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November 13, 2006

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

Re: Default Investment Regulation

Dear Mr. Robert Doyle:

The American Bankers Association appreciates this opportunity to provide comments regarding proposed default investment regulations that would implement section 624(a) of the Pension Protection Act of 2006, Public Law 109-280. Section 624(a) is intended to encourage America's workers to save for retirement through automatic enrollment in employer defined contribution plans. In order to encourage employers and other fiduciaries to provide employees with automatic enrollment features, Section 624(a) provides relief from liability for fiduciaries that invest participant assets in certain types of default investment alternatives in the absence of participant investment direction.

The ABA 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 owning IRAs. As of year-end 2005, banks and thrifts held more than \$18 trillion in fiduciary assets for both retail and institutional customers in 15 million accounts.¹ Of those assets, \$7.3 trillion are held by banks, savings association and non-deposit trust companies in defined benefit and defined contribution accounts.²

Discussion

The Department has proposed several qualified investments as a safe harbor for plan fiduciaries responsible for accounts for which participants have not made an affirmative investment selection. This guidance is intended to assist fiduciaries

¹ FDIC Call Report Data, December 2005

² FDIC Call Report Data, December 2005

who make investment selections on behalf of those plan participants who are automatically enrolled in a retirement plan, and neither affirmatively opt out, nor make an investment selection. We believe the Department has taken the right approach with respect to these regulations by providing, among other things, a flexible definition for qualified default investment alternatives (QDIA). We would, however, request clarification regarding certain aspects of the proposal. Specifically, we request clarification:

- (1) That the prohibition on imposing financial penalties does not preclude compliance with SEC Rule 22c-2;
- (2) That bank trustees are not precluded from serving as investment manager of a QDIA;
- (3) That the 30-day notice requirement would not apply under certain limited circumstances (such as in the case of new hires) where such notice may not be practical; and
- (4) That there is no requirement to provide to QDIA participants investment materials that are not normally provided to non-QDIA participants.

Financial Penalties

The proposal provides six conditions for fiduciary relief, one of which is that the assets invested on behalf of participants or beneficiaries must be invested in a QDIA. A QDIA, among other things, may not impose financial penalties or otherwise restrict the ability of a participant or beneficiary to transfer his or her investment from the QDIA to any other investment alternative available under the plan.

The Department should clarify that it is the service provider and the plan, not the “investment,” that cannot impose financial penalties.

The ABA is concerned that this limitation could prohibit any mutual fund that imposes a redemption fee on short-term purchases and redemptions of mutual fund shares, as permitted under Rule 22c-2 of the Investment Company Act, from being considered a QDIA. As the Department is aware, Rule 22c-2 provides that a mutual fund’s board of directors can impose up to a 2% redemption fee to address costs associated with short-term purchases and redemptions incurred at the expense of long-term investors in the fund.

It is the ABA’s understanding that a significant number of mutual funds impose some sort of redemption fee as permitted under Rule 22c-2, except, of course, those funds that are exempt from the Rule, e.g., money market funds, exchange-traded funds, and funds that permit market timing. We would hope, and would recommend that it be made clear, that the imposition of such a fee would not be deemed to be a “financial penalty” if a participant were to transfer his funds out of an account within the specified time period and assessed such a fee.

The ABA believes that the Department did not intend to exclude funds with redemption fees from the definition of QDIA; a contrary interpretation would greatly reduce the field of attractive investments for beneficiaries.

Bank Trustees

Another condition of the QDIA is that it must also either be managed by an investment manager, as defined in Section 3(38) of ERISA, or an investment company registered under the Investment Company Act. We would understand this to include collective funds trusted by or managed by a 3(38) investment manager.

ABA is concerned that the reference to Section 3(38) of ERISA may be construed to preclude the use of an otherwise qualified investment vehicle managed by a bank, such as a collective investment fund, in cases where the bank also acts as the trustee of the plan.

Section 3(38) of ERISA provides (emphasis added):

The term “investment manager” means any fiduciary (*other than a trustee* or named fiduciary, as defined in section 402(a)(2)) —

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

Section 3(38)(B)(iii) makes clear that banks are eligible to serve as investment managers under ERISA. Therefore, an investment vehicle trusted and/or managed by a bank that satisfies the conditions of the proposed default investment regulations should be QDIA, even if the bank serves as the trustee of the plan that has selected the bank-managed investment vehicle as the default option. We would suggest that the Department confirm that the phrase “other than a trustee” in the parenthetical at the beginning of Section 3(38) was not meant to exclude 3(38) coverage for a bank that is acting as an “investment manager” even though the bank also functions as a trustee of the plan.

Banks trust departments and trust companies frequently manage employee benefit plans either individually or collectively through the use of pooled investment vehicles, such as collective investment funds. A collective investment fund is a trust held and managed by a bank that holds the commingled assets. The bank acts as a fiduciary for the fund while investing and managing the fund's assets. Collective investment funds managed by national banks are subject to 12 CFR 9.18. Banks and other financial services firms offering these pooled funds are subject to extensive supervision for compliance with fiduciary principles by either state or federal bank examiners, which may include the Office of Thrift Supervision, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency.

There may also be cases where a plan sponsor requests the bank trustee to manage the plan's default investment alternative on a separate account basis as opposed to investing in a collective investment fund. As a practical matter, this situation may arise more likely in a larger plan context where there are sufficient plan assets to allow for the appropriate diversification and investment strategy goals to be achieved. There is no reason why a bank should be precluded from managing the default fund merely because it is also the trustee of the plan.

Advisory Opinion 77-69/70A would seem to support this position. In that opinion, the Department specifically addressed the parenthetical, focusing on the term "named fiduciary," but the same explanation should apply to the term "trustee." The Department stated that in its view the parenthetical expression was not intended to prohibit a named fiduciary from also serving as an investment manager for plan assets, but rather "was merely intended to indicate that in order for a person to be an investment manager for a plan, he must be more than a mere trustee or a named fiduciary – he must be a professional who meets the standards of section 3(38)(B) of ERISA." The Department further stated that the parenthetical serves to reinforce the distinction between trustee or named fiduciary functions and investment manager functions. Applying that same discussion to a trustee, it is clear that a bank is not intended to be excluded when acting as a trustee, but instead, a bank as a trustee is intended to be included when acting as investment manager.

The Department should clarify that a default investment alternative will not fail to be a QDIA solely because it is managed by a bank that is also the trustee of the plan.

Notice Requirement

The proposal requires that a participant or beneficiary receive notice that an investment will be made in a QDIA at least 30 days in advance of an investment. This notice must be written in a manner calculated to be understood by the average plan participant, and must include:

- (1) A description of the circumstances under which assets in the individual account of a participant or beneficiary may be invested on behalf of the participant and beneficiary in a QDIA;
- (2) A description of the QDIA, including a description of the investment objectives, risk and return characteristics, and fees and expenses attendant to the investment alternative;
- (3) A description of the right of the participants and beneficiaries on whose behalf assets are invested in a QDIA to direct the investment of those assets to any other investment alternative under the plan, without financial penalty; and
- (4) An explanation of where the participants and beneficiaries can obtain investment information concerning the other investment alternatives available under the plan.

In addition, the notice must be provided through a summary plan description, summary of material modification or other comparable notice.

While we recognize the benefit of a 30-day notice, we are concerned about employers who have 401(K) plans with automatic enrollment as of date of hire. In those situations a participant will have money deferred and placed in a QDIA before the 30 days have tolled. To provide certainty on this issue and to encourage the adoption of automatic enrollment by plan sponsors, the Department should allow for a shorter time period for the provision of the notice to allow

the participants to join the plan as soon as practicable. The Department could provide in those situations for the participant to receive these materials as part of the plan enrollment.

Delivery of Investment Materials

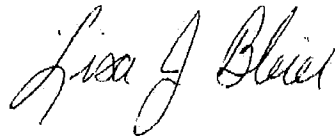
The proposed regulation requires certain additional materials to be provided to participants or beneficiaries who are in a QDIA. In the proposed regulations, the Department proposes to require that any material provided to the plan relating to a participant's or beneficiary's investment in a QDIA will also be provided to the participant or beneficiary. As examples, the regulations list account statements, prospectuses and proxy voting material.

While account statements are appropriate to be sent to individual QDIA participants and beneficiaries, proxy voting materials are currently not sent to participants in an investment fund, since the fund manager or in some cases the plan makes the voting decisions in these situations. Participants or beneficiaries who are in a QDIA should be required to receive only those materials that are received by participants and beneficiaries in other non-QDIA but similar investment alternatives.

Conclusion

The ABA appreciates the opportunity to offer comments on the proposed regulations. Please do not hesitate to contact the undersigned should you wish to discuss the issues raised in this letter.

Sincerely,

A handwritten signature in cursive script that reads "Lisa J. Bleier".

Lisa J. Bleier
Senior Counsel
American Bankers Association