

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration****29 CFR Part 2509**

RIN 1210-AA50

Interpretive Bulletin 96-1; Participant Investment Education**AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Interpretive bulletin.

SUMMARY: This interpretive bulletin sets forth the views of the Department of Labor (the Department) concerning the circumstances under which the provision of investment-related information to participants and beneficiaries in participant-directed individual account pension plans will not constitute the rendering of "investment advice" under the Employee Retirement Income Security Act of 1974, as amended (ERISA). This guidance is intended to assist plan sponsors, service providers, participants and beneficiaries in determining when activities designed to educate and assist participants and beneficiaries in making informed investment decisions will not cause persons engaged in such activities to become fiduciaries with respect to a plan by virtue of providing "investment advice" to plan participants and beneficiaries for a fee or other compensation.

EFFECTIVE DATE: January 1, 1975.**FOR FURTHER INFORMATION CONTACT:**

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SUPPLEMENTARY INFORMATION: In order to provide a concise and ready reference to its interpretations of ERISA, the Department publishes its interpretive bulletins in the Rules and Regulations section of the Federal Register. Published in this issue of the Federal Register is ERISA Interpretive Bulletin 96-1, which interprets section 3(21)(A)(ii), 29 U.S.C. 1002(21)(A)(ii), and the Department's regulation issued thereunder at 29 CFR 2510.3-21(c). The Department is publishing this interpretive bulletin because it believes there is a need to clarify the circumstances under which the

provision of investment-related information to participants and beneficiaries will not give rise to fiduciary status under ERISA section 3(21)(A)(ii).

(Sec. 505, Pub. L. 93-406, 88 Stat. 894 (29 U.S.C. 1135).)

Background

With the growth of participant-directed individual account pension plans, more employees are directing the investment of their pension plan assets and, thereby, assuming more responsibility for ensuring the adequacy of their retirement income.* At the same time, there has been an increasing concern on the part of the Department, employers and others that many participants may not have a sufficient understanding of investment principles and strategies to make their own informed investment decisions. It has been represented to the Department that, while a number of employers sponsoring participant-directed individual account pension plans have instituted programs intended to educate their employees about investment principles, financial planning and retirement, many employers have not offered programs or offered only limited programs due to uncertainty regarding the extent to which the provision of investment-related information may be considered the rendering of "investment advice" under section 3(21)(A)(ii) of ERISA, resulting in fiduciary responsibility and potential liability in connection with participant-directed investments. Although section 404(c) of ERISA, 29 U.S.C. 1104(c), and the Department's regulations, at 29 CFR 2550.404c-1, provide limited relief from liability for fiduciaries of pension plans that permit a participant or beneficiary to exercise control over the assets in his or her individual account, there remains a need for employers and others who provide investment information with respect to pension plan assets to know what standards apply in determining whether an education activity may give rise to fiduciary status.

In view of the important role that investment education can play in

* Under section 3(2) of ERISA, 29 U.S.C. 1002(2), the term "pension plan" encompasses any plan, fund or program established or maintained by an employer or employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances, it provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. The Department notes that, for purposes of Title I of ERISA, an employer-sponsored individual retirement account (IRA) is considered to be an individual account pension plan. See 29 CFR 2510.3-2(d).

assisting participants and beneficiaries in making informed investment and retirement-related decisions and the uncertainty relating to the fiduciary implications of providing investment-related information to participants and beneficiaries, the Department is clarifying, herein, the application of ERISA's definition of the term "fiduciary with respect to a plan" in section 3(21)(A)(ii) to the provision of investment-related information to participants and beneficiaries.

Interpretive Bulletin 96-1 identifies categories of information and materials regarding participant-directed individual account pension plans that do not, in the view of the Department, constitute "investment advice" under the definition of "fiduciary" in ERISA section 3(21)(A)(ii) and the corresponding regulation at 29 CFR 2510.3-21(c)(1). The interpretive bulletin points out, in effect, a series of graduated safe harbors under ERISA for plan sponsors and service providers who provide participants and beneficiaries with four increasingly specific categories of investment information and materials—plan information, general financial and investment information, asset allocation models and interactive investment materials—as described in paragraph (d) of IB 96-1.

Comments on the Interpretive Bulletin

Interpretive Bulletin 96-1 was developed following extensive review of educational materials currently being provided by plan sponsors and service providers to participants. To further ensure that the guidance provided would be helpful, and would promote increased and improved participant education efforts, the Department also released an exposure draft of the interpretive bulletin for public comment. The response to the exposure draft was overwhelmingly positive. Both plan sponsor and service provider representatives unequivocally agreed that the guidance as drafted would strengthen participant investment education, and urged the Department to proceed as expeditiously as possible to adopt the interpretive bulletin. The commenters also suggested various technical and clarifying changes which, as discussed below, have been included in the interpretive bulletin.

Identifying Specific Investment Alternatives in Model Asset Allocations

The most frequent comment on the exposure draft concerned the safe harbor provision in paragraphs (d)(3) (asset allocation models) and (d)(4) (interactive investment materials) that if

a model asset allocation identifies or matches any specific investment alternative available under the plan with a generic asset class, then all investment alternatives under the plan with similar risk and return characteristics must be similarly identified or matched. The commenters were concerned that in plans with investment alternatives offered by multiple service providers it would be difficult, and possibly inappropriate, for one service provider to identify and describe a competitor's products.

The requirement to identify other investment alternatives within an asset class was intended to address the concern that a service provider could effectively steer participants to a specific investment alternative by identifying only one particular fund in connection with an asset allocation model. Where it is possible to identify other investment alternatives within an asset class, the Department encourages service providers to do so. In response to the comments, however, safe harbors (d)(3) and (d)(4) have been revised to provide that, where an asset allocation model identifies any specific investment alternative available under the plan, an accompanying statement must indicate that other investment alternatives having similar risk and return characteristics may be available under the plan, and must identify where information on those investment alternatives may be obtained.

The Fiduciary Safe Harbors and Section 404(c)

Several commenters requested clarification of the statement in the exposure draft that issues relating to the circumstances under which information provided to participants and beneficiaries may affect their ability to exercise independent control for purposes of 404(c) are outside the scope of the IB. The commenters were concerned that activities which come within one of the safe harbors for participant education may nevertheless be viewed by the Department as compromising a participant's or beneficiary's ability to exercise independent control under section 404(c).

Whether a participant or beneficiary has exercised independent control over the assets in his or her individual account pursuant to section 404(c) is necessarily a factual inquiry. In general, however, the types of educational programs described in the safe harbors do not, in the view of the Department, raise issues under section 404(c). Accordingly, footnote 2 of IB 96-1 makes clear that the provision of

investment-related information and materials to participants and beneficiaries in accordance with paragraph (d) of the IB will not, in and of itself, affect the availability of relief from the fiduciary responsibility provisions of ERISA that is provided by section 404(c).

Applying Asset Allocations to Individual Participants and Beneficiaries

A number of commenters asked the Department to clarify the requirement to provide a statement that individual participants and beneficiaries should consider their other assets, income or investments (outside of the plan) when applying an asset allocation model or using interactive investment materials. The commenters pointed out that, in many instances, interactive models or materials already take into account an individual's other assets. Accordingly, they requested clarification that such models or materials come within the safe harbor in paragraph (d)(4). Commenters were also concerned that given the rationale for the safe harbor in paragraph (d)(4)—*i.e.* that interactive investment models or materials enable participants and beneficiaries independently to design and assess multiple asset allocation models—the Department may have intended to exclude from the safe harbors situations in which service providers assist individual participants or beneficiaries to develop possible asset allocation models based upon their personal financial information.

The provisions of the safe harbors are designed to ensure that participants and beneficiaries will have adequate information to enable them to make their own, informed asset allocation decisions. The Department has clarified that the safe harbor in paragraph (d)(4) for interactive investment materials would not be unavailable merely because the asset allocation models generated by the materials take into account a participant's or beneficiary's non-plan assets, income and investments. Nor does the Department consider that the safe harbor would be unavailable merely because participants and beneficiaries receive personal assistance in developing model asset allocations. In this regard, paragraph (d) of the IB states that providing the categories of information identified in paragraph (d) will not in and of itself constitute the rendering of "investment advice" irrespective of the form in which the materials are provided (*e.g.*, whether on an individual or group basis, in writing or orally, or via video or computer software). The interpretive

bulletin also makes clear that information and materials within each category may be furnished alone or combined with information and materials from other categories. For example, general financial and investment information on estimating future retirement income needs, determining investment time horizons and assessing risk tolerance, as described in paragraph (d)(2), may be combined with interactive investment materials described in paragraph (d)(4) in order to assist participants and beneficiaries to relate basic retirement planning concepts to their individual situations.

Generally Accepted Investment Theories

Several commenters requested clarification of the requirement that asset allocation models and interactive investment materials must be based on "generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over defined periods of time." The Department included this requirement to assure that, for purposes of the safe harbors, any models or materials presented to participants or beneficiaries will be consistent with widely accepted principles of modern portfolio theory, recognizing the relationship between risk and return, the historic returns of different asset classes, and the importance of diversification.

Plan Sponsor or Fiduciary Endorsements of Service Providers

The commenters also requested clarification regarding the circumstances in which a plan sponsor or fiduciary may be viewed as having fiduciary responsibility by virtue of endorsing a third party who has been selected by a participant or beneficiary to provide participant education or investment advice. Commenters noted, for example, that a plan sponsor may wish merely to provide office space or make computer terminals available for use by a service provider that has been selected by a participant or beneficiary to provide investment education using interactive materials. Whether a plan sponsor or fiduciary has effectively endorsed or made an arrangement with a particular service provider is an inherently factual inquiry which depends upon all the relevant facts and circumstances. It is the Department's view, however, that a uniformly applied policy of providing office space or computer terminals for use by participants or beneficiaries who have independently selected a service provider to provide investment

education would not, in and of itself, constitute an endorsement of or arrangement with the service provider for purposes of the IB.

Participation Rates, Contribution Levels and Preretirement Withdrawals

With the objective of distinguishing between investment education and investment advice, IB 96-1 focuses primarily on educational activities relating to investment decision-making. However, as suggested in a recent study by the Employee Benefits Research Institute (EBRI), which was commissioned by the Department of Labor, plan participants also need to be informed about the impact on retirement savings of preretirement withdrawals and other fundamental principles regarding plan participation and contribution levels. According to the EBRI study, the impact of preretirement withdrawals on retirement income is one of the least often provided topics and could have serious consequences for the adequacy of employees' retirement income. 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.

Application of the Investment Advisers Act of 1940

Employer sponsors of participant-directed individual account pension plans that provide investment-related information to employees who are participants in those plans have also raised questions regarding their status under the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, ("Advisers Act"). In this regard, the staff of the Division of Investment Management of the Securities and Exchange Commission (SEC) has advised the Department of Labor that, generally, employers who provide their employees with investment information including, but not limited to, the type described in paragraph (d) of IB 96-1 would not be subject to registration or regulation under the Advisers Act. This position applies only to employers who provide such information, and not to third-party service providers, whose status under the Adviser's Act must be

determined independently. See Letters from Jack W. Murphy, Associate Director (Chief Counsel), Division of Investment Management, SEC, to Olena Berg, Assistant Secretary, Pension and Welfare Benefit Administration, U.S. Department of Labor, dated February 22, 1996, and December 5, 1995. Persons who have questions regarding this issue are directed to contact the Office of the Chief Counsel, Division of Investment Management, at (202) 942-0660. This is not a toll free number.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Department must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in, among other things, a rule raising novel policy issues arising out of the President's priorities.

Pursuant to the terms of the Executive Order, the Department has determined that this regulatory action is a "significant regulatory action" as that term is used in Executive Order 12866 because the action would raise novel policy issues arising out of the President's priorities. Thus, the Department believes this notice is "significant," and subject to OMB review on that basis. OMB has reviewed this rule.

Paperwork Reduction Act

The regulation being issued here is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain an "information collection request" as defined in 44 U.S.C. 3502 (4).

Small Business Regulatory Enforcement Fairness Act

The regulation being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review.

List of Subjects in 29 CFR Part 2509

Employee benefits plans, Pensions.

For the reasons set forth above, Part 2509 of Title 29 of The Code of Federal Regulations is amended as follows:

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for Part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Section 2509.75-1 is also issued under 29 U.S.C. 1114. Sections 2509.75-10 and 2509.75-2 are also issued under 29 U.S.C. 1052, 1053, 1054. Secretary of Labor's Order No. 1-87 (52 FR 13139).

2. Part 2509 is amended by adding new § 2509.96-1 to read as follows:

§ 2509.96-1 Interpretive Bulletin Relating to Participant Investment Education.

(a) *Scope.* This interpretive bulletin sets forth the Department of Labor's interpretation of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and 29 CFR 2510.3-21(c) as applied to the provision of investment-related educational information to participants and beneficiaries in participant-directed individual account pension plans (*i.e.*, pension plans that permit participants and beneficiaries to direct the investment of assets in their individual accounts, including plans that meet the requirements of the Department's regulations at 29 CFR 2550.404c-1).

(b) *General.* Fiduciaries of an employee benefit plan are charged with carrying out their duties prudently and solely in the interest of participants and beneficiaries of the plan, and are subject to personal liability to, among other things, make good any losses to the plan resulting from a breach of their fiduciary duties. ERISA sections 403, 404 and 409, 29 U.S.C. 1103, 1104, and 1109. Section 404(c) of ERISA provides a limited exception to these rules for a pension plan that permits a participant or beneficiary to exercise control over the assets in his or her individual account. The Department of Labor's regulation, at 29 CFR 2550.404c-1, describes the kinds of plans to which section 404(c) applies, the circumstances under which a participant or beneficiary will be considered to have exercised independent control over the assets in his or her account, and the consequences of a participant's or beneficiary's exercise of such control.¹

With both an increase in the number of participant-directed individual account plans and the number of investment options available to participants and beneficiaries under such plans, there has been an increasing recognition of the importance of providing participants and beneficiaries,

¹ The section 404(c) regulation conditions relief from fiduciary liability on, among other things, the participant or beneficiary being provided or having the opportunity to obtain sufficient investment information regarding the investment alternatives available under the plan in order to make informed investment decisions. Compliance with this condition, however, does not require that participants and beneficiaries be offered or provided either investment advice or investment education, *e.g.* regarding general investment principles and strategies, to assist them in making investment decisions. 29 CFR 2550.404c-1(c)(4).

whose investment decisions will directly affect their income at retirement, with information designed to assist them in making investment and retirement-related decisions appropriate to their particular situations. Concerns have been raised, however, that the provision of such information may in some situations be viewed as rendering "investment advice for a fee or other compensation," within the meaning of ERISA section 3(21)(A)(ii), thereby giving rise to fiduciary status and potential liability under ERISA for investment decisions of plan participants and beneficiaries.

In response to these concerns, the Department of Labor is clarifying herein the applicability of ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c) to the provision of investment-related educational information to participants and beneficiaries in participant directed individual account plans.² In providing this clarification, the Department does not address the "fee or other compensation, direct or indirect," which is a necessary element of fiduciary status under ERISA section 3(21)(A)(ii).³

(c) *Investment Advice.* Under ERISA section 3(21)(A)(ii), a person is considered a fiduciary with respect to an employee benefit plan to the extent that person "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority to do so * * *." The Department issued a regulation, at 29 CFR 2510.3-21(c), describing the circumstances under which a person will be considered to be rendering "investment advice" within the meaning of section 3(21)(A)(ii). Because section 3(21)(A)(ii) applies to advice with respect to "any moneys or other property" of a plan and 29 CFR 2510.3-21(c) is intended to clarify the application of that section, it is the view of the Department of Labor that the criteria set forth in the regulation apply to determine whether a person renders "investment advice" to a pension plan participant or beneficiary who is permitted to direct the investment of assets in his or her individual account.

Applying 29 CFR 2510.3-21(c) in the context of providing investment-related information to participants and beneficiaries

² Issues relating to the circumstances under which information provided to participants and beneficiaries may affect a participant's or beneficiary's ability to exercise independent control over the assets in his or her account for purposes of relief from fiduciary liability under ERISA section 404(c) are beyond the scope of this interpretive bulletin. Accordingly, no inferences should be drawn regarding such issues. See 29 CFR 2550.404c-1(c)(2). It is the view of the Department, however, that the provision of investment-related information and material to participants and beneficiaries in accordance with paragraph (d) of this interpretive bulletin will not, in and of itself, affect the availability of relief under section 404(c).

³ The Department has expressed the view that, for purposes of section 3(21)(A)(ii), such fees or other compensation need not come from the plan and should be deemed to include all fees or other compensation incident to the transaction in which the investment advice has been or will be rendered. See A.O. 83-60A (Nov. 21, 1983); *Reich v. McManus*, 883 F. Supp. 1144 (N.D. Ill. 1995).

of participant-directed individual account pension plans, a person will be considered to be rendering "investment advice," within the meaning of ERISA section 3(21)(A)(ii), to a participant or beneficiary only if: (i) the person renders advice to the participant or beneficiary as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2510.3-21(c)(1)(i)); and (ii) the person, either directly or indirectly, (A) has discretionary authority or control with respect to purchasing or selling securities or other property for the participant or beneficiary (2510.3-21(c)(1)(ii)(A)), or (B) renders the advice on a regular basis to the participant or beneficiary, pursuant to a mutual agreement, arrangement or understanding (written or otherwise) with the participant or beneficiary that the advice will serve as a primary basis for the participant's or beneficiary's investment decisions with respect to plan assets and that such person will render individualized advice based on the particular needs of the participant or beneficiary (2510.3-21(c)(1)(ii)(B)).⁴

Whether the provision of particular investment-related information or materials to a participant or beneficiary constitutes the rendering of "investment advice," within the meaning of 29 CFR 2510.3-21(c)(1), generally can be determined only by reference to the facts and circumstances of the particular case with respect to the individual plan participant or beneficiary. To facilitate such determinations, however, the Department of Labor has identified, in paragraph (d), below, examples of investment-related information and materials which if provided to plan participants and beneficiaries would not, in the view of the Department, result in the rendering of "investment advice" under ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c).

(d) *Investment Education.* For purposes of ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c), the Department of Labor has determined that the furnishing of the following categories of information and materials to a participant or beneficiary in a participant-directed individual account pension plan will not constitute the rendering of "investment advice," irrespective of who provides the information (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials.

(1) *Plan Information.* (i) Information and materials that inform a participant or beneficiary about the benefits of plan participation, the benefits of increasing plan contributions, the impact of preretirement

withdrawals on retirement income, the terms of the plan, or the operation of the plan; or

(ii) information such as that described in 29 CFR 2550.404c-1(b)(2)(i) on investment alternatives under the plan (e.g., descriptions of investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses).⁵

The information and materials described above 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 information, therefore, does not contain either "advice" or "recommendations" within the meaning of 29 CFR 2510.3-21(c)(1)(i). Accordingly, the furnishing of such information would not constitute the rendering of "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

(2) *General Financial and Investment Information.* Information and materials that inform a participant or beneficiary about: (i) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment; (ii) historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices; (iii) effects of inflation; (iv) estimating future retirement income needs; (v) determining investment time horizons; and (vi) assessing risk tolerance.

The information and materials described above are general financial and investment information that have no direct relationship to investment alternatives available to participants and beneficiaries under a plan or to individual participants or beneficiaries. The furnishing of such information, therefore, would not constitute rendering "advice" or making "recommendations" to a participant or beneficiary within the meaning of 29 CFR 2510.3-21(c)(1)(i). Accordingly, the furnishing of such information would not constitute the rendering of "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

(3) *Asset Allocation Models.* Information and materials (e.g., pie charts, graphs, or case studies) that provide a participant or beneficiary with models, available to all plan participants and beneficiaries, of asset allocation portfolios of hypothetical individuals with different time horizons and risk profiles, where: (i) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over define periods of time; (ii) all material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models; (iii) to the extent that an asset allocation model identifies any specific investment alternative available under the plan, the

⁴ This IB does not address the application of 29 CFR 2510.3-21(c) to communications with fiduciaries of participant-directed individual account pension plans.

⁵ Descriptions of investment alternatives under the plan may include information relating to the generic asset class (e.g., equities, bonds, or cash) of the investment alternatives. 29 CFR 2550.404c-1(b)(2)(i)(B)(ii).

model is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and (iv) the asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (e.g., equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.

Because the information and materials described above would enable a participant or beneficiary to assess the relevance of an asset allocation model to his or her individual situation, the furnishing of such information would not constitute a "recommendation" within the meaning of 29 CFR 2510.3-21(c)(1)(i) and, accordingly, would not constitute "investment advice" for purposes of section 3(21)(A)(ii) of ERISA. This result would not, in the view of the Department, be affected by the fact that a plan offers only one investment alternative in a particular asset class identified in an asset allocation model.

(4) *Interactive Investment Materials.* Questionnaires, worksheets, software, and similar materials which provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income, where: (i) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time; (ii) there is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant or beneficiary; (iii) all material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) which may affect a participant's or beneficiary's assessment of the different asset allocations accompany the materials or are specified by the participant or beneficiary; (iv) to the extent that an asset allocation generated by the materials identifies any

specific investment alternative available under the plan, the asset allocation is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and (v) the materials either take into account or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (e.g., equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.

The information provided through the use of the above-described materials enables participants and beneficiaries independently to design and assess multiple asset allocation models, but otherwise these materials do not differ from asset allocation models based on hypothetical assumptions. Such information would not constitute a "recommendation" within the meaning of 29 CFR 2510.3-21(c)(1)(i) and, accordingly, would not constitute "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

The Department notes that the information and materials described in subparagraphs (1)-(4) above merely represent examples of the type of information and materials which may be furnished to participants and beneficiaries without such information and materials constituting "investment advice." In this regard, the Department recognizes that there may be many other examples of information, materials, and educational services which, if furnished to participants and beneficiaries, would not constitute "investment advice." Accordingly, no inferences should be drawn from subparagraphs (1)-(4), above, with respect to whether the furnishing of any information, materials or educational services not described therein may constitute "investment advice." Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of "investment advice" must be made by reference to the criteria set forth in 29 CFR 2510.3-21(c)(1).

(e) *Selection and Monitoring of Educators and Advisors.* As with any designation of a

service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). See ERISA sections 3(21)(A)(i) and 404(a), 29 U.S.C. 1002 (21)(A)(i) and 1104(a). In addition, the designation of an investment advisor to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. See ERISA section 405(a), 29 U.S.C. 1105(a). The Department notes, however, that, in the context of an ERISA section 404(c) plan, neither the designation of a person to provide education nor the designation of a fiduciary to provide investment advice to participants and beneficiaries would, in itself, give rise to fiduciary liability for loss, or with respect to any breach of part 4 of title I of ERISA, that is the direct and necessary result of a participant's or beneficiary's exercise of independent control. 29 CFR 2550.404c-1(d). The Department also notes that a plan sponsor or fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or advisor, nor otherwise makes arrangements with the educator or advisor to provide such services.

Signed at Washington, DC, this 30th day of May, 1996.

Olena Berg,

Assistant Secretary, Pension and Welfare, Benefits Administration, U.S. Department of Labor.

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