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**From:** Robert Blum [Rblum@hansonbridgett.com]  
**Sent:** Thursday, April 01, 2004 2:01 PM  
**To:** e-ori@dol.gov  
**Subject:** comment on proposed regulation 2550.404a-2 - automatic rollovers

This email comments on proposed regulation 2550.404a-2 regarding automatic rollovers.

REQUEST

We respectfully request that the Labor Department explicitly recognize that any finalized regulation will not apply to state and local government pension plans, and therefore that the requirement of section 657(c)(5)(A) of P.L.107-16 (the Economic Growth and Tax Relief Reconciliation Act of 2001) is not met for these plans. Consequently, section 401(a)(31)(B) of the Internal Revenue Code cannot be made effective for state and local government retirement plans.

ANALYSIS

In the preamble to the proposed regulation, the Labor Department stated that "it appears clear that Congress did not intend fiduciaries to be subject to the automatic rollover requirements under the Code in the absence of a safe harbor. . . ." 41 Fed. Reg. 9904 (3/2/04). We agree. Without a safe harbor for fiduciaries who must implement the automatic rollover rules, the Congress would have put plan administrators and other plan fiduciaries at risk for litigation and liability. We believe that Congress did not intend to do this.

State and local government plans are not subject to the fiduciary rules of ERISA, and therefore any safe harbor regulations issued by the Labor Department will not apply to these plans. Their fiduciaries are subject to state and local law rules, and the Labor Department has no authority over these rules. Of course, some state courts will take into account rules issued by the Labor Department in interpreting state law, but this is far from a safe harbor.

In this circumstance, if the Labor Department issues final regulations on automatic rollovers without an explicit recognition of the Department's limitations with respect to state and local law, it could be argued that these regulations are sufficient to trigger the effective date of Code section 401(a)(31)(B). That would appear not to fit with the intent of the Congress, as recognized by the Department.

Therefore, we respectfully request that when the Department does issue final regulations it explicitly provide in the effective date that they are not effective for state and local government pension plans and therefore, that the effective date requirement for Code section 401(a)(31)(B) is not met for these plans.

Thank you for considering these comments. If you have any questions, please contact me at the address below.

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