

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration****29 CFR Part 2550****RIN 1210-AA92****Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974; Automatic Rollovers****AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Request for information.

**SUMMARY:** Section 657(c) of the Economic Growth and Tax Relief Reconciliation Act of 2001 directs the Department of Labor (Department) to develop, through regulations, safe harbors relating to the automatic rollovers of certain mandatory tax-qualified plan distributions to individual retirement plans. Under these safe harbors, the designation of an institution and the investment of funds by a plan administrator to receive automatic rollovers in accordance with section 401(a)(31)(B) of the Internal Revenue Code (Code) would be deemed to satisfy the fiduciary requirements of section 404(a) of the Employee Retirement Income Security Act (ERISA). The purpose of this document is to request information from the public on issues relating to the development of these safe harbors and to assist in drafting regulations. The Department also seeks information on low-cost individual retirement plans for purposes of transfers under section 401(a)(31)(B) of the Code and for other uses that promote the preservation of assets for retirement income.

**DATES:** Written or electronic responses should be submitted to the Department of Labor on or before March 10, 2003.

**RESPONSES:** Written responses (preferably, at least three copies) should be addressed to the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, Washington, DC 20210, Attention: Automatic Rollovers RFI. All responses will be available for public inspection at the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, Washington, DC 20210. Electronic responses should contain "Automatic Rollovers RFI" in the subject line and be addressed to *e-ORI@pwba.dol.gov*.

**FOR FURTHER INFORMATION CONTACT:** Stacey A. Gillis or Katherine D. Lewis, Office of Regulations and

Interpretations, Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693-8510. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background**

Tax-qualified retirement plans are permitted to make an immediate distribution to a separating participant without the participant's consent if the present value of the participant's vested accrued benefit does not exceed \$5,000.<sup>1</sup> Recipients may choose to roll the plan distribution (cash-out) into an IRA<sup>2</sup> or another qualified plan, or they may retain the cash-out as a taxable distribution. Prior to making a distribution, plan administrators are required to provide the participant with a written explanation of the Code provisions under which the participant may elect to have the distribution transferred directly to an IRA or another qualified plan, the provision requiring tax withholding if the distribution is not directly transferred and the provisions under which the distribution will not be taxed if the participant transfers the distribution to an IRA or another qualified plan within 60 days of receipt.<sup>3</sup> In recent years, both plan sponsors and participants have indicated an interest in establishing rollover accounts as the default form of distribution option to encourage preservation of the amount distributed for retirement purposes and to mitigate the tax consequences to the participant with respect to the amount distributed.

In July 2000, the Internal Revenue Service (Service) issued Revenue Ruling 2000-36<sup>4</sup> approving a plan amendment which permitted a direct rollover to an IRA as the default distribution option for an involuntary cash-out of a qualified plan distribution of an amount greater than \$1,000 but less than or equal to \$5,000, whenever a separating employee failed to make an affirmative election to either choose a direct rollover or take a taxable cash payment. The Service held that the plan amendment requiring the direct rollover to an IRA in these circumstances did not cause the plan to fail to satisfy the requirements of sections 401(a)(31) and 411(d)(6) of the Code. The plan amendment also provided that in the case of a default direct rollover, the plan administrator would select an IRA

trustee, custodian, or issuer that is unrelated to the employer, establish the IRA with that trustee, custodian, or issuer on behalf of any separating employee, and make the initial investment choices for the account.

In this ruling, the Department advised the Treasury and the Service that, under Title I of the ERISA, in the context of a default direct rollover described in the ruling, the participant will cease to be a participant covered under the plan within the meaning of 29 CFR 2510.3-3(d)(2)(ii)(B), where the distribution constitutes the entire benefit rights of a participant, and the distributed assets will cease to be plan assets within the meaning of 29 CFR 2510.3-101.

However, the Department also noted that the selection of an IRA trustee, custodian or issuer and IRA investment for purposes of a default direct rollover would constitute a fiduciary act subject to the general fiduciary standards and prohibited transaction provisions of ERISA.<sup>5</sup> In addition, the Department stated that plan provisions governing the default direct rollover of distributions, including the participant's ability to affirmatively opt out of the arrangement, must be described in the plan's summary plan description furnished to participants and beneficiaries.

Subsequent to the issuance of Revenue Ruling 2000-36, section 657 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Public Law 107-16, amended section 401(a)(31) of the Code to require that, absent an affirmative election by the participant, certain mandatory distributions from a qualified retirement plan must be directly transferred to an individual retirement plan<sup>6</sup> of a designated trustee or issuer.

Specifically, section 657(a) of EGTRRA added a new section 401(a)(31)(B)(i) to the Code to provide that, in the case of a trust that is part of an eligible plan, the trust will not constitute a qualified trust unless the plan of which the trust is a

<sup>5</sup> See the Department's information letter to Diana Orantes Ceresi (Feb. 19, 1998) regarding the factors a plan fiduciary should consider in selecting a service provider. Among other things, a responsible plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the service provider, the quality of the services offered and the reasonableness of the fees charged in light of the services provided. Such process should also be designed to avoid self-dealing, conflicts of interest or other improper influence.

<sup>6</sup> Section 401(a)(31)(B)(i) of the Code requires the transfer to be made to an "individual retirement plan," which section 7701(a)(37) of the Code defines to mean an individual retirement account described in section 408(a) and an individual retirement annuity described in section 408(b), *i.e.* "IRA."

<sup>1</sup> Code sections 411(a)(11) and 417(e).

<sup>2</sup> "IRA" means an individual retirement account under section 408(a) of the Code and an individual retirement annuity under section 408(b) of the Code.

<sup>3</sup> Code section 402(f).

<sup>4</sup> Rev. Rul. 2000-36, 2000-2 C.B. 140.