MassMutual
FINANCIAL GROUP®

VIA ELECTROINC SUBMISSION

November 13, 2006

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

Re: ***Default Investment Alternatives Under Participant Directed Individual Account Plans [RIN 1210-AB10]***

Ladies and Gentlemen:

Massachusetts Mutual Life Insurance Company ("MassMutual") appreciates the opportunity to comment on the regulations proposed by the Department of Labor (the "Department") regarding default investment alternatives under participant directed individual account plans (the "Proposed Regulation"). 71 Fed. Reg. 56806 (Sept. 27, 2006) (the "Proposing Release").

Founded in 1851, MassMutual is a mutually owned financial protection, accumulation and income management company headquartered in Springfield, Massachusetts. We are a premier provider of life insurance, annuities, disability income insurance, long term care insurance, retirement planning products, income management and other products and services for individuals, business owners, and corporate and institutional markets. MassMutual currently provides investment and administrative services to over 4,400 defined contribution plans, which hold approximately $27 billion of assets and cover over 850,000 participants. According to Pension & Investments, MassMutual is the 12th largest manager of defined contribution plan assets. (P&I, May 29, 2006).

As an institution committed to serving plan sponsors and their participants with best in class products and services, MassMutual fully supports the recent Congressional initiatives to facilitate automatic enrollment arrangements that will greatly enhance retirement savings for millions of American workers. MassMutual's RetireSmart℠ program offers sponsors the services necessary to support an automatic enrollment plan with an automatic deferral contribution increase feature. MassMutual also sponsors the Select Destination Retirement Funds – a series of target-maturity date (life-cycle) retirement funds that satisfy the Proposed Regulation's definition of a qualified default investment alternative ("QDIA") – which employers may select as default investment options for plans using the RetireSmart program.

MassMutual commends the Department's overall efforts in developing the Proposed Regulation and has, as explained above, already created investment products and retirement plan services that sponsors are using and that will be consistent with the Proposed Regulation when finalized. Nevertheless, we strongly believe that the Department's exclusion of guaranteed general investment account and other stable value guaranteed products (hereafter "Guaranteed Products") from the list of QDIAs is an unacceptable shortcoming in the Proposed Regulation that must be addressed. As more fully discussed below, we believe this exclusion represents bad policy and is inconsistent with the relevant statutory authority pursuant to which the regulation was proposed.

Exclusion Of Guaranteed Products Not Supported By Public Policy

As a starting point, we wish to emphasize that we not only support the underlying goal of the Proposed Regulation – namely, to encourage plan sponsors generally to select default investment options that provide higher returns and increased retirement savings over the long-term- but that we also specifically agree that in many cases it would be most appropriate for plan fiduciaries to select a default investment that has the potential for higher returns over time than is typical with Guaranteed Products. However, we strongly disagree, for the reasons enumerated below, that these policy objectives should result in Guaranteed Products being excluded from the list of QDIAs.

Guaranteed Products are Appropriate Default Investments: The life insurance industry is dynamic, and insurers are developing and bringing to market new Guaranteed Products that are appropriate for retirement plan default investment options. In particular, new forms of Guaranteed Products have recently been introduced that not only guarantee the principal of a participant's investment, but also provide a guaranteed lifetime income stream at retirement. The Proposed Regulation strongly suggests that the Department is unaware of this new generation of Guaranteed Products that do not focus solely on capital preservation. The final regulation should not be drafted in such a way as to exclude innovative new Guaranteed Products from the definition of a QDIA simply because they do not constitute one of the three designated investment fund products, model portfolios or investment management services under the Proposed Regulation's definition of a QDIA[1].

Even in the case of traditional Guaranteed Products that focus on capital preservation in conjunction with a specified rate of return, MassMutual strongly believes those products are the

[1] We also note that the Department's enumeration of an extremely narrow category of QDIAs is likely to quickly become outdated. ERISA has proven to be a highly successful and adaptable framework for retirement plan regulation and innovation precisely because of its reliance on guiding principals and its emphasis on thoughtful and informed oversight by fiduciaries rather than rigid rules and the promulgation of "legal lists" of approved investments.

most appropriate default option in many circumstances, a fact recognized by the Department in existing regulations and the Proposing Release. The Department's exclusion of Guaranteed Products appears to be based on three factors: 1) the observation that historically, over periods of multiple years and decades, diversified portfolios that include equities have tended to outperform those consisting solely of very low risk, short-term debt instruments; 2) the apparent assumptions and/or over-generalizations that the participants of a plan as a whole will always be, and/or have the financial capacity to be, long-term investors; and 3) the over-simplification of Guaranteed Products.

MassMutual is concerned that this over-simplification of Guaranteed Products and the Department's mistaken assumptions and/or over-generalizations regarding participants' investment time horizon will have unfortunate consequences for many plan participants. There are, in fact, numerous circumstances in which the investment horizon for a plan's participants is not long-term but intermediate-term or even short-term (e.g., employers whose employees are older and closer to retirement and employers with high workforce turnover). In these cases, the resulting status change of the participant (e.g., retirement, job change) often results in the employee liquidating his or her default investment. Even if one assumes that some of these employees continue to invest for retirement by rolling their distributions to a rollover IRA or new employer's plan, the original default investment will not have been held as a long-term investment[2].

Even in the case of younger workers who may not retire or take a distribution for 30 or more years, it does not necessarily follow that their default investment will be held for the long-term. For example, there are employers whose workforce is difficult to reach for initial election but who ultimately exercise investment discretion, either on their own initiative or at the prompting of a proactive human resources department.[3] More generally, the annual notice requirements included in the Proposed Regulation and the quarterly benefit statements required by the Pension Protection Act of 2006 ("PPA")[4] will likely encourage most participants whose contributions were initially invested in a default investment to take an active role with respect to their retirement planning and transfer their account out of the QDIA as they deem appropriate. The Department itself stated in the Proposing Release its belief that the notice will encourage active decision making by participants and beneficiaries.

In the case of transient workers, older workers and other participants with short investment horizons and/or low risk tolerance, a default investment that reduces or eliminates the risk of short-term market losses, such as a Guaranteed Product, would be prudent[5]. We note that from

[2] We note that the assumption that employees will actually roll their distribution into a new plan or into an IRA is itself an optimistic one since statistics provided by the Employee Benefits Research Institute show that only approximately 35% of employees aged 21-30 and less than half of those employees age 31-40 actually do so.
[3] There are many sponsors who use behavioral economics to develop customized campaigns to increase active participation by employees.
[4] Pub.L. 109-280.
[5] This point is evidenced by the fact that since 2000, the equity markets, as measured by the S&P 500 Index, have experienced three years (2000, 2001, and 2002) with *negative* returns. During this same time period, there were 3 three-year periods when an investor in the S&P 500 Index would have experienced a negative return (2000-2002,

an overall investment perspective, Guaranteed Products have proven to be an attractive option for defined contribution plans. Historically, yields for Guaranteed Products have been higher than money market funds and their performance relative to inflation has been superior to money market funds. Guaranteed Products are also insulated from some of the market risks associated with bond or money market funds. Therefore, it makes no sense to discourage plan fiduciaries from choosing a Guaranteed Product default option where doing so would be in the best interest of participants.

The Exclusion of Guaranteed Products from the List of QDIAs has Adverse Consequences: In the Proposing Release, the Department states that the omission of Guaranteed Products from the list of QDIAs should not be construed to indicate that the use of such default investments would be imprudent. While plan sponsors have been selecting Guaranteed Products for years without incurring fiduciary liability or, apparently, complaints from participants, MassMutual's experience in the short period of time since the Proposed Regulation was issued indicates that sponsors may, in fact, view the Proposed Regulation as a mandate to move away from Guaranteed Products in all cases. [6] By excluding Guaranteed Products from the list of eligible QDIAs, the Proposed Regulation deprives fiduciaries who select a Guaranteed Product default option of the safe harbor protection afforded by Section 624(a) of the PPA and the ability to make permissible withdrawals of erroneous contributions to automatic enrollment plans under Section 902(d) of the PPA. The exclusion also results, at the very least, in uncertainty as to the availability of the PPA's preemption of state wage withholding laws for any automatic enrollment plan using a non-QDIA option. In an era where lawsuits against fiduciaries are not uncommon, as a practical matter, fiduciaries are very unlikely to select default investments that are not QDIAs. The omission of Guaranteed Products will, therefore, almost certainly eliminate them from consideration as a viable default option for most fiduciaries, even where a Guaranteed Product would clearly be the most appropriate choice for participants. In fact, the Proposed Regulation, if left uncorrected, will be an incentive for plan fiduciaries to select a default investment option that protects the fiduciary from liability regardless of whether the investment is imprudent for defaulted participants or plan participants as a whole. Further, the resulting increased exposure to short-term investment losses inherent in the proposed QDIAs may very well be discouraging to participants, particularly younger and lower-income workers, causing them to sour on employer-sponsored plans and opt out of participation altogether.

2001-2003, and 2002-2004). Moreover, from April 2000 (the S&P 500 Index's high water mark was in March 2000) through September 2006, the Index had a *cumulative* return of -0.92% (assumes dividends were reinvested). During this same period, the Lehman Government/Credit Index had a cumulative return of 50.48% (assumes reinvestment of principal and interest). Moreover, over this time period, the S&P 500 Index delivered in excess of 3 times the return volatility of the Lehman Government/Credit Index, on an annualized basis. Even over a much longer period, stocks have not proven to be significantly more attractive on a risk adjusted basis as measured by Sharpe ratios. From 1973 (the inception of the Lehman Government/Credit Index), the S&P 500 Index had an annualized Sharpe ratio of .38% versus .35% for the Lehman Index.

[6] Although the Proposed Regulation has not been finalized, we have already heard from sponsors' counsel who insist that for fiduciary reasons plans *must* switch their current Guaranteed Product default investment option to a QDIA, notwithstanding the fact that the sponsor has otherwise been satisfied with its default investment selection and counsel had not previously raised legal objections to the selected default investment option.

Department's Objective can be Accomplished without Excluding Guaranteed Products: It is not necessary to exclude Guaranteed Products from the list of QDIAs in order to accomplish the Department's goal of encouraging more plan sponsors to select default investment options that provide a potential higher return over the long-term through exposure to equity securities. Rather, it would be sufficient, and result in more thoughtful decisions by fiduciaries, to place life-cycle, balanced and other equity funds on an even footing with Guaranteed Products in terms of the relief from fiduciary liability afforded to QDIAs. In that way, the fiduciary's incentive to insulate itself from liability ceases to be the determining factor in the fiduciary's selection of a QDIA.

Fiduciaries Should be Encouraged to Select Appropriate Default Investments: MassMutual strongly believes that the goal of the default investment regulations should be to make available to plan fiduciaries a range of QDIAs from which they can select, including Guaranteed Products, so each plan fiduciary can select a QDIA which is prudent for the majority of that fiduciary's plan participants, without exposing the fiduciary to liability for its choice. For example, if a plan has a stable, young work force whose investment horizon is presumably long-term, the plan fiduciary should be able to select an equity or a balanced fund as a QDIA without exposure to fiduciary liability for loses, thereby eliminating the current incentive to select an option based on minimizing potential liability for the fiduciary. Conversely, in those situations where the plan fiduciary determines that the higher short-term risk inherent in equity investments would be imprudent based on workforce demographics and/or other characteristics (such as high turnover), the fiduciary should not be discouraged from selecting a Guaranteed Product as the most appropriate default option. Unfortunately, the Proposed Regulation falls woefully short in this regard for the reasons cited above. The simple solution is to include Guaranteed Products as eligible QDIAs and let sponsors select the appropriate default investment, consistent with their fiduciary duties, based on the characteristics of their participants as a whole or on the characteristics of those participants mostly likely to be affected by the default investment selection. Retaining Guaranteed Products as viable QDIA options will merely allow fiduciaries the flexibility needed to always act in the best interests of plan participants and beneficiaries.

<u>Exclusion of Guaranteed Products Is Inconsistent With the Pension Protection Act</u>

In addition to policy reasons, we believe that there is a compelling legal argument why Guaranteed Products should not be excluded as QDIAs. Section 624(a) of the PPA amended ERISA to provide relief to fiduciaries that invest participant assets in certain types of default investments alternatives in the absence of participant direction. More specifically, Section 624(a) states that default investments should "include a mix of asset classes consistent with capital preservation <u>or</u> long-term capital appreciation <u>or</u> a blend of both." (emphasis added). Similarly, the Technical Explanation of the Pension Protection Act provides that the DOL's default investment regulations must provide guidance on "asset classes which the Secretary considers consistent with long-term capital appreciation <u>*or*</u> long-term capital preservation (or both)" (emphasis added). Technical Explanation of H.R. 4, the Pension Protection Act, JCX-38-06 at 148 (Aug. 3, 2006). The Proposed Regulation, in effect, ignores the "capital preservation" component of the statute by failing to provide a safe harbor for Guaranteed Products and result, we believe, in the Department acting outside of its statutory authority[7].

Endorsement of Comments Filed by the ACLI. MassMutual is a member of the American Council of Life Insurers. In addition to our comments set forth here, MassMutual also fully supports similar comments submitted by the ACLI.

****

Thank you for the opportunity to provide our comments on this vital issue. We look forward to continuing to work with the Department on providing guidance that will encourage plan sponsors to adopt automatic enrollment features and appropriate default investment options. Please do not hesitate to contact us if you would like to discuss any of our suggestions in more detail.

Respectfully submitted,

Frederick C. Castellani

Frederick C. Castellani
Executive Vice President
MassMutual Retirement Services

[7] We believe that not only the plain reading of the statute, but also the circumstances under which it was adopted support our interpretation. As the Department acknowledged in the release accompanying the Proposed Regulation, Guaranteed Products and other capital preservation investment options currently enjoy widespread use as default investment options. To suggest Congress was unaware of this fact strains credulity. Therefore, if Congress sought to exclude the use of default investments that seek to achieve capital preservation it could have easily done so by writing Section 624 to state that default investments should "include a mix of asset classes consistent with long-term capital appreciation or a blend of both long-term capital appreciation <u>and</u> long-term capital preservation", which is in effect, how the Department has read the statute. The fact that Congress did not write the statute in this manner cannot be ignored.