

Douglas O. Kant
Senior Vice President &
Deputy General Counsel

FMR LLC Legal Department

82 Devonshire Street, V7A Boston, MA 02109
Phone: 617-563-6645 Fax: 617-385-1862
Email: doug.kant@fmr.com



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SUBMITTED ELECTRONICALLY

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

Re: Definition of Fiduciary Proposed Rule – Distribution Information

Ladies and Gentlemen:

The U.S. Department of Labor (“Department”) published a proposed rule relating to the definition of investment advice (“Proposal”) in the Federal Register on October 22, 2010 (75 FR 65263). Substantive comments on the Proposal have been submitted on behalf of the group of financial service companies for which FMR LLC is the parent company and which is known as Fidelity Investments (collectively, “Fidelity Investments”). This letter comments separately on whether the Department should expand the Proposal to include recommendations with respect to plan distributions.

Fidelity Investments provides record keeping, investment management, and custodial services to thousands of Internal Revenue Code (“Code”) Section 401(k), 403(b) and other retirement plans covering millions of employees and their beneficiaries. The services provided by Fidelity Investments include the provision of assistance to plan participants (or beneficiaries) who are considering whether to request a distribution upon retirement or at some later date.

The Proposal preamble asks whether the Department should reconsider the position taken in a 2005 advisory opinion that a recommendation to a participant whether to take a plan distribution would not generally constitute investment advice under ERISA (75 FR 65266). The Department has apparently received some expressions of concern regarding this position. We respectfully suggest that these comments may point the Department in the wrong direction.

As an initial matter, there are a substantial number of factors that should be considered by a participant who is eligible to withdraw his or her plan account. Of course, the initial question is whether to maintain the funds on a tax deferred basis. The Code Section 402(f) tax notice is an example of information intended to help with that analysis. In some cases, the participant

may need to request a distribution to satisfy current financial needs. Assuming the participant wants to keep the funds in a retirement account, however, the participant then needs to compare options available under the employee benefit plan with those available under an individual retirement account or annuity (“IRA”).

Some comments previously submitted to the Department have taken the view that it is always in the best interest of a retiring participant to leave funds in the plan rather than rollover to an IRA. To the contrary, however, there is no one-size-fits-all answer to that question. The participant may benefit from plan fiduciary oversight or, in some cases, from lower expenses ratios in certain plan investment options. On the other hand, plan sponsors may maintain a relatively small universe of investment options, particularly in light of the new fee and fund information requirements for designated investment options. IRAs also provide a vehicle for consolidation that allows an individual to manage his or her retirement assets in one place. Even more critical, most plans do not offer options specifically designed to provide retirement income, such as annuities or income distribution funds. Participants need help in determining which considerations are most important to their own situation.

We think that it would be a mistake to view recommendations regarding the factors to be considered in deciding whether to rollover a plan account balance as investment advice. Interpretive Bulletin 96-1 (the “Bulletin”) provides that information and materials that inform a participant or beneficiary about the benefits of plan participation and information on the investment alternatives under the plan do not constitute the rendering of investment advice under ERISA. The rationale is that such information and materials “relate to the plan and plan participation, without reference to the appropriateness of any individual investment option for a particular participant or beneficiary under the plan”. The same rationale applies with equal force as a participant or beneficiary considers whether to leave the plan.

A decision to rollover funds does not by itself involve the selection of one investment option versus another even absent the ability to make an “in kind” rollover of plan investments. Just as a decision to enroll in a plan does not dictate how to invest the resulting contributions, a decision to leave the plan does not by itself dictate the change in asset allocation in retirement. Assuming a complete rollover of the account balance, all plan account investments would be redeemed without regard to the merits of one investment versus another. Moreover, in many cases the redemption of investments in connection with a distribution would be required pursuant to the terms of the plan (i.e., many plans do not provide for distributions in kind) rather than as the result of any recommendation.

The 2005 advisory opinion is not the first time that the Department has taken the position that distribution recommendations do not constitute investment advice. The Federal Register

notice of the Bulletin included the following in connection with pre-retirement withdrawals: “The Department, therefore, encourages educational service providers to emphasize that participants should: (1) participate in available plans as soon as they are eligible; (2) make the maximum contribution possible to the plan; and (3) if they change employment, refrain from withdrawing their retirement savings, and opt instead to directly transfer or roll over their plan account into an IRA or other retirement vehicle. Such information relating to plan participation is specifically encompassed within the safe harbor in paragraph (d)(1) of IB 96-1 [61 FR 29588]”.

Finally, to the extent that information is provided with respect to the investment of an IRA rollover balance, that information should be subject to the guidelines set forth in the Bulletin. Additional comments on that aspect of the Proposal have been included in the other comment letter. Among other considerations, it is important to remember that most 401(k) and other individual account plans don’t offer annuity products or income distribution funds, either as an in-plan option or as a distribution option. Thus, useful educational modeling should inform the participant of possible options in investing or allocating funds withdrawn from the plan.

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The definitional changes included in the Proposal do not address recommendations with respect to plan distributions. If, notwithstanding the discussion provided above, the Department contemplates a reversal of its position on this issue, we respectfully request that such an approach should be issued in proposed form for public comment.

In conclusion, we would be pleased to provide any additional information that would be deemed useful to your deliberations on this topic.

Respectfully,



Douglas O. Kant
Senior Vice President and
Deputy General Counsel

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