



AMERICAN BENEFITS
COUNCIL

VIA EMAIL
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March 31, 2004

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

RE: Automatic Rollover Regulation

Sir/Madam:

The American Benefits Council (the "Council") appreciates the opportunity to comment on the Fiduciary Responsibility under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor Proposed Rule. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council commends the Department of Labor (DOL) for its efforts to provide comprehensive guidance to plan fiduciaries to facilitate automatic rollovers of accrued benefits between \$1,000 and \$5,000 to Individual Retirement Accounts (IRAs). However, the Council is concerned that limitations on the fees and expenses that can be charged to these IRAs will significantly limit the number of institutions willing to accept these accounts, especially from small plans (as explained below). In addition, the Council seeks further guidance on (1) default beneficiaries, (2) calculation of the amount of the distribution (to determine eligibility for the automatic rollover), (3) plan document and disclosure requirements, and (4) various miscellaneous issues.

Limitation on Fees and Expenses

Initially, the proposed rule provides that fees and expenses must meet two conditions – (1) they must be consistent with fees and expenses charged in the marketplace, and (2) they cannot exceed the fees and expenses charged by the provider to comparable IRAs for rollovers that are not subject to the mandatory rollover rule. These rules sensibly limit the fees and expenses to the normal fees charged by the provider that are consistent with fees charged by providers in general.

However, the proposed rule also limits fees and expenses to no more than the income earned by the IRA while limiting the investment products to ones designed to preserve principal and provide a reasonable rate of return, such as money market funds, savings accounts, CDs and stable value products.¹ Such a limitation in today's interest rate environment (with returns often less than one percent) will result in many IRA providers' inability to impose even their minimum fee structure on these relatively small accounts. In addition, limiting fees in this manner will result in programming and other costs for IRA providers that must make sure that the fees never exceed the IRA's income. Providers should be allowed to recoup the full costs associated with offering an IRA including complying with applicable disclosure and reporting requirements.

The Council believes that few IRA providers will willingly take these accounts, especially with the fees limited to income. In many cases, large plans may be able to use their influence to force providers to take on the mandatory rollover IRAs from their plans in order to keep the larger retirement plan business. However, smaller plans may have difficulty finding a willing provider without subsidizing the fees. In addition, a plan may have difficulty finding a willing provider if the plan uses an independent non-financial institution company to provide administrative services and that company (or its affiliates) does not offer IRA products. For financial institutions that do accept the new mandatory rollover IRA accounts, many will end up subsidizing the accounts.

While the Council appreciates the DOL's desire to safeguard the principal of the mandatory rollover IRA, the DOL should appreciate IRA providers' desire to have a financially viable product. If the income limitation is eliminated, IRA providers' fees would still be subject to the first two limitations discussed above.

¹ It should be noted that many IRA institutions likely will not consider investment in CDs since they may be precluded from making a charge for cashing in the CD prior to maturity. In addition, IRA institutions may hesitate to use money market or other mutual funds without the consent of the participant because of potential securities law implications and the Council suggests that the DOL consult with the SEC for guidance in resolving the securities law issues.

As previously indicated, if the final regulations contain the income limitation, mandatory rollover IRAs may not be a financially viable product for many institutions. Some Council members are analyzing structures that might allow them to offer this product and further clarification of the fee limitation would be helpful in analyzing the viability of these structures. For example, if a provider commonly charges a deferred sales charge on IRAs, it would be helpful if the DOL could clarify whether the deferred sales charge would be counted as an establishment fee (since they are typically charged in lieu of an establishment fee). If not, it would be helpful to clarify whether the income limitation is based on one-year's income or accumulated income.

In some cases IRA providers do not currently offer IRAs to individuals with initial investment amounts of \$1,000 to \$5,000. The Council seeks clarification whether the IRA provider could (1) charge a set-up fee to the plan sponsor (rather than the individual participant) regardless of whether establishment fees are charged for other IRAs, and/or (2) charge a set-up fee for IRAs with assets of less than \$5,000 (when the only IRAs of this size accepted by the provider are mandatory rollover IRAs).

The Council also seeks clarification of whether it will be permissible for IRA providers to apply a "spread pay" feature to subsequent transfers of the automatic rollover to another IRA provider requiring, for example, substantially equal payments (transfers) over several years in lieu of a lump sum distribution. This would allow these IRAs to be invested in stable value investment products (which invest in slightly longer term vehicles to increase returns).

In addition, there will be cost savings if the IRA provider is allowed to set up the IRA in a group IRA structure (such as is permitted for deemed IRAs) rather than as individual IRAs, and the Council seeks clarification that such structures will be permitted.

Default Beneficiaries

The Council also requests additional guidance regarding beneficiaries of the plan and IRA, especially default beneficiaries. In some cases, the participant will have designated a beneficiary under the retirement plan and, in others, the plan's default beneficiary rules will apply. The plan's default beneficiary or the designated beneficiary may differ from the IRA's default beneficiary.

Plan sponsors and IRA providers need clarification of a number of potential issues in this area such as which default beneficiary provisions apply (retirement plan or IRA). Most IRAs make provision for a default beneficiary. The Council suggests it would be more simple and cost effective for these IRA default provisions to apply. However, there are other alternatives. If the participant

designated a beneficiary under the plan, the Council requests clarification of whether this designated beneficiary transfers to the IRA and whether the plan sponsor is required to provide that information to the IRA provider. If there is a designated beneficiary but the plan sponsor fails to provide that information to the IRA provider for any reason (e.g., the beneficiary designation form is lost by the employer, which has long-since outsourced the forms to its service provider; the plan service provider sends the forms to the IRA provider but did not have the particular individual's form), the Council requests that the DOL provide guidance on how the beneficiary is determined and who bears the liability (plan sponsor or IRA provider) if the wrong beneficiary is paid. The Council also requests guidance on the effects of the participant's death (unbeknownst to the plan and the IRA provider) prior to the rollover.

Calculation of Amount of Distribution

The Council seeks clarification regarding calculation of the amount of the distribution for purposes of determining whether the mandatory rollover rule is applicable.

First, the Council requests clarification regarding how the plan fiduciary should treat an outstanding loan. Specifically, guidance is needed on whether the defaulted or outstanding loan would count toward the \$1,000 minimum and \$5,000 maximum. Since no money actually changes hands, the Council suggests that the defaulted or outstanding loan amount not be considered part of the calculation (e.g., the account value should be reduced by the outstanding or defaulted loan amount). Otherwise, IRAs might be obligated to take even smaller rollover amounts (e.g., participant had \$250 retirement plan account balance and \$1,000 loan) and retirement plans might be incapable of rolling over a balance of less than \$5,000 because the outstanding or defaulted loan causes the "distribution" to exceed \$5,000.

Second, plan fiduciaries need clarification of the timing of the calculation. If a retirement plan account balance exceeds \$1,000 and the plan begins the automatic rollover distribution process, the Council seeks clarification of what happens if market fluctuations cause the amounts to be reduced below \$1,000 before the rollover is completed. The Council recommends that the DOL allow the plan to rely on the original computation provided the rollover is completed within some specific period of time.

The Council recognizes that both the calculation and beneficiary issues may be primarily under the jurisdiction of the Internal Revenue Service (IRS) and requests that the DOL coordinate these issues with the IRS to the extent necessary (possibly through the IRS' simultaneous or concurrent guidance).

Plan Documents and Disclosure Requirements

The proposed rule provides that disclosure of the new rule can be provided in the plan's summary plan description (SPD) or a summary of material modifications (SMM). This requirement would be more costly than a third option recommended by the Council – providing the disclosure at the time of distribution. This third option would allow plans to provide only those participants actually affected by the change (those with forced distributions between \$1,000 and \$5,000) with information that they will receive at the time of the distribution. We recommend a choice among the three options, not a mandate. If the distribution notice option is used, provisions could be added to the SPD the next time it is revised and distributed for other reasons.

The DOL estimated that the cost of providing the required disclosure would be approximately \$13 million for all affected plans. The Council believes that the cost of this disclosure, if provided via an SPD or SMM to all plan participants and beneficiaries (instead of just those who might qualify), would be considerably in excess of the estimated amount. According to the 2002 Current Population Survey (produced by the U.S. Census Bureau), 152,048,000 persons are covered by employer-sponsored retirement plans. If the cost of producing the SPD or SMM were only 50 cents per person, the cost would be approximately \$76 million and this does not include the cost for legal counsel to amend the plan and write the SPD or SMM. Although some of these employees may be in plans not subject to cashout provisions (and some may be in more than one plan with cashout provisions), a significant reduction in the number of employees needing SPDs or SMMs would still result in costs considerably more than the estimated \$13 million.

In addition, the Council requests that the DOL provide a model plan amendment for this new requirement.²

Miscellaneous Issues

Finally, the Council requests clarification of a number of miscellaneous issues as described below relating to the mandatory IRA rollovers.

² In addition to a model amendment, plan sponsors and service providers would likely benefit from specific step-by-step practical instructions including some or all of the following:

- Determine the vested balance after application of the break in service rules
- Reduce balance by outstanding loans
- Tell participant about the impending automatic rollover by providing X days' written notice at last known address letting participants know that unless they direct a rollover to another provider or elect to receive their vested balance in cash, the vested balance will be automatically rolled over to IRA provider
- At expiration of notice period, direct automatic rollover to IRA provider

Approved IRA Providers. While the Council appreciates the DOL's efforts to allow plan fiduciaries to select any approved IRA provider, it appears that broker-dealers were inadvertently left out of approved providers. Broker-dealers are IRS approved non-bank trustees/custodians of IRAs pursuant to IRC Regulation Section 1.408-2(b) (2) (i) and are also federally regulated. The Council recommends that broker-dealers be included in the definition of "regulated financial institution" in the final regulations.

State Insurance Laws. If either the retirement plan or the IRA is invested through an insurance product, how will the new requirements interact with state insurance laws? Is this rule creating new "groups" of contract holders not previously contemplated by state insurance laws but who would be bona-fide holders of group IRA contracts? The Council is also concerned that the maximum fees proposed in this regulation could be improperly discriminatory under state insurance laws. Although insurance company products are regulated by state insurance departments, state insurance laws are not generally written in direct contemplation of retirement plan savings.³

Escheat Laws. When do a state's escheat laws go into effect (at normal retirement age?) and which state law applies? What if the IRA provider can not obtain a date of birth?

Lost Participants. It should be noted that the automatic rollover rules will not provide a panacea for the lost participant problem, particularly in connection with defined contribution plans. At least initially, a number of these automatic rollovers will be made for participants that plans have been unable to locate. In many cases, benefits rolled over to an IRA will eventually escheat to the state. The Council suggests that a better proposal to address the lost participant problem would be the development of a comprehensive process which could handle such accounts for plans while safeguarding the assets for participants.

Returned Checks. In some cases under the current rules (which provide for a default cash payment instead of a rollover), distribution checks have remained outstanding (uncashed) for some period of time. The Council seeks clarification whether the automatic rollover rules should apply to a participant's benefit when the previous distribution check remains uncashed. Does it matter whether the participant elected cash (but never cashed the check) versus never making an election?

³ The Council suggests that the DOL may want to consult the National Association of Insurance Commissioners to clarify issues related to state insurance laws in order to provide a level playing field for insurance companies that might be willing to accept automatic rollover IRAs.

End of Special Rules. When do the special rules and fee limitations on the account end? What if the participant exercises control over the account such as moving the money to another investment fund (such as a stock fund which may have a loss)? If exercising control is sufficient to eliminate the restrictions, what constitutes exercising control? Would it be enough to simply contact the IRA provider without moving money? The Council requests that the limitations end on the earlier of the participant's exercise of control or one year after the money is rolled over into the mandatory rollover IRA.

Automatic Rollovers May Not "Save" as Many Assets as Predicted. In making calculations of predicted costs and savings, the proposed rule assumes that a plan will experience the same level of lack of response from participants regarding plan distributions that it currently experiences. Council members indicate that many plan participants call the plan's service provider after receiving notification of an automatic payment of their distribution to clarify that if they do nothing, they will receive a check. Then they do nothing. Other participants may be simply reading the required disclosures and coming to that conclusion without asking the clarifying question. The Council believes that not all participants who failed to request a rollover under prior law will fail to request a check when the new requirements are implemented. Many will request a cash payment.

Multiple IRA Providers. Can plan fiduciaries select multiple IRA providers at the same time or only use one provider at a time? Must or may the SPD list the IRA providers? If the participant comes back after many years and cannot locate the financial institution (which may have been bought out or changed names), does the plan have any further obligation?

Fiduciary Fails to Select IRA Provider. What should the plan's service provider do if the plan fiduciary fails to select an IRA provider? Can the service provider give notice of a default IRA provider if no selection is made (negative election)?

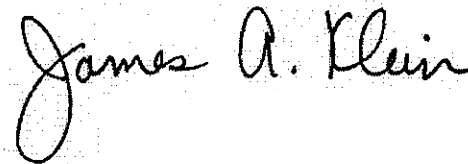
Office of Foreign Assets Control (OFAC) and Anti-Money Laundering (AML) Considerations: The Council requests that the DOL also coordinate with Treasury to develop concurrent guidance regarding OFAC and AML requirements as these pertain to these accounts. While the Council commends the DOL for discussing these issues with Treasury and for the references set forth in Section C of the proposed rule, we note that the Customer Identification Program (CIP) rules applicable to the insurance industry have not yet been promulgated. In addition, the Council is concerned that the requirements regarding OFAC's "Specially Designated Nations and Blocked Persons" (SDN) list may apply at the time the account is established. It appears that the OFAC rules preclude an entity from "doing business with" individuals identified on the SDN list. We recognize the possibility that, given the nature and size of these

accounts, Treasury could be persuaded to create an exception under both OFAC and the USA PATRIOT Act.

Finally, the Council asks the DOL to consider allowing plans to combine benefits from multiple tax-qualified retirement plans of a single employer prior to distribution of an automatic rollover (or to keep the benefits in the plan if they now exceed \$5,000). While plan documents and grandfathering issues would need to be addressed (ideally this merger could occur without grandfathering the originating plan's rights and features), this would permit plan sponsors to consolidate benefits from several plans into one plan (including merging benefits from defined benefit and defined contribution plans). This consolidation would have the effect of reducing overall expenses, both for the plan sponsor and the plan participant. For example, a participant who has \$2,000 of benefits in each of two plans could have those benefits consolidated before they are rolled into a mandatory IRA rollover account that imposes a minimum fee per account.

We appreciate the opportunity to provide further input to the development of potential rules in this area, and to comment on such rules. We believe that the American Benefits Council brings an important and unique perspective and are pleased to make this information and perspective available to the Department. If additional information from us would be helpful, please do not hesitate to contact Jan Jacobson, director of retirement policy at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "James A. Klein". The signature is written in a cursive style with a large, looped initial "J".

James Klein
President

cc: Bill Sweetnam
Carol Gold