Smith McKenzie Rothwell & Barlow, P.S.

A PROFESSIONAL SERVICES CORPORATION
ATTORNEYS AT LAW

500 UNION STREET, SUITE 700
SEATTLE, WA 98101
(206) 224-9900
Fax (206) 224-9820

DIRECT LINE (206) 674-5213
Email: lesc@smrblaw.com

MILTON C. SMITH
A. BRUCE McKENZIE*
CATHERINE A. ROTHWELL
DAVID S. BARLOW**
MICHAEL H. KORPI**
MARK E. SMITH
LES M. COUGHRAN

*ALSO ADMITTED IN DISTRICT OF COLUMBIA
**ALSO ADMITTED IN OREGON
***ALSO ADMITTED IN CALIFORNIA

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

Attn: Default Investment Regulations

Re: Comments on Default Investment Regulations

To Whom It May Concern:

This firm serves as legal counsel to a number of retirement plans, both single employer and multiemployer, that permit plan participants to direct their investments. We commend the U.S. Department of Labor in its efforts to allow plan fiduciaries to establish default investment allocations that should provide additional retirement income for plan participants.

Proposed Regulations Intended to Allow "Fund of Funds" Model Portfolios

When reviewing the regulations, we noted that the Department intends to allow plan fiduciaries to select a "fund of funds," which is described to include a model portfolio that consists of various investment options otherwise available under the plan. This concept, however, is not entirely reflected in the substance of the regulations.

Regulations Have Narrower Definition than Programs Described in the Preamble

In proposed regulation § 2550-404c-5(e)(3), a "qualified default investment alternative" is defined to include only those investments that are either:

(i) Managed by an investment manager, as defined in Section 3(38) of the Act; or

(ii) An investment company registered under the Investment Company Act of 1940.

This definition uses singular prose and may be overly narrow. Our concern is that this definition may not cover model portfolios that consist of two or more investment options otherwise available

under the plan, where the default allocation is selected by the plan's named fiduciary, rather than an investment manager.

Background of Fund of Fund Programs – Some Are Provided through Administrative Platform and Are Not Managed by Investment Managers or Stand Alone Mutual Funds

By way of background, many record keepers, who take the position that they are not fiduciaries with respect to the plan, have added default allocation programs to their administrative platforms. These programs are intended to allow participants to select from several "pre-mixed" investment allocations comprised of mutual funds offered under the plan. These pre-mixed allocations typically are designed to avoid the selection of funds that have overlapping characteristics.

These pre-mixed allocations differ from "lifestyle-funds" or "target-retirement date" mutual funds, since the pre-mixed allocations are not stand-alone mutual funds. Instead, they are comprised of several mutual funds offered under the plan. When reviewing communication materials describing the "pre-mixed" portfolio options, the record keepers take extreme care to avoid providing "investment advice" and instead rely heavily on the "investment education" concept to avoid fiduciary status.

In our view, these default allocation programs, which utilize the mutual funds offered through the plan, should fit within the definition of "qualified default investment alternative." The governance structures provide substantially the same protections as a lifestyle or target retirement date mutual fund. For example, under the pre-mixed allocations all of the underlying investments are mutual funds and these funds are selected by plan fiduciaries. In addition, the specific pre-mixed allocation used as a default would be selected by plan fiduciaries.

To permit pre-mixed portfolios to fit within the definition of "qualified default investment alternative" we would suggest the following changes to the regulations:

> (e) Qualified default investment alternative. For purposes of this section, a qualified default investment alternative means an investment ~~alternative~~ *allocation* that:
>
> *****
>
> (3)(ii) *consists of one ore more investment companies* an ~~investment company~~ registered under the Investment Company Act of 1940;

These changes would allow plan fiduciaries who may not have a single fund that satisfies the requirements of a "qualified default investment alternative" to create a portfolio that meets these requirements without retaining an investment manager to prepare the default allocation formula.

If the Department of Labor's intent is to limit "qualified default investment status" to a single mutual fund or to a model portfolio designed by an investment manager, then we would suggest then that the regulations be developed further in this regard. If the Department of Labor intends to allow default allocations to include more than one mutual fund, then the regulation should be expanded in 29 CFR § 2550.404c-5(e) to accommodate a default portfolio allocation that uses more than one mutual fund.

We look forward to final regulations on this matter and appreciate your efforts in this regard. If you need further information about our comments, please let us know.

Best regards,

SMITH McKENZIE ROTHWELL & BARLOW, P.S.

Les M. Coughran