



THE PROFIT SHARING AND 401(k) ADVOCATE ♦ SHARING THE COMMITMENT SINCE 1947

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delivered electronically

TO: United States Department of Labor
Washington, DC

RE: Proposed Regulation Amending Regulations 2550.404a-5 and 2550.404c-5 in Regards to Target Date Funds and Other Matters

I am pleased to comment on behalf of the Profit Sharing/401k Council of America (PSCA) on the proposed rule that provides amendments regarding the treatment of target date funds in regulation 2550-404a-5, that relates to disclosures in participant directed individual account plans; and provides amendments regarding target date funds and other disclosure requirements for all qualified default investment alternatives (QDIAs) in regulation 2550-404c-5, that relates to fiduciary relief for investments in a QDIA.

PSCA is a 64-year old nonprofit association representing companies that sponsor profit sharing, 401(k), and similar plans. PSCA speaks for over 1,200 companies who employ approximately five million plan participants throughout the United States. PSCA's members range in size from very small firms to conglomerates with hundreds of thousands of employees. All regard their defined contribution plans as vital factors in their business success.

PSCA believes that the disclosure requirements regarding asset allocations and investment strategies in target dates funds are noncontroversial and generally currently provided.

Automatic enrollment of plan participants and the use of target date funds as a default investment are moving the employer provided defined contribution system to a new level of success in accumulating retirement assets for American workers. PSCA's 53rd Annual Survey, reflecting 2009 plan experience, reveals that 62.3% of plans offer target date funds; up from 58% in 2008, 25% in 2005 and virtually none in 2000. Fifty-seven percent of plans with automatic enrollment have a target date fund as the default investment. Other research indicates that practically all new automatic enrollment arrangements select a target date fund default investment. Mutual fund products continue to be the product of choice for most qualified plans, and almost the exclusive choice for small and mid-size plans (stable value products are also prevalent in plans of all sizes).

Financial investment experts, by a broad consensus, recommend three basic principles for long-term capital appreciation, the method used to accumulate retirement assets. First, diversification among bonds,

equities, and cash-like investments provides the optimal balance between risk and return. Second, once an investment allocation is determined, periodic rebalancing is necessary to preserve the allocation ratio. Finally, the asset allocation ratio should be altered as an investment horizon shortens to reduce the volatility of returns. These three principles are the bedrock of a prudent investment policy for a defined contribution plan. Target date funds embrace these principles and apply them automatically to individual plan participants based on the participant's assumed retirement date.

We offer the following recommendations on specific issues raised in the proposed amendments.

Assumptions regarding behavior at the date on the target date fund

The proposed rule includes a requirement for plan fiduciaries and administrators, if a target date fund is named or otherwise described with reference to a particular date, to provide "any assumptions about a participant's or beneficiary's contribution and withdrawal intentions on or after such date." This requirement is in addition to other requirements to disclose the investments objectives, goals, and strategies, which will include significant information about the investment. An assumption, by definition, involves a degree of speculation or forecasting. PSCA is concerned that this disclosure may provide new fodder for the plaintiff's bar and lead to significant new fiduciary liabilities for plan fiduciaries. We recommend that this requirement not be included in the final rule.

When selecting a target date fund, or any plan investment option, the plan fiduciary must make a decision that serves the collective best interest of all participants and beneficiaries. Given the diverse and unique conditions that apply to each participant or beneficiary, any assumption provided pursuant to the proposed amendments could be inaccurate for any individual participant or beneficiary; and will be inaccurate for a significant portion of them. If this requirement is included in the final amendments, the Department should specify that the deviation from any assumption by any individual or groups of individuals should not be grounds for a cause of action against the plan fiduciary. The Department should also provide that the requirement can be satisfied by a statement that the plan administrator or fiduciary makes no assumption regarding a participant's or beneficiary's contribution and withdrawal intentions on or after such date.

A statement that a participant or beneficiary may lose money

Under both amendments, a disclosure is required that a participant or beneficiary may lose money by investing in a target date fund. (Under regulation 2550.404c-5 the disclosure is required "if applicable.") PSCA is far more concerned with the fact that this requirement is unique to target date funds than the nature of the disclosure.

The requirement to disclose that an investment may lose money does not apply to other investments under either regulation. (However, oddly, the model comparative chart under 2550.404a-5 includes the statement, "Your investment in these options could lose money.") Singling out target date funds for this notice can deliver two messages to participants and beneficiaries – that target date funds are more risky than other investment alternatives and/or that other investment alternatives do not have any risk of losing money. We urge the Department address this inconsistency.

Harmonization and coordination of disclosures

All plans with a QDIA are subject to the participant fee disclosure regulations under regulation 2550.404a-5. The proposed amendments for disclosures regarding target date funds in both regulations and the new proposed requirements for reporting expenses and fees under the QDIA regulation are generally common to both regulations, but the delivery methods differ. For example, the proposed information about a target date fund's investment principles and strategies must be reported on the

website under the participant disclosure regulation, but it must be provided directly under the QDIA regulation. Notwithstanding the 30-day advance notice requirement in the QDIA regulation, we urge the Department to amend the proposed amendments to permit satisfaction of the QDIA disclosure requirements by meeting the requirements of the participant fee disclosure regulations.

Specifically, we suggest that the QDIA notice requirements under proposed regulation 2550.404c-5(d)(3) be amended to remove the specific disclosure requirements of subsections (i) through (vi) and, instead, require (1) a statement directing the participant to the disclosures provided to them under 2550.404a-5, and (2) a citation to the Web address for the investment(s) defined under 2550.404a-5(d)(1)(v).

Certain disclosures for managed accounts

The proposed rule amends the QDIA regulation to require, among other things, numerous investment related disclosures such as historical performance, sales loads, surrender fees, and annual operating expenses. A managed account, as defined in 2550.404c-5(e)(4)(iii), is an investment management service that allocates a plan's investment options, or a subset of them, in a participant's individual account. As such, the service does not assess any investment-related fees, although it may assess a fee for the management service itself. The plan investment alternatives utilized in the service do, of course, assess various investment related fees that are subject to the participant fee disclosure final rule, as are any additional fees assessed by the investment management service. The total fees included in the managed account will likely vary when the investment management service reallocates the participant's account among various plan investment alternatives; or even by adjusting the allocations among a constant set of investments. All these factors result in the inability to report investment related fees or historical performance as single figures for a managed account QDIA. PSCA recommends that the final rule be amended to reflect this reality by removing these requirements for a managed account QDIA. The disclosures applicable to investment in a managed account QDIA can best be provided under the unified disclosure regime described in the preceding section of this letter.

Effective date should be coordinated with participant fee disclosure regulations

The proposed regulation provides that it will be effective 90 days after publication of the final rule. This presents the possibility this rule could be effective and applicable prior to the applicability date of the participant fee disclosure regulation, which is plan years beginning on or after November 1, 2011. Additionally, the 90 day period may not be sufficient to implement the new requirements. The final rule should be effective 180 days after publication and subsequently applicable for plan years beginning on or after November 1, 2011.

Thank you for considering our comments. If I can of any assistance, or if you have any questions, please do not hesitate to contact me at 202 863 7272.

Sincerely,

Edward Ferrigno