

March 10, 2003

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 Rollovers RFI

Ladies and Gentlemen:

On behalf of its members, the Savings Coalition of America is pleased to submit comments in response to the Department of Labor's request for information (RFI) on the automatic rollover provision of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Established in 1991, the Savings Coalition supports incentives to increase personal savings for all Americans. Savings Coalition members, which consist of more than 75 member organizations, represent a wide variety of interests and industries including engineering, realtors, home-building, tangible assets, financial services, insurance, banking, securities, trust companies, health care, education, consumer and business groups.

The Savings Coalition has consistently supported initiatives to encourage Americans to save for their futures, including expanded Individual Retirement Account (IRA) legislation. Thus, our members have a particular interest in the rules governing the establishment and operation of IRAs under EGTRRA's automatic rollover provision.

As a preliminary matter, we note that the implementation of the automatic rollover provision will present a number of legal and practical difficulties. Some of these issues can be resolved by the Department in its safe harbor rules; other matters will likely require guidance from other regulatory bodies. Notably, many of these issues will arise because participants subject to these rules often will be difficult to find or simply unavailable. We, therefore, request that the Department work closely with the Treasury Department, the Internal Revenue Service and other appropriate agencies to provide guidance that facilitates the operation of the automatic rollover rules. Our comments are as follows:

Safe Harbor Guidance

Section 657(c) of EGTRRA directs the Department of Labor to prescribe regulations setting forth safe harbors under which the designation of institutions and investment of funds would be deemed to satisfy the fiduciary requirements of ERISA section 404(a). Furthermore, the Department has specific authority to provide fiduciary relief at the point at which the assets are distributed from the plan.¹ We ask that the Department provide such relief in accordance with the recommendations made below.²

Safe Harbor Investments. Because of the diverse situations that employers face with regard to their respective workforce, we recommend that the Department's guidance set forth several categories of safe harbor investments, rather than a single type of investment that may not be appropriate for all plans or participants.

First, low risk investment vehicles, such as money market funds or principal-protected investments, should be deemed to be safe harbor investments under the automatic rollover rules. The Department's guidance, for instance, could specify the category of "income producing, low risk, liquid" funds (identified in the ERISA section 404(c) regulations) as a safe harbor investment.

Second, where a defined contribution plan specifies a default investment option for its participants, that investment vehicle also should qualify as a safe harbor investment under the IRA. For plans that have a default option, the plan sponsor — subject to ERISA's fiduciary rules — has already selected a default investment relating to plan assets that have not been directed toward a specific investment. The same or equivalent vehicle, therefore, should qualify as a safe harbor investment under the IRA to which the account balance is transferred.

Finally, the Department should consider providing a safe harbor for the investment of IRA assets pursuant to a mapping process. Under this approach, an account's investments in the plan are matched with the same investment vehicle(s) available in the IRA. Investments made in accordance with this approach should qualify as safe harbor investments under the automatic rollover rule, as it would continue the investments made in the participant's plan account.

Safe Harbor Entities. We recommend that all IRA trustees and custodians that meet the current requirements of Code section 408(a)(2) qualify as safe harbor

¹ EGTRRA provides that a participant or beneficiary will be treated as exercising control over the assets in the IRA 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." ERISA section 404(c)(3).

² Therefore, upon distribution from the qualified plan, the participant would cease to be a participant covered by the plan and the distributed assets would cease to be plan assets. This result would be consistent with the Department's position articulated in Rev. Rul. 2000-36 (2000-31 I.R.B. 140).

institutions. Long-standing rules under banking regulations and Treasury regulations setting forth nonbank IRA trustee standards³ provide the qualification requirements for IRA trustees and custodians. Limiting the safe harbor institutions to a subcategory of IRA providers would prohibit otherwise qualified institutions from offering these IRAs, which would limit the vendor selection for plan sponsors and effectively harm the interests of participants.

Costs and Fees. IRA providers receiving automatic rollovers should be allowed to set their own fees, costs and charges. Cost should serve as only one of a number of factors in the selection of an IRA provider; the amount of fees should not effectively become the dispositive factor in granting special status to an IRA provider or particular investment products. In addition, each financial institution has different fee structures to take into account the services it provides. These structures do not lend themselves to a standardized format. To the extent that certain fee standards or caps are established under the safe harbor guidance, the Department, in effect, could be forcing existing clients of the IRA provider to subsidize the accounts established under the automatic rollover rules.

The RFI also asks whether refund or waiver features in an IRA should determine whether an IRA provider or initial investment qualifies under a safe harbor. We note here that the costs involved in establishing IRAs, processing transactions, and complying with reporting and record retention requirements are incurred by the IRA provider, even if the IRA is terminated within one year. Therefore, the Department's safe harbor guidance should refrain from requiring IRA providers to refund fees or provide waivers for these accounts.

Legal Impediments

The automatic rollover rules present a number of legal and operational issues for plan administrators and financial institutions that choose to serve as IRA providers. As noted above, many of these issues will arise because participants subject to these rules may not be available to execute the necessary documents and often will be difficult to locate.⁴

Establishment of IRAs. An IRA is typically established with the IRA owner's signature on an IRA account agreement. In the case of an IRA under the automatic rollover rules, however, it will often be difficult to obtain the owner's signature because many participants with accounts subject to the rules may be unavailable. Regulatory guidance, therefore, should address how IRAs may be established where an employer, rather than the employee, is opening the account. Moreover, such guidance should expressly provide that the terms of the relevant IRA documents will bind the IRA owner

³ 26 C.F.R. § 1.408-2.

⁴ In addition to the issues discussed below, state trust and escheatment laws that affect the status of IRAs should be considered in the development of regulatory guidance under the automatic rollover rules.

to the terms of the agreement, including the materials describing the relevant investment options and the default beneficiary rules provided in the IRA document.

Under existing Treasury regulations, a disclosure statement and a copy of the IRA agreement must be delivered to a prospective IRA owner on or before the account's establishment.⁵ Guidance should provide relief from these rules, as it may be difficult to meet this requirement where the employer, not the employee, is establishing the account and/or where the employee cannot be located. As part of this guidance, the regulations, for example, could provide that the mailing of such documents to the address of the participant provided by the employer would be deemed to satisfy the requirement.

Current rules also provide IRA owners with seven days after "the earlier of the date of [IRA] establishment or purchase" to exercise their right of revocation. The regulations should provide that even where an employer, rather than the employee, establishes the IRA, the seven-day revocation period begins on "the date of establishment or purchase." In the absence of this guidance, IRA trustees would be unable to rely on the terms of the IRA document and would effectively serve as guarantors against market declines for an indefinite period.

Anti-Money Laundering Issues. Under the USA PATRIOT Act,⁶ financial institutions are required to collect specific identification information from customers such as name, address, social security number, and birthdate.⁷ In many instances, this information may be available from the employer. In certain instances, however, the information may be incomplete, outdated, or simply incorrect.

Once this information is collected, the firm is required to verify the information. If the account is opened in a face to face exchange, the firm could rely on a government issued identification such as a driver's license. Unfortunately, many of these accounts will likely be opened without any type of signature or contact with the former plan participant. The PATRIOT Act does provide for verification methods when an account is not opened in person through the use of non-documentary methods, such as special databases operated by, for example, credit bureaus. If the database method is utilized, however, the customer must be notified — which would be very difficult to do if the customer cannot be found.

We ask that the Department consider these issues in the context of automatic rollovers to IRAs, consult other agencies working on the development of anti-money

⁵ 26 C.F.R. § 1.408-6.

⁶ Pub. L. 107-56.

⁷ Self-regulatory entities such as the National Association of Securities Dealers (NASD) and the New York Stock Exchange also require financial firms and sales representatives to have a reasonable base of knowledge about their customers.

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laundering rules, and provide appropriate relief for IRA providers required to comply with them.

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

Sincerely,

Kathy Hamor
Executive Director