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To: PWBA_NO.PWBA-NPO(E-ORI)
Date: Fri, Mar 7, 2003 3:36 PM
Subject: Automatic Rollovers RFI

Dear Sir or Madam:

Attached is a response on behalf of the Society for Human Resource Management to the Request for Information on Automatic Rollovers. The original and three copies are being sent by overnight delivery.

If you have any problems with the attachment, please contact me.

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March 7, 2003

BY ELECTRONIC MAIL AND FEDERAL EXPRESS OVERNIGHT

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

Attention: Automatic Rollovers RFI

Dear Sir or Madam:

On behalf of the Society for Human Resource Management, we are responding to the Department of Labor, Employee Benefits Security Administration ("EBSA"), on its Request for Information on automatic rollovers, which was published on January 7, 2003 in the *Federal Register* at 68 Fed. Reg. 992.

STATEMENT OF INTEREST

The Society for Human Resource Management (the "Society" or "SHRM") is the world's largest association devoted to human resource management. Representing more than 170,000 individual members, the Society's mission is to serve the needs of human resource ("HR") professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 120 countries.

SHRM's membership is comprised of HR professionals who balance strategic, operational, and administrative roles. Additionally, many HR professionals play an extensive role in the administration of employee benefit plans. SHRM and its members, therefore, have a vested interest in the safe harbor regulations the Department of Labor will promulgate to govern automatic rollover distributions from tax-qualified employee pension benefit plans. These comments reflect the substantial expertise and experiences of the Society's members. The comments were developed with input from SHRM's Compensation and Benefits committee,

which is comprised of HR professionals from all levels and a variety of industries who focus on pension and compensation issues.

INTRODUCTION

SHRM welcomes this opportunity to respond to the EBSA's request for information on issues relating to the development of safe harbor regulations. As noted above, SHRM members have a vested interest in the safe harbor regulations as eventually promulgated, because many SHRM members will be charged with implementing and administering the automatic rollover requirements. However, SHRM members with administrative responsibilities for tax-qualified pension benefit plans also have fiduciary obligations to plan participants. SHRM's response to the EBSA's Request for Information therefore seeks to balance these fiduciary obligations with administrative efficiency and effectiveness.

AUTOMATIC ROLLOVER SAFE HARBORS

SHRM's comments on the EBSA's "Issues Under Consideration" regarding the automatic rollover safe harbors follow the numbered list in the Request for Information.

1. Standards for Safe Harbor Entity

SHRM believes it is not necessary for the safe harbor regulations to impose additional criteria on an individual retirement account ("IRA") custodian, trustee, or issuer in order to qualify as a safe harbor entity (an "IRA Provider"). The existing requirements under the Treasury Regulations and the Internal Revenue Code are accepted as providing sufficient protection for current IRA owners. A former participant in a tax-qualified plan whose benefits are automatically rolled over under the plan's mandatory distribution rule (a "Distributee") does not need a more "qualified" IRA Provider than a former participant who affirmatively elects to have his or her mandatory distribution directly rolled over to an IRA. The essential function and purpose of the IRA receiving the automatic rollover is the same as an IRA receiving an elective rollover, and accordingly the same criteria should apply to IRA Providers as to other IRA custodians, trustees, and issuers.

Because SHRM believes no additional criteria need to be imposed on IRA Providers, it is not necessary for the safe harbor regulations to give special consideration for safe harbor status to an IRA custodian, trustee, or issuer who is also an existing service provider to the tax-qualified plan. However, SHRM suggests that the safe harbor regulations should require plan administrators to give primary consideration, when all other factors are comparable, to an IRA Provider who is an existing service provider to the plan if the IRA Provider will accept the automatic rollover in-kind without transaction fees. If the plan permitted the Distributee to self-

direct the investment of the Distributee's plan account, the plan administrator's selection of an IRA Provider that accepts an in-kind automatic rollover preserves the investments selected by the Distributee and avoids realization of investment losses as a result of the automatic rollover. This results in an automatic rollover that mirrors the investment characteristics of the Distributee's plan account, which should be encouraged by the safe harbor regulations.

2. Standards for Safe Harbor Initial Investment

SHRM believes the safe harbor regulations should limit permissible safe harbor initial investments for an automatic rollover to two categories. The first category would only apply if the Distributee self-directed the investment of the Distributee's plan account and the automatic rollover can be distributed in-kind without liquidating the existing investments and repurchasing identical investments. Under this category, the investments directly rolled over in-kind would qualify as safe harbor initial investments. This in-kind distribution without liquidation and repurchase can often be provided when the plan's current service provider is also an IRA Provider. When the Distributee's plan account is distributed in-kind, the investments in the automatic rollover IRA reflect the Distributee's most recent investment selections. The plan administrator should not be required to substitute the plan administrator's selection of investment options for the Distributee's selection of investment options under these circumstances, and the plan administrator should be able to rely on the Distributee's most recent investment selections when those investment selections can be automatically rolled over in-kind.

The second category would apply whenever the first category does not apply, *i.e.*, the Distributee did not self-direct the investment of the Distributee's plan account, or the investments in the Distributee's plan account cannot be distributed in-kind without liquidating the existing investments and repurchasing either identical or substantially similar (*i.e.*, "mapped") investments. Under this category, safe harbor initial investments should be limited to investments that are both highly liquid and preserve principal (*e.g.*, U.S. Treasury money market account). The high liquidity requirement permits the Distributee to select new investments without risk of liquidity loss, and the preservation of principal requirement protects against investment losses, even though it may not always protect the Distributee from inflation losses.

SHRM does not believe the safe harbor regulations can include or exclude specific classes of mutual funds or other types of investments, or specify asset allocation standards and still satisfy the plan administrator's fiduciary responsibility to the Distributee. The prudence of investing in a specific class of mutual funds or another type of investment, or under a specific asset allocation standard with respect to any Distributee cannot be determined without considering the Distributee's intended retirement age and investment risk tolerance. SHRM presumes that if the plan administrator could obtain this information from the Distributee, the plan administrator could likely obtain a distribution election from the Distributee and avoid

automatically rolling over the mandatory distribution. Therefore, because any particular class of mutual funds or other type of investment, or any specific asset allocation standard would be prudent for one Distributee but imprudent for another Distributee, SHRM believes it would be difficult to create safe harbors that would be both simple to administer and satisfy the plan administrator's fiduciary duties to the Distributee. Therefore, SHRM recommends that the safe harbor initial investments be limited to the two categories described above.

3. Establishment Costs

SHRM members generally are not involved with the establishment or set-up of IRAs for plan participants receiving distributions. Therefore, we are unable to comment on the EBSA's request for information regarding the range of establishment or set-up costs for IRAs with initial investments of $1,000 to $5,000. When a plan participant elects to have a distribution directly rolled over to an IRA, the participant is generally responsible for selecting the IRA trustee, custodian, or issuer and taking all necessary actions to establish the IRA. The cost of establishing or setting up the IRA is generally not a cost paid by the plan, but is almost always paid from the distributed plan benefits after the distribution occurs. Therefore, SHRM members do not accumulate information about IRA establishment and set-up costs, and SHRM is unable to comment on factors to be used in determining the reasonableness of these costs.

However, SHRM suggests that the safe harbor regulations require the distributing plan or plan sponsor to bear part or all of the establishment or set-up costs for automatic rollover IRAs only if the distributing plan or plan sponsor bears part or all of the establishment or set-up costs for IRAs that receive other direct rollover distributions from the plan. SHRM does not believe that a Distributee should be put in a better position regarding IRA establishment or set-up fees than a plan participant who affirmatively elects to have a distribution directly rolled over to an IRA. Requiring the distributing plan or plan sponsor to always bear the establishment or set-up costs for automatic rollover IRAs may treat a Distributee more favorably than a plan participant who made the effort to make an affirmative distribution election or to keep the plan administrator informed of the participant's current address. SHRM does not believe that the safe harbor regulations should be designed to in any way encourage plan participants to intentionally neglect their responsibilities to make distribution elections or to provide the plan administrator with current contact information.

4. Termination Costs

Again, SHRM members generally are not involved with the termination of IRAs established by former plan participants. Therefore, SHRM is unable to comment on the EBSA's request for information regarding the range of termination costs for IRAs with initial investments of $1,000 to $5,000. Once a plan distribution is directly rolled over to an IRA, the plan sponsor

and plan administrator generally have no subsequent interaction with the IRA. SHRM members generally do not accumulate information about IRA termination costs, and SHRM is unable to comment on factors to be used in determining the reasonableness of these costs.

5. Maintenance Fees

SHRM members generally are not involved with the maintenance or administration of IRAs for former plan participants. Accordingly, we are unable to comment on the EBSA's request for information regarding the range of maintenance and administrative fees charged by IRA custodians, trustees, or issuers for IRAs with initial investments of $1,000 to $5,000. As noted above, the plan sponsor and plan administrator generally have no interaction with the IRA or the IRA custodian, trustee, or issuer once a plan distribution is directly rolled over to an IRA. Therefore, SHRM members do not accumulate information about IRA maintenance and administrative fees, and SHRM is unable to comment on factors to be used in determining the reasonableness of these fees.

6. Investment Fees

SHRM members generally are not involved with investing assets held in IRAs for the benefit of former plan participants. SHRM is therefore unable to comment on the EBSA's request for information regarding the types of investment fees and the range of investment fees charged to IRAs with initial investments of $1,000 to $5,000. Once a plan distribution is directly rolled over to an IRA, the plan sponsor and plan administrator generally have no subsequent interaction with the IRA. Therefore, SHRM members do not accumulate information about IRA investment fees, and SHRM is unable to comment on factors to be used in determining the reasonableness of these costs.

SHRM does not recommend that the safe harbor regulations require the IRA principal to be guaranteed or that all investment fees, maintenance fees, and establishment costs be charged to investment earnings. As noted previously, SHRM does not believe that a Distributee should be put in a better position than a plan participant who affirmatively elects a direct rollover of a distribution into an IRA. An IRA Provider should only be required to guarantee the IRA principal against invasion for fees if the IRA Provider provides the same protection to all other IRAs held by the IRA Provider.

SHRM suggests that the safe harbor standards for initial investments and determining the reasonableness of the fees charged by the IRA Provider be designed to provide sufficient protection for the IRA principal. For example, SHRM suggested above that if the Distributee-selected investments can be automatically rolled over in-kind without liquidation and repurchase of the investments, those Distributee-selected investments should qualify as safe harbor initial

investments. The investment fees associated with those initial investments could vary significantly from Distributee to Distributee. Requiring the IRA Provider to guarantee the principal against erosion for investment fees could discourage entities from acting as IRA Providers, thereby limiting the selection of IRA Providers available for selection by the plan administrator. SHRM believes that the safe harbor regulations should provide incentives, not disincentives, for entities to act as IRA Providers.

7. Surrender Charges

SHRM members generally are not involved with changing investment vehicles within IRAs held for the benefit of former plan participants. We are therefore unable to comment on the EBSA's request for information regarding the range of surrender charges imposed on investment vehicles in IRAs with initial investments of $1,000 to $5,000, how surrender charges vary, and the circumstances triggering imposition of surrender charges. After a plan distribution is directly rolled over to an IRA, the plan sponsor and plan administrator generally have no subsequent interaction with the IRA. Therefore, SHRM members do not accumulate information about investment vehicle surrender charges, and SHRM is unable to comment on factors to be used in determining the reasonableness of these costs.

However, SHRM does believe that the safe harbor regulations should address surrender charges imposed by IRA Providers on any investments classified as safe harbor initial investments. SHRM suggests that an IRA Provider should be required to waive all surrender charges on any investments offered by the IRA Provider that are designated as safe harbor initial investments, other than Distributee-selected investments rolled over in-kind. If the Distributee's selected investments are automatically rolled over in-kind, the IRA Provider should be required to include the period the investment was held in the Distributee's plan account prior to the rollover when determining any surrender charges applicable to the investment when surrendered or redeemed within the IRA.

8. Transfers within One Year

SHRM members generally are not involved with transfers of assets out of IRAs held for the benefit of former plan participants. Therefore, SHRM is are unable to comment on the EBSA's request for information regarding IRA Providers' policies governing the refunding or waiving of fees or charges when an IRA is withdrawn or directly rolled over to another eligible retirement plan within one year of establishment. After a plan distribution is directly rolled over to an IRA, the plan sponsor and plan administrator generally have no subsequent interaction with the IRA. Therefore, SHRM members do not accumulate information about IRA Providers' policies or practices regarding fee refunds or waivers.

However, SHRM believes that the safe harbor regulations should require an IRA Provider to waive or refund on a pro-rata basis the establishment costs and maintenance fees imposed on the IRA if the Distributee withdraws or otherwise rolls over the IRA within one year. The Distributee should be permitted to move the mandatory distribution from the safe harbor IRA to an IRA selected by the Distributee within limited period of time without incurring a significant financial penalty. This provision would put the Distributee in a similar position to a plan participant who affirmatively selected the IRA to which the participant's mandatory distribution would be directly rolled over.

SHRM also suggests that the safe harbor regulations require an IRA Provider to refund or waive in whole any termination costs or surrender charges imposed on safe harbor initial investments other than investments rolled over in-kind if the Distributee withdraws or otherwise rolls over the IRA within one year. If investments are not rolled over in-kind, the Distributee should not be subject to a financial penalty resulting from initial investments not selected by the Distributee. Alternatively, the safe harbor initial investment requirements can provide that safe harbor initial investments be investment vehicles that do not have termination costs or surrender charges.

9. Prohibited Transaction Relief

SHRM believes that the existing prohibited transaction requirements imposed on, and exemption relief available to, a plan sponsor with respect to the tax-qualified plan should be applied to a plan sponsor that wishes to select itself or an affiliate as an IRA provider or to choose a safe harbor initial investment in which the plan sponsor has an interest. The existing prohibited transaction requirements and available exemption relief provide adequate protection for plan participants, and therefore would also provide adequate relief for Distributees.

SHRM recommends that a plan sponsor or an affiliate of a plan sponsor who has already obtained an individual prohibited transaction exemption or qualifies for a statutory or class exemption with respect to the qualified plan be permitted to act with regard to automatic rollover IRAs in the same capacity (*e.g.*, IRA Provider, interested party to a safe harbor initial investment) by providing advance written notice to the EBSA.

However, if a plan sponsor or an affiliate of a plan sponsor wishes to act with regard to automatic rollover IRAs in a different capacity than the plan sponsor or affiliate acts with regard to the qualified plan, the plan sponsor or affiliate should be required to obtain an individual prohibited transaction exemption or qualify for a statutory or class exemption. Similarly, if a plan sponsor or affiliate does not already meet the regulatory and statutory requirements to act as an IRA trustee, custodian, or issuer, the plan sponsor or affiliate must satisfy those requirements

before the plan sponsor or affiliate can qualify as an IRA Provider under the safe harbor regulations.

10. Legal Impediments

SHRM members acting as plan administrators have already encountered difficulties when attempting to directly rollover mandatory distributions to IRAs. This situation has most often occurred when a terminating defined contribution plan cannot locate a former participant, and accordingly cannot obtain a distribution election from that former participant. In general, IRA trustees, custodians, and issuers have frequently refused to establish an IRA for the missing participant because the participant has not authorized the opening of the IRA, and the plan administrator cannot provide a current address (even though the plan administrator can provide a name and a social security number). SHRM anticipates similar difficulties from IRA Providers unless the safe harbor regulations or the regulatory and statutory criteria for IRA Providers, or both, address this issue.

SHRM recommends that the safe harbor regulations, if possible, authorize the plan administrator to execute on behalf of the Distributee any documents required to establish an automatic rollover IRA. The safe harbor regulations, if possible, should permit the IRA Provider to rely on the plan administrator's representation that the Distributee has failed to make an affirmative election regarding the mandatory distribution and that the plan administrator is establishing the automatic rollover IRA on the Distributee's behalf as required under Code Section 401(a)(31)(B).

SHRM realizes an IRA Provider may be reluctant to establish an automatic rollover IRA if the IRA Provider is not entitled to rely on the plan administrator's representations. At the same time, SHRM recommends that the safe harbor regulations impose limits on the extent of the representations that an IRA Provider can demand from a plan administrator before establishing an automatic rollover IRA. The safe harbor regulations should not permit an IRA Provider to require a plan administrator to assume any liability with regard to the establishment of the automatic rollover IRA than the plan administrator is required to assume under the safe harbors. The safe harbor regulations need to balance the plan administrator's obligation to comply with the automatic rollover requirements with the IRA Provider's desire to avoid liability arising from the establishment of an automatic rollover IRA.

11. Disclosure

SHRM recommends that the safe harbor regulations require the IRA Provider to send a written notice to the Distributee (at the Distributee's last known address as provided by the plan administrator) providing the Distributee with the IRA Provider's name, address, and any other

information needed by the Distributee to take action with regard to the automatic rollover IRA established for the Distributee. The safe harbor regulations should require the IRA Provider to mail this notice within a stated time period (*e.g.*, 30 days) after the date the mandatory distribution is directly rolled over to the automatic rollover IRA.

SHRM believes the IRA Provider, rather than the plan administrator, is the appropriate party to provide this notice because the IRA Provider has knowledge of the information the Distributee will need, and the Distributee generally will not have any interaction with the plan administrator regarding the mandatory distribution after the automatic rollover has occurred. The plan administrator will no longer have any control over the mandatory distribution after the automatic rollover has occurred, and would only be able to refer the Distributee to the IRA Provider with any questions.

SHRM also suggests that Schedule SSA (Form 5500) be revised to require plan administrators to report the name of the IRA Provider to which a mandatory distribution has been automatically rolled over. This will enable the EBSA to provide the name of the IRA Provider to a Distributee in the event the qualified plan or the plan sponsor, or both, cease to exist between the date the automatic rollover occurs and the date the Distributee seeks to claim the automatic rollover IRA. It is SHRM's understanding that the EBSA already maintains a database of vested former participants in qualified plans who are reported on Schedule SSA as having accrued but undistributed benefits in qualified plans. Adding the name of the IRA Provider will assist the Distributee in claiming the Distributee's mandatory distribution in the event the plan administrator and the IRA Provider could not locate the Distributee at the time the automatic rollover occurred.

12. Low-Cost IRAs

SHRM agrees that the safe harbor regulations should provide special consideration for IRA Providers who provide low-cost IRAs for automatic rollovers. This special consideration would serve two purposes. First, low-cost automatic rollover IRAs can minimize or eliminate the erosion of the IRA principal, thereby preserving the Distributee's retirement assets. Second, providing preferential treatment under the safe harbor regulations for low-cost automatic rollover IRAs provided by IRA Providers who otherwise meet all of the safe harbor requirements would encourage IRA trustees, custodians, and issuers to not only accept automatic rollovers, but to develop and market specialized products for the automatic rollover market. This could give plan administrators a greater number of IRA Providers from which to select, and ideally enhance the quality of the IRA products offered as automatic rollover IRAs.

As noted above, SHRM members generally have no involvement with IRAs established to receive rollover distributions from qualified plans, and therefore do not accumulate cost or

performance information on IRA Providers. We are therefore unable to comment on EBSA's request for information on criteria to be used to demonstrate low cost or preservation of retirement assets, or on the kinds of low-cost IRA products currently available.

13. Current Practices

It is SHRM's understanding that substantially all defined contribution pension plans have mandatory distribution provisions requiring distribution of a participant's account balance of not more than $5,000 after a participant's plan participation terminates (most commonly because of termination of employment). SHRM understands that a majority of defined benefit pension plans that offer a lump sum payment as an optional form of benefit also require distribution of a participant's accrued vested benefit with a present value of not more than $5,000 after the participant ceases to participate in the plan.

These provisions serve to simplify plan administration, because they relieve the plan from maintaining significant numbers of defined contribution plan participant accounts, or retaining liability for accrued vested defined benefits, for former plan participants. The mandatory distribution provisions enable plans to reduce their ongoing administrative costs (*e.g.*, recordkeeping of plan accounts, maintaining current contact information on former participants) and reduce the plan's liability for accrued benefits. Promulgation of the safe harbor regulations will enable plans to more efficiently and effectively administer these provisions, and correspondingly more efficiently and effectively administer the plan overall.

Because of the limited period of time between publication of the EBSA's Request for Information and the deadline for submitting responses, SHRM was unable to effectively gather information from its members regarding the number of mandatory distributions made annually by its members' plans and the annual costs associated with those mandatory distributions.

14. EGTRRA Provisions

Implementing the automatic rollover requirements will result in qualified retirement plans incurring new administrative costs associated with selecting an IRA Provider and selecting initial safe harbor investments. Qualified plans already incur costs from directly transferring distributions to rollover IRAs, so implementing the automatic rollover requirements will result in an increase in this existing cost. If the safe harbor regulations require the plan administrator to make significant efforts to locate a Distributee before the plan administrator can make an automatic rollover of the mandatory distribution (as discussed below under "Other Issues"), the plan administrator would also incur new administrative costs associated with locating Distributees.

Depending on the safe harbor regulations, additional costs or fees might not be imposed on a Distributee's assets automatically rolled over to an IRA. In general, however, presuming that most IRA establishing with an initial balance of $1,000 to $5,000 incur some establishment fees, maintenance fees, or investment fees, or a combination of these fees, SHRM anticipates that the safe harbor regulations will not impose costs or fees on an automatic rollover IRA in excess of the costs or fees that would have been imposed on an IRA affirmatively elected by a former plan participant to receive the direct rollover from the qualified plan.

IMPACT ON SMALL ENTITIES

SHRM anticipates that the annual burden on small businesses and small plans resulting from the automatic rollover requirement and the safe harbor regulations should not be higher than the annual burden on large businesses and large plans. Rather, SHRM believes that the availability of IRA Providers accepting automatic rollovers will enable small businesses and small plans to reduce their ongoing administrative costs and burdens. A small plan that can make automatic rollovers of mandatory distributions will no longer be required to maintain small account balances for unresponsive or missing former participants, which generally will reduce the plan's administrative costs. Further, the plan administrator would be relieved from making ongoing attempts to locate former participants to whom mandatory distributions are to be made but for whom the plan administrator does not have current contact information.

OTHER ISSUES

Application to Other Distributions

Code Section 401(a)(31)(B)(ii) limits the application of the automatic rollover provisions to mandatory distributions of nonforfeitable accrued benefits when the present value is more than $1,000 and does not exceed $5,000 and the Distributee has not elected to have the distribution either paid directly to the Distributee or directly rolled over to an eligible retirement plan. However, plan administrators encounter at least two other situations where the availability of the safe harbors would simplify plan administration.

The first situation is a mandatory distribution with a present value of not more than $1,000. A significant number of plans require automatic rollovers for mandatory distributions of any amount. However, it is usually more common for the plan administrator to be unable to locate a former plan participant when the amount of the mandatory distribution is not more than $1,000 than when the amount of the mandatory distribution is more than $1,000.

The second situation arises when the plan administrator of a terminating tax-qualified plan attempts to distribute plan benefits of amounts both greater than and less than $5,000 in

order to complete the termination of the plan. For example, the plan administrator often discovers nonforfeitable accrued benefits of greater than $5,000 payable to former participants who did not elect to receive a distribution when their participation in the plan terminated. However, often those participants cannot be located because the participants have not kept the plan administrator informed of subsequent changes to their address. Similarly, accrued benefits of less than $5,000 payable to former participants can be required if the plan did not provide for mandatory distributions, but again the former participants have not provided updated address information to the plan administrator.

When the benefits are payable from a terminating defined benefit plan, the plan administrator can pay the nonforfeitable accrued benefits to the Pension Benefit Guarantee Corporation so that the distribution of plan benefits, and correspondingly the plan termination, can be completed. However, no parallel option is provided to the plan administrator of a defined contribution plan.

Although the safe harbor regulations will be promulgated to specifically address Code Section 401(a)(31)(B)(ii), SHRM requests that EBSA authorize plan administrators to rely on the safe harbor regulations when making mandatory distributions of less than $1,000 and when making distributions from a terminating plan. This authorization could be made in the preamble to the proposed and final safe harbor regulations, or in another authoritative pronouncement from EBSA. SHRM believes that once the safe harbor automatic rollover provisions are in place, plan administrators should be permitted to rely on the safe harbors when making mandatory distributions from tax-qualified retirement benefit plans other than the mandatory distributions described in Code Section 401(a)(31)(B)(ii). This would provide a uniform standard for automatic rollovers of all mandatory distributions from tax-qualified retirement benefit plans, which would benefit the former plan participants entitled to the mandatory distributions. It would also enable the plan administrators of plans required to make these other types of mandatory distributions, and particularly mandatory distributions from terminating plans, to provide for the effective and efficient administration of both the plans and the distributions.

Safe Harbor Efforts by Plan Administrator to Obtain Election

The Request for Information does not raise the issue of the extent to which a plan administrator must attempt to obtain an election from a distributee before the plan administrator is permitted to automatically rollover a mandatory distribution. For example, can a plan administrator simply wait a specified number of days after mailing an election form to the distributee before automatically rolling over the mandatory distribution, whether or not the plan administrator knows if the distributee actually received the election form? Is a plan administrator required to make a reasonable attempt to locate the distributee before automatically

rolling over the mandatory distribution if the last known address for the distributee in the plan administrator's records is not current?

While SHRM realizes that this administrative issue is outside the specific scope of the safe harbor regulations required under the legislative directive, SHRM suggests that the EBSA consider developing safe harbor administrative procedures addressing this issue. Establishing safe harbor administrative procedures will protect a distributee from having a mandatory distribution involuntarily rolled over to an IRA provider not of the distributee's choosing simply because the plan administrator required the distributee to respond within an unreasonably short period of time. Similarly, a plan administrator will be permitted to automatically rollover a mandatory distribution to a missing distributee as soon as possible. Safe harbor administrative procedures will both protect distributee's interests and enable the plan administrator to establish internal procedures allowing for the efficient and cost-effective operation of the plan.

SHRM suggests that the safe harbor regulations provide that a plan administrator cannot automatically rollover a mandatory distribution before the earlier of:

A. 90 days after the date the plan administrator provides an election form to the distributee, but only if an election form that is mailed is not returned to the plan administrator as undeliverable because the distributee's address has changed; or

B. the date the plan administrator is notified, by returned mail or otherwise, that the distributee's address has changed, if the plan administrator does not have actual knowledge of the distributee's new address.

The 90-day election period for the distributee to elect the form of the mandatory distribution corresponds to the maximum "reasonable period" prior to a distribution when the plan administrator can provide the required notice under Code Section 402(f). If the distributee has received the election form, the 90-day period provides a reasonable amount of time for the distributee to make an election.

If the distributee's address has changed, the plan administrator should be permitted to automatically rollover the mandatory distribution as soon as possible. The mandatory distribution retains its tax-deferred status after the automatic rollover, so the distributee has no adverse income tax consequences, and the plan administrator is not required to maintain a plan account balance for a missing distributee for an extended period of time.

CONCLUSION

SHRM appreciates the opportunity to submit its comments to EBSA on the development of safe harbor regulations for automatic rollovers. The Society recognizes that the automatic rollover provisions will help preserve the tax-deferred status of mandatory distributions to plan participants from tax-qualified pension benefit plans and will reduce the administrative burdens and costs incurred by tax-qualified pension benefit plans. SHRM also understands the need to protect plan participants' retirement assets by establishing minimum safe harbor criteria on IRA Providers and initial investments, and believes that the safe harbor regulations can successfully accommodate the needs of plan participants, plan administrators, and IRA Providers. SHRM looks forward to reviewing proposed safe harbor regulations in the near future, and to the promulgation of final safe harbor regulations as soon as possible.

If you have any questions or require any further clarification of these comments, please let us know.

Very truly yours,

BUTZEL LONG

Antoinette M. Pilzner

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AMP
c: Wendy E. Wunsh, Esq., Society for Human Resource Management
82818