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Fidelity Investments

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Employee Benefits Security Administration
Room N-5669
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Attention: Automatic Rollover Regulation

Re: Safe Harbor Guidance – Written Comments

The U.S. Department of Labor recently issued a proposed regulation (the "Proposal") with respect to the new automatic rollover requirements added to the Internal Revenue Code ("Code") by the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). The Proposal would implement a fiduciary "safe harbor" for administrators and other plan fiduciaries in effecting such rollovers in accordance with Section 657(c) of EGTRRA. The safe harbor guidance will also significantly impact IRA vendors as well as plan service providers.

Several members of the controlled group of companies generally known as "Fidelity Investments" provide trustee, investment management and recordkeeping services to retirement plans subject to the Employee Retirement Income Security Act of 1974. Fidelity Investments companies also provide custodial and investment management services for individual retirement arrangements ("IRAs") established for retail customers, as well as for customers of intermediary firms who sell Fidelity products.

The written comments provided below on behalf of Fidelity Investments thus consider the concerns of both the plan fiduciary and the IRA provider in the automatic rollover process.

**Proposed Fee Cap**

We think that the most significant concern relates to the Proposal provision which would limit fees (except for establishment fees) to the income earned by the IRA. This fee cap appears to be prompted by the language in Section 657(c)(2)(B) of EGTRRA, which states that the Secretaries of Labor and Treasury shall give consideration to providing special relief with respect to the use of low-cost individual retirement plans for purposes of the new automatic rollover rule.

In the Proposal preamble, the Department states that the framework of the safe harbor encourages the use of low-cost IRAs. The Proposal justifies the fee cap rule due to the importance of cost considerations and protecting principal. In essence, the Department is proposing to require the creation of a new IRA product. However, it is difficult to understand why other IRA customers should be required to bear the cost of accepting automatic rollovers, which is the logical result of the fee cap.

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We believe that the imposition of an artificial limit on fees will inhibit providers from offering IRAs for the automatic rollover market. The Proposal requires that fees and expenses charged by providers for automatic rollover IRAs must be "comparable" to the fees and expenses charged for other IRAs. That should be sufficient protection for the participants so that they would not bear more costs than other IRA customers with similar account balances. In reality, IRA providers may find that in the aggregate, automatic rollover IRAs require more administrative support (identifying and tracking automatic rollover IRAs, training personnel, and mailings and search services to locate unresponsive IRA owners) than other IRAs.

Furthermore, clarification is requested with respect to the types of fees subject to the proposed safe harbor fee cap. IRA providers may waive the initial set up and/or annual custodial or maintenance fees but impose an account termination fee, particularly in early years of an account. Termination fees typically recover a portion of the cost associated with administering the IRA. Limiting such fees to income earned on the account will essentially provide one more disincentive to IRA providers .

Further, it is unclear whether the definition of fees and expenses provided in paragraph (c)(4)(ii) of the proposed regulation would include, as fees attendant to the individual retirement plan, distribution fees paid pursuant to SEC Rule 12b-1 from certain mutual funds. While it is reasonable to require that 12b-1 fees not exceed the same fees for comparable IRAs not subject to the automatic rollover provisions, to include such 12b-1 fees in the fee cap may severely reduce the investment products available for automatic rollovers across the industry.

Finally, the proposed fee cap may be inconsistent with recent guidance from the IRS regarding the allocation of reasonable expenses to terminated participants in pension plans (Rev. Rul. 2004-10), even if the employer pays the expenses for active employees. The revenue ruling notes that comparable expenses may be imposed on an amounts transferred by the participant to an IRA. The same approach should apply for automatic rollover IRAs.

**Other Safe Harbor Issues**

The proposed fee cap raises the issue of how long the appropriate plan fiduciary would be required to monitor the operation of the automatic rollover IRA. That is, what happens if the IRA vendor subsequently amends or changes the IRA documentation to remove the fee cap prospectively? The safe harbor regulation should confirm that the plan fiduciary would have no responsibility or authority to intervene in such event.

We would also recommend that the Proposal be revised to state that the appropriate plan fiduciary would satisfy the "comparable" fee standard by obtaining a representation from the IRA vendor that the fees and expenses charged to an automatic rollover IRA are comparable to the fees and expenses charged to another IRA funded by a similar dollar amount. This would give the plan fiduciary a definitive process for discharging its due diligence obligations.

The Proposal acknowledges that the safe harbor restriction on investment mediums to money market funds, bank deposits and stable value funds does not represent the exclusive means by which a fiduciary may discharge its obligations with respect to an automatic rollover. The best analogy appears to be the selection of "default" options by fiduciaries for participant account balances for which the participant has not provided an investment direction. It may be helpful to include that example in the final regulation, although the appropriateness of a specific investment option would still require a factual determination by the fiduciary.

Unresolved IRS Issues

The Proposal includes an acknowledgement of the need for additional guidance on some tax issues from the Internal Revenue Service. Some of the tax issues are fairly straight forward. For example, the IRS should issue a revised Code section 402(f) safe harbor notice and confirm whether plan amendments can be delayed under the usual EGTRRA amendment timing rules. However, IRA providers also face a number of more difficult legal concerns that require the issuance of IRS guidance before the Department finalizes the safe harbor guidance.

The IRA custodial agreement represents a binding contract that sets forth the rights and responsibilities of the IRA provider and the IRA owner. A difficult issue for the automatic rollover IRA relates to the enforceability of the IRA agreement in the absence of the accountholder's assent to the terms of the agreement. That is, IRA custodians need assurance that such an account may be treated as an account "established and maintained by an individual, by an employer for the benefit of his employees ..." eligible for tax deferred treatment under the statute. Similarly, IRA vendors need assurance that the mandatory disclosure requirements and the corresponding 7-day revocation rules in Income Tax Regulation Section 1.408-6 are satisfied without regard to actual receipt by the account owner.

In Notice 98-4, Q & A G-4, the IRS concluded that if an eligible employee does not establish a SIMPLE IRA in a timely fashion, the employer may execute the necessary documents to establish a SIMPLE IRA on the employee's behalf with a financial institution selected by the employer. Otherwise, the employer's SIMPLE program could be disqualified by the refusal of one employee to take the necessary action. Similar confirmation of authority is needed in the case of an automatic rollover IRA. In some respects, the need for guidance is even more important here because the account is not being established under the employer's plan.

Another question relates to situations where the participant died before the rollover distribution is made from the plan, but the plan is not notified of the death until after the transfer to the IRA. Presumably the plan fiduciary's actions would be proper in the absence of information to the contrary. That is, rights to the proceeds would be determined under the IRA, not under the distributing plan. This is a critical issue if different beneficiaries are named under the plan and under the IRA. Assuming the plan administrator receives notice of death before the rollover distribution, it would appear that the plan rules should prevail. In any event, official guidance would be extremely helpful.

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Finally, the Service should address the treatment of participants who are subject to the Code Section 401(a)(9) required minimum distributions rules. In such cases, a portion of the account would not be eligible for rollover. Plan fiduciaries need confirmation that the reminder of the account would still be subject to the automatic rollover rules.

**Effective Date Issues**

We appreciate the efforts of the Department to issue guidance in response to the Congressional mandate. The Department acknowledges that under Section 657(c)(2)(A) of EGTRRA, the automatic rollover rule will not become effective until the issuance of safe harbor guidance. The short comment period included in the Regulation notice confirms the desire of the Department to finalize the Proposal as expeditiously as possible

The Proposal preamble states that the Department anticipates the issuance of guidance by the IRS "in advance of or simultaneously with" the Department's issuance of a final harbor regulation. We respectfully request that the Department coordinate the effective date of the final safe harbor regulation with the effective date of the guidance to be issued by the IRS. In effect, we ask that the Department guidance not take effect until the tax issues are also resolved.

In addition, we would appreciate confirmation from the Department and IRS that the Code automatic rollover rule will not take effect until the effective date of the safe harbor regulation (and corresponding IRS guidance). It would create a period of serious uncertainty if plans were required to try to comply with the new automatic rollover rule before the resolution of the various issue discussed above.

Finally, we believe that the record keeping systems enhancements required for the maintenance of a fee cap (including the identification of automatic rollover IRAs) by IRA providers may warrant a further delay in the imposition of the automatic rollover rule well beyond the six month period suggested in the Proposal.

Thank you for your consideration of these comments.

Sincerely,

Douglas O. Kant

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