



November 13, 2006

Robert Doyle
Director
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: Comments on the Proposed Rule on Default Investment Alternatives under Participant Directed Individual Account Plans. 71 Fed. Reg. 56,806 (September 27, 2006)

Dear Mr. Doyle:

The Society for Human Resource Management (SHRM) respectfully submits these comments to the U.S. Department of Labor (DOL), Employee Benefits Security Administration in response to the proposed rule on Default Investment Alternatives under Participant Directed Individual Account Plans. This notice of proposed rulemaking was published in the *Federal Register* on September 27, 2006. See 71 Fed. Reg. 56,806 (September 27, 2006).

SHRM is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available to advance the human resource profession and to ensure that HR is recognized as an essential partner in developing and executing organizational strategies. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

SHRM strongly supports the Department of Labor's initiative to encourage automatic enrollment in individual account plans in order to increase participation in such plans and to encourage greater retirement savings on the part of employees. SHRM also appreciates the Department's guidance on the types of default investments that plan fiduciaries should consider in their selection of default investments.

As employee benefit plan sponsors, managers and administrators, HR professionals are intimately involved in all aspects of pension plan management and administration, including individual account pension plans. We appreciate the opportunity to provide input in the development of the regulation and offer the following specific comments on the Department's proposed rule.

I. Conditions for Fiduciary Relief.

Notice Requirement

The Department of Labor has proposed a notice requirement as one of the conditions for fiduciary relief. *See* 71 Fed. Reg. 56,808 (September 27, 2006). Under the proposal, the required notice must be furnished within a reasonable period of time of at least 30 days in advance of the first investment in a "qualified default investment arrangement" and within a reasonable period of time of at least 30 days in advance of each subsequent plan year. The notice can be furnished in the plan's summary plan description (SPD), summary of material modifications (SMM), or other notice.

SHRM agrees with the concept of a notice requirement. SHRM members also appreciate that the notice can be included in other communications provided to participants, such as SPDs and SMMs and are not required to be furnished independently. However, SHRM is concerned about the requirement that the notice be furnished at least 30 days in advance of the first investment in a "qualified default investment arrangement," because it does not take into consideration those plans that provide for immediate participation of eligible employees. Under such circumstances, it would be impossible to expect plan sponsors to provide 30-day advance notice. Accordingly, SHRM requests that the final rule provide an exception from the 30-day advance notification requirement for those plan sponsors whose plans provide for immediate enrollment of eligible employees upon date of hire. SHRM suggests that, under such circumstances, the required minimum advance notice be five (5) business days.

In addition to the proposed 30-day notice provisions, SHRM has additional recommendations regarding the notice requirements. Specifically, SHRM requests that the final rule expressly provide plan sponsors with the option of providing such notices to participants in an electronic format in accordance with the applicable final rules under 26 C.F.R. § 1.401(a)-21 relating to disclosures through electronic media. *See* 71 Fed. Reg. 61,877 (October 20, 2006). These Treasury regulations permit the electronic transmission of notices that must be provided in writing to plan participants and beneficiaries if two safe harbor rules and methods are used. The first method is the consumer consent method, whereby a participant must first consent to electronic delivery of notices. Under the second alternative method of notice, at the time the notice is provided, the recipient must be advised that he or she may request and receive the notice in writing on paper at no charge. Therefore, SHRM recommends that DOL permit plan sponsors to provide such notices in an electronic format.

SHRM also recommends that DOL include a model notice in order to assist plan sponsors in providing the correct notice to eligible employees. In the past, model notices have allowed SHRM members to provide accurate and consistent information for the benefit of participants and beneficiaries.

Materials Required to be Provided to Participants

Plan participants are already inundated with multiple materials regarding the plan, their rights and obligations thereunder, and information on investment options. It is the experience of SHRM members that if plan participants receive multiple notices, they are less likely to review them. Too much information does not necessarily benefit the plan participants and beneficiaries.

The proposed rule requires that the terms of the affected plan provide that any material provided to the plan relating to a participant's or a beneficiary's investment in a "qualified default investment alternative" (e.g., account statements, prospectuses, proxy voting materials) be provided to the participant or the beneficiary. SHRM takes exception to this requirement because it requires the plan administrator to provide the information even if the participant already receives it directly from the default investment fund. Accordingly, SHRM requests that materials required to be provided by the plan under the final regulation not duplicate information already provided to participants and reflect the current requirements under section 404(c) of the Employee Retirement Income and Security Act of 1974 (ERISA) for participants who actively direct the investments of their accounts. By doing so, this would minimize the burden placed on plan sponsors that provide for default investments under their plans and provide consistency with the regulations governing § 404(c).

Financial Penalties

The proposed rule requires that neither the plan nor the "qualified default investment alternatives" impose financial penalties that would restrict the rights of participants and beneficiaries to direct their assets to other investment alternatives available under the plan. SHRM agrees that plan participants and beneficiaries should not be penalized for directing their assets to other investment alternatives. SHRM, however, is concerned that mutual fund and pooled fund redemption fees may be considered by some individuals to constitute financial penalties. Accordingly, SHRM requests that the final rule clarify that such fees will not be considered financial penalties.

II. Qualified Default Investment Alternatives.

The Department proposes to implement fiduciary relief under ERISA § 404(c)(5), allowing a plan fiduciary to select one or more "qualified default investment alternatives" for investment of contributions made on behalf of participants who fail to provide investment direction of their accounts. *See* 71 Fed. Reg. 56,809 (September 27, 2006). If a plan fiduciary designates a "qualified default investment alternative" for such participant, this participant would be treated as exercising control over his or her account with respect to a qualified investment alternative. The relief provided by the proposed rule is conditioned on the use of certain investment

alternatives, including “life-cycle” or “targeted-retirement-date” funds or accounts, “balanced funds,” and “managed accounts.”

In the preamble to the proposed rule, the Department assures that use of certain investment alternatives other than those identified in the proposed rule should not be construed as imprudent. The Department further indicates that it recognizes that investments in money market funds, stable value products and similarly performing investments may be prudent for some participants or beneficiaries.

SHRM members are pleased with the guidance recognizing that the default investments selected by employers may have a significant impact on the accumulated retirement savings of employees. Nonetheless, SHRM is concerned by the fact that the Department declined to include safe harbor for investments in money market funds, stable value products and similarly performing investments under appropriate circumstances. These investments may be appropriate for young employees with high turnovers or for retirees who continue to participate in a plan. Such individuals may be better served by these investments. Accordingly, SHRM recommends that the final regulations allow the safe harbor to cover these near-risk-free investments in special circumstances where the plan fiduciary has determined the appropriateness of their use consistent with section 404(a).

Static Investment Choices

The Department’s choice of safe harbor investments as “qualified default investment alternatives” reflects current market trends and financial planning practices. However, the final regulations may cause the investment choices to remain static and not include new and better investment alternatives that may become available over time. Plan sponsors may forgo more attractive, although prudent, investment choices in the future. Accordingly, SHRM recommends that the preamble to the final rule include a provision that the qualified default investment alternatives may be reevaluated by the Department from time to time to reflect the introduction of new retirement investment products to achieve increased retirement savings by employees.

III. Other Considerations.

Interaction with § 404(a)

The proposed rule indicates that it provides no relief under ERISA’s requirements to prudently select and monitor any “qualified default investment alternatives,” and that such relief would have to be provided under § 404(a) of ERISA. SHRM believes plan sponsors may be confused regarding their responsibilities under § 404(a) and not understand that compliance with these rules only provides limited relief. Accordingly, SHRM recommends that the final rule further elaborate (with examples) on the differences between a plan sponsor’s responsibilities under § 404(a) and the requirements of this new rule.

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IV. Conclusion.

SHRM appreciates the opportunity to submit these comments on qualified default investment alternatives. SHRM applauds the Department for proposing the guidelines to address safe harbor for plan fiduciaries investing participant assets in certain types of qualified default investment alternatives. SHRM looks forward to working with the Department of Labor to improve the guidance and provide outreach to the employer community on the final changes.

Respectfully submitted,



Michael P. Aitken
Director, Governmental Affairs
Society for Human Resource Management