

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB10

Default Investment Alternatives Under Participant Directed Individual Account Plans

AGENCY: Employee Benefits Security Administration.

ACTION: Correcting amendments.

SUMMARY: The Department published in the **Federal Register** of October 24, 2007 (72 FR 60452), a final regulation providing relief from certain fiduciary responsibilities for fiduciaries of participant directed individual account plans who, in the absence of directions from a participant, invest the participant's account in a qualified default investment alternative. The final regulation implemented recent amendments to title I of the Employee Retirement Income Security Act of 1974 (ERISA) enacted as part of the Pension Protection Act of 2006, Public Law 109-280. The Department has determined that two paragraphs in the final regulation, and one statement in the Supplementary Information, require correction. Accordingly, this document corrects the final regulation by revising these paragraphs.

DATES: *Effective Date:* The amendments to the final regulation are effective on [ENTER DATE OF PUBLICATION IN FEDERAL REGISTER].

Applicability Date: The amendments to the final regulation apply on and after December 24, 2007.

FOR FURTHER INFORMATION CONTACT: Allison Wielobob, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION

A. General

Section 624(a) of the Pension Protection Act of 2006 (Pension Protection Act) added a new section 404(c)(5) to ERISA. Section 404(c)(5)(A) of ERISA provides that, for purposes of section 404(c)(1) of ERISA, a participant in an individual account plan shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary of Labor. On October 24, 2007, the Department of Labor (Department) published a final regulation implementing the provisions of section 404(c)(5) of ERISA. A fiduciary of a plan that complies with the final regulation will not be liable for any loss, or by reason of any breach, that occurs as a result of investment in a qualified default investment alternative. The regulation describes the types of investments that qualify as default investment alternatives under section 404(c)(5) of ERISA.

B. Correcting Amendments

The Department has determined that one statement in the text of the Supplementary Information to the final regulation and two regulatory provisions require amendment.

1. Amendment of Supplementary Information Text

In the Supplementary Information, 72 FR at 60456, the Department provides an explanation of paragraph (c)(5)(ii) of the final regulation. This paragraph provides that any transfer or permissible withdrawal from a qualified default investment alternative resulting from a participant's or beneficiary's election to make such a transfer or withdrawal during the 90-day period beginning on the date of the participant's first elective contribution, or other first investment in a qualified default investment alternative, shall not be subject to any restrictions, fees or expenses, other than certain ongoing administrative and investment fees. The Department explained that this provision was intended to prevent the imposition of any restriction, fee, or expense on a transfer or permissible withdrawal of assets, whether assessed by the plan, the plan sponsor, or as part of an underlying investment product or portfolio. The Department also provided a few examples of restrictions that might inhibit a participant's or beneficiary's decision to withdraw, sell or transfer assets out of a qualified default investment alternative during this 90-day period. One of the cited examples was a "round-trip" restriction on the ability of the participant or beneficiary to reinvest within a defined period of time. The Department has concluded that the reference to "round-trip" restrictions was too broad and

should not have been included as an example of an impermissible restriction. “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 final regulation.

2. Regulatory Text Amendments

The Department is also amending language in paragraph (e)(3) of the regulation, describing persons that may manage a qualified default investment alternative. In response to comments on the proposed regulation, paragraph (e)(3) was expanded to include a plan sponsor who is a named fiduciary of the plan. 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 is amending paragraph (e)(3)(i)(C) to make clear that such a committee of the plan sponsor may manage a qualified default investment alternative.

Finally, the Department is amending paragraph (e)(4)(v) of the final regulation. As explained in the Supplementary Information to the final regulation, this provision establishes a “grandfather”-type rule to treat stable value products and funds as qualified default investment alternatives solely for purposes of investments made before the effective date of the final regulation. The Department included this provision to accommodate employers who had selected stable value products or funds as their default investments before the regulation’s effective date and who may not be able to transfer participants’ and beneficiaries’ assets out of such investments without incurring significant expenses.

Following publication of the final 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. To ensure broad application of this relief to stable value products and funds, the Department is changing paragraph (e)(4)(v) of the final regulation to provide that stable value products or funds must invest primarily in investment products that are backed by state or federally regulated financial institutions. For example, these investment products may be issued directly by such institutions. Alternatively, the principal and accrued interest on the investment products may be backed by contracts issued by such institutions.

The Department finds, in accordance with section 553(b) of the Administrative Procedure Act (5 U.S.C. 553(b)), that notice and public comment is not necessary. This document merely amends a statement in the Supplementary Information to the final regulation regarding the

application of a regulatory provision and modifies two provisions to address public uncertainty regarding their scope. For the same reason, the Department finds good cause for making this document effective upon publication in the Federal Register.

C. Regulatory Impact Analysis

None of the correcting amendments being adopted herein will alter the analysis or data contained in the regulatory impact analysis of the final regulation. See 72 FR at 60466 (October 24, 2007).

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and trustees.

Accordingly, 29 CFR part 2550 is corrected by making the following correcting amendments:

Part 2550 – Rules and Regulations for Fiduciary Responsibility

1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135; sec. 657, Pub. L. 107-16, 115 Stat.38; and Secretary of Labor's Order No. 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b-1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c-1 also issued under 29 U.S.C. 1101. Sections 2550.404c-1 and 2550.404c-5 also issued under 29 U.S.C. 1104. Sec. 2550.407c-3 also issued under 29 U.S.C. 1107. Sec. 2550.408b-1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412-1 also issued under 29 U.S.C. 1112.

2. Amend § 2550.404c-5 by revising paragraphs (e)(3)(i)(C) and (e)(4)(v)(A) to read as follows:

§ 2550.404c-5 Fiduciary relief for investments in qualified default investment alternatives.

* * * * *

(e) * * *

(3) * * *

(i) * * *

(C) the plan sponsor, or a committee comprised primarily of employees of the plan sponsor, which is a named fiduciary within the meaning of section 402(a)(2) of the Act;

* * * * *

(4) * * *

(v) * * *

(A) Subject to paragraph (e)(4)(v)(B) of this section, 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. Such investment product or fund shall, for purposes of this paragraph (e)(4)(v), meet the following requirements:

(1) There are no fees or surrender charges imposed in connection with withdrawals initiated by a participant or beneficiary; and

(2) Such investment product or fund invests primarily in investment products that are backed by State or federally regulated financial institutions.

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Signed at Washington, DC, this 24th day of April, 2008.

Bradford P. Campbell,
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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