

part provides that if a mandatory distribution of more than \$1,000 is made and the distributee (generally the participant) does not elect to have such distribution paid directly to an eligible retirement plan or receive the distribution directly, the plan administrator must transfer such distribution to an IRA of a designated trustee or issuer. Section 657(a)(1)(B)(ii) of EGTRRA defines an "eligible plan" as a plan which provides for an immediate distribution to a participant of any "nonforfeitable accrued benefit for which the present value (as determined under section 411(a)(11) of the Code) does not exceed \$5,000".

Additionally, section 657(a) of EGTRRA added a notice requirement in section 401(a)(31)(B)(i) of the Code requiring the plan administrator to notify the distributee in writing, either separately or as part of the notice required under section 402(f) of the Code, that the participant may transfer the distribution to another IRA.<sup>7</sup>

As part of these new EGTRRA provisions, section 657(c)(2)(A) directs the Department to issue final regulations providing safe harbors under which the plan administrator's designation of an institution to receive the automatic rollover and the initial investment choice for the rolled-over funds would be deemed to satisfy the fiduciary requirements of section 404(a) of ERISA. Moreover, the provisions requiring all tax-qualified retirement plans to make automatic rollovers to IRAs the default option for involuntary distributions of certain defined amounts will not become effective until the Department issues the safe harbor regulations.

Section 657(c)(2)(B) of EGTRRA also states that the Secretaries of Labor and Treasury may provide, and shall give consideration to providing, special relief with respect to the use of low-cost individual retirement plans for purposes of Code section 401(a)(31)(B) transfers and for other uses that promote the preservation of assets for retirement income.

## B. Issues Under Consideration

### *Automatic Rollover Safe Harbors*

The Department is interested in comments regarding appropriate standards for the development of safe harbors under which the designation of an institution providing an IRA to receive the automatic rollover of funds and the initial investment choice for the rolled-over funds would be deemed to satisfy the fiduciary requirements of

section 404(a) of ERISA. A list of some of the issues with respect to which comments are requested is included below. Responses on other issues pertinent to the Department's consideration are also invited.

As a framework for these comments, the Department notes that existing Treasury regulations describe fundamental requirements that must be satisfied in order for IRAs to maintain their tax classification under the Code.<sup>8</sup> Any standards made part of a safe harbor would supplement such requirements.

### *Request for Information*

1. *Standards for Safe Harbor Entity:* What criteria should apply to the Department's determination that an IRA custodian, trustee or issuer (IRA provider) qualifies as a safe harbor entity? Should the standards differ depending on whether the IRA is an account or an annuity? Should IRA providers who are existing plan service providers receive any special consideration if plan investments can be rolled directly in-kind without transaction fees for liquidating plan investments and purchasing IRA investments?

2. *Standards for Safe Harbor Initial Investment:* What criteria should apply to the Department's determination that an initial investment qualifies as a safe harbor investment? Should consideration be given to including or excluding specific investment vehicles in the safe harbor? If mutual funds are included, should they be limited to passively invested mutual funds such as index funds or include all publicly traded mutual funds? Should the criteria include specific asset allocation standards?

3. *Establishment Costs:* What is the range of establishment costs that IRA providers charge for the establishment or set-up of IRAs of the typical size of an automatic rollover and how do they vary? What factors should be considered in determining the reasonableness of these costs imposed by an IRA provider under the safe harbor? Should regulations clarify that establishment

costs are either an expense of the distributing plan or a charge to the IRA funds of the account-holder?

4. *Termination Costs:* What is the range of termination costs that IRA providers charge for the termination or closure of IRAs of the typical size of an automatic rollover and how do they vary? What factors should be considered in determining the reasonableness of these costs imposed by an IRA provider under the safe harbor?

5. *Maintenance Fees:* What is the range of maintenance and administrative fees that IRA providers charge for maintaining and administering IRAs of the typical size of an automatic rollover and how do they vary? What factors should be considered in determining the reasonableness of these fees imposed by an IRA provider under the safe harbor?

6. *Investment Fees:* What types of fees would be associated with the initial investment of the IRA? What types of fees would be associated with the ongoing investment vehicle of the IRA? What factors should be considered in determining the reasonableness of these fees imposed by an IRA provider under the safe harbor? Should the IRA principal be guaranteed with all investment fees, maintenance fees and establishment costs being charged to investment earnings?

7. *Surrender Charges:* What is the range of surrender charges that investment vehicles for IRAs of the typical size of an automatic rollover are subject to upon surrender or redemption, how do they vary and what circumstances trigger their imposition? What factors should be considered in determining the reasonableness of these charges imposed by an IRA provider under the safe harbor?

8. *Transfers within One Year:* Do IRA providers refund or waive in whole or part establishment costs, termination costs, maintenance fees or surrender charges for IRAs that are withdrawn or directly rolled over within one year of establishment by the account-holder? Should the Department consider refund or waiver features in determining whether an IRA provider or initial investment qualifies for safe harbor treatment?

9. *Prohibited Transaction Relief:* Is there a need for prohibited transaction relief that would enable a plan sponsor, as the plan administrator, to select itself or an affiliate as the IRA provider, or to choose an initial investment in which it may have an interest? If relief is needed, what safeguards should be imposed with respect to such relief?

10. *Legal Impediments:* What legal impediments are plan administrators

<sup>7</sup> Conforming amendments to Code sections 401(a)(31) and 402(f)(1) were also made by section 657 of EGTRRA.

<sup>8</sup> For example, with respect to individual retirement accounts, 26 CFR 1.408-2(b)(2)(i) states that the trustee of an individual retirement account must be a bank (as defined in § 408(n) of the Code and regulations thereunder) or another person who demonstrates, in the manner described in paragraph (e) of the regulation, to the satisfaction of the Service, that the manner in which the trust will be administered will be consistent with § 408(e) of the Code and with the regulation. With respect to individual retirement annuities, 29 CFR § 1.408-3 describes, among other things, requirements that must be met in order to maintain the tax-qualified status of such annuity arrangements.