have broadly held that no fiduciary liability would arise from claims that the Plan fiduciary breached its Duty of Prudence



(“Hindsight Fiduciary Liability”) when they are based solely on the identification of alternative investments with better performance after the date of the applicable fiduciary decision or advice. Based on the information and analysis herein, in our view, if Plan clients with the support of Financial Professionals using the Analytics Tool were to make annuity selection decisions in accordance with the Duty of Prudence under ERISA, such Plan clients would not be subject to Hindsight Fiduciary Liability as a result of their annuity selection decisions merely because alternative annuities with better performance can be identified after the fact. Further, in our view, if Fiduciary Advisors were to provide annuity selection advice with the support of the Analytics Tool, such Fiduciary Advisors would not be subject to Hindsight Fiduciary Liability as a result of their annuity selection advice merely because alternative annuities with

better performance can be identified after the fact. This opinion addresses the potential fiduciary liability related to a Plan fiduciary’s annuity selection decision or annuity selection advice as applicable, and not the required fiduciary monitoring of any selected annuity on an ongoing basis, and we have assumed that the Plan client will be monitoring the selected annuity on an ongoing basis as required under ERISA as further discussed below.



“Approximately 65% of total retiree expenditures are estimated to be inelastic (i.e., ‘needs’)”
- David Blanchett

Overview of ERISA Fiduciary Standards for Annuity Selection

A. Duty of Prudence for Plan Clients

In the case of Plans that are subject to ERISA, employers acting as named fiduciaries for their Plans as well as other Plan fiduciaries must make investment decisions on behalf of their respective Plans in accordance with the duty of prudence under ERISA Section 404(a)(1)(B) (the “Duty of Prudence”). This Duty of Prudence expressly requires a Plan fiduciary to discharge its fiduciary duties with “the care, skill, prudence, and diligence” that a “prudent man acting in a like capacity and familiar with such matters” would use.

Under the applicable regulations issued by the U.S. Department of Labor (the “DOL Regulations”), the Duty of Prudence is satisfied when Plan fiduciaries give “appropriate consideration” to the applicable facts and circumstances that the fiduciary knows (or should know) are relevant to the particular investment decision, including the role of the investment in the Plan’s investment menu. Such appropriate consideration is defined to include a determination by the Plan fiduciary that the investment is reasonably designed as part of the Plan’s investment menu to further the purposes of the Plan, taking into consideration the risk of loss and the opportunity for gain associated with such investment as compared to the risk of loss and the opportunity for gain associated with reasonably available alternatives with similar risks. These DOL Regulations further provide, in relevant part, that a fiduciary’s investment decision must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis, using appropriate investment



horizons consistent with the Plan's investment objectives.

Generally speaking, the mere fact that a Plan fiduciary has acted in good faith will not be sufficient to meet this standard of care. Under applicable case law, the Duty of Prudence requires more than “a pure heart and an empty head,” although fiduciaries can “easily clear this bar” by appropriately investigating the merits of an investment decision prior to acting. The courts have also held that ERISA's prudence requirement is not that of a prudent layperson but rather that of a “prudent fiduciary with experience” dealing with a similar enterprise. In light of the “appropriate investigation” and the “prudent fiduciary with experience” requirements as described above, the Duty of Prudence is sometimes described as requiring the care and skill of a “prudent expert.”

Thus, a fiduciary generally has a duty to seek independent advice when lacking the qualifications to make fiduciary decisions in accordance with the standard of care under ERISA's Duty of Prudence. Specifically, the courts have expressly held that when Plan fiduciaries “lack the requisite knowledge, experience and expertise to make the

necessary decisions with respect to investments, their fiduciary obligations require them to hire independent professional advisors.” It should also be noted that “securing an independent assessment from a financial advisor” with the necessary expertise is generally seen by the courts as evidence of a thorough investigation that is being conducted in accordance with a fiduciary's Duty of Prudence.

B. SECURE Act's Safe Harbor for Annuity Provider Selection

ERISA Section 404(e) was enacted as part of the SECURE Act of 2019. Section 404(e) established a fiduciary safe harbor (“Safe Harbor”) where a Plan fiduciary is deemed to satisfy its Duty of Prudence in regard to the selection of an annuity provider for the Plan, when it follows the “safe harbor” procedures set forth in the statute. The Safe Harbor generally requires the Plan fiduciary to take the following actions:

- Analytical Search. Engage in an objective, thorough and analytical search (“Analytical Search”) to identify insurers from which to purchase annuities.
- Financial Capability Assessment. Consider the financial capability of such identified insurers to satisfy their respective obligations under their annuities (the “Financial Capability Assessment”).
- Annuity Cost Assessment. Consider the cost of the applicable annuities in relation to the benefits and product features of the annuities (the “Annuity Cost Assessment”).

After taking into account the foregoing considerations as required under the Safe Harbor, the Plan fiduciary must then conclude that (i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the annuity, and (ii) the relative cost of the selected annuity is reasonable. With regard to the Safe Harbor's requirement for a Financial Capability Assessment, special “optional” relief is available. Specifically, a Plan fiduciary is automatically deemed to have fulfilled the Financial Capability Assessment of the Insurer if the Plan fiduciary meets the following conditions:



- Attestation Letter. Obtains written representations from the Insurer (i.e., Insurer Attestations) that it is licensed to offer annuities to Plans, maintains reserves which satisfy applicable state insurance law, and satisfies certain other conditions;
- No Information Raising “Questions”. At the time of selection of the insurer, the Plan fiduciary has not received notice of any changes to the Insurer Attestations, and it does not possess information which would cause it to “question” the Insurer Attestations.
- Annual Attestation Updates. If the Plan remains invested in the selected annuity on an ongoing basis, it must obtain updated Insurer Attestations annually.

It should be noted that a Plan client’s fiduciary responsibilities with respect to making an annuity selection decision prudently are broader than merely meeting the requirements of the Safe Harbor. The legislative history for the Safe Harbor clarifies that the Safe Harbor only addresses a Plan fiduciary’s selection of the annuity provider and that the Plan fiduciary “must conduct a separate analysis of the prudence and terms and conditions” of the annuity itself for ERISA purposes. Accordingly, when assessing the prudence of the annuity itself, Plan fiduciaries should still give “appropriate consideration” to the applicable facts and circumstances that the fiduciary knows (or should know) are relevant to the particular investment decision, including the role of the investment in the Plan’s investment menu, as discussed in Section III.A above.

“Unlike defined benefit pensions that provide participants with steady benefits for as long as they live, 401(k) plans provide little guidance on how to turn accumulated assets into income.”



Application of Fiduciary Standards for Annuity Selection by Plan Clients

A Plan client's investment decisions, including the selection of an annuity solution for the Plan and Plan participants, must be made in accordance with the Duty of Prudence under ERISA. In order to make a prudent annuity selection decision under the applicable DOL regulations, the Plan client must give appropriate consideration to all relevant facts and circumstances including the role of the annuity solution for the Plan. This "appropriate consideration" condition effectively requires the Plan client to perform a comparative risk-return analysis for the Plan's proposed annuity product as well as reasonably available annuity products with similar risks. The "role" condition effectively requires the Plan client to identify the Plan's annuity objectives (e.g., whether the annuity option is intended to help Plan participants with the payout or distribution phase of retirement or both the accumulation and distribution phases). Consistent with the related case law as discussed above, the Plan client should "appropriately investigate" the merits of the proposed annuity solution, and it must perform this investigation with the care and skill of a "prudent fiduciary with experience." Furthermore, a Plan client generally will

have a duty to seek independent advice when lacking the requisite education, experience and skill to make an annuity select decision in accordance with the standard of care under ERISA's Duty of Prudence.

As noted above, given the demands of evaluating lifetime income solutions, many Plan clients will engage Financial Professionals for assistance with the selection of annuity solutions for their respective Plans. In the case of Financial Professionals that choose to utilize Nestimate, this Analytics Tool will guide the Financial Professional through a six-step process that is designed to mirror the objective, procedural steps that a hypothetical Plan fiduciary might follow under ERISA to identify and review potential annuity solutions for the Plan.

A. Role of the Investment (Annuity Solution) for Purposes of Duty of Prudence

In Steps 1 and 2, the Financial Professional inputs key demographic data about the Plan's participants and also ranks various



annuity products feature based on their importance to Plan participants. In Step 3, the Analytics Tool will determine the Product Type with the closest fit to the preferences of Plan participants as determined by an objective formula based on how the various product features have been ranked. Steps 1 through 3 are designed to help the Financial Professional ascertain the role of the annuity solution for the Plan, which will then help determine the preferred Product Type for the Plan's annuity solution.

The information gathered in Steps 1 and 2 as well as the preferred Product Type analysis from Step 3 are collectively designed to help the Plan client ascertain the role of the annuity solution for the Plan. The information gathered and generated in Steps 1 through 3 will be included in the Lifetime Income Proposal that is ultimately presented by the Financial Professional to the Plan client, enabling the Plan client to confirm the factual accuracy of the data provided by the Financial Professional in Steps 1 and 2. The information included in the Lifetime Income Proposal will also enable the Plan client to review and evaluate the preferred Product Type as determined by the Analytics Tool's percentage scoring generated from the data entered by the Financial Professional.

B. Appropriate Consideration and Comparative Analysis of Annuity Choices

To satisfy ERISA's Duty of Prudence when making an annuity selection decision, the Plan client must give appropriate consideration to all relevant facts and circumstances, which effectively requires the Plan client to perform a comparative risk-return analysis for the Plan's proposed annuity solution as well as reasonably available annuity products with similar risks. As discussed, in Step 4, the Analytics Tool will perform a comparative analysis of the potential annuity products that are available from covered insurers within the preferred Product Type. All comparative data results are included in the Lifetime Income

Proposal, enabling the Plan client to review and evaluate key informational items for each product.

As summarized above, in Step 5, the Analytics Tool will ask the Financial Professional to make a product choice for the Plan's potential lifetime income solution. The comparative data results generated in Step 4 are designed to assist the Financial Professional in making this product choice. The Analytics Tool also asks the Financial Professional to memorialize his or her rationale for the product selection. The comparative data results from Step 4 and the Financial Professional's rationale for the product selection are all included in the Lifetime Income Proposal for the Plan client's review and evaluation. Such information is designed to give the Plan client the ability to make a comparative assessment (including a risk-return assessment) of the individual products within the preferred Product Type, as well as the product choice that has been made by the Financial Professional for the Plan client's consideration. In this regard, such information is intended to assist the Plan client in giving "appropriate consideration" to all relevant facts and circumstances.

C. Safe Harbor for Annuity Provider Selection

Under the Safe Harbor established by the SECURE Act of 2019, a Plan client is deemed to satisfy the Duty of Prudence in regard to the selection of an annuity provider for the Plan, when it takes the following actions: (i) Analytical Search, (ii) Financial Capability Assessment and (iii) Annuity Cost Assessment as discussed above. The Plan client must then conclude that the insurer is financially capable of satisfying its obligations under the annuity, and that the relative cost of the selected annuity is reasonable

As discussed above, Steps 1 through 4 of the Analytics Tool guides the Financial Professional through an objective and methodical search of covered insurers and their annuity products based on the preferred Product Type. The results of this

search are reflected in the Lifetime Income Proposal, which in turn are shared with the Plan client for its review and evaluation.

For purposes of the Financial Capability Assessment, the financial ratings history for each applicable insurance carrier is provided in Step 4. Moreover, Insurer Attestations are provided by the Analytics Tool in Step 5, potentially making special relief available to the Plan client in respect of the Financial Capability Assessment requirement under the Safe Harbor. The financial ratings history and the Insurer Attestations are included in the Lifetime Income Proposal for the Plan client's consideration.

Under the comparative analysis performed in Step 4, the Analytics Tool will determine the estimated product fees for each applicable annuity within the preferred Product Type. This comparative analysis is designed to assist the Plan client in performing the Annuity Cost Assessment required under the Safe Harbor, which effectively requires the Plan client to assess the relative cost of the product choice by drawing comparisons with the costs of competing annuity products within the same Product Type.

D. Legal Conclusions

ERISA does not expressly approve of any particular type of interactive tool to satisfy the Duty of Prudence, and the mere fact that a Plan fiduciary has relied on the analysis generated by the Analytics Tool would not automatically guarantee the prudence of the Plan fiduciary's investment conduct for ERISA purposes. They are also designed to give the Plan client the ability to perform a comparative investment analysis (including a risk-return analysis) of (i) the product choice that has been made by the Financial Professional, and (ii) competing products within the same preferred Product Type. Such comparative data is intended to assist the Plan client in giving appropriate consideration to all relevant facts and circumstances. This search is designed to meet the requirements of an Analytical Search. The results of this search

The Analytical Tool is also designed to assist the Plan client in taking the actions required to satisfy the Safe Harbor for annuity provider selection including an Analytical Search, a Financial Capability Assessment and an Annuity Cost Assessment. Based on the foregoing analysis, in our view, the Analytics Tool including the related Lifetime Income Proposal is reasonably designed to assist Plan clients in making annuity selection decisions that comport and are consistent with their Duty of Prudence as Plan fiduciaries under ERISA Section 404(a)(1)(B). Further, in our view, the making of annuity selection decisions with the support of a software-based analytics tool such as Nestimate may be an evolving best practice for Plan clients seeking annuity solutions. These views assume the following: (i) the Financial Professionals using the Analytics Tool are entering information into the Analytics Tool that is factually accurate, and (ii) the Lifetime Income Proposals generated by the Analytics Tool are presented to such Plan clients for their review and evaluation.



Application of Fiduciary Standards to Fiduciary Annuity Advisors

The Analytics Tool is designed to guide a Financial Professional through a comparative due diligence review of annuity products. When the Lifetime Income Proposal generated by the Analytics Tool is presented to the Financial Professional's Plan Client, as discussed in Section IV above, such information can help Plan clients make annuity selection decisions that comport and are consistent with their Duty of Prudence as Plan fiduciaries. For substantially similar reasons, the Analytics Tool can also help Financial Professionals who are Fiduciary Advisors provide annuity selection advice to their Plan clients in a prudent manner.

As noted in Section IV above, the mere fact that a Plan fiduciary has relied on the analysis generated by the Analytics Tool would not automatically guarantee the prudence of the Plan fiduciary's investment conduct for ERISA purposes. But the Analytics Tool can help a Fiduciary Advisor ascertain the role of the annuity solution for the Plan as further noted in Section IV above. It can also help the Fiduciary Advisor perform a comparative investment analysis (including a risk-return analysis) of the various annuity products within a preferred Product Type that are

available from covered insurers. Such comparative data can therefore assist the Fiduciary Advisor in giving appropriate consideration to all relevant facts and circumstances. The Analytical Tool can also assist the Fiduciary Advisor in taking actions on behalf of the Plan client that satisfy the Safe Harbor for annuity provider selection including an Analytical Search, a Financial Capability Assessment and an Annuity Cost Assessment. Based on the foregoing analysis, in our view, the Analytics Tool is reasonably designed to assist Financial Professionals who are Fiduciary Advisors to their Plan clients in providing annuity selection advice (i.e., annuity product recommendations) to their respective Plan clients that comports and is consistent with their Duty of Prudence as Plan fiduciaries under ERISA Section 404(a)(1)(B). Further, in our view, the use of a software-based analytics tool such as Nestimate may be an evolving best practice for Fiduciary Advisors engaged to provide annuity selection advice to Plan clients. ERISA Section 409 imposes personal liability on any Plan fiduciary who breaches its duties under ERISA requiring the Plan fiduciary to restore and make good to the Plan any losses resulting from such



Protection Against Hindsight Fiduciary Liability

breach. Thus, if a Plan client were to make an “imprudent” annuity selection decision or if a Fiduciary Advisor were to provide “imprudent” annuity selection advice in violation of the Duty of Prudence, the applicable Plan fiduciary (i.e., Plan client or Fiduciary Advisor) would be personally liable for any resulting losses.

“The duty to act prudently is one of a fiduciary’s central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions.”

-Department of Labor Guidance

However, the courts have broadly held that ERISA does not require a Plan fiduciary to select the best performing investment. In other words, the Plan fiduciary will be protected against liability (i.e., Hindsight Fiduciary Liability) for claims that the Plan fiduciary breached its Duty of Prudence solely because alternative investments with better performance can be identified after the date of the applicable fiduciary decision or advice. In determining whether a Plan fiduciary has acted prudently, the courts have held that the relevant standard is that of “conduct, tested at the time of the investment decision” rather than “performance, judged from the vantage point of hindsight.” Although Plan fiduciaries should be held accountable for losses arising from actual imprudent investment conduct, they are not subject to Hindsight Fiduciary Liability when they “appropriately investigate the merits” of the investment decision before acting. As noted in a frequently quoted court decision, “ERISA does not require clairvoyance on the part of plan fiduciaries.”

Accordingly, when a Plan client makes an annuity selection decision or a Fiduciary Advisor provides annuity selection advice, the applicable Plan fiduciary (i.e., Plan client or Fiduciary Advisor) would be protected against Hindsight Fiduciary Liability to the extent that the fiduciary conduct was performed in accordance with ERISA’s Duty of Prudence. We also note that with respect to a Plan client’s annuity selection decision, if the Plan client’s related selection of the annuity provider was made in accordance with the Safe Harbor established by the SECURE Act of 2019, the Plan client would be deemed to have satisfied the Duty of Prudence in regard to the selection of the annuity provider for the Plan. Thus, if the annuity provider were to become insolvent and consequentially unable to make future

payments under the selected annuity, the Plan client would not be held liable for any resulting harm to Plan participants as long as the requirements of the Safe Harbor were satisfied (i.e., Analytical Search, Financial Capability Assessment and Annuity Cost Assessment).

Plan fiduciaries are able to make annuity selection decisions and provide annuity selection advice as applicable under a variety of approaches and arrangements, and there is no provision under ERISA that specifically requires the engagement of a Financial Professional that uses the Analytics Tool. However, as discussed in Section IV above, the Analytics Tool including the related Lifetime Income Proposal are reasonably designed to help Plan clients make annuity selection decisions that comport and are consistent with their Duty of Prudence as Plan fiduciaries. Further, as discussed in Section V above, the Analytics Tool is reasonably designed to help Fiduciary Advisors provide annuity selection advice that comport and are consistent with their Duty of Prudence as Plan fiduciaries. Based on the foregoing analysis, in our view, if Plan clients with the support of Financial Professionals using the Analytics Tool were to make annuity selection decisions in accordance with the Duty of Prudence under ERISA, such Plan clients would not be subject to Hindsight Fiduciary Liability as a result of their annuity selection decisions merely because alternative annuities with better performance can be identified after the fact. Further, in our view, if Fiduciary Advisors were to provide annuity selection advice with the support of the Analytics Tool, such Fiduciary Advisors would not be subject to Hindsight Fiduciary Liability as a result of their annuity selection advice merely because alternative annuities with better performance can be identified after the fact.

We note that once an annuity solution has been selected for the Plan, the Plan client has an ongoing duty to monitor such investment in accordance with general

fiduciary principles under ERISA. For example, under the Safe Harbor for annuity provider selection, the Plan client must obtain updated Insurer Attestations annually as discussed above. Similarly, if a Fiduciary Advisor were engaged to monitor the Plan's selected annuity on an ongoing basis, such Fiduciary Advisor would have a duty to provide annuity advice consistent with such ongoing monitoring duties. Our opinion in this Section VI addresses the potential ERISA liability related to a Plan client's annuity selection decision or a Fiduciary Advisor's annuity selection advice as applicable, and not the required fiduciary monitoring of any selected annuity on an ongoing basis. We have assumed that the applicable Plan fiduciary will be monitoring the selected annuity on an ongoing basis to the extent required under ERISA. Such ongoing monitoring duties may require the Plan fiduciary to take appropriate action or provide appropriate advice as applicable in the event that the Plan fiduciary learns of any material change in the applicable facts and circumstances (e.g., insurer is unable to provide a satisfactory annual update to its Insurer Attestations).



Nestimate

Conclusion

The opinions and views included in this letter represent our view of the outcome in a court of law if a challenge were to be made to the conclusions set out above and do not represent a guarantee as to the outcome. The legal analysis included herein is based on the materials and factual information presented to us, which we have relied upon without independent verification, and the existing laws and regulations in effect as of the date of this letter. The addition of facts other than those described above and any material changes in the law or regulatory guidance may affect the legal analysis and conclusions set forth herein. Our opinions and views expressed in this letter are furnished to you solely for your benefit. Although we understand that you may wish to provide copies of this letter to third parties for their information only, to which we provide our consent, the opinions and views expressed in this letter may not be relied upon by any person other than you without our prior written consent.

Sincerely,

The Wagner Law Group

