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VIA ELECTRONIC MAIL

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

Subject: Proposed Rule 29 CFR Section 2550.404c-5

Dear Sir or Madam:

We submit the following comments on the proposed Department of Labor ("DOL") regulation regarding default investment alternatives under participant-directed individual account plans (Proposed Regulation § 2550.404c-5), which was issued on September 27, 2006:

1. **Plan Amendment Requirement.** Proposed Regulation § 2550.404c-5(c)(4) includes the following requirement for fiduciary relief for default investments under Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"):

> "*Under the terms of the plan* any material provided to the plan relating to a participant's or beneficiary's investment in a qualified default investment alternative . . . will be provided to the participant or beneficiary." [Emphasis added].

The emphasized phrase appears to require that the plan document expressly incorporate the new information requirement for default investments. Participant-directed plans are not required to include provisions reciting the other investment information requirements under the current ERISA Section 404(c) regulation, and many plans do not include such provisions. If the final regulation includes the language quoted above without modification, many plans that wish to take full advantage of the fiduciary relief for default investments will need to adopt plan amendments.

A plan should not be required to adopt a formal amendment to incorporate the default investment information requirement. As noted above, the other information requirements for ERISA Section 404(c) relief are not required to be stated in the plan document. Under the current regulation, fiduciary relief is not available if the required information is not given. The same principle should apply here – fiduciary relief should be available if the plan provides the default investment information. If the DOL nevertheless concludes that additional documentation is necessary, it should be sufficient for a plan to adopt administrative procedures, apart from the official plan document, that require the plan to provide the default investment information in accordance with the final regulation.

If the final regulation retains the plan document requirement, it should clarify when a plan must be amended to incorporate the new default investment information requirement. Plan sponsors are just beginning to evaluate the law changes made by the Pension Protection Act, many of which will require plan amendments. Because of the magnitude and complexity of the Pension Protection Act changes, the Act permits required plan amendments, including those required by regulations issued under the Act, to be made on or before the last day of the 2009 plan year. If the final regulation will require a plan document amendment, the DOL should clarify that the Act's special amendment deadline will apply.

2. <u>Advance Notice of Qualified Default Investment Alternative</u>. Proposed Regulation § 2550.404c-5(c)(3) provides, in part:

> "The participant or beneficiary on whose behalf an investment in a qualified default investment alternative may be made is furnished within a reasonable period of time of at least 30 days in advance of the first such investment . . . [a] notice that meets the requirements of paragraph (d) of this section."

The above notice requirement is not imposed by the Pension Protection Act, which requires only that a plan provide annual notices of the qualified default investment alternative. If the final regulation retains the 30-day notice requirement, many plans that wish to take full advantage of the fiduciary relief for default investments will be forced to make changes that result in lower retirement savings for participants. For example, 401(k) plans with automatic enrollment features may impose a longer waiting period for new employees' initial participation. Other plans that now deposit employer contributions on a monthly or payroll period basis may change to annual contributions and thus defer the investment of those contributions. The potential harm caused by such

changes will far outweigh any benefit to be derived from providing relatively few individuals with a 30-day advance notice of the default investment alternative.

The current regulation under ERISA Section 404(c) does not require plans to provide other investment information to new participants at least 30 days before the first participant-directed investment is made. We agree that new participants should have access to relevant investment information before deciding how, or whether, to direct the investment of their accounts. However, the final regulation should not impose a different disclosure deadline for default investment information than for other investment information. We recommend that the 30-day advance notice requirement in the proposed regulation be eliminated. The final regulation should permit default investment information to be given to new participants at the same time and on the same basis as the disclosure of other investment information under the current regulation.

If the final regulation retains the 30-day advance notice requirement, it should clarify that if a new participant is not given a timely notice, fiduciary relief will be available for periods beginning 30 days after the notice is provided, provided that the plan otherwise complies with the final regulation's requirements for a qualified default investment alternative.

3. **Annual Notice of Qualified Default Investment Alternative.** Proposed Regulation § 2550.404c-5(c)(3) provides:

> "The participant or beneficiary on whose behalf an investment in a qualified default investment alternative may be made is furnished within a reasonable period of time of at least 30 days in advance of the first such investment *and within a reasonable period of time of at least 30 days in advance of each subsequent plan year*, a summary plan description, summary of material modification, or other notice that meets the requirements of paragraph (d) of this section." [Emphasis added].

The above notice requirement does not appear to apply until a default investment is first made on behalf of a participant or beneficiary. The preamble to the proposed regulation indicates that the phrase "in advance of the first such investment" means the first default investment that is made after the final regulation takes effect. Thus, it appears that the final regulation will not require any default investment notice to be provided until 30 days before the first default investment is made on or after the final regulation's effective date.

Once the initial 30-day notice is given, the annual notice requirement applies to "each subsequent plan year." We interpret the annual notice requirement as applying

only to participants and beneficiaries on whose behalf a default investment was made during a prior plan year, and who have not made an affirmative investment election as of the due date for the annual notice. If a different meaning was intended, the final regulation should clarify that point.

Very truly yours,

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