

April 1, 2004

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Automatic Rollover Regulation

Dear Sir or Madam:

On behalf of its members, the Savings Coalition of America¹ submits the following comments in response to the Department of Labor's proposed safe harbor regulation on the automatic rollover provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). As an organization committed to promoting personal savings in the U.S., the Savings Coalition has a strong interest in policy matters affecting IRAs and other long-term savings vehicles.

Under EGTRRA's automatic rollover rules, retirement plans that contain certain cash-out provisions must automatically roll these amounts (generally between \$1,000 and \$5,000) into an IRA, unless the participant elects to have the distribution paid directly to an eligible retirement plan or receive the distribution directly. Section 657(c)(2) of EGTRRA directed the Department to issue "regulations providing for safe harbors under which the designation of an institution and investment of funds" would be deemed to satisfy the fiduciary requirements of ERISA section 404(a). Such safe harbor guidance is particularly important because plan fiduciaries would seek to comply with its terms in order to be deemed to satisfy their fiduciary duties.

For the automatic rollover mechanism to function effectively, it is critical that the Department's safe harbor regulation avoids imposing restrictive conditions that would dissuade financial institutions from offering such accounts. One requirement set forth in the proposed regulation, however, creates a significant disincentive for IRA trustees and custodians. Under the proposed safe harbor, IRA maintenance fees may be assessed only

¹ The Savings Coalition's membership consists of more than 75 member organizations, representing a wide variety of interests and industries including engineering, realtors, home-building, intangible assets, financial services, insurance, banking, securities, trust companies, health care, education, consumer and business groups.

against the income earned by the IRA. Because the rule would be burdensome to implement and costly to administer for many IRA custodians and trustees, the rule may discourage financial institutions that are considering whether to offer automatic rollover IRAs. Moreover, we are concerned about the collateral effect of this fee restriction on other retirement investors — that other IRA investors would effectively be required to subsidize these accounts. We therefore urge the Department to eliminate this requirement.

Finally, we ask that the Department clarify several issues that arise under the proposed regulation. Specifically, the Department should (1) clarify the interplay between the Department's safe harbor regulation and the statutory fiduciary relief provided in ERISA section 404(c)(3), (2) clarify the types of financial institutions permitted to serve as IRA trustees/custodians under the safe harbor, and (3) extend the effective date of the automatic rollover provisions beyond the proposed 6-month implementation period.

Limitation on Fees and Expenses

The proposed safe harbor regulation provides two separate limitations on fees and expenses applicable to automatic rollover IRAs.² The second of the two rules would limit fees and expenses to the income earned by the IRA.³ The Savings Coalition strongly objects to this requirement.

As the Department is aware, automatic rollover IRAs already raise a number of concerns from an IRA provider's perspective. For instance, the automatic rollover provisions apply to relatively small amounts, generally between \$1,000 and \$5,000. Furthermore, these accounts are less likely to receive additional contributions and would likely give rise to administrative issues such as stale/inaccurate addresses. Thus, a restriction that limits revenues from such accounts to earnings — particularly where assets would be invested in an investment designed to preserve principal — would further diminish the incentives for IRA providers considering whether to offer such accounts.

Moreover, absent substantial systems modifications, the rule as proposed would be difficult to administer for many financial institutions. While the types of systems changes required would vary depending on, for example, when/how a particular financial institution assesses an annual fee (*e.g.*, whether charged annually on a specific date or upon the anniversary of the IRA's inception) and/or whether such fees are charged prospectively or in arrears, many financial services firms would be required to establish new and costly systems to comply with the fee limitation.

² The first rule would require that fees and expenses attendant to the IRA, including the investments of such IRA, may not exceed the fees and expenses charged by the IRA provider for comparable IRAs established for rollover distributions that are not subject to the automatic rollover rules.

³ The proposed regulation provides an exception for "establishment" charges associated with an IRA. While such charges would not be limited by the IRA's earnings, they would not be permitted to exceed establishment charges assessed against comparable IRAs established for rollover distributions.

For example, compliance with the proposed limitation on fees to earnings would require the development of recordkeeping systems that differentiate automatic rollover IRAs from other IRAs. These systems also would be required to compare annual maintenance/custodial fees to the earnings of any automatic rollover IRA and determine the lesser of the two amounts. Where earnings were less than the annual maintenance fee, systems would be required to charge an individualized fee. Descriptive materials relating to fees, such as IRA disclosure statements, also would require changes in order to take into account the different fees that might apply to automatic rollover IRAs. In effect, the proposed safe harbor's limitation on fees to earnings may require many financial institutions to create a new type of IRA for recordkeeping and customer communication purposes.

Finally, beyond the disincentives created by the fee restriction on IRA providers, we are concerned about the impact that the restriction on fees to income would have on other retirement investors. The Department, in the preamble to the proposed regulation, observes that the proposed regulation may result in other IRAs subsidizing automatic rollover accounts.⁴ Effectively requiring other retirement investors to incur the costs of establishing and maintaining automatic rollover IRAs, however, would adversely impact their retirement savings. In our view, the costs that the fee restriction effectively would impose on other retirement investors would outweigh any benefits provided by the rule.

Accordingly, we urge the Department to remove the safe harbor requirement that fees be restricted to earnings in the IRA. We believe that the Department's other fee limitation (limiting fees to those charged by the IRA provider for comparable rollover IRAs) sufficiently protects IRA owners under the automatic rollover rules, refrains from imposing additional disincentives that would discourage participation by IRA providers, and avoids harming the interests of other individuals saving for retirement.

ERISA Section 404(c)(3)

In addition to directing the Department of Labor to issue safe harbors under ERISA section 404(a), EGTRRA created statutory relief for plan fiduciaries under section 404(c) of ERISA. Specifically, section 404(c)(3) provides that where a pension plan makes a transfer under the Code's automatic rollover provisions, "the participant or beneficiary shall for purposes of [ERISA section 404(c)(1)] be treated as exercising control over the assets in the account or annuity upon —

- (A) the earlier of —
 - (i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or
 - (ii) one year after the transfer is made; or
- (B) a transfer that is made in a manner consistent with guidance provided by the Secretary [of Labor]."

⁴ See 69 Fed. Reg. 9904, 9906-9907 (March 2, 2004).

While the Department has acknowledged that plan fiduciaries may satisfy their duties outside of the safe harbor,⁵ clarification of the interplay between the statutory relief in ERISA section 404(c)(3) vis-à-vis the Department's regulatory safe harbor would provide plan sponsors greater certainty on how they may satisfy their duties as ERISA fiduciaries.

Safe Harbor IRA Providers

We also seek clarification on the types of institutions permitted to serve as IRA trustees or custodians under the safe harbor. The preamble to the proposed regulation makes clear that the existing qualification requirements in the Internal Revenue Code would constitute the criteria for safe harbor IRA providers. While we appreciate the Department's adoption of this approach, we note that certain language used in the proposed regulation has caused some confusion with regard to the types of entities that qualify as safe harbor IRA providers. The confusion arises because although IRAs that qualify under the safe harbor are provided in the second condition⁶ of the proposed regulation, the third condition,⁷ which identifies investment products that qualify under the safe harbor, (1) describes such investments by reference to those "offered by" certain "regulated financial institutions" and (2) enumerates certain types of entities that qualify as such "regulated financial institutions."

While it appears that the term "regulated financial institution" is relevant solely for purposes of determining the safe harbor status of an investment product (rather than an IRA provider), the use of the phrase "offered by a state or federally regulated financial institution" in the third condition could be interpreted to limit safe harbor IRA providers to those entities expressly enumerated under the definition of "regulated financial institution."

We therefore request clarification in the final regulation on the distinction between the safe harbor qualification requirements for IRA providers versus investment providers/issuers, as well as further clarification that all entities that qualify as IRA trustees or custodians under existing Code requirements also qualify as safe harbor IRA providers under the automatic rollover provisions.

Effective Date

The Department has proposed an effective date of 6 months following the issuance of the final regulation for the automatic rollover rules to take effect. We commend the Department for providing this additional implementation period.

As identified in our March 2003 letter to the Department, however, there are a number of issues outside the scope of the Department's safe harbor guidance that require clarification. These issues primarily fall within the jurisdiction of the Treasury Department

⁵ The preamble states that the safe harbor's standards are "not intended to represent the exclusive means by which a fiduciary might satisfy his or her duties under ERISA with respect to automatic rollovers of mandatory distributions described in section 401(a)(31)(B) of the Code."

⁶ Prop. Reg. § 2550.404a-2(c)(2).

⁷ Prop. Reg. § 2550.404a-2(c)(3).

and the Internal Revenue Service. Because of the significant compliance efforts that may be required under these rules, we urge the Department to extend the implementation period to 1 year following the issuance of the final safe harbor regulation.

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The Savings Coalition appreciates the opportunity to comment on the proposed automatic rollover regulation. If you have any questions, please feel free to contact me at (202) 223-2632.

Sincerely,

Kathy Hamor
Executive Director