SUBMISSION OF
THE ERISA INDUSTRY COMMITTEE
TO THE
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U.S. DEPARTMENT OF LABOR

COMMENTS ON THE PROPOSED REGULATION REGARDING THE AUTOMATIC ROLLOVER SAFE HARBOR

April 1, 2004

The ERISA Industry Committee ("ERIC")[1] is pleased to submit the following comments on the Department's proposed regulation under ERISA § 404, which was issued by the Department in accordance with § 657(c)(2)(A) of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA").

EGTRRA § 657(a) amended Internal Revenue Code ("Code") § 401(a)(31) to provide, in general, that a tax-qualified retirement plan must provide that if the plan makes a mandatory cash-out distribution of more than $1,000 (but not more than $5,000), and the participant does not elect to have the distribution paid to an eligible retirement plan or directly to the participant, the plan administrator must transfer the distribution to an individual retirement plan (an "IRA"). EGTRRA § 657(a) also amended Code § 401(a)(31) to require the plan administrator to notify the participant that the distribution may be transferred to another IRA.

In addition, EGTRRA § 657(c)(2)(A) directed the Department of Labor to issue regulations providing for safe harbors under which both (1) the plan administrator's designation of an institution to receive the automatic rollover and (2) the investment choice for the rolled-over funds will be deemed to satisfy the fiduciary standards of ERISA § 404(a). Section 657(d) provides that the automatic rollover

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[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

provisions will not become effective until the Department of Labor issues final regulations under § 657(c)(2)(A).

The Department's proposed regulation was published in the Federal Register on March 2, 2004. The Department's notice of proposed rulemaking asked that comments be submitted by April 1, 2004. 69 Fed. Reg. 9900.

Summary of Comments

1. The Department should revise the regulation to provide that if a fiduciary of the distributing plan reasonably relies in good faith on the IRA-provider's representation that the IRA meets the conditions set forth in subparagraphs (2), (3), and (4) of § 2550.404a-2(c), those conditions will be deemed to be satisfied.

2. The Department should revise the regulation to provide that, in order to comply with the safe harbor, the fiduciary of the distributing plan is not required, after rolling over the distribution, to monitor the conduct of the IRA-provider or to verify that both the provider and the IRA comply on an on-going basis with the conditions set forth in subparagraphs (2), (3), and (4) of § 2550.404a-2(c).

3. The Department should revise the regulation to provide that a fiduciary will not fail to qualify for the safe harbor merely because the plan administrator was unable to furnish a § 402(f) notice, summary plan description, or summary of material modifications to some plan participants despite making reasonable efforts to do so.

4. The Department should revise the regulation to make clear that the regulation does not prohibit a plan fiduciary from designating the plan's recordkeeper or trustee as the IRA-provider.

5. The Department should revise the regulation to make clear that the regulation does not prohibit the fiduciaries of multiple plans sponsored by the same employer from designating the same IRA-provider as the recipient of all of the automatic rollovers from the plans so that all of the automatic rollovers from those plans for the same individual will be transferred to a single IRA for that individual.

Comments

1. <u>The Department should revise the regulation to provide that if a fiduciary of the distributing plan reasonably relies in good faith on the IRA-provider's representation that the IRA meets the conditions set forth in subparagraphs (2), (3), and (4) of § 2550.404a-2(c), those conditions will be deemed to be satisfied</u>.

In general, subparagraphs (2), (3), and (4) require that --

a. the IRA must qualify as an individual retirement plan within the meaning of Code § 7701(a)(37),

b. the distribution must be invested in an investment product designed to preserve principal and to provide a reasonable rate of return, consistent with liquidity, and offered by a state or federally regulated financial institution, and

c. fees and expenses (i) must not exceed the fees and expenses charged by the IRA-provider for comparable IRAs established for rollovers that are not subject to the automatic rollover rules and (ii) must be charged only against the IRA's income (except for charges assessed for establishing the IRA).

Plan fiduciaries cannot reasonably be expected to verify all of this on their own. They do not have the information required to make all of these determinations. The purpose of the safe harbor -- to encourage rollovers -- would be defeated if fiduciaries were expected to verify that the IRA meets all of these requirements.

2. The Department should revise the regulation to provide that, in order to comply with the safe harbor, the fiduciary of the distributing plan is not required, after rolling over the distribution, to monitor the conduct of the IRA-provider or to verify that both the provider and the IRA comply on an on-going basis with the conditions set forth in subparagraphs (2), (3), and (4) of § 2550.404a-2(c).

This comment follows from the previous comment. The purpose of the safe harbor would be defeated if plan fiduciaries were required to monitor the future conduct of the IRA-provider. Such a requirement would also be inconsistent with the statute and the legislative history, both of which contemplate a one-time event, not an on-going process.

3. The Department should revise the regulation to provide that a fiduciary will not fail to qualify for the safe harbor merely because the plan administrator was unable to furnish a § 402(f) notice, summary plan description, or summary of material modifications to some plan participants despite making reasonable efforts to do so.

Some plan participants are former employers whom the plan administrator can no longer contact despite making reasonable efforts to reach them. The plan fiduciary should not lose the benefit of the safe harbor merely because the plan administrator is unable to locate some participants.

4. The Department should revise the regulation to make clear that the regulation does not prohibit a plan fiduciary from designating the plan's recordkeeper or trustee as the IRA-provider.

Because the IRA is not a part of the distributing retirement plan, the IRA-provider should not be deemed to provide a service to the distributing plan. However, even if

the IRA-provider is deemed to be a service-provider to the distributing plan, ERISA does not bar a plan fiduciary with no interest in the plan's recordkeeper or trustee from engaging the recordkeeper or trustee to provide additional services to the plan as the IRA-provider. *See* ERISA §§ 408(b)(2), 408(c)(2); 29 C.F.R. § 2550.408b-2.

5. The Department should revise the regulation to make clear that the regulation does not prohibit the fiduciaries of multiple plans sponsored by the same employer from designating the same IRA-provider as the recipient of all of the automatic rollovers from the plans so that all of the automatic rollovers from those plans for the same individual will be transferred to a single IRA for that individual.

Many major employers sponsor multiple tax-qualified plans, and many employees participate in more than one of them. For example, many employees participate in both a defined benefit plan and a defined contribution plan sponsored by the same employer. Where automatic rollover distributions are made from multiple plans for the same individual, the regulation should not bar plan fiduciaries from making rollovers to the same IRA for that individual. This will be in the interest of participants. It will concentrate their retirement savings in a single IRA, rather than disperse them among a number of separate IRAs where they will be more difficult to monitor. It also is likely to stimulate greater interest among IRA-providers in accepting automatic rollovers, thereby encouraging greater competition among IRA-providers to make their IRAs more attractive to participants (since aggregating the rollovers for an individual in a single IRA will result in fewer small IRAs and increase the average asset balance in the IRAs).

We very much appreciate the opportunity to submit these comments. We look forward to working with the Department to improve the proposed regulation.

THE ERISA INDUSTRY COMMITTEE