January 13, 2011

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attention: Target Date Amendments

Dear Sir or Madam,

The American Benefits Council (Council) appreciates the opportunity to comment on the Department of Labor's proposed regulatory amendments of earlier regulations on (1) qualified default investment alternatives (QDIA) under participant directed individual account plans and (2) participant fee disclosure. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We would like to start by commending the Department for addressing fiduciary issues related to Target Retirement Date investment options (TDFs). Many of the Council's plan sponsor member companies offer TDFs as investment options for their plan participants, either as qualified default investment alternatives, when participants have failed to make an investment election, or as a regular investment alternatives (or both). Clarifying the fiduciary obligations related to the TDFs should help provide a road map for fiduciaries working to provide appropriate investment options for their participants. With this in mind, we have a number of suggestions for improving the regulations that are discussed below.

Effective Date

It is very important that plan fiduciaries have sufficient time to respond to the regulations. The proposed regulation indicates that the effective date will be 90 days after publication of the regulations in final form in the Federal Register.

While it is not clear when the regulations will be finalized, the Council would urge the Department to allow at least six months after the regulations are finalized. Plans and their service providers will need to review documents and processes to ensure that the new requirements are met and Council members indicate six months would be an ambitious time frame for this process. In any event, these regulations should not be effective prior to the participant fee disclosure regulations (plan years beginning on or after November 1, 2011).

Specific Content Requirements

It is also important that plan fiduciaries have clear guidance that will improve disclosure to participants without creating new unclear (gray) areas or duplicative, conflicting or potentially misleading disclosures that could lead to increased litigation exposure.

First, the proposed requirement to provide a chart or other graphical illustration of the TDF's asset allocation over time appears consistent with a similar proposal from the Securities and Exchange Commission (SEC) except that a clause was added that the illustration "does not obscure or impede the participant's understanding of the information explained". On first review, this new phrase seems supportable in that no plan fiduciary wants to "obscure or impede the participant's understanding". However, Council members are concerned that interpretation of this generalized standard could lead to confusion as well as potential litigation. The Council recommends that registered investment products that follow the SEC requirements should be deemed to satisfy the Department's similar requirement and un-registered investment options could be provided the same relief if they follow SEC requirements. It would also be helpful if the Department could provide an acceptable sample chart that would serve as an alternative to the SEC requirements for unregistered investment options, where adopting SEC registered fund disclosure requirements would otherwise not be required.

The proposed regulations also require a statement related to the assumptions about the participant's intended contributions and withdrawals after the target date. While the Council commends the Department for apparently trying to distinguish between TDFs that grow more conservative after the stated date (so called "through funds") and those that remain with the same allocation after the dated date ("to funds"), interpretation of this requirement could lead to a lengthy disclosure that would not be understood by the average participant. Alternatively, the Council recommends that the Department draft and publish a simple sample disclosure that could be used by all plans. This would diminish the possibility that plan fiduciaries would use lengthy, hard-to-understand disclosures designed to cover all of the possible contingencies.

In addition, the proposed regulations require disclosure that participants can lose money by investing in TDFs and that such investments do not guarantee adequate retirement income. While we appreciate that the nature of TDFs may make them particularly at risk of being misunderstood by participants with regard to retirement income, plan fiduciaries are concerned that such a statement, applicable only to TDFs, might be misleading to plan participants. The Council notes that the model chart in the participant fee disclosure regulations contains a sentence that says "Your investment in these options could lose money." The Council recommends a similar but more comprehensive approach in the context of TDFs with a more general disclosure applicable to investment allocation in general. Specifically, the Council recommends the Department draft a sample disclaimer which makes clear that TDFs, as well as other investment options in the plan (unless specifically stated otherwise) do not guarantee against loss or that the participant who chooses or is defaulted into that investment will have adequate retirement income as a result.

Overall Consistency with SEC

The Council also strongly urges the Department to make sure that the newly amended regulations are consistent with SEC disclosure requirements for TDFs subject to SEC jurisdiction. Council members are concerned that differing disclosure requirements may result in confused participants attempting to compare apples to oranges. However, it is not necessary to duplicate all of the SEC's proposed rules if the Department makes clear that satisfaction of the SEC rules (as described above) will be deemed to satisfy the Department's requirements.

Consolidation/Conformation of Notices

Also, from a plan participant viewpoint, it is very important that participants not be inundated with disclosures at different times that are duplicative or only slightly modified (which can cause more confusion). Specifically, the Council recommends consolidating the QDIA notices with participant fee disclosure notices. Since the requirements are similar, it is more efficient from a cost perspective and perhaps more compelling (and less confusing) from a participant's perspective to receive the notices together. Now that all participants will be receiving disclosures related to the plan's investment options on an annual basis, it would make sense to add the QDIA requirements to the notice, perhaps as an appendix to the comparative chart. This would require a change in the timing requirements since they are currently different.

Alternatively, the QDIA notice could simply refer to the most recent fee disclosure notice to avoid duplicative disclosures of items required like restrictions, fees or expenses in connection with a transfer out of the QDIA (or

simply reference the same website that is required for participant fee disclosure). This would simplify the QDIA notice without sacrificing participant disclosure.

Material Provided on Request

Plan fiduciaries would also appreciate clarification that materials described in ERISA Section 2550.404a-5(d)(4) need only be provided upon the request of the participant. That section of the regulations currently only requires providing those materials upon the request of the participant with other (nearby) regulatory requirements to provide other materials without a request from the participant. A footnote in the preamble of the current proposal appears to indicate that this material must only be furnished upon request, but the QDIA regulation itself does not appear to distinguish between materials that must be provided or are only provided upon request. Some will interpret this as a new requirement to provide these materials automatically without clarification that the Department did not intend to change this structure.

Benchmarking

Finally, the Council understands the Department's concern about manipulating benchmarks but is also concerned that the use of only one benchmark (even if followed by a blended benchmark) may be inappropriately confusing to the participant in the context of TDFs. The Council urges the Department to allow use of a combination of indexes, such as an appropriate blend of a nationally-recognized equity index and bond index (using the percentages that make up the TDF), to benchmark TDFs.

Again, we appreciate the opportunity to comment on these proposed amendments to regulations relating to TDFs. We believe that the American Benefits Council offers an important and unique perspective of the employer sponsors of, and service providers to, retirement plans and we look forward to working with you on these important changes.

Sincerely,

Jan M. Jacobson
Senior Counsel, Retirement Policy