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Subject: Guidance Regarding Qualified Default Investment Alternatives (29 CFR § 2550.404c-5)

Background

On October 24, 2007, the Department of Labor (Department) published a final regulation[(1)] providing relief from certain fiduciary responsibilities under the Employee Retirement Income Security Act (ERISA) for investments made on behalf of participants or beneficiaries who fail to direct the investment of assets in their individual accounts. See 29 CFR § 2550.404c-5 (hereafter referred to as the "QDIA regulation"). Since publication of the QDIA regulation, a number of issues have been raised concerning the scope and meaning of various provisions of the QDIA regulation. This Bulletin is intended to supplement the QDIA regulation by providing guidance, in a question and answer format, on a number of the most frequently asked questions.

Questions And Answers

Scope Of QDIA Regulation

Q-1. To what extent does the QDIA regulation relieve a plan sponsor from fiduciary liability when the plan sponsor chooses to create and manage a qualified default investment alternative (QDIA) itself using a mix of the plan's available investment alternatives?

A plan sponsor that chooses to create and manage a QDIA itself may be relieved of liability for decisions to invest all or part of a participant's or beneficiary's account in a QDIA only if the plan sponsor is a named fiduciary (see § 2550.404c-5(e)(3)(i)(C)). The plan sponsor would not be relieved of liability for the management of the QDIA (see § 2550.404c-5(b)(1)(ii)) or the prudent selection and monitoring of the QDIA (see § 2550.404c-5(b)(3)).

Q-2. Is relief available under the QDIA regulation for assets invested in a default investment prior to the effective date of the regulation?

Yes, if all conditions of the QDIA regulation are satisfied with respect to such assets. The relief available under the QDIA regulation is not limited to assets that are invested in a QDIA on or after the effective date of the regulation. If the notice and other requirements for relief under the QDIA regulation are satisfied, the fiduciary will, except to the extent otherwise limited by the regulation, be relieved of liability with respect to all assets invested in the QDIA, without regard to whether the assets were contributed prior to the effective date of the regulation. The fiduciary will have the benefit of the relief under the QDIA regulation for fiduciary decisions made on or after the date that all requirements of the QDIA regulation have been satisfied. However, relief is not available for fiduciary decisions made prior to the effective date of the QDIA regulation, such as decisions by a fiduciary to invest assets in a default investment.

Q-3. Could a fiduciary obtain the relief referred to in Q-2, above, with respect to assets invested in a QDIA on behalf of participants and beneficiaries who elected to invest in a default investment prior to the effective date of the regulation?

Yes. The relief available under the QDIA regulation would extend to all assets invested in a QDIA on behalf of participants and beneficiaries who, on or after the effective date of the regulation, fail to give investment direction after being provided the required notice without regard to whether the participant or beneficiary made an earlier affirmative election to invest in the default investment. This result may be significant when plan records cannot establish that an investment was the direct and necessary result of a participant's or beneficiary's exercise of control for purposes of ERISA section 404(c)(1)(A) and 29 CFR § 2550.404c-1.

For example, assume that prior to the effective date of the QDIA regulation, plan sponsor (PS) used Default A as the default investment for its plan, an investment that would not qualify as a QDIA under the regulation. Following publication of the QDIA regulation, PS decides to change to Default B, an investment that would qualify as a QDIA under the regulation, but PS is unable to distinguish between those participants and beneficiaries who directed that their assets be invested in Default A and those participants and beneficiaries who were defaulted into Default A. If PS distributes a new investment election form to all participants and beneficiaries invested in Default A, relief under the QDIA regulation would be available to PS with respect to assets that are moved into Default B and held in the plan accounts of participants and beneficiaries who failed to respond to the investment election form, if all of the requirements of the regulation are otherwise satisfied with respect to such participants and beneficiaries. Alternatively, if Default A is an investment that would qualify as a QDIA under the regulation and PS complies with the notice and other requirements necessary to establish Default A as a QDIA, PS would be relieved of liability in accordance with the QDIA regulation with respect to all assets invested in Default A, without regard to whether the assets were the result of a default investment.

Q-4. Is fiduciary relief under the QDIA regulation available if non-elective contributions such as qualified non-elective contributions (QNECs), or the proceeds from litigation or settlements, are invested in a QDIA?

One of the conditions for fiduciary relief under the QDIA regulation is that the participant or beneficiary on whose behalf an investment in a QDIA is made must have had the opportunity to direct the investment of assets in his or her plan account, but did not direct such investment. See § 2550.404c-5(c)(2). Although the answer to this question may vary based on the particular facts and circumstances, if participants and beneficiaries are not provided the opportunity to direct the investment of plan assets that result from non-elective contributions such as QNECs, or the proceeds from litigation or other settlements, at least one of the conditions for fiduciary relief will not have been satisfied, and relief would not be available under the QDIA regulation. To the extent a participant or beneficiary is, in fact, given the opportunity to direct the investment of such contributions, or after such amounts are allocated to a participant's or beneficiary's plan account and the participant or beneficiary is subsequently provided the opportunity to direct the investment of those assets, the answer may be different.

Q-5. Does the QDIA regulation, including the preemption provisions, apply to plans under section 403(b) of the Internal Revenue Code (Code)?

The fiduciary relief provided under section 404(c)(5) of ERISA and the QDIA regulation is available to a Code section 403(b) plan, if the program is a “pension plan” within the meaning of section 3(2) of ERISA and covered by Title I pursuant to section 4(a) of ERISA. For more information regarding ERISA coverage of Code section 403(b) plans, see 29 CFR § 2510.3-2(f) and Field Assistance Bulletin 2007-02 (July 24, 2007).

Notice Requirements

Q-6. How much information regarding fees and expenses attendant to a QDIA must be provided in a notice? Can this information be provided by attaching other disclosure documents to the notice?

Paragraph (d) of § 2550.404c-5 sets forth the information required to be included in notices required by paragraph (c)(3) of § 2550.404c-5. Fees and expenses are addressed in paragraph (d)(3), which, among other things, requires that the notice include “a description of the qualified default investment alternative, including a description of the. . . fees and expenses attendant to the investment alternative[.]” In the absence of further guidance, the Department believes that, for purposes of § 2550.404c-5(d)(3), participants and beneficiaries generally should be provided information concerning: (1) the amount and a description of any shareholder-type fees such as sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees and (2) for investments with respect to which performance may vary over the term of the investment, the total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio). In this regard, the Department notes that it is currently developing a proposed regulation that would establish disclosure requirements, including requirements applicable to the disclosure of plan and investment fee and expense information, for participant directed individual account plans. The Department anticipates that furnishing the information required under that regulation would satisfy the investment-related fee and expense disclosures required by paragraph (d)(3) of § 2550.404c-5.

With regard to the form of disclosure of the fee and expense information, the Department notes that there is nothing in the QDIA regulation that would preclude the use of separate, but simultaneously furnished, documents to satisfy the notice requirements of § 2550.404c-5(c)(3). Accordingly, in the absence of additional guidance, the furnishing of a prospectus or profile prospectus of an investment alternative subject to the Securities Act of 1933, along with the other information required by paragraph (d) of § 2550.404c-5, could be used to satisfy the disclosures required by paragraph (d)(3) of § 2550.404c-5.

Q-7. Does the flexibility permitted with respect to use of the Treasury Department’s electronic distribution rules apply only to the QDIA notice requirement, or more broadly (i.e. to pass-through of investment materials)?

The preamble to the QDIA regulation provides the Department’s view that “plans that wish to use electronic means by which to satisfy their notice requirements may rely on either guidance issued by the Department of Labor at 29 CFR § 2520.104b-1(c) or the guidance issued by the Department of Treasury and Internal Revenue Service at 26 CFR § 1.401(a)-21 relating to use of electronic media.” [Emphasis added.] Accordingly, in the absence of further guidance, the Department’s views extend only to the QDIA regulation’s notice requirement at paragraph (c)(3) of § 2550.404c-5. However, the Department currently is working on a separate regulatory initiative concerning the broader application of disclosure by electronic means.

Q-8. Do plan sponsors have to combine the QDIA notice required by the regulation

with a notice required by Code sections 401(k)(13) and 414(w)?

No. Although the Department did coordinate with Treasury and the Internal Revenue Service to ensure that plan sponsors could comply with the notice requirements of the Code (sections 401(k)(13) and 414(w)) and ERISA (sections 404(c)(5) and 514(e)(3)) with a single, stand-alone document, plan sponsors are not required to combine these notices. Some plan sponsors offering a qualified automatic contribution arrangement (QACA) under Code section 401(k)(13) will not seek the fiduciary relief provided by ERISA section 404(c)(5). Alternatively, a plan sponsor could select a QDIA and avail itself of the fiduciary relief provided by ERISA section 404(c)(5) under circumstances other than automatic enrollment or under an automatic enrollment provision that is not intended to qualify under Code sections 401(k)(13) and 414(w). Plan sponsors are free to satisfy these notice requirements independently if they choose to do so.

For plan sponsors that wish to combine these notices, the Department coordinated with the Department of Treasury and the Internal Revenue Service in providing a sample notice which is available on the internet that may be used to help a plan sponsor satisfy these notice content requirements.

Q-9. Are the timing requirements for the notices required by the Department of Labor's QDIA regulation the same as the timing requirements for the notices required by the Treasury Department's proposed regulations under Code sections 401(k)(13) and 414(w)?

The timing requirements for these notices are not inconsistent. Under the Department's QDIA regulation, an initial notice generally must be provided at least thirty days in advance of a participant's date of plan eligibility or any first investment in a QDIA, or on or before the date of plan eligibility (if the participant has the opportunity to make a permissible withdrawal as determined under section 414(w) of the Code). An annual notice also must be provided at least thirty days in advance of each subsequent plan year.

Under the Treasury Department's proposed regulations on QACAs and eligible automatic contribution arrangements (EACAs), the Treasury Department articulated the timing requirements for the notices required under Code sections 401(k)(13) and 414(w). See 72 FR 63144. Specifically, a notice must be provided within a reasonable period of time before the beginning of each plan year or a reasonable period of time before an employee first becomes eligible under the plan. A notice is deemed to satisfy these timing requirements if the notice is provided at least thirty days (and not more than ninety days) before the beginning of each plan year or, if an employee did not receive the annually-required notice because it was provided before his or her date of eligibility for the plan, at least by the employee's eligibility date (and not more than ninety days before the employee's eligibility date).

Although the timing provisions for these notices are not identical, plan sponsors can easily satisfy both requirements for a plan year. A plan sponsor can satisfy the annual notice requirements under the QDIA regulation and the Treasury Department's proposed regulations if a notice is provided at least thirty, and not more than ninety, days before the beginning of each plan year. For example, the sponsor of a calendar year plan may choose to distribute a notice on November 1 of each year. A notice distributed on September 1 would not necessarily comply with the Service's rules, because September 1 is more than ninety days before the first day of the subsequent plan year.

Further, a plan that includes an EACA under section 414(w) of the Code and permits an employee to withdraw default contributions during the 90-day period following the date of the employee's first elective contribution can satisfy the Department's initial notice requirement, as well as the Service's special rule for employees who do not receive the annually-required notice due to their eligibility date, by providing a notice on or before, but no more than ninety days before, an employee's date of plan eligibility. For example, if a new employee is immediately eligible for participation on his or her first day of employment, which is June 1, the distribution of a notice to that employee on June 1 would satisfy both regulations.

Q-10. Can the QDIA notice be combined with the Code section 401(k)(12) safe harbor notice in the same manner that it can be combined with the Code section 401(k)(13) and 414(w) notices?

Yes. While the QDIA regulation generally provides for disclosure through a separate notice, the Department indicated in the preamble to the QDIA regulation that it anticipates that the QDIA notice requirements and the notice requirements of Code sections 401(k)(13)(E) and 414(w)(4) could be satisfied in a single disclosure document. See 72 FR at 60455. It is the view of the Department that the information required to be disclosed in a notice pursuant to Code section 401(k)(12)(D) is sufficiently related to the information required to be disclosed in the QDIA notice that combining the notices would improve, rather than complicate, the disclosure of plan information to participants and beneficiaries.

90-Day Limitation On Fees And Restrictions

Q-11. Would the payment of a fee or expense (e.g., redemption fee) by a plan sponsor or service provider that would otherwise be assessed to the account of a participant or beneficiary during the initial 90-day period satisfy the requirements of paragraph (c)(5)(ii) of § 2550.404c-5?

Yes. Paragraph (c)(5)(ii) of § 2550.404c-5 generally provides that, for a 90-day period following the first investment in a QDIA on behalf of a participant or beneficiary, any transfer or withdrawal of assets from the QDIA by a participant or beneficiary cannot be subject to any restrictions, fees, or expenses (including surrender charges, liquidation or exchange fees, redemption fees and similar expenses charged in connection with the liquidation of, or transfer from, the investment). The Department included this requirement to ensure that participants and beneficiaries would not be restricted from or penalized for moving assets out of the QDIA during the period of time that they would be most likely to opt out of the plan or redirect their plan investments. To the extent that any such fees or expenses otherwise assessed to the account of a participant or beneficiary are paid by the plan sponsor or a service provider, and not by the participant or beneficiary or the plan generally, the assessment of the fees or expenses would not serve to inhibit a participant's or beneficiary's decision to opt out of the investment alternative and the policy objective of the requirement at § 2550.404c-5(c)(5)(ii) would be satisfied. This Bulletin does not address the character of these payments for Code purposes.

Q-12. For purposes of § 2550.404c-5(c)(5)(ii), does the 90-day clock start from the date an investment becomes a QDIA, or does it begin only in reference to a participant who is being newly "defaulted" into a QDIA?

Paragraph (c)(5)(ii) of § 2550.404c-5 generally provides that, for a 90-day period following the first investment in a QDIA on behalf of a participant or beneficiary, any transfer or withdrawal of assets from the QDIA by a participant or beneficiary cannot be subject to restrictions, fees, or expenses.

For purposes of this requirement, the 90-day condition on restrictions, fees or expenses does not apply to participants or beneficiaries who have "existing" assets invested in the plan as of the effective date of the QDIA regulation. For example, if a plan, prior to the effective date of the QDIA regulation, used a balanced fund as its default investment, and the balanced fund qualifies as a QDIA under the QDIA regulation, the plan sponsor may wish to continue to use this fund as its default investment and obtain relief under the regulation. With respect to "existing" assets, the plan sponsor is not subject to the condition described in paragraph (c)(5)(ii) of the regulation for a 90-day period following the effective date of the regulation (or the date the balanced fund becomes a QDIA). Of course, consistent with paragraph (c)(5)(iii) of the regulation, assets invested in the QDIA cannot be subject to any restrictions, fees, or expenses that are not otherwise applicable to participants and beneficiaries who elected to invest in the QDIA.

However, if a new participant is enrolled in the plan on or after the effective date of the QDIA regulation, the restriction in paragraph (c)(5)(ii) of the final regulation will apply with respect to the first elective contribution or other investment that is made into the balanced fund QDIA on behalf of that participant.

Q-13. Is a QDIA prohibited from including any "round-trip" restriction for the first ninety days?

No. The Department has concluded that the reference in the preamble to the QDIA regulation to "round-trip" restrictions was too broad and should not have been included as an example of an impermissible restriction. As stated in the preamble to the technical corrections to the regulation,[(2)] "round-trip" restrictions, unlike fees and expenses assessed directly upon liquidation of, or transfer from, an investment, generally affect only a participant's ability to reinvest in the qualified default investment alternative for a limited period of time. This is not a restriction prohibited by paragraph (c)(5)(ii) of the final regulation. However, to the extent that a "round-trip" restriction would affect a participant's or beneficiary's ability to liquidate or transfer from a qualified default investment alternative or restrict a participant's or beneficiary's ability to invest in any other investment alternative available under the plan, it would be impermissible for purposes of paragraph (c)(5)(ii) of the QDIA regulation.

QDIAs – Management And Asset Allocation

Q-14. Can an investment fund or product with zero fixed income (or, alternatively, zero equity) qualify as one of the permanent, long-term QDIAs described in paragraph (e)(4)(i) through (iii) of the final regulation?

No. Each of the QDIA categories described in paragraph (e)(4)(i) through (iii) of the QDIA regulation requires that the investment fund product, model portfolio, or investment management service be "diversified so as to minimize the risk of large losses" and be designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures. In the preamble to the QDIA regulation, the Department explains that it did not intend to include funds, products, or services with no fixed income exposure. Although an investment option with no fixed income component may be appropriate for certain individuals actively directing their own investments, the Department determined that a QDIA should have some fixed income exposure. Similarly, a fund, product, or service with no equity exposure cannot qualify as a QDIA under paragraph (e)(4)(i) through (iii) of the QDIA regulation.

The regulation does not establish minimum fixed income or equity exposures necessary to satisfy the requirement for a mix within a QDIA. The Department continues to believe that such a determination is best left to the discretion of the entities described in paragraph (e)(3) of the QDIA regulation in assessing the appropriateness of a particular QDIA and, therefore, the Department does not plan to provide further guidance on the issue.

Q-15. The QDIA regulation, at § 2550.404c-5(c)(4), requires that defaulted participants be provided material in accordance with the regulations governing ERISA section 404(c) plans. Is the QDIA regulation intended to require that all of the referenced information be furnished automatically, without regard to whether some of the information for ERISA section 404(c) plans is required to be provided only upon request of a participant or beneficiary?

No. In response to comments, the Department explained in the preamble that it believed that defaulted participants should be furnished neither less nor more material than would be provided to participants who direct their own investments in an ERISA section 404(c) plan. The disclosure rules set forth in paragraph (c)(4) of § 2550.404c-5, therefore, are intended to operate in the same manner as under the section 404(c) regulations (29 CFR § 2550.404c-1). That is, for purposes of the QDIA regulation, defaulted participants are required to be automatically furnished, in the case of registered investment companies, the most recent prospectus or profile prospectus (see Advisory Opinion No. 2003-11A (September 8, 2003)) and furnished any material relating to voting, tender or similar rights provided to the plan. See 29 CFR § 2550.404c-1(b)(2)(i)(B)(1)(viii) and (ix). In addition, plans are required to furnish either automatically or upon request certain information concerning the plan's investment alternatives, such as annual operating expenses and the value of shares or units in the investment alternatives. See 29 CFR § 2550.404c-1(b)(2)(i)(B)(2).

Q-16. Can a plan sponsor use two different QDIAs, for example, one for its automatic contribution arrangement, but another for rollover contributions?
Yes. Nothing in the QDIA regulation limits the ability of a plan sponsor to use more than one QDIA, so long as all requirements of the regulation are satisfied with respect to each QDIA.

Q-17. In the case of an individual account plan sponsored by a single employer, can a committee that is established by a plan sponsor and that, pursuant to the documents and instruments governing the plan, is a named fiduciary of the plan be treated as managing a QDIA for purposes of paragraph (e)(3)(i)(C) of § 2550.404c-5?
Yes. In response to comments on the proposed regulation, paragraph (e)(3) of the final QDIA regulation was expanded to include a plan sponsor who is a named fiduciary of the plan in response to comments on the proposed regulation. The Department intended that this expansion would broadly accommodate employers that manage their plan investments in-house. However, the reference to "plan sponsor" in paragraph (e)(3)(i)(C) has raised questions as to whether a committee that is a named fiduciary of the plan and is comprised primarily of employees of the plan sponsor can manage a qualified default investment alternative when that committee, pursuant to plan documents, is a named fiduciary. To address this uncertainty, the Department has amended paragraph (e)(3)(i)(C) in the technical corrections to the QDIA regulation[(3)] to make clear that such a committee of the plan sponsor may manage a qualified default investment alternative.

120-Day Capital Preservation QDIA

Q-18. Is the 120-day capital preservation QDIA, described in paragraph (e)(4)(iv) of § 2550.404c-5, available only for plans that include an EACA?
Yes. The 120-day capital preservation QDIA, described in paragraph (e)(4)(iv), permits investment in a capital preservation product for a 120-day period following a participant's first elective contribution (as determined under Code section 414(w)(2)(B)) to an eligible automatic contribution arrangement (EACA). This QDIA is intended to provide administrative flexibility to plans that satisfy the EACA requirements and allow employees to make permissible withdrawals in accordance with Code section 414(w)(1). Accordingly, a plan fiduciary that uses the 120-day capital preservation QDIA for the investment of assets other than assets contributed pursuant to an EACA will not obtain fiduciary relief under the regulation. For example, use of the 120-day capital preservation QDIA for a rollover from an IRA or other plan would not relieve a plan sponsor from liability under the QDIA regulation (unless the rollover was made during the 120-day period following a participant's first EACA contribution).

Q-19. Are plans required to provide a 120-day capital preservation QDIA?

No. A plan sponsor is not required to use any of the QDIAs described in the regulation for its plan, including the 120-day capital preservation QDIA. The 120-day capital preservation QDIA, described in paragraph (e)(4)(iv) of § 2550.404c-5, was included in the regulation to afford plan sponsors the flexibility of using a capital preservation investment alternative for the investment of contributions during the period of time when employees are most likely to opt out of plan participation.

Q-20. Can a plan sponsor manage the 120-day capital preservation QDIA?

Generally, no. The investment fund or product must be offered by a State or federally regulated financial institution as required in paragraph (e)(4)(iv)(A)(2) of the QDIA regulation.

Grandfather-Type Relief For Stable Value Funds

Q-21. Must a plan sponsor distribute a notice thirty days before the effective date of the QDIA regulation to obtain relief for prior contributions to a stable value fund or product?

No, but the relief provided by the QDIA regulation generally will not take effect until thirty days after the initial notice required by § 2550.404c-5(c)(3) is furnished to participants and beneficiaries. For example, if a plan sponsor distributes the initial notice on January 1, 2008 to participants and beneficiaries who were defaulted into a stable value fund prior to the effective date of the regulation, and assuming all other requirements of the regulation have been satisfied, the fiduciary relief provided by the regulation would be available to the plan sponsor on January 31, 2008 (i.e., thirty days later). Of course, regardless of the date on which fiduciary relief is available to the plan sponsor, the relief will extend only to assets that were invested in the stable value product or fund on or before the effective date of the final regulation.

Q-22. What types of stable value products or funds did the Department intend to include as QDIAs for purposes of the “grandfather”-type relief described in paragraph (e)(4)(v) of § 2550.404c-5?

Paragraph (e)(4)(v) of the QDIA regulation provides “grandfather”-type relief for assets invested in certain stable value products or funds prior to the effective date of the regulation. Following publication of the QDIA regulation, the Department determined that the description of stable value products and funds as set forth in paragraph (e)(4)(v) may limit the availability of the “grandfather”-type relief, contrary to the intention of the Department. Accordingly, to ensure broad application of this relief to stable value products and funds, the Department amended paragraph (e)(4)(v) of the QDIA regulation.[(4)] As amended, paragraph (e)(4)(v)(A) provides that relief is available with respect to “an investment product or fund designed to preserve principal; provide a rate of return generally consistent with that earned on intermediate investment grade bonds; and provide liquidity for withdrawals by participants and beneficiaries, including transfers to other investment alternatives.” Two additional conditions apply: no fees or surrender charges can be imposed in connection with withdrawals from the product or fund initiated by a participant or beneficiary, and the product or fund must invest primarily in investment products that are backed by State or federally regulated financial institutions. For example, the product or fund may be issued directly by a State or federal regulated financial institution. Alternatively, the principal and accrued interest on the product or fund may be backed by contracts issued by such institutions.

Questions concerning the QDIA regulation or this guidance can be directed to the Division of Fiduciary Interpretations, Office of Regulations and Interpretations, at 202.693.8510.

Footnotes

1. 72 FR 60452 (Oct. 24, 2007).
2. Federal Register Document #2008-09371.
3. Federal Register Document #2008-09371.
4. Federal Register Document #2008-09371.