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By Federal Express

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

ATTN: Default Investment Regulation

To Whom It May Concern:

Further to my earlier comment of November 10, 2006, I would like to address two erroneous comments made by other commentators. The first questions whether a person who is responsible for, and has the power to manage investments under the Sun America advisory opinion can be an investment manager. The second proposes that the Department should provide an inflexible standard, at odds with the current thinking of most academic literature, that it would be prudent, in the case of a balanced fund, to ignore the ages and other circumstances regarding the persons for whom a manager invests.

The first comment posed an apocryphal issue and provides a disingenuous solution. Money managers often employ software they have developed, purchased or leased, to perform a variety of functions in connection with their management of investments. Some commentators suggest that the use of such software, if licensed from a third party, means a money manager cannot be an investment manager because the manager would not have the **power** to manage, acquire or dispose of **any** asset of a plan.

This is totally unfounded. Software is a critical component of the operations of virtually all money managers. They utilize it to perform a variety of functions, including asset allocation. In some instances, they or an affiliate develop the software and in others it purchases or licenses software from a third party. There is not any legal authority cited by the comments that would in any way suggest that an entity's status as an investment manager should turn on the use of software it selects and may discontinue, whether or not it was developed by a third party.

Money managers use the Sun America structure because they are receiving fees and/or profits that vary due to asset allocation. These fees vary because the money managers charge different fees and have differing expenses for the various investment vehicles that may be

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included in an asset allocation program. The money managers have the power to and generally perform a variety of functions with respect to the interests in these vehicles as well as their underlying assets, including managing, acquiring and disposing. Since at least the interests in the vehicles and generally the underlying assets are plan assets,¹ such a manager has power to manage, acquire or dispose of assets in addition to the asset allocation that it performs using third party software.

The solution the commentators suggest is disingenuous. While ostensibly suggesting changes to include such program as a default investment alternative, such a change would call into question the status of all investment managers appointed using the simple and inexpensive procedure under section 402 of ERISA referenced in the preamble to the proposed regulation if they use software, particularly third party software, for any function related to money management for plans. This would place plan sponsors, including plan sponsors which sponsor defined benefit plans, at unnecessary risk. This is the case since plan sponsors, acting as named fiduciaries, appoint investment managers using the procedure described in section 402 of ERISA, which reduces their fiduciary responsibility to selection and oversight. If the persons they have appointed are not investment managers because of the use of software or third party software, then the plan sponsor would be ultimately responsible for each and every investment decision that is made.

The undersigned suggests the Department avoid this result by noting that the comments do not provide any basis for such assertion, and that the Department does not believe that there is any issue in this case. In the alternative, the Department could state that there is not any issue with respect to a money manager's use of third party software if the money manager selects the software, can replace the software or otherwise has the power to manage, acquire or dispose of any asset of the plan, including voting securities which are plan assets. In this connection, the undersigned notes the power to change the software is necessarily a power to dispose of an asset of a plan because at least some new software that could be substituted would be sufficiently different so that its allocations would require the disposition of existing plan assets. Therefore, the power to change the software would necessarily include the power to dispose of assets of a plan.²

With respect to the second comment, it is beyond the scope of the regulation to provide for a prudence safe harbor for persons who fail to take the circumstances of the persons for whom they invest into account. If the commentators believe it is prudent to do so, the Department could note that they are free to take this position. However, the Department could also note that a radical position such as this that is inconsistent with the great majority of practice and published thought could well invite litigation.

¹ We note that if the underlying assets that would be disposed of do not constitute plan assets, it would not be necessary to avoid the application of the prohibited transaction provisions by using a Sun America-type approach.

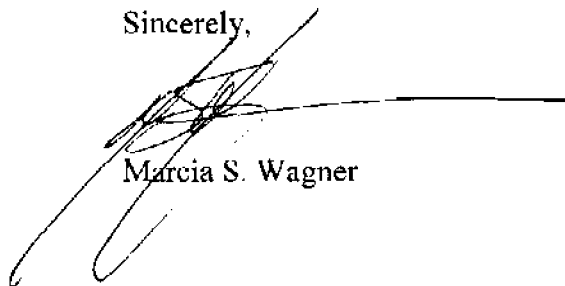
² See footnote 1.

In the alternative, the Department could simply eliminate balanced funds as qualified default investment alternatives under the regulation. This would avoid the confusion referenced by the commentators and could be appropriate given the likely lack of suitability of a single balanced fund alternative for a workforce of any material diversity. Such elimination might be more acceptable if it were done in combination with adding other alternatives that are likely better suited to take into account the individual circumstances of participants and beneficiaries in a plan. In adding any new alternatives, the Department should carefully consider the fact that the regulation provides relief for asset allocation as if the individual participant or beneficiary exercise control over his or her individual account. The most important and relevant fact that will be known about a participant or beneficiary is his or her age, which serves as a proxy for a number of estimates, including date of retirement and life expectancy. Given this, the plan sponsor could be imprudent for failing to consider age in designating one or more qualified default investment alternatives. Therefore, the Department should consider limiting default investment alternatives to those which consider age of a participant or beneficiary. This could assist plan sponsors in properly and prudently selecting a qualified default investment alternative for their plans.

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Thank you for your attention to and consideration of this comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia S. Wagner", is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

Marcia S. Wagner