CUNA
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VIA E-MAIL – e-ORI@dol.gov

November 13, 2006

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
ATTN: Default Investment Regulation

RE: Default Investment Alternatives Under Participant Directed Individual Account Plans

Dear Sir or Madam:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the Department of Labor's proposed regulations implementing the provisions of the Pension Protection Act of 2006 regarding default investment alternatives under participant directed individual account plans. The proposal would make it easier for fiduciaries of 401(k) plans and other participant-directed defined contribution (retirement) plans to adopt automatic enrollment and default investment plan design features. This proposal would apply to credit union sponsors of 401(k) plans. Under the proposed regulation, a fiduciary would not be liable for any loss as a result of automatically investing a participant's account in a qualified default investment alternative (QDIA is defined in the proposal), provided certain conditions are met. The fiduciary, however, would remain liable for the selection and monitoring of a QDIA. By way of background, CUNA is the largest credit union trade association, representing approximately 90% of our nation's nearly 8,800 state and federal credit unions, which serve 88 million members.

**Summary of CUNA's Comments**

- In general, automatic enrollment programs are beneficial to both the employee and employer. They increase participation and can help the employer meet the regulatory requirements associated with a 401(k) program.
- The requirements of the QDIA (qualified default investment alternative) as defined in the proposal do not appear to impose unreasonable problems or costs that would be especially burdensome.
- CUNA recommends modifying the rule to grandfather participants whose accounts are invested under prior default provisions.

- CUNA suggests that the requirement to furnish participants and beneficiaries with a notice that covers the circumstances under which assets will be invested in a QDIA at least 30 days in advance of the first investment in the QDIA be made more flexible so that newly hired employees as well as employees who have been terminated are addressed. It would be helpful for the final regulations to contain a provision stating that in such situations, a good-faith attempt by the plan to provide the required notice is sufficient.
- It would be beneficial for employers with an automatic enrollment plan for the final regulations to incorporate the notice that such plans are already required to provide under existing IRS guidance.

**Discussion of CUNA's Comments**

CUNA feels this proposal will assist credit unions wishing to adopt automatic enrollment features, which in turn can lead to increasing participation in retirement savings plans by their employees. Generally, credit unions find that staff members who participate in these types of retirement plans do not decrease savings in other areas as a result. Often, staff report that their financial advisors suggest they maximize contributions to such plans before saving through other methods because of the favorable tax treatment.

QDIAs will be more beneficial for 401(k) participants that fail to provide investment instructions than default investment alternatives permitted in the past. Traditionally, because fiduciary responsibility was focused on preserving principal, most plans defaulted to a conservative account – a guaranteed interest or money market account. The participant would have to make an investment choice and move the money to have more potential long term growth. Setting up a default account that is more of a long-term growth account based on a person's retirement date, as the QDIA safe harbor permits, could lead to higher-performing portfolios. In other words, employees could potentially realize greater returns through a QDIA.

In our view, the QDIA requirements do not impose significant problems or costs that would be especially burdensome. While credit unions may pay more in requisite matching contributions as a result of more participants due to auto enrollment, we do not expect these matching amounts to substantially impact a credit union's bottom line.

In fact, automatic enrollment would help ensure that employers comply with their 401(k) obligations, including Internal Revenue Service (IRS) rules requiring that contributions made under the plan meet specific nondiscrimination requirements. In particular, in order to ensure that the plan satisfies these requirements, the employer must perform annual tests to verify that deferred wages and employer matching contributions do not discriminate in favor of highly compensated employees.

We encourage the Department to provide clear guidance in the final regulations for plans that have selected guaranteed interest or money market accounts as their default option prior to the effective date of final regulations. There should be grandfathering provisions for participants whose accounts are invested under prior default provisions and whose assets are invested in funds that may not be subject to the safe harbor provided in the rule. Without the grandfathering rules, credit unions and other 401(k) plan sponsors might have to move money in default investments into new investments to comply with the new rule, thereby incurring penalties for early withdrawal. This would be costly for participants. Alternatively, if the sponsor does not move the money into a compliant default investment, then it could be subject to fiduciary liability. Therefore, final guidance should permit such default options as long as the selection was and continues to comply with prior applicable rules. In addition, the final rules should also state that plans may continue to invest participant monies in such grandfathered default options.

In order to rely on the QDIA safe harbor, the proposal requires the plan to furnish a notice to the participant or beneficiary on whose behalf an investment in a QDIA is a notice within a reasonable period of time of at least 30 days in advance of the first such investment. The notice -- which may be a summary plan description, summary of material modifications, or a separate communication -- must explain the circumstances under which default investments might be made in a QDIA on behalf of the participant or beneficiary. CUNA agrees that it is important to ensure that 401(k) plan participants have access to timely and useful information about their plan. While providing this initial notice is a reasonable requirement in the vast majority of cases, a requirement to provide advance disclosure in all cases would be impracticable and would involve considerable administrative resources. One instance where a more flexible standard makes sense is newly-hired employees. Many plans now permit immediate participation (although employers may not begin matching contributions for of period of time such as one year). However, immediate participation would not be possible if the thirty-day notice requirement applies. A second category would be terminated employees who were vested in the plan for whom the employer no longer has a current address.

Consequently, CUNA suggests that the final regulations contain a provision stating that in situations where the thirty-day advance notice rule is not practical, a good-faith effort by the plan to provide the required notice is sufficient. For newly-hired employees, providing the initial notice along with the initial enrollment material should be deemed reasonable. For employees no longer working for the plan sponsor, mailing the notice to the last known address of the participant or beneficiary seems reasonable and feasible. Since many employers or their service providers are offering electronic elections, consents and notices to plan participants, complying with the Department's regulations on electronic plan administration also seems reasonable and efficient.

Finally, with regard to the automatic enrollment feature, it would be helpful for the final rules to incorporate the notice that automatic enrollment plans are already required to provide under existing IRS guidance. This would eliminate the possibility of duplicative notices. It would be less confusing for plan participants as well as less expensive for plan sponsors.

In conclusion, these new regulations should provide welcome guidance to credit unions and other employers who have been concerned about potential fiduciary liability arising when investing a participant's accounts in default investments in the absence of any direction from the participant as well as those eager to adopt an automatic enrollment program. Thank you for the opportunity to share our comments. If you have any further questions, please contact me by phone at (202) 508-6743 or by e-mail at corr@cuna.com.

Sincerely,

Catherine A. Orr

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