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SENT VIA EMAIL/HARDCOPY VIA FEDERAL EXPRESS
Office of Regulations and Interpretations
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, N.W.
Room N-5669
Washington, DC 20210
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Re: **Comments on the Default Investment Alternatives Under Participant Directed Individual Account Plans; Proposed Rule (29 CFR Part 2550)**

Ladies and Gentlemen:

I am writing to submit comments on your proposed regulation under ERISA §404(c)(5), as adopted by the Pension Protection Act of 2006.

My specific comments concerning the proposed 404(c)(5) regulation are as follows:

1. Subsection (c)(3) of the proposed regulation requires that a notice be given to participants at least 30 days in advance of the first investment in a qualified default investment alternative (QDIA).

   Obviously, that will be impossible for plans that admit eligible employees to participation immediately, or within 30 days of employment. It would also be impossible to satisfy for employers who automatically enroll employees into their plans upon commencement of employment or within a short time thereafter. The problem is made worse by the fact that there is a trend among employers for reducing eligibility periods, and that is particularly true of employers who adopt automatic enrollment. In effect, this provision discourages employers from using immediate eligibility, which cannot possibly be the intended effect.

The most direct solution would be to permit shorter notices where a plan provides for immediate or prompt enrollment. On the other hand, if the Department is unwilling to reduce the notice period, then it should specify a "correction" method. For example, the Department might provide that, in those cases, the investment will be deemed to satisfy the QDIA requirements after a 30-day notice has been given to the employee, either concurrent with the commencement of participation or concurrent with the beginning of the following plan year. In other words, where employers are helping their employees save for retirement by an early enrollment provision, there should be a method whereby they can satisfy the QDIA requirements (and obtain their 404(c)(5) fiduciary protections) either concurrent with or within a relatively short time after, the enrollment of the participant.

2. Subsection (c)(3) also requires that an annual notice be provided to participants or beneficiaries (on whose behalf an investment in a qualified default investment alternative may be made). While that language works well for the initial notice, it does not work for the subsequent annual notices.

For the subsequent annual notices, there will be three categories of participants and beneficiaries.

The first will be a soon-to-be newly eligible employee who would be receiving his initial notice. Realistically, the initial notices will be worded differently than the annual notices, at least by many plan sponsors, fiduciaries and providers. That is because, among other reasons, those notices will be handed out during the course of the year as participants become eligible on date of hire, on the first day of the first month following the date of hire, quarterly, and so on (depending on the specific entry dates chosen by the plan).

The second group will be participants and beneficiaries who have elected other investments and who are not in the QDIA. Obviously, there is no need for them to receive annual information about the default investments.

The third group will be the participants and beneficiaries who are invested, via the default process, in the QDIAs--the "affected participants." The proposed regulations should be modified to make clear that the annual notice applies only to these affected participants. To do otherwise would confuse participants and add administrative burdens onto employers and fiduciaries because of the need to respond to questions, to explain why a participant was given notice that did not apply to him, and so on.

3. Subsection (c)(4) provides that, in essence, "under the terms of the plan," materials provided to the plan relating to the QDIA (such as prospectuses and proxy voting materials) must be provided to the participant. Unfortunately, a literal reading of this language suggests that plans must be amended in this regard in order for 404(c)(5) fiduciary protections to be available.

   I suspect that this provision was intended to be similar to current regulation section 2550.404c-1(b)(2)(B)(1)(ix) which requires that similar materials be passed through to participants "to the extent that such rights are passed through to participants and beneficiaries under the terms of the plan."

   As a practical matter, with very few exceptions, the only plans which provide for the pass through of this type of information are plans which offer a company stock investment.

   As the result of the use of the phrase "under the terms of the plan," virtually every participant-directed plan in America would need to be amended in order to comply with the conditions of the proposed 404(c)(5) regulation. Obviously, that would be a considerable expense and burden. To make matters worse, most plans are prototypes and, as such, may not be amended without losing their prototype status.

   I recommend that the regulation be changed to provide that this requirement be expressed as an operational requirement, rather than as a plan document requirement.

4. Subsection (c)(5) provides that a participant must be able to transfer any amounts invested in a QDIA "without financial penalty." Elsewhere in the 404(c)(5) regulation package, there are also prohibitions on other restrictions on transfers.

   Plan sponsors and fiduciaries need additional guidance from the Department on this issue. For example, a key concern is whether a reasonable redemption fee would be considered a financial penalty. As the Department is aware, one of the consequences of market timing in participant-directed plans has been the imposition of redemption fees by mutual funds. It is not uncommon for mutual funds, including lifestyle and lifecycle funds, to impose a redemption fee of, for example, 1% if the funds are reallocated within 30 days of being invested. Most redemption fees are in the range of 1% to 2% and the covered time period would be between 30 and 90 days of the date of the initial investment. Keep in mind, though, that if an employer has a twice-a-month payroll, there will always be deferrals that are deposited within 30 days of an investment in a QDIA, should the

participant transfer his full account. As a result, the Department needs to clarify that reasonable, and relatively minor, charges are not considered financial penalties or other restrictions. The Department also needs to clarify whether other possible reductions in the value of QDIA investments (such as a market value adjustment or a surrender charge) will be considered a financial penalty or other restriction and, if so, under what circumstances.

In addition, the Department needs to clarify its concern about other restrictions. (This is in reference to the language in 2550.404c-5(e)(2) which states "otherwise restrict the ability of the participant as beneficiary to transfer, in whole or in part, his or her investment from the qualified default investment alternative to any other investment alternative available under the plan.") In my experience, most plans permit transfers on any day on which the major financial markets are open for business. As a result, the vast majority of plans would satisfy the requirement that a transfer be allowed at least once within a three-month period. If that is the Department's only concern, then the regulation would not impose any unreasonable burdens on participant-directed plans. On the other hand, if the Department has other concerns, then it should make those known. If it does not have specific concerns, then it would be helpful for the Department to outline, perhaps in the preamble for the final regulation, the types of broad concerns that it has.

As it now stands, the proposed regulation does not provide adequate guidance. As a result, there is a concern in the private sector that the Department or the courts may, after the fact, decide that certain common practices are not permissible--at least in the context of the 404(c)(5) protections.

5. Subsection (d)(2) requires a description of the QDIA (including a description of the investment objectives, risk-and-return characteristics--if applicable--and fees and expenses attendant to the investment alternative).

First, with regard to the description of the investment objectives and risk-and-return characteristics, this requirement, if read literally, will prove to be difficult to comply with--in the sense that it will be expensive and overly burdensome. For example, if a plan uses age-based or target maturity funds, and if it offers eight funds with varying targeted dates, a notice would either need to be customized for eligible employees by age groups or, alternatively, the investment information would need to be provided to all eligible employees on all eight of the funds. Since it would be difficult, particularly for small- and mid-sized plans, to provide the customized information, then they would need to include in the notice the information on all funds. The effect of that would be (1) to confuse participants

and (2) to create lengthy notices. When combined with the other required information, it is not inconceivable that the notice could be five to 10 pages long. Once a document becomes that lengthy, it has limited value to the participants because of the difficult concepts and technical language, as well as the length. In addition, much of the information would not be relevant to a particular participant, since it would apply to other age groups.

In addition to those problems, this requirement puts plan providers and fiduciaries in a difficult position of quoting from, or paraphrasing, prospectuses that are written by mutual funds. The mutual fund prospectuses are drafted by the mutual funds both to inform prospective investors of their investment objectives and to protect the mutual fund from possible claims and lawsuits. As a result, the prospectuses tend to be drafted in a defensive and very broad manner, often limiting the value of the information in the prospectus. Nonetheless, plan sponsors, fiduciaries and providers would be reluctant to deviate from the prospectus language because they could not legally commit the mutual fund to a style of investment management that was different than the stated purpose in the prospectus.

I suggest that, in order to provide meaningful information to participants, but at a level that is reasonable and practical for plan providers and fiduciaries, the Department should modify the regulation to clarify that it only requires a brief, general statement of the overall purpose of the QDIA. The regulation should provide that the general statement of the purpose must be supplemented by a reference to the prospectus or similar materials for investments other than mutual funds.

The proposed regulation also requires that the notice contain information about the fees and expenses. Again, this requirement should be limited and cross references should be permitted. For example, for a mutual fund, the notice could have an attachment with the expense ratio of the mutual fund (or, for target maturity funds, of the mutual funds) as they exist at the current time or at the prior year end. But, it should also be made clear that this does not contemplate disclosure of transaction fees, for example, redemption fees, contingent deferred sales charges, or other transactional charges or adjustments. Instead, the participants should be directed to where they can obtain that information. That is, there should be clear disclosure, but not all the information should be required to be included in the notice.

The cross references could be similar to the explanation contemplated in subsection (d)(4).

6. Unfortunately, the proposed regulation does not provide guidance concerning the methodology, if any, by which fiduciaries can convert existing defaults in non-qualifying investment vehicles into 404(c)(5) protected QDIAs. I recommend that a provision be added to the regulation that provides that, if the plan fiduciaries have defaulted into an investment alternative that does not satisfy the requirement of the regulation, then the fiduciaries should be able to "re-default" the participant to a QDIA. That would be done by providing the participant with the required notice and then re-defaulting the participant, if the participant did not direct the investment of his account into with other investment options or, alternatively, if the participant did not direct the fiduciaries to continue to hold his account in prior default option.

   Similarly, if the fiduciaries had defaulted participants into investments that would satisfy one of the three alternatives in the regulation, but would not be entitled to the 404(c)(5) fiduciary protections (because, *e.g.*, the defaults pre-dated the effective date of the statute or the notice did not satisfy the detailed requirements of the regulation), the fiduciaries should be allowed to "re-default" those participants in order to obtain the 404(c)(5) protections.

As a final comment, I applaud the Department on its work in the analysis and drafting of the proposed regulation. I believe that the result will be that many more participants are well invested and, as a result, have greater levels of income in retirement.

Thank you for consideration of these comments.

Very truly hours,

C. FREDERICK REISH

CFR:shm