citigroup

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Automatic Rollovers RFI

RE: Automatic Rollovers Request for Information

Ladies and Gentlemen:

The Department of Labor (the "Department") published a request for information in The Federal Register on January 7, 2003[1] related to automatic rollovers of certain distributions from retirement plans. Citigroup Inc. ("Citigroup") and its subsidiaries[2] appreciate the opportunity to provide the Department with information and comments on these automatic rollovers.

Section 657(c) of the Economic Growth and Tax Relief Reconciliation Act of 2001[3] ("EGTRRA") requires the Department to issue regulations on automatic rollovers to provide safe harbors that would satisfy the fiduciary requirements imposed on plan administrators under Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The Department has specifically asked for information and comments regarding appropriate standards for the development of safe harbors under which, if met, would be deemed to satisfy the fiduciary duties imposed by Section 404(a) of ERISA.[4] We would urge the Department to include a clarification in any regulations that a plan administrator choosing an

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1 68 Fed. Reg. 992 (January 7, 2003).

2 Citigroup is the preeminent global financial services company with some 200 million customer accounts in more than 100 countries, provides consumers, corporations, governments and institutions with a broad range of financial products and services, including consumer banking and credit, corporate and investment banking, insurance, securities brokerage, and asset management. Major brand names under Citigroup's trademark red umbrella include Citibank, CitiFinancial, Primerica, Salomon Smith Barney, Banamex, and Travelers Life and Annuity.

3 Pub. L. 107-16.

4 68 Fed. Reg. 992, 993 (January 7, 2003).

automatic rollover option outside of the safe harbors may, nonetheless, still have met his or her fiduciary obligations when the facts and circumstances of the automatic rollover chosen by the plan administrator are examined.

A. Standards for Safe Harbor Entity.

The safe harbors set forth by the Department for the entity to serve as the custodian, trustee or issuer of the individual retirement arrangement (the "IRA") should be broad-based.

Currently, the Internal Revenue Code of 1986, as amended (the "Code") provides that the custodian, trustee or issuer of and IRA must be a bank (as defined in Code Section 408(n)) or such other person who demonstrates to the Secretary of the Treasury (or his or her designee) that such person will administer the IRA in conformity with the requirements of Code Section 408.[5] Alternatively, in the case of an individual retirement annuity contract, such contract must be issued by an insurance company.[6]

Thus, the safe harbor should provide that the entity to act as custodian, trustee or issuer of the IRA must meet the requirements set forth in the Code and Treasury Regulations for determining who may act as an IRA custodian, trustee or issuer. Any safe harbor should not take into account any more restrictive qualifications for this purpose. Furthermore, the safe harbor should not include a preference for a particular IRA custodian, trustee or issuer, or any preference for a particular form of custodian, trustee or issuer (*e.g.*, a bank or brokerage firm versus an insurance company, etc.).

B. Standards for Safe Harbor Initial Investment.

The proper form of investment within a plan subject to Title I of ERISA is based on a standard of prudence as set forth in ERISA Section 404(a) and the Labor Regulations issued thereunder.[7] Applying this type of standard to an IRA that receives an automatic rollover may fail to provide sufficient guidance for plan administrators to constitute a safe harbor. A safe harbor that simply provides that the automatic rollover should be invested to mirror the investment allocation within the distributing plan is also impractical.

In many cases, the automatic rollover will come from a plan that qualifies for certain classes of shares in the case of mutual fund investments that the IRA will not qualify for on its own. A plan may also be designed where the assets in the trust are managed as a pool, such that

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5 Code Section 408(a)(2).

6 Code Section 408(b).

7 ERISA Section 404(a). *See, also*, Labor Regulations Section 2550.404a-1.

participants do not own particular assets but instead have an undivided interest in the entire trust portfolio. A third investment alternative for a plan may be in collective investment funds of a bank.

Once the automatic rollover is deposited in the IRA, there likely will not be sufficient amounts to replicate an entire portfolio, or in the case of a collective investment fund, the IRA may not be permitted to invest in such a fund.

If the Department feels that a specific type of investment (or class of investments) should be deemed a safe harbor, the investment should be of the variety where market volatility has little or no impact, such as a money market or stable value type of investment.

We would also like to request that the Department clarify that an IRA trustee/custodian may require that assets to be deposited in an IRA through an automatic rollover must be acceptable to the IRA trustee/custodian. This clarification should also indicate that the IRA trustee/custodian may require that an automatic rollover deposit be made in cash from the distributing plan.

C. Establishment Costs, Termination Costs, Maintenance Fees and Transfers Within One Year.

The decision by a particular IRA provider to charge a fee for an IRA is driven by numerous factors, including the IRA provider's realized costs and market competition. The fact that a particular provider does or does not charge a fee should not, by itself, be taken as an indication of whether that IRA provider should or should not be considered by an employer to receive an automatic rollover.

IRA providers generally include a fee schedule setting forth any fees charged on account opening or closing, and any on-going maintenance fees in the IRA disclosure document or in a supplemental disclosure document. The IRA document (or supplemental disclosure document) will typically provide that the fees are a charge properly made against the assets of the IRA to the extent the fees are not paid by the IRA holder. It does not seem necessary to impose a safe harbor to make any such fees an expense of the distributing plan. Such a requirement would unfairly burden participants remaining in the plan with the expenses of employees' accounts where such employees are no longer plan participants.

As for the determination of reasonableness of fees, competition within the marketplace between IRA providers will serve to ensure that any fees charged by IRA providers will remain reasonable. Competition will also dictate whether an IRA provider will waive or refund certain

fees in the year that an IRA holder terminates his or her IRA and receives a distribution or transfers the IRA to another IRA provider.

When an IRA is established, the IRA trustee/custodian must provide the IRA holder with the ability to review the terms of the IRA – either prior to the actual establishment of the IRA, or by providing the IRA holder with the opportunity to revoke the IRA without adjustment for market gain, loss, or fees within seven days of establishing the IRA.[8] We ask the Department to clarify, along with the Internal Revenue Service (the "IRS"), or to request that the IRS provide clarification, that the "seven day revocation period" applies from the date of the establishment of the IRA by the employer/sponsor, and not from the date of locating the IRA holder. Allowing the seven day revocation period to be suspended until the IRA holder is located would have the unintended consequence of forcing IRA trustees/custodians to be guarantors of amounts deposited in the IRA against declines in the market, no matter how long an account has been established. Such a suspension of the seven day revocation period would permit an IRA holder to decide whether to revoke an IRA based on whether there has been a gain in the investment of his or her account or whether there has been a loss. If a loss has occurred, the IRA holder could simply choose to revoke the account within seven days of making himself or herself known to the IRA trustee/custodian, and the IRA trustee/custodian would be required to return the initially deposited amount, regardless of the length of time such IRA has been held, or the extent of the decline. The IRA trustee/custodian would also be required to return any fees deducted from the IRA for maintenance and custody of the assets in the IRA from the time of the deposit to the time of the revocation.

D. Prohibited Transaction Relief.

In certain cases, the employer/sponsor or plan administrator of the plan distributing assets in an automatic rollover will also be an IRA provider. Where the employer/sponsor or plan administrator is also an IRA provider, there is the potential that directing the rollover to one of its own IRAs would be a prohibited transaction by virtue of directing that plan assets be deposited in an account that would, potentially, generate the payment of fees or other income to the IRA provider.

In general, the IRA account to which such a deposit will be made would be identical to those IRAs offered by the IRA provider to the general public. Any fee charged for such an IRA is used to offset the expenses and costs realized by the IRA provider in connection with maintaining such an account. Examples of expenses or costs realized by IRA providers include, but are not limited to: (a) printing and mailing of IRA documents, statements and other notices; (b) safekeeping of assets; (c) computer usage and maintenance; (d) preparation and delivery of

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8 Treas. Reg. Section 1.408-6(d)(4)(iii)(A)(4).

required reports to the Secretary of the Treasury; and, (e) the cost of employing support and operations staff.

The Code and ERISA both prohibit the transfer to, or use by or for the benefit of, a party-in-interest or disqualified person, any of the assets of a plan.[9] Arguably, the distribution and automatic rollover of assets from an employer-sponsored plan to an IRA where the employer is also the IRA provider could be viewed as a prohibited transfer to, or use by, a party-in-interest of the assets of the plan. The party-in-interest would be the plan sponsor. This is especially the case as the decision of which IRA provider will receive the automatic rollover must be made before any distribution takes place and while the assets are still held in the plan's trust.

Both the Code and ERISA do recognize that an administrative exemption from the prohibited transaction rules may be desirable.[10] Such an administrative exemption may be granted by the Department[11] where the Department finds such an exemption is administratively feasible; is in the best interests of the plan and of its participants and beneficiaries; and is protective of the rights of the participants and beneficiaries of the plan.

In the instant case, such an exemption is administratively feasible, in the interest of plans and their participants and beneficiaries, and is also protective of such participants' and beneficiaries' rights. An exemption of this nature is also sensible from a policy standpoint as it will result in the plan sponsor's ability to distribute the assets from the plan, thereby reducing the costs of administering the plan[12] and reducing the annual reporting necessary for the plan.[13]

As stated previously, the IRAs that would receive the automatic rollover, if the employer/plan sponsor or plan administrator were also the IRA provider, would be the same as those IRAs made available to the general public and, as such, there would be no potential or

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9 Code Section 4975(c)(1)(D) and ERISA Sections 406(a)(1)(D) and 406(b).

10 Code Section 4975(c)(2) and ERISA Section 408(a).

11 Presidential Reorganization Plan No. 4 of 1978 (August 10, 1978) transferred the authority of the Secretary of the Treasury to issue prohibited transaction exemptions pursuant to Code Section 4975(c)(2) to the Secretary of Labor.

12 ERISA Section 404(a)(1)(A)(ii) states that a fiduciary's responsibilities with respect to a plan are to discharge his or her duties to defray reasonable expenses of administering the plan.

13 The annual Form 5500 series report requires the plan sponsor to include a report of all former participants nit he plan that continue to have a balance in the plan at the plan's year-end. Automatic rollovers will allow employers to minimize the number of former participants included in such reports.

incentive for abuse on the part of an employer/plan sponsor to direct the automatic rollover to an IRA offered by the employer/plan sponsor or one of its affiliates.

An exemption allowing such a rollover to take place is also in the interests of participants and beneficiaries, and is protective of the participants' and beneficiaries' rights as the deposit of a distribution to the IRA allows the assets to remain tax-deferred, as well as providing the potential for further tax-deferred growth.

E. Legal Impediments.

An automatic rollover is intended to allow an employer/sponsor to establish an IRA on behalf of certain former employees who have balances in a plan sponsored by the employer of greater than $1,000, but less than $5,000. When the employer/sponsor establishes the IRA with an IRA provider, the employer will need to provide certain information to the IRA provider about the former employee. This information will be required to satisfy various regulations and requirements imposed on IRA providers, including the provisions of the USA Patriot Act.[14] These rules are sometimes referred to as "Know Your Customer" rules and are imposed both by regulatory organizations overseeing the business of IRA providers and/or local laws. In the instance where the employer is unable to provide such information, the Department should clarify, to the extent possible, that the refusal of the IRA provider to accept the automatic rollover will not be viewed as a discriminatory act by the IRA provider.

Furthermore, an IRA is defined as a written trust created or organized in the United States.[15] Typically, when an IRA is established, the trust is created upon the acceptance of the terms of the IRA by both the custodian/trustee and the individual IRA holder. Such acceptance is evidenced by the signatures of the IRA trustee's/custodian's authorized representative and the individual IRA holder. In the case of an automatic rollover, the individual will potentially not be available to sign the acceptance of the IRA's terms to create the trust.

Proposed Treasury Regulation Section 1.408-7(d)(2) provides that, in the case of a simplified employee pension plan adopted by an employer, the employer may execute any necessary documents on behalf of an employee entitled to a contribution where such employee is unable or unwilling to do so himself or herself. The Department should involve the IRS and the Department of the Treasury ("Treasury") in this endeavor and request that the IRS and Treasury propose amendments to the Treasury Regulations for IRAs to allow employers to execute any necessary documents on behalf of a former employee to establish an IRA to receive automatic rollovers where the former employee is unable or unwilling to do so himself or herself.

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14 Pub. L. 107-56.

15 Code Section 408(a). *See, also*, Treas. Reg. Section 1.408-2(b).

F. Disclosure.

IRA providers are currently subject to very detailed disclosure requirements for the IRA products they offer.[16] Due to the detailed nature of the disclosure requirements, additional disclosures should not be necessary. Any information about an IRA established to receive an automatic rollover that could possibly be needed in a disclosure document would need to be included in the disclosure document as a result of the operation of the Treasury Regulations governing the contents of the disclosure statement that are already in effect.

On behalf of Citigroup, I thank the Department for the opportunity to provide this information and comments on automatic rollovers. If you have any questions, please feel free to contact me at (212) 793-2674.

Very truly yours,

Louis J. Denkovic

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16 The disclosure requirements for IRAs are set forth in Treas. Reg. Section 1.408-6.

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