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November 13, 2006

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

Attn: Default Investment Regulation

Ladies and Gentlemen:

On behalf of the more than 10 million working men and women of the AFL-CIO, we offer our comments on the proposed regulations, issued September 27, 2006, addressing default investment alternatives under participant directed individual account plans.

While worker savings in employer-provided individual account plans should be an important component in assuring adequate retirement income, they must be viewed not as the primary means for providing retirement income, but only a supplement to the security provided by an appropriately funded pension plan which provides a guaranteed lifetime retirement income. Defined contribution plans, including the 401(k) plans covered by the proposed regulation—present well-recognized risks to workers and fall far short of true retirement security. Most importantly, workers are the ones who bear the risks of investment, adequacy and longevity—the likelihood that there will be inadequate assets in their accounts upon retirement to provide a sufficient income stream.

The proposed regulations can only address one aspect of the growing retirement security problem confronting our nation—the appropriate investment of worker contributions to employer-sponsored savings plans. While increases in the investment return on retirement savings are helpful, they do not, standing alone, provide retirement security.

Qualified Default Investment Alternatives

The proposed regulation limits the types of investment products that will satisfy the regulatory requirements to three alternatives that fiduciaries may use to limit their liability. While paragraph (a)(2) of the proposed regulation states the "... standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under the Act with respect to the investment of assets in the individual account of a participant ...," the text should specify that no negative inference is intended if fiduciaries select investment products that are not among the specified alternatives.

Because we believe the classes of qualified default investment alternatives should be expanded and that there should be no question of satisfaction of ERISA's requirements if our suggested alternative is used, we recommend that the proposed regulation be revised to include an alternative that emphasizes capital preservation with little or no risk. Inclusion of this alternative would permit the use of money market funds, stable value products and similarly performing vehicles. These investment products, as the Department itself acknowledges, are currently used by most plans as default investment options. 71 Fed. Reg. at 56,806-56,807.

The Department's apparent rejection of capital preservation products, the first time the Department has done so, is premised on the expressed concern that if "... such funds become the exclusive investment of participants ..., it is unlikely that the rate of return generated by those funds over time will be sufficient to generate adequate retirement savings ...." 71 Fed. Reg. at 56,807.

But, the failure to include capital preservation products as a qualified default investment alternative ignores the unique circumstances addressed by the proposed regulation. In most instances, there will be assets to invest because participants are automatically enrolled in the plan. No affirmative choices to participate will be made and no directions will be given about the investment of these "forced savings." Yet, participants will bear the investment risk resulting from decisions plan fiduciaries make. In this situation, we think that DOL should be careful about requiring fiduciaries to place assets at risk, a situation that may make many of them uncomfortable and those that choose to be more cautious should not be penalized.

As part of our recommendation to include capital preservation products as a qualified default investment alternative, we also suggest that an explanation of the perceived shortcomings of such products for long-term investment be part of the notice required under paragraph (d) of the proposed regulation for those plans electing to use the capital preservation alternative.

Our suggestion to include capital preservation alternatives is also consistent with prior guidance provided by the Department with respect to the investment of assets without explicit direction from participants. When final regulations on the automatic rollover safe harbor and the termination of abandoned individual account plans were issued, the Department in each instance required utilization of capital preservation investment products and explicitly rejected suggestions to expand the permitted investment types. *See* Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor, 69 Fed.

Reg. 58,018, 58,020-58,021 (Sept. 28, 2004); Termination of Abandoned Individual Account Plans, 71 Fed. Reg. 20,820, 20,829 (Apr. 21, 2006).

The underlying premise of the current proposal, however, seems to be that participants will never change the initial allocation of their savings to the default investment alternative. While we appreciate the Department's desire to encourage alternatives that may in the long-term generate greater retirement savings, we suggest that the proposed rule be modified to include an incentive for participants to affirmatively elect alternatives, like those included in the proposal, that present more investment risk.

Fees

In its overview of the proposed regulation, the Department specifically noted that fiduciaries "... would be required to carefully consider investment fees and expenses in choosing a qualified default investment alternative ...." 71 Fed. Reg. at 56,808. However, the text of the proposed regulation does not include that directive. In light of the impact fees and expenses can have on investment return, we suggest that the Department include a specific reference to consideration of these items in paragraph (b)(2). In addition, we urge the Department to consider including specific language permitting the use of indexed funds in the investment products permitted as qualified default investment alternatives as such funds will typically provide comparable performance at a lower cost.

Notice

We suggest that the Department consider issuing a model notice that can be used to satisfy the requirements of paragraphs (c)(3) and (d) of the proposed regulation. Most recently, the Department included a model notice in the Appendix to the safe harbor for distributions from terminated individual account plans (29 C.F.R. § 2550.404a-3), part of which explained how the participant's account would be invested in the absence of an affirmative distribution election. With appropriate adaptations, similar language could be included in a model notice as part of the final regulations.

We also recommend that the notice include the investment information about other investment alternatives under the plan rather than just an explanation of where to obtain the information as currently set forth in proposed paragraph (d)(4). Including this information will make it easier for participants to consider the impact of allowing their contributions to be invested in a qualified default investment alternative rather than providing an affirmative direction.

Applicability of Age Discrimination in Employment Act

The proposed regulation directs plan fiduciaries who wish to take advantage of the available relief and limit their fiduciary liability to offer investment alternatives that take into account the participant's age, target retirement date or life expectancy. *See* Proposed 29 C.F.R. §2550.404c-5(e)(5)(i) and (iii). The proposed relief may raise some questions under the Age

Discrimination in Employment Act, 29 USC § 621 et seq. (ADEA), because the product in which assets are invested and the returns earned by a participant's account will vary based on age. We suggest the Secretary consult the Equal Employment Opportunity Commission in order to obtain appropriate guidance exempting fiduciaries, collective bargaining representatives and employers from liability under the ADEA for investments made in accordance with any final regulations issued by the Department.

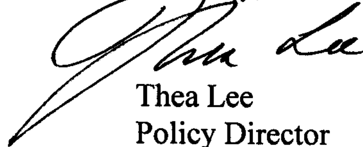
PPA Section 902

The Department specifically requested "...comments on whether and to what extent regulations would be helpful in addressing the preemption provision of section 514(e) of ERISA." 71 Fed. Reg. at 56,811.

We believe regulations under new section 514(e) of ERISA are not needed at this time. The statutory definition of an "automatic contribution arrangement" in section 514(e)(2) is sufficiently specific that the establishment of minimum standards through regulations would be unwarranted.

We hope our comments are helpful and should there be any questions about them, please do not hesitate to contact me at (202) 637-5907.

Sincerely,



Thea Lee
Policy Director
Legislation Department

TL/KF:lr