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Via E-mail and UPS Overnight Mail

ORI@dol.gov

Office of Regulations and Interpretations,
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attn: Default Investment Regulation (RIN 1210-AB10)

Dear Madam or Sir:

These comments are filed by the National Coordinating Committee for Multiemployer Plans (NCCMP) in response to the request by the Department of Labor's Employee Benefits Security Administration (EBSA) for public comments on its Proposed Rules to implement recent amendments to Title I of the Employee Retirement Income Security Act of 1974 (ERISA) enacted as part of the Pension Protection Act of 2006 (PPA), Public Law 109-280 under which a participant of a participant directed individual account pension plan¹ will be deemed to have exercised control over assets in his or her account if, in the absence of investment directions from the participant, the plan invests in a "qualified default investment alternative."²

¹ See ERISA § 404(c), 29 U.S.C. § 1104(c).

² PPA § 624.

Background

The NCCMP is the only national organization devoted exclusively to protecting the interests of the workers, retirees, and their families who rely on multiemployer plans³ for pension, health and other benefits. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, food production, distribution and retail sales, health care, hospitality, mining, maritime, industrial fabrication, service, textile, and trucking industries.

Over the past thirty years, more and more employers and the labor organizations representing their employees have established multiemployer defined contribution pension plans, including a growing number of 401(k) plans, to supplement the pensions provided under long-established multiemployer defined benefit plans. This growth in the number of multiemployer defined contribution pension plans parallels an overall decline in private sector defined benefit plans and a concomitant increase in defined contribution plans over this period.⁴

While we note that continued growth in the number of defined contribution plans and the number of workers participating in such plans provides an important source of retirement security to workers and their families, we concur in the general observation that many workers are not taking full advantage of the opportunities

³ Under ERISA, a multiemployer plan is a plan “(i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary [of Labor] may prescribe by regulation.” *See* ERISA section 3(37)(A), 29 U.S.C. §1002(37)(A).

⁴ Since the mid-1970s there has been a gradual shift away from defined benefit plans to defined contribution plans. The number of PBGC-insured defined benefit plans peaked in 1985 at about 114,000. By 2001, the number of PBGC-insured defined benefit plans had declined almost 70 percent. According to the PBGC, in 1980, 38 percent of the private sector workforce participated in defined benefit pension plans, and by 1998, the percentage had declined to 22 percent. By contrast, in 1980, about two-thirds of workers who had a defined benefit pension plan participated in no other employer sponsored pension plan; yet by 1998, this ratio had reversed with only one-third participating in no other pension plan. While the number of defined benefit pension plans declined, 401(k) plans and other defined contribution plans grew. Since the early 1980s, the number of 401(k) plans has grown from 17,000 to over 300,000 by 1998. *See* Statement of Steven Kandarian, PBGC Executive Director, before the Subcommittee on Oversight Committee on Ways and Means, U.S. House of Representatives (June 20, 2002) (www.pbgc.gov/media/news-archive/EscecutiveTestimony/tm14601.html).

these plans offer employees in preparing for retirement.⁵ Moreover, we find that without better statutory or regulatory guidance, the boards of trustees of most multiemployer 401(k) plans, along with their employer and union sponsors, have been reluctant to adopt automatic enrollment provisions (*i.e.*, provisions that require participants to affirmatively opt out of participation).

Identifying these concerns, Congress included in the PPA a number of provisions designed to further enhance the appeal of defined contribution plans as a means of providing greater retirement security to employees and their families. For instance, several provisions of the PPA expand the relief accorded fiduciaries of ERISA section 404(c) plans during periods where participants may not actually have control over assets in their accounts.

Under current law, the relief granted fiduciaries of “participant-directed” defined contribution plans is described in ERISA section 404(c)(1):

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary [of Labor])—

- (A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
- (B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control.

ERISA section 404(c)’s “exercise of control” provision requires that in order for fiduciaries to have these protections participants must *affirmatively* exercise control over the assets in their accounts:

While ERISA section 404(c) may serve to relieve certain fiduciaries from liability when participants or beneficiaries exercise control over the assets in their individual accounts, the Department of Labor has taken the position that a participant or beneficiary will not be considered to have exercised control when the participant is merely apprised of investments

⁵ See *e.g.*, Statement of David M. Walker, Comptroller General of the United States, *Private Pensions: Key Issues to Consider Following the Enron Collapse*, 5-6 (Testimony before the Senate Finance Committee) GAO-02-480T (Feb. 27, 2002).

that will be made on his or her behalf in the absence of instructions to the contrary.⁶

Thus, a fiduciary receives no section 404(c)(1) relief for the investment of assets held in the accounts of those plan participants who fail to affirmatively direct assets even though that fiduciary may have thoughtfully designed a section 404(c) plan in full compliance with Department of Labor regulations.⁷ Accordingly, that fiduciary must ensure that the plan continues to comply with the Department's regulations governing ERISA section 404(c) plans for plan participants who affirmatively exercise control of assets in their account while, in the case of those participants who fail to affirmatively direct investments, assume all fiduciary obligations associated with non-404(c) plans.

As long as an ERISA section 404(c) plan has participants who fail or refuse to affirmatively control assets in their accounts, the fiduciaries administering that plan will never be accorded complete ERISA section 404(c)(1) protection under current law. One might consider this an anomaly but for the fact that ERISA does not set forth standards for "default" investment vehicles for participants of ERISA section 404(c) plans who fail to exercise control over the assets in their accounts. Through PPA § 624, Congress sought to resolve this problem by directing the Secretary of Labor to issue regulations that will "provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long term capital appreciation, or a blend of both." ERISA section 404(c)(5)(A) (as amended by PPA § 624(a)).

Comments Regarding the Preamble of the Proposed Rule

We welcome those provisions of the PPA that promote automatic enrollment as well as those provisions of the PPA that, under special circumstances, accord fiduciaries relief previously available only when a participant exercised actual control over the assets in his or her individual account. Specifically, the PPA expands the scope of fiduciary relief described in ERISA section 404(c)(1) in three cases: (1) during periods when the plan invests the assets in a participant's account in a qualified default investment alternative (the subject of this rulemaking); (2) when a "qualified change in

⁶ Retirement Plans, Cash or Deferred Arrangements under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m) Regulations, 69 CFR 78144, 78146 n.2 (Dec. 29, 2004) (codified at 26 CFR pts. 1 & 602) (citing 29 CFR §2550.404c-1).

⁷ See 29 CFR §2550.404c-1

investment options” occurs and; (3) during “blackout periods” in which the plan’s sponsor or fiduciaries comply with ERISA section 101(i) and relevant regulations.⁸

As an initial matter, we find that the observations and reasoning set forth in the preamble of the Proposed Rule reassuring on several scores. First, the preamble expressly states what trustees of defined contribution plans and their investment advisors have assumed for a number of years: short-term investment, money market or stable value funds may “play a useful role as a component of a diversified portfolio; [h]owever, when such funds become the exclusive investment of participants and beneficiaries, it is unlikely that the rate of return generated by those funds over time will be sufficient to generate adequate retirement savings for most participants and beneficiaries.” 71 FR at 56807.⁹

Second, notwithstanding the first observation, “the Department recognizes investments in money market funds, stable value products and similarly performing investment vehicles may be prudent for some participants or beneficiaries.” *Id.* Accordingly, the Proposed Rule establishes three “qualified default investment alternatives”—two of which are designed to “provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant’s age, target retirement date . . . or life expectancy, and a third 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 participant of the plan as a whole.” 71 FR at

⁸ See PPA §§ 624 and 621 (amending ERISA section 404(c)). PPA § 624 applies to plan years beginning after December 31, 2006. PPA § 624(b)(1). However, the provisions of PPA §621 dealing with blackout periods and qualified changes in investment options apply for plan years beginning in 2008 for non-collectively bargained plans and, in the case of multiemployer plans and other collectively bargained plans, the earlier of—

1. the later of—
 - a. December 31, 2008 or
 - b. the date on which the last of the collective bargaining agreements expires without regard to any extensions after August 17, 2006; or

2. December 31, 2009.

PPA §621(b)(1) and (2).

⁹ The courts also have cautioned against overly conservative investments in the context of defined contribution plans. See e.g., *Meyer v. Berkshire Life Insurance Company*, 250 F. Supp. 2d 544, 565-566 (D. Md. 2003) (plan’s investment manager did not invest plans’ assets in an objectively prudent manner where it invested part of the plan’s assets in life insurance policies and invested the rest of the plan’s assets “very conservatively.”).

56810. Happily, many of our multiemployer 404(c) plan affiliates have been prescient enough to establish as their default options investment vehicles that meet the requirements of one of these qualified default investment alternatives.

Third, with regards to the Proposed Rule's advance notice requirement, the Department notes that:

the phrase—"in advance of the first such investment [in a qualified default investment alternative]"—is not intended to foreclose availability of relief to fiduciaries that, prior to the adoption of a final regulation, invested assets on behalf of participants and beneficiaries in a default investment alternative that would constitute a "qualified default investment alternative" under the regulation. In such cases, the phrase "in advance of the first such investment" should be read to mean the first investment with respect to which relief under the Proposed Rule is intended to apply after the effective date of the regulation.

71 FR at 56808. We gather that the Department takes this reasonable position because the alternative view would water down significantly the fiduciary relief provided by PPA § 624 in those instances where plans established default options that meet the requirements of a qualified default investment alternative before the effective date of § 624. That is, without this "prior adoption rule," the fiduciaries of these plans would not obtain the relief provided under ERISA section 404(c)(1) for the portion of a participant's individual account that was invested in the default option prior to the effective date of PPA § 624.

The NCCMP's comment concerns situations not unlike the one described above. As discussed below, we urge the Department to expand this exception to the regulation's advance notice requirement where, due to the manner in which employers remit contributions to many multiemployer plans, 30-day advance notice to the participant is not possible.

**NCCMP Comments Regarding
Notice in Advance of a Participant's First
Investment in a Default Investment Arrangement**

PPA § 624 amends ERISA subsection 404(c) by adding new paragraph (5) ("Default Investment Arrangements") to that subsection. New subparagraph 404(c)(5)(B) sets forth annual notice requirements relating to default investment arrangements:

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

Under the Proposed Rule, in order for a fiduciary to qualify for relief under ERISA section 404(c)(1), six conditions must be met. The third of these conditions relates to this notice requirement—

The participant or beneficiary on whose behalf an investment in a qualified default investment alternative may be made is furnished within a reasonable time of at least 30 days in advance of the first such investment and within a reasonable period of time of at least 30 days in advance of each subsequent plan year, a summary plan description, summary of material modification, or other notice that meets the [notice requirements of the Proposed Rule].

Prop. Reg. §2550.404c-5(c)(3). We note, however, that unlike new subparagraph 404(c)(5)(B), the Proposed Rule requires two types of advance notice: (1) *annual* advance notice and (2) *first investment* advance notice.

Neither the Proposed Rule nor the preamble describe how a failure to furnish timely notice will impact a fiduciary's right to relief under ERISA section 404(c)(1). For instance, if a plan provides notice only 29 days in advance of the first investment in a qualified default investment alternative, will the fiduciary lose all relief afforded trustees under section 404(c)(1) for all subsequent investments the plan makes to a qualified default investment alternative on behalf of that participant? If so, the trustees of many multiemployer 404(c) plans that established default investment options that satisfy the Proposed Rule's qualified default investment alternative requirements would nevertheless be excluded from the relief Congress provided under PPA § 624. That is, due to the manner in which the collective bargaining parties have determined the due date of contributions to multiemployer 404(c) plans, there is no practical way for the plans to provide new participants with the written notice prescribed in §2550.404c-5(d) at least 30 days in advance of the first investment in the plan's qualified default investment alternative.

In general, employers maintaining a multiemployer defined contribution plan remit contributions to that plan once a month. Trust documents of multiemployer plans—incorporating terms established by the collective bargaining parties—will describe the timing of these contributions. Generally, contributions are due after the first of the month immediately after the month work is performed by the employee, and the due date may range from 10 to 25 days after the end of the work month.

A common characteristic of the industries where multiemployer plans are prevalent requires that employees frequently move from employer to employer. Moreover, workers employed in these industries may have to travel throughout the country in order to find work. Under these circumstances, multiemployer defined contribution plans receive a high volume of first-time contributions made on behalf of employees without any advance notice from their employers of their participant status. Multiemployer plans establish procedures that allow them to contact the employer and union of a new participant in order to obtain that participant's contact information. As soon as possible after receiving contact information, these plans will send plan information to the new participant. While an employer sponsor of a single employer plan will know the identify and contact information of a new participant at the time that participant is hired, the first notice that a multiemployer plan often has of a new participant is the receipt of contributions on behalf of that participant. This is the case with employer funded plans and 401(k) plans with automatic enrollment.

As a result of these factors, many multiemployer 404(c) plans, upon learning of a new participant, will immediately establish his or her individual account and invest contributions made on behalf of that participant in the plan's default option.¹⁰ As a consequence, these plans cannot satisfy the 30-day notice requirement of §2550.404c-5(c)(3) of the Proposed Rule.

As noted above, the preamble of the Proposed Rule provides an exception to the requirement that notice be given 30 days in advance of the first investment in a qualified default investment alternative in cases where, prior to the adoption of the final regulation, the plan invested assets on behalf of participants in a default investment alternative that would have constituted a qualified default investment alternative. The preamble instructs that in such cases a plan will satisfy the notice requirement if it provides notice to participants 30 days before the effective date of the final regulation. We understand this to mean that as long as such plans provide notice to participants at least 30 days before the effective date of the regulation,¹¹

¹⁰ Multiemployer defined contribution plans often provide immediate participation and vesting.

¹¹ The proposed effective date of the final rule is 60 days after the publication of the final rule. 71 FR at 56808.

fiduciaries of these plans will be granted the relief provided under ERISA section 404(c)(1) for the investments made to the qualified default investment alternative both *before and after* the notice is given.

Similar treatment should be afforded multiemployer plans where it is not administratively feasible for them to provide 30-days advance notice. We note that while the statute requires annual notice within a reasonable time before each plan year, it does not expressly require that notice be given in advance of a plan's initial investment of a participant's account in a qualified default investment alternative. Nevertheless, we understand why notice at the time of initial investment furthers the purpose of PPA § 664. For instance, such a rule informs a participant who first has his or her account invested in a plan's qualified default investment alternative soon after the start of a plan year to receive the detailed information contained in the notice described in Prop. Reg. §2550.404c-5(d) well before the end of that plan year. However, we question whether the purpose of the notice requirements of PPA § 624 is impaired where the rule's "initial investment notice" (as opposed to the statute's annual notice) is provided within a reasonable time after the plan first invests the assets of a participant's account in a qualified default investment alternative.¹²

To ensure that the rights of participants are protected while still affording fiduciaries the protections accorded them under PPA § 624, we suggest that §2550.404c-5(c)(3) of the Proposed Rule be revised. A suggested revision is set forth below.

(c)(1) *Notice (new participants)*. The participant on whose behalf an investment in a qualified default investment alternative may be made is furnished as soon as administratively feasible after the plan receives for the first time contributions made on such participant's behalf a summary plan description, summary of material modification, or other notice that meets the requirements of paragraph (d) of this section. The relief described in paragraph (b)(1) of this section will be effective for all investments in a qualified default investment alternative 30 days after the plan provides such notice to the participant.

¹² We note that PPA § 624 does not expressly direct the Secretary of Labor to issue regulations regarding the notice requirements of PPA § 624. Rather, PPA § 624 provides that the notice requirements of clauses (i) and (ii) of section 401(k)(12)(D) of the Internal Revenue Code of 1986 apply with respect to the notices described in ERISA section 404(c)(5)(B). Section 401(k)(12) of the Code sets forth alternative methods of meeting 401(k) nondiscrimination requirements and section 401(k)(12)(D) requires that participants receive *annual advance notice* of any such arrangement. Clauses (i) and (ii) of section 401(k)(12)(D) require that the notice must be (i) "sufficiently accurate and comprehensive to appraise the employee of such rights and obligations" and (ii) "written in a manner calculated to be understood by the average employee eligible to participate."

(2) *Annual advance notice.* In addition to the notice prescribed in paragraph (1), the participant or beneficiary on whose behalf an investment in a qualified default investment alternative may be made is furnished within a reasonable period of time of at least 30 days in advance of each plan year, a summary plan description, summary of material modification, or other notice that meets the requirements of paragraph (d) of this section.

We believe a revision such as the one set forth above recognizes the unique characteristics of many multiemployer 404(c) plans while preserving the rights and protections PPA § 624 and the Proposed Rule should accord all participants.

Finally, we note that the Proposed Rule does not explain how failure to provide timely notice will affect a fiduciary *vis-à-vis* protections granted under ERISA section 404(c)(1) and Prop. Reg. §2550.404c-5(b). We request that the Department clarify this issue. We believe the most reasonable approach to effectuate the purpose of PPA § 624 would be a temporary suspension of the protections afforded fiduciaries under ERISA section 404(c)(1) for periods when proper notice is not provided. Thus, a fiduciary will not be relieved from his or her fiduciary duties under ERISA or from any liability that results from a failure to satisfy those duties, including liability for any resulting loss, for any periods that notice under Prop. Reg. §2550.404c-5(d) is not timely given in accordance with Prop. Reg. §2550.404c-5(c)(3). For example, where a plan inadvertently fails to give a participant initial investment notice in accordance with Prop. Reg. §2550.404c-5(c)(3)(1), a fiduciary will not be relieved from fiduciary duties under ERISA relating to that participant's investment in a qualified default investment alternative until the plan provides the participant with timely annual advance notice.

We appreciate the opportunity to comment on this Proposed Rule and urge your careful consideration of the recommendations set forth above. We also request the opportunity to explain and expand on these comments in the event any of our comments require further clarification.

Respectfully submitted,

Joyce A. Mader
John M. McIntire
On behalf of the National
Coordinating Committee for
Multiemployer Plans