We respectfully submit the following comments to the proposed regulations on qualified default investment alternatives ("QDIAs") under participant directed individual account plans.

1. Timing of Delivery of Initial Notice

Proposed Regulation § 2550.404c-5(c)(3) requires, as a condition of the fiduciary relief, that the participant or beneficiary receive a prescribed notice regarding the QDIA "within a reasonable period of time of at least 30 days in advance" of the first investment of a participant's or beneficiary's account in the QDIA.

There appear to be a number of circumstances in which it would be impracticable or impossible for a plan administrator to deliver the initial notice at least 30 days before the first investment in the QDIA. These include the following:

- the plan's eligibility provisions allow a participant to make or receive contributions within less than 30 days after becoming employed by the plan sponsor;
- an account is established for a plan beneficiary within less than 30 days after the plan administrator learns of the participant's death; and
- an account is established for an alternate payee under a qualified domestic relations order within less than 30 days from that date that the plan administrator qualifies the order.[1]

To satisfy the 30-day advance notice requirement, many plan sponsors would be required to amend their plans to delay initial eligibility to participate in the plans. The advance notice requirement conflicts with the growing trend among employers to offer immediate eligibility.[2] Plan administrators also may be forced to delay establishing accounts for beneficiaries and alternate payees; such delays may conflict with the administrators' fiduciary responsibilities.

We recommend that the final regulations extend the fiduciary protection to appropriate circumstances in which the plan notice is provided less than 30 days before the initial investment in the QDIA. In circumstances where advance notice is not possible, the regulations should allow the plan administrator to provide the notice within a reasonable period of time *after* the initial investment.

If the Department does not modify the 30-day advance notice requirement, the final regulations should make clear that, even when the initial notice is not delivered 30 days in advance of the first investment in the fund, the fiduciary relief afforded under the regulations will still be effective 30 days after the notice is provided. By requiring that the notice be provided in advance of "the first such investment," the proposed regulations suggest that fiduciary protection may never be available if the notice is not provided at least 30 days before the date on which the participant or beneficiary's account is first invested in the QDIA. During any period before the notice becomes effective, existing fiduciary standards would apply.

2. Selection of Mixed Investment Fund QDIAs

The proposed regulations require that a QDIA meet one of three alternative designs, one of which is an "investment fund product or model portfolio that is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with a target level of risk appropriate for participants of the plan as a whole." See § 2550.404c-5(e)(5)(ii). The proposed regulations state that a "balanced" fund is an example of such a mixed investment fund.

The use of a balanced fund as a QDIA is likely to appeal to many plan sponsors. Such a fund is likely to be among the plan's existing investment alternatives, and, unlike the other two QDIA alternatives, "life-cycle" or actively managed investment services, the balanced fund alternative allows a single "retail" mutual fund to be used as the QDIA for all participants in the plan.

While we endorse the use of a balanced fund as a QDIA, we are concerned about the requirements that the proposed regulations seem to impose in the selection and monitoring of such a fund. Although the proposed regulations specifically state that the "age, risk tolerance, investments and other preferences" of *individual participants* are not required to be taken into account in selecting a balanced fund, the requirement that the fund's equity and fixed-income exposure be "consistent with the target level of risk appropriate for participants in the plan as a whole" may impose a significant burden on plan fiduciaries responsible for selecting and monitoring such a fund.

The "participants of the plan as a whole" requirement appears, at a minimum, to impose a duty on the plan's investment fiduciary to take into account the plan's unique demographics in selecting a balanced fund QDIA. Presumably, the median age of participants would be the most relevant statistic, but the fiduciary also could be obligated to consider other factors, such as the gender of plan participants (to the extent it affects life expectancies) and the expected retirement age of participants.

These requirements may present significant challenges to plan fiduciaries, particularly fiduciaries of smaller plans that may experience greater demographic volatility than larger plans. An appropriate analysis of these factors could require plan fiduciaries to engage investment advisers solely for the purpose of selecting and monitoring mixed investment fund QDIAs. Ironically, the proposed regulations may impose less of a burden on fiduciaries of the very largest plans, since the demographics of large plans can be expected to be less volatile and more closely resemble the demographics of the nation's overall workforce. For plans with more "generic" demographics, the plan's investment fiduciary may be safe in concluding that any number of retail balanced funds is a suitable QDIA.

We recommend that the final regulations give plan fiduciaries greater flexibility in selecting mixed investment fund QDIAs. Specifically, in lieu of basing its selection on the plan's individual population, the fiduciary should be allowed to assume that a balanced fund is a suitable QDIA if, based on generally accepted investment principles, the fund would be a suitable diversified investment portfolio for a broad class of retirement investors of various ages.

3. Delivery of Information Relating to the QDIA

Under § 2550.404c-5(c)(4), the fiduciary relief is conditioned on the terms of the plan requiring that any material relating to the QDIA (such as account statements, prospectuses, and proxy voting materials) be provided to the participant or beneficiary.

This provision is somewhat similar to the existing requirement in 29 CFR 2550.404c-1(b)(2)(i)(B)(2)(ii) requiring that the plan fiduciary "either directly or upon request" provide participants or beneficiaries with "copies of any prospectuses, financial statements and reports, and any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan." In contrast to the existing regulation, however, the proposed regulation appears to require that such information concerning the QDIA be delivered affirmatively rather than upon request.

A requirement that such information be affirmatively delivered to participants and beneficiaries would impose a significant burden on plan administrators and unnecessarily increase plan expenses. If the QDIA is an investment company registered under the Investment Company Act of 1940, the plan apparently would be required to deliver copies of the investment company's quarterly and annual reports to each participant and beneficiary whose account is invested in the QDIA. It also appears that the plan would be required to deliver proxy voting materials without regard to whether the plan provides that voting rights with respect to the QDIA are passed through to participants and beneficiaries. Because the QDIA likely will be an available investment option to participants and beneficiaries who affirmatively direct the investment of their accounts, the plan administrator would need to provide these materials to all participants and beneficiaries or separately identify those participants who affirmatively elected to invest in the QDIA.

Much of the material required to be delivered arguably would consist of information that is unlikely to be read by participants and beneficiaries. Certainly there seems to be no reason to require that such information be affirmatively delivered to individuals who have declined to make affirmative investment elections, but that it should be delivered only upon request to individuals who have made affirmative investment elections.

We recommend that the final regulations allow the plan to deliver this information only upon the request of a participant or beneficiary. Moreover, the final regulations should not require that the terms of the plan require delivery of this information, but should instead base the availability of relief upon whether the requirement is satisfied in practice. Both changes would be consistent with the existing regulations under Section 404(c).

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[1] Although the proposed regulations do not expressly address default investments with regard to the accounts of alternate payees, ERISA Section 206(d)(3)(J) states that an alternate payee is to be considered a beneficiary under the plan for purposes of any provision of ERISA.

[2] Of the 830 plan sponsors who participated in Deloitte Consulting LLP's 2005/2006 Annual 401(k) Benchmarking Survey, 49 percent offered immediate eligibility, up from 45 percent from the 2004 survey.