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Employee Benefit Security Administration
US Department of Labor
Room N-5669
200 Constitution Avenue, NW
Washington, DC 20210

Re: Automatic Rollovers RFI

To Whom It May Concern:

We appreciate this opportunity to provide comments about proposed regulations implementing section 657(c) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). This provision calls on the Department of Labor to develop safe harbors relating to the automatic rollovers of certain tax-qualified plan distributions to individual retirement accounts (IRAs). We look forward to speaking with the Department about the issues we raise in this letter as well as any follow-up discussion on these points.

The American Bankers Association is the largest banking trade association in the country bringing together all elements of the banking community, including community, regional, money center banks and holding companies, as well as savings associations, trust companies and savings banks. Many of these institutions provide trust or custody services to institutional clients, including employee benefit plans covered by ERISA, as well as services to individuals in IRAs.

While we understand the goal of adding this provision to EGTRRA, we have great concerns about how these rollovers will work in practice. In particular, we have concerns about how these accounts will comply with current banking laws, as well as the creation of the necessary safeguards to allow custodians and trustees to accept these IRAs.

## General Observations

We have some general concerns about achieving the goal of increasing savings, and avoiding leakage, by pushing funds to IRAs. In moving these funds without an affirmative action by the employee, there will be future problems of employees losing track of these funds, while these funds merely leak out slowly or escheat. As

the Department is well aware, IRAs are not subject to ERISA and, therefore, any pre-emption of state escheat or unclaimed property laws that may apply to qualified plans, do not apply to IRAs. Further, depending on the state, these funds could escheat within 5 years, which does not further the goal of increasing savings for retirement.

Under the regulation, when the plan administrator is unable to locate the participant, or the participant does not reply to letters sent to him or her, the plan administrator will then be able to transfer the account over to an IRA custodian. That IRA custodian needs to be protected in relying on the actions taken by the plan administrator to find the participant. Whatever method the plan administrator has used, whether Social Security tracking, IRS tracking, or private locator services, needs to be sufficient for purposes of the custodian to accept these new accounts. The regulation should include safe harbor protection to allow the IRA custodian to rely upon the information provided by the plan administrator to open these IRAs.

For purposes of the required minimum distribution rules, the IRA custodian needs the date of birth. If a person is near retirement, the IRA custodian needs to be able to rely on the address provided by the plan administrator to send the appropriate notice when it is time.

**Investment Decisions**

The request for information asks about the appropriate vehicles for these funds. We suggest the most appropriate type of investment for these accounts is a principal preservation type of investment. A principal preservation type of investment is one that emphasizes the retention of principal and income over growth. Examples would include a money-market account or fund, a stable value fund, or a GIC. All of these investment vehicles should be considered safe harbor investments.

In terms of which of those vehicles is selected, it should be the decision of the plan administrator as to where the money should be invested in particular. This would be determined by the plan administrator and the IRA custodian. A proprietary or affiliated fund of the IRA custodian should be clearly identified as an appropriate safe harbor investment.

In the request for information, we are asked about rolling over plan investments directly in-kind. We believe that an in-kind rollover is not feasible for a number of reasons. Initially, we believe that a true in-kind rollover, i.e. a transfer of the specific assets held in the participant's plan account to an IRA will be a relatively rare situation.

If a true in-kind transfer is not feasible, then "mapping would be required because the IRA may not have identical investment options. However, mapping requires that decisions be made as to what is the "most similar" investment option. We are concerned that this would be considered a fiduciary decision. Accordingly, we believe that mapping is too difficult in these situations – and raises too many additional fiduciary liability concerns. Further, many times the IRA investment options are much more limited than those available under the plan – in such situations mapping would not be possible at all. In addition, even if the same funds are available, the same class of shares may not be, necessitating a share class exchange.

The request for information asks about taking fees only from the money earned on the account. Although that could certainly be a goal, that cannot be a requirement. Assuming that a principal preservation fund is designated as a safe harbor investment that cannot be guaranteed. Certainly with the volatility of the market, it should be clear to everyone that there cannot be a guarantee of any amount of income in the account, much less sufficient income to cover the costs of administering these accounts.

**Employer Stock**

We believe that additional safe harbors need to be put in place to address the issue of a plan account with employer stock in it. First, we ask the Department to establish a safe harbor that creates a clear preference for selling employer stock prior to transfer to the IRA custodian. Then, the plan administrator will need protection for selecting a date at which the employer stock is sold prior to rolling over the cash proceeds into the IRA. Because of the volatility of the market, the plan sponsor and plan administrator should not be put in the untenable position of guessing when to sell employer stock. Regardless of whether the stock may increase or decrease in value between the time the stock is sold and the beneficiary reclaims the account, the plan sponsor and plan administrator will be vulnerable to claims by participants.

Accordingly, the plan administrator needs to be protected from any liability for liquidating employer stock and transferring cash in these situations, should the employer stock have been shown to have been a better investment had the employer stock been rolled over in kind. We need a specific safe harbor addressing these accounts, recognizing the necessity to sell the employer stock to fund the IRA.

While most of our comments are from the perspective of the custodian, our institutions are plan sponsors and administrators as well, and we would be concerned about liability in employer stock situations from that perspective, as well. The Department should provide safe harbor protection for both the plan sponsor and plan administrator in these situations.

## Fees

The request for information asks several questions about fees; however, we find it inaccurate to discuss fees without discussing the differences between these types of IRA accounts and regular retail IRA accounts. Why? Fees are often discounted by the institutions in the hope that those accounts will increase over time. The types of accounts we are discussing here are unlikely to grow, and are very likely to become missing participant accounts.[1] We believe this because these accounts are opened without the affirmative participation of the participant, whom the plan administrator has already tried and failed to locate.

There are further differences from the retail market. In the retail environment, the account holder affirmatively chooses that particular institution, with the intention of working with that institution. That person probably intends to move future funds to that institution, and may intend to make additional annual contributions. With the accounts at issue in this RFI, the plan administrator or sponsor chooses the IRA custodian and there is little or no likelihood of ongoing contributions to grow the account.

Further, when the account holder affirmatively chooses the institution, certain administrative problems and hassles are not present. For example, the institution will have a signature on file, as well as a current address, phone number and beneficiary designation. This eases the management of these accounts.

In addition, if the account holder continues to contribute funds, then within a handful of years the set-up costs will be offset. Further, account activity by the account holder is a potential source of revenue, which is lacking for these accounts.

In addition, even if the Department of Labor provides that the IRA custodian is protected by the plan administrator's efforts to locate the account holder, the IRA custodian will still be required to attempt to locate the account holder in order to satisfy other legal requirements, described below. Therefore, in addition to the fact that these accounts do not have the benefits of those that come from the retail market, the costs will be higher for these IRA accounts, for whom a due diligence search has already failed, in order to sign documents to satisfy banking retail regulations (which we will discuss in the section on banking laws), and trying to track the people down for further information, such as providing certain required notices.

As a result any consideration of the fees needs to account for the greater costs of managing these individual accounts, as well as the lower revenue generated by them, in contrast to the retail market. Institutions accepting these accounts should be

[1] We believe they are likely to become missing participant accounts because these accounts are opened on behalf of participants who did not respond to the notice sent by the plan sponsor.

entitled to reasonable compensation in light of these issues, and should be free to negotiate the appropriate fees with the plan sponsor.

Due to these higher expenses, we would also note that providers should not be expected to refund or waive establishment costs, termination costs, maintenances fees or surrender charges for IRAs that are withdrawn or directly rolled over within one year of establishment.

**Prohibited Transaction Problems**

One of the prohibited transaction problems we see relates to being able to provide the necessary notices as required in a variety of areas. One particular example is the notice required under prohibited transaction exemption 77-4 (PTE 77-4)[2]. This PTE requires a variety of notices to be applied relating to advisory and service fees.

The Department of Labor should deem it sufficient for this notice to be provided to the participant along with the requisite distribution papers.

When the employee leaves employment, the plan sponsor will then send the notice which should disclose where any funds would be invested if the participant who has left employment takes no affirmative action, including the name and address of the IRA custodian.

We would also need prohibited transaction relief to allow a current plan service provider or affiliate to be the IRA custodian. Institutions should be able to treat these accounts in the same manner as any other individual retirement account, and should therefore be able to use our own affiliates. We would like to confirm that the use of proprietary funds in these situations would not create a problem.

**Other Banking Laws**

There are several banking laws that will become an issue should financial institutions take on these individual accounts. Among the laws that come into play are various state banking laws, the Truth in Savings Act, and the USA Patriot Act.

Under most state banking laws, it has become standard to require a signature for the opening of an account. This has become the standard for determining that the person coming to collect the funds in the account is who they claim to be. The institution wants to ensure that they have paid out to the right person, to protect themselves from liability should they have paid out to an incorrect person.

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[2] 42 FR 18732, April 8, 1977, which was applied to IRAs under AO 93-26A issued September 9, 1993.

Various state laws explicitly provide that a signature is a way to protect the institution from liability in such a situation. For example, in Louisiana, a bank "may conclusively rely on any application, agreement or signature card used to establish a deposit account as establishing ownership of any and all funds and other credits deposited therein."[3] If the IRA custodian opens these accounts without the account owner's signature, the institution would not be protected from liability in these situations. The Department of Labor would be requiring the institution to accept less than that contemplated by state laws.

Under the Truth in Savings Act[4], a financial institution is required to clearly disclose the rates of interest which are payable on deposit accounts, as well as the fees assessed on deposit accounts. The Truth in Savings Act was passed to provide customers with the ability to compare between institutions. It requires uniformity in the disclosure of the terms and conditions in which interest is paid and fees are assessed in connection with deposit accounts.

The Department of Labor needs to make it clear that it is sufficient for the institution to use the address provided by the plan sponsor for providing notice of required information and that no further due diligence is required. We may need to seek further guidance from the banking regulators on this issue as well.

In addition, even if the IRA custodian can rely on the plan administrator's due diligence for ERISA purposes, it is unclear as to the burden on the IRA custodian for purposes of other laws, such as the recently enacted USA Patriot Act[5]. Under the Act, institutions are required to verify certain information of each client, including the name, address, date of birth and social security number of each client. Section 326 of the USA Patriot Act requires regulations to be issued that set out minimum account opening identification and verification standards for financial institutions. These regulations have not been issued yet.

Current guidance details that, as part of verification, financial institutions must consult lists, provided by a governmental agency, of known or suspected terrorists or terrorist organization and keep records of the information used to verify the customer's identity.

For these accounts, it is unclear how much due diligence would be required to "verify" this information. The Department of Labor needs to make it clear that it is sufficient to rely on the information provided by the plan sponsor. However, it is unclear as to whether the Department of Justice will find that to be sufficient.

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[3] Section 317 of the Louisiana Code.
[4] 12 USC 4301 et seq.
[5] The USA Patriot Act is an acronym for the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56 (October 26, 2001).

**Conclusion**

Thank you for taking the time to consider our comments. As we mentioned, we have concerns about implementing these accounts, and whether they will bring us closer to the goal of preventing leakage in retirement accounts, and increasing the level of savings in our country.

We look forward to following-up with you regarding these comments, and answering any questions that may arise.

Sincerely,

Lisa J. Bleier

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