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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

Introduction

We are writing to comment on the proposed rule for default investment alternatives under participant directed individual account plans. The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers and their families. We appreciate this opportunity to comment on the proposed regulations establishing qualified default investment alternatives, and the notices pertaining to those investment alternatives.

Notifying Participants

We have several concerns about the notice provisions in the proposed regulation.

First, we believe that a notice to a participant that his or her assets have been placed in a qualified default investment alternative (QDIA) should be provided individually to the participant in a separate notice. The Summary Plan Document or Summary of Material Modification is an inadequate format for providing sufficient notice of the consequences of failing to direct investments in an employer sponsored individual account plan. Summary plan descriptions and summary material modifications are lengthy documents that often go unread by plan participants. A targeted notice would not be burdensome for employers, since the same initial notice can be provided to all participants whose assets are placed in a qualified default investment alternative. Since the QDIA is designed to provide savings for retirement, it is particularly important for the individual participant to receive a clear and personal notice of the investment on his or her behalf. Similarly, notice by electronic means should only be permitted when the participant has previously agreed to receive notices electronically.

Second, the notice content rules should require that the notice include a statement explaining that the assets will be placed in a QDIA because the participant failed to affirmatively elect investment choices. Any notice should clearly state that the plan fiduciary may not be held responsible for investment performance of a QDIA established in accordance with legal requirements. It is essential that participants know that they are deemed responsible even though they have not chosen the investment vehicle. Without such a statement, participants could easily conclude that the plan fiduciary will be responsible for investment performance.

Third, the description of the participant's right to direct his or her own investment should also mention when the next opportunity to self-direct the investments will be available. The notice should include the requirement that the option to self-direct investments must be offered at least every three months. The description should state that transferring assets to a self-directed alternative will not incur a financial penalty (or any additional fees). The explanation of where participants can obtain information about the other investment options under the plan should include a statement that this information will be provided free of charge.

Fourth, we recommend that the Department consider adding a statement advising participants automatically invested in a QDIA that they may opt-out of the individual account plan within 90 days without penalty. The statement should also specify the amount of the excise tax that will be payable if they opt out after the 90 day period. As the Department has noted, the employees automatically enrolled in a QDIA are likely to be "lower-paid, younger and shorter-tenure employees." If these employees are not alerted to the "cost" of opting out in a timely manner, and they need (or choose) to opt-out, they may lose rather than gain retirement savings as the result of automatic enrollment.

Finally, we urge the Department to consider issuing a Sample QDIA Notice that employers can use to notify employees about their QDIA investments.

Fiduciary Relief

We recommend that the exemption from fiduciary liability for a QDIA only apply when the plan also offers a conservative fund designed for capital preservation as one of its self-directed options. This type of fund would provide a safe alternative for employees automatically enrolled in a 401(k) plan who cannot afford a loss of principal. The availability of such an alternative is particularly important for short-term employees who will leave the plan before they can benefit from life-cycle type investing. Also, because of the financial vulnerability of these employees whose assets will likely be placed in a QDIA, we recommend that anyone in a QDIA be given a statement once a year of the net return on the investment, namely, the return amount minus fees and expenses (including any recordkeeping or other administrative fees of the 401(k) plan that may be passed on to participants.)

We applaud the proposed regulation's preservation of the fiduciary duty to prudently select and monitor QDIAs under the plan. Preserving this duty ensures that participants who are accepting QDIAs will still be protected from unreasonable fees and expenses that could go unnoticed until a plan's assets have significantly diminished or failed to grow. Although the prudence standard has been interpreted only to require procedural prudence, by requiring a fiduciary to monitor plan costs, unknowing participants will have some level of protection from asset diminishing fees thus preserving the retirement savings of individuals Congress intends to benefit through automatic enrollment arrangements.

We appreciate the opportunity to submit comments on these important regulations governing default investment alternative for participants.

Sincerely,

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