



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-310709

November 13, 2007

The Honorable Edward M. Kennedy
Chairman
The Honorable Michael B. Enzi
Ranking Minority Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable George Miller
Chairman
The Honorable Howard P. "Buck" McKeon
Ranking Minority Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Employee Benefits Security Administration:
Default Investment Alternatives Under Participant Directed Individual
Account Plans*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Employee Benefits Security Administration, entitled "Default Investment Alternatives Under Participant Directed Individual Account Plans" (RIN: 1210-AB10). We received the rule on October 29, 2007. It was published in the *Federal Register* as a final rule on October 24, 2007. 72 Fed. Reg. 60,452.

The final rule implements recent amendments to title I of the Employee Retirement Income Security Act of 1974. The rule provides liability relief for any fiduciary of a participant directed individual account pension plan if the fiduciary complies with the final rule.

Under the final rule, a participant will be deemed to have exercised control over assets in his or her account, and the fiduciary will be relieved of liability, if, in the absence of investment directions from the participant, the plan invests in a qualified default investment alternative. The final rule describes the types of investments that qualify as default investment alternatives. The final rule does not relieve fiduciaries of the responsibility to prudently select and monitor the investments. Relief from liability is further conditioned on the fiduciary providing advance notice to

participants and beneficiaries describing the circumstances under which contributions or other assets will be invested on their behalf in a qualified default investment alternative, the investment objectives of the qualified default investment alternative, and the right of participants and beneficiaries to direct investments out of the qualified default investment alternative.

The final rule has an announced effective date of December 24, 2007. The Congressional Review Act requires 60 days between the effective date of a major rule and the later of the date of publication of the rule in the Federal Register or receipt of the rule by Congress. 5 U.S.C. § 801(a)(3)(A). This final rule was published on October 24 and received by Congress on October 25. Therefore, this final rule does not have the required 60-day period prior to its effective date. Additionally, while it does not trigger the 60-day requirement, our Office did not receive this rule until October 29.

Enclosed is our assessment of the Department of Labor's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that, with the exception of the 60-day period prior to the effective date, Labor complied with the applicable requirements.

If you have any questions about this report, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Bradford P. Campbell
Assistant Secretary, Employee Benefits
Security Administration
Department of Labor

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
ENTITLED
"DEFAULT INVESTMENT ALTERNATIVES UNDER
PARTICIPANT DIRECTED INDIVIDUAL ACCOUNT PLANS"
(RIN: 1210-AB10)

(i) Cost-benefit analysis

The Department of Labor (Department) has determined that the final rule will result in an aggregate increase in 401(k) balances of between \$70 billion and \$134 billion in 2034. The Department believes that the final rule will increase pension income for many individuals age 65 and older in 2034 (\$1.3 billion per year on aggregate for 1.6 million in a low-impact estimate; \$2.5 billion per year for 2.5 million in a high impact estimate) and decrease pension income for a few (\$0.3 billion for 6 million individuals in a low-impact estimate; \$0.6 billion per year for 0.9 million in a high impact estimate). The Department estimates that the final rule will have an indirect effect of increasing aggregate employer-matching contributions in 2034 by between \$1.7 billion and \$3.4 billion, but does not expect adverse consequences because compliance with this final rule is voluntary for the plan sponsor. The Department also states that the policies will improve overall social welfare by helping workers secure retirement living standards that meet their expectations.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The Department has certified that the final rule will not have a significant economic impact on a substantial number of small entities, and, therefore, did not prepare a regulatory flexibility analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The final rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, that may impose an annual burden of \$100 million in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On September 27, 2006, the Department published a notice of proposed rulemaking in the *Federal Register* that upon adoption would implement the provisions of ERISA section 404(c)(5). 71 Fed. Reg. 56,806. The Department received over 120 comments to the proposed rule from various parties, including plan sponsors and fiduciaries, plan service providers, financial institutions, and employee benefit plan representatives. On October 24, 2007, the Department published the final rule in the *Federal Register* and responded to the comments. 72 Fed. Reg. 60,452. The effective date of this final rule is December 24, 2007.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains a collection of information that is subject to review by the Office of Management and Budget (OMB) under the Act. The Department has submitted an information collection request to OMB and intends to publish a notice announcing OMB's decision upon review of the request. The Department estimates that the total annual paperwork burden will be 795,000 hours and \$24,711,000 in the first year.

Statutory authorization for the rule

The final rule is authorized under section 505 of the Employee Retirement Income Security Act (ERISA) and section 624 of the Pension Protection Act of 2006, Public Law 109-280, August 17, 2006, 120 Stat. 780.

Executive Order No. 12,866

The final rule is significant under Executive Order No. 12,866 because it is likely to have an annual effect on the economy of \$100 million or more. The Department has undertaken a cost-benefit analysis as required under the Order.

Executive Order No. 13,132 (Federalism)

The Department concluded that the final rule does not have federalism implications. The ERISA statute, as amended by the Pension Protection Act of 2006, specifically supersedes any state laws that “would directly or indirectly prohibit or restrict the inclusion in any plan of an automatic contribution arrangement.” Public Law 109-280, section 902(f), 29 U.S.C. §1144(e)(1). The Department, in accordance with the Executive Order, has construed the preemptive effect of the statute at the minimum level necessary to achieve the objectives of the statute.