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Submitted Electronically to e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
Room N-5669
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

Attn: Default Investment Regulation

Ladies and Gentlemen:

Automatic Data Processing, Inc., with nearly $9 billion in revenues and more than 570,000 clients worldwide, is one of the largest providers of a broad range of transaction processing and information-based business solutions. ADP® Employer Services (ES), a division of ADP, Inc. ("ADP"), offers a very wide range of human resource, payroll, and benefit administration solutions from a single source to meet the business needs of employers worldwide.

ADP® Retirement Services, part of the Employer Services division, is one of the largest recordkeepers of 401(k) plans in the United States. It provides comprehensive recordkeeping services to over 28,000 clients and 1.2 million plan participants in plans with approximately $28 billion in assets. ADP offers retirement plan products and services to companies with only a few employees to companies with thousands of employees.

Many of ADP's plan clients currently include, or are contemplating including, automatic enrollment features in the defined contribution retirement plans they sponsor for their employees. Therefore, ADP welcomes the Department's efforts to assist plan fiduciaries responsible for the investment of plan assets in automatic enrollment plans and other circumstances where participants have not provided investment instructions. However, it is critical that the Department address certain outstanding issues, including issues raised by the new preemption provision under ERISA section 514(e), which incorporates requirements to comply with the Department's default investment regulations. We discuss our specific recommendations below.

A. Transition Relief

For some plans that have already adopted automatic contribution arrangements, the plan administrator may not have ready access to records (or the records simply may not be available) that indicate whether assets in a plan investment option that has been designated as a default were defaulted into the option or were invested in that option based on a participant's affirmative election. This situation commonly arises, and is usually exacerbated, when plans transition (or "convert") to ADP from another recordkeeper, because ADP generally does not receive sufficient information in the transition to determine whether or not participants in the plan's default investment alternative

affirmatively elected to invest in the alternative. Our concern arises because the Department has indicated that the proposed regulations would not provide relief when a participant or beneficiary has provided affirmative investment direction concerning the assets invested on the participant's or beneficiary's behalf."[1] We believe that the transition relief we have requested below is consistent with the application of the proposed regulations in the context of the conversion of a plan's records to another recordkeeper, as is clearly contemplated by the Department.[2]

ADP requests that the Department address this problem by clarifying that a participant may be treated as not providing an affirmative investment direction where the participant fails to respond to a request for new investment instructions. Even if such a participant has previously provided an affirmative instruction, the failure to respond to a request for a new investment direction should allow the plan to treat that participant as not having provided an instruction. Under this approach, a participant will in fact have "had the opportunity to direct the investment of assets in his or her account but did not direct the investment of assets" as required by the proposed regulations, because the participant will have had the opportunity to provide instructions following receipt of a request to provide new instructions. (For this purpose, the request would include a notice with the information required by § 2550.404c-5(d) of the proposed regulation). This approach would provide plan sponsors much needed flexibility to transition participant investments from a currently designated default alternative to a qualified default investment alternative ("QDIA") and obtain relief under section 404(c)(5), even if plan records do not specify which participants have previously provided investment directions. On an ongoing basis, this approach also would facilitate the investment of participants' individual accounts in appropriate default investments.

B. Information Delivery Requirements

ADP also requests that the Department reconsider its proposed requirements with respect to the information that must be delivered to participants invested in a QDIA under the proposed regulation. The proposed regulations would require that a plan provide to participants "any material provided to the plan relating to the plan relating to a participant's or beneficiary's investment in a qualified default investment alternative (e.g., account statements, prospectuses, proxy voting material) . . ." We believe that this requirement will be extremely burdensome for plans and would not result in delivery of disclosure information that will be helpful to plan participants. The cost of such delivery is likely to be passed on directly or indirectly to plan participants, and will in many cases not provide meaningful information that will assist the participant in making investment decisions.

The document delivery requirement will almost certainly result in delivery of a substantial volume of materials, such as annual prospectuses, prospectus updates, mutual fund semi-annual reports, notices of board of directors meetings, etc. The volume would be substantially greater where a QDIA consists of a portfolio of other plan investment options, so that information related to each underlying investment option must be delivered to participants. Further, proxy materials are specifically required to be delivered to participants whose plan accounts are invested in a QDIA under the proposed default investment regulations, a requirement that makes little sense under participant-directed plans that do not provide for the pass-through of proxy-voting responsibility to

[1] 71 Fed. Reg. at 56808.

[2] 71 Fed Reg. At 56806, footnote 5.

participants. In that situation, delivering proxy materials to participants who are not eligible to vote would be at best confusing.

C. Incorporation by Reference

ADP requests that the notice requirements in the proposed regulation be clarified to permit incorporation by reference of certain items provided together with the initial default investment notice. The proposed regulation states that certain information must be "contained" in the notice.[3] As a practical matter, initial notices regarding automatic enrollment will be provided together with (or in) an enrollment kit. The enrollment kit will contain booklets with easily-accessible information covered by the notice requirement, and often will include a separate fund fact sheet on each fund. It will ease plan administration greatly, and reduce cost and time expended, if such information need not be incorporated specifically into the body of the notice, but instead may be contained in a document delivered to an eligible employee contemporaneously with the notice.

D. Coordination of Regulations with Preemption Relief

ADP is concerned, and we believe that many of our plan clients are concerned, that the intent of Congress in enacting the default investment and preemption provisions of the PPA may not be fulfilled because the proposed regulations do not address certain issues raised by conditions under new ERISA section 514(e). A failure to provide comprehensive preemption of state anti-wage garnishment laws in connection with automatic enrollment arrangements would discourage plan sponsors from implementing automatic enrollment features and could create possible liability for plan sponsors who have already adopted such arrangements. Therefore, ADP recommends that the Department take the following steps in the final regulations to provide plans much needed certainty in this area.

First, the Department should clarify that the participant notice requirement contained in new ERISA section 514(e)(3) is not a condition that must be met in order for state laws prohibiting or restricting automatic enrollment features in plans to be preempted. The express language of section 514(e) preempts state laws limiting or restricting a plan from including an "automatic contribution arrangement" as that term is further defined in section 514(e)(2).

Section 514(e)(3) requires plan administrators to provide certain types of notice to participants in automatic contribution arrangements. The PPA further amended ERISA section 502(c)(4) to include a civil penalty for failure to provide the required notice. ADP believes that this notice requirement was not intended to be a condition for obtaining preemption relief under ERISA section 514(e), and we request that the Department confirm this view.

Second, the Department should structure the final default investment regulations such that a plan with an automatic enrollment feature may meet the statutory definition of an "automatic contribution arrangement" for purposes of preemption even if the plan includes a default investment alternative other than those defined in the proposed regulations as QDIAs. We understand that a number of those commenting on the Department's proposed regulation are requesting an expansion of the investment vehicles that may qualify for QDIA status. ADP supports many of these

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[3] Regulation section § 2550.404c-5(d).

comments, especially as they pertain to stable value funds. But, regardless of the Department's ultimate position with respect to QDIAs, we request that the Department's final regulations provide that plan assets will not fail to be invested in accordance with the Department's regulations under section 404(c)(5) for purposes of section 514(e) so long as the assets are invested in a prudent default investment alternative. The preamble to the proposed regulations makes clear that default investment alternatives other than the alternatives that may qualify as QDIAs (i.e., life cycle funds, balanced funds and managed accounts) could be prudent selections.[4] We do not believe that Congress intended to deprive a plan with a prudent default option of the protections afforded by preempting state anti-wage garnishment statutes, and we ask the Department to consider this as it finalizes the regulation. Otherwise, we believe that under the regulation as currently proposed, the Department de facto will have defined the universe of prudent default options, as plan fiduciaries will not as a practical matter be in a position to use those options not falling within the literal terms of the regulation, even if they would be prudent under the circumstances.

Third, we request that the Department act to ensure that plans with pre-existing automatic enrollment features are not disadvantaged by the lag-time between the enactment of the PPA and the Department's adoption of final regulations. Specifically, the PPA provides that amendments to section 514(e) of ERISA are effective upon the date of the enactment of the PPA (August 17, 2006). However, to qualify as an "automatic contribution arrangement" and take advantage of the preemption provisions, a plan must invest contributions made under an automatic enrollment arrangement according to the Department's regulations under ERISA section 404(c)(5), even though this requirements cannot be met until Department's regulations are final. Therefore, the final regulations should provide a transition period for compliance, and specifically, that a plan will be deemed to have complied with the Department's section 404(c)(5) regulations as of August 17, 2006 to the extent that the plan complies with the final regulations by the end of that transition period. In order for the transition period to be meaningful, for purposes of preemption and otherwise, it should be at least one year from the date final regulations are issued. This will allow plan fiduciaries the opportunity to select a QDIA for their plan, arrange for including the QDIA in the plan's investment line-up, and to notify affected participants that their account balances and new contributions will be invested in the newly adopted QDIA.

Finally, if the Department is unwilling to confirm (as requested above) that delivering notice under ERISA section 514(e)(3) is not a condition for preemption of state anti-wage garnishment laws, we request that the Department provide that the notice condition will be satisfied by a good faith attempt to provide notice until such time as the Department provides a model notice. For example, notices informing participants about their rights to change the investment of their plan accounts or deferrals made on their behalf, which are included in account statements or in summary plan descriptions, should be deemed sufficient notice for section 514(e)(3) purposes, until the Department issues a form of model notice.

E. Annual Notices

We request that the Department clarify the circumstances under the regulations when annual notices must be provided to participants. Specifically, it is not clear under the proposed regulation whether or not an annual notice must be provided to a participant who, after previously receiving a

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[4] 71 Fed. Reg. at 56808.

default notice and opportunity to make an investment election in accordance with the terms of the proposed regulation, has his or her account automatically invested in a default investment, and subsequently diversifies a portion of his or her account into other investment alternatives. We believe that such a participant should be considered to have exercised investment discretion over his or her entire account (not just the diversified portion), and there is no purpose to providing an annual notice about default investments in this case.

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We appreciate the opportunity to provide these comments on the Department's proposed default regulations and thank you in advance for your consideration. Please contact the undersigned if you have any questions about our comments.

Sincerely,

Andrew Stewart
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ADP Retirement Services
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