

February 18, 2011

Mr. Robert Doyle
Director, Office of Regulations and Interpretations
U.S. Department of Labor, Employee Benefits Security Administration
200 Constitution Ave, N.W., Suite N-5655
Washington, DC 20210

Re: Interpretive Bulletin 96-1

Dear Mr. Doyle:

In a comment letter on the Request for Information on lifetime income options issued in February 2010 by the Departments of Labor and Treasury, and at the follow-up public hearing held in September 2010, the Investment Company Institute¹ urged the Department of Labor to expand Interpretive Bulletin 96-1 to encompass education on the distribution or “decumulation” phase. We recommended that DOL extend IB 96-1 or provide other guidance that makes clear that sponsors and service providers may convey the general advantages and disadvantages of various distribution forms without triggering fiduciary liability. This letter provides more specific recommendations.

IB 96-1 has been highly successful in establishing clarity on how plans and their service providers can provide education and information to participants without being deemed to provide investment advice under section 3(21) of ERISA. Since its publication, IB 96-1 has helped significantly increase the availability and use of participant education materials and tools. We understand the Department is open to broadening the examples provided in IB 96-1 to include distribution-phase

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.68 trillion and serve over 90 million shareholders.

information and tools, so that sponsors and providers can offer more information about income and distribution options without triggering fiduciary concerns. Expanding the Bulletin to cover distribution decisions and retirement income approaches would be simple and logical, and would have the same significant positive impact on the provision of educational materials geared toward the distribution phase as the original Bulletin had on the provision of investment education materials generally.

Revisiting IB 96-1 is particularly timely, in light of the Department's proposed revision of the definition of investment advice fiduciary under 29 C.F.R. §2510.3-21. If finalized as proposed, the new definition would significantly widen the scope of potential providers of fiduciary investment advice. It thus becomes even more important to have clear guidance on what types of educational information and materials may be provided without triggering fiduciary status. Similarly, we believe it is important for the Department to clarify that the same types of educational information and materials described in IB 96-1 (and any future amendments to that Bulletin) in the context of participant-directed individual account plans, may be provided to IRA owners without triggering fiduciary status.

IB 96-1 currently sets out examples of four categories of information and materials that when furnished to participants would not constitute the rendering of investment advice under ERISA section 3(21): plan-specific information, general financial and investment information, asset allocation models, and interactive investment materials. The examples focus mainly on helping participants and beneficiaries make investment decisions within the context of saving for retirement. We believe the revisions we recommend (which would add retirement income examples) are within the scope of services originally contemplated by IB 96-1 and would not alter the fundamental nature of the guidance. In fact, the Bulletin already states that the safe harbor covers information and materials about estimating future retirement income needs.²

To make clear that providing information and materials on distribution and retirement income decisions would not be considered fiduciary investment advice, we recommend the Department add a new category in paragraph (d) of the Bulletin. Our suggested new language would fit within the current structure of the Bulletin with only minor conforming changes needed to existing language (including re-titling paragraph (d) as follows):

² Moreover, the Bulletin specifies that the examples identified do not preclude providing other types of information, materials and educational services.

“(d) Investment and retirement income education.

(5) Retirement income information. Information, materials, and tools that inform a participant or beneficiary about distribution options and income in retirement. The information, materials and tools may be plan-specific, generally-applicable, and/or interactive, as described in subparagraphs (d)(1)-(d)(4) above.

(i) Plan information. Information on the benefits prior to retirement of identifying retirement income needs and other objectives in retirement and information, including comparative material, about the general advantages and disadvantages of distribution forms offered under the plan, including the tax and other financial consequences of different distribution options. For example, a lump sum distribution that is rolled over to another retirement plan or IRA allows a participant to consolidate assets, but the participant will lose any benefits associated with remaining a participant in X plan; an annuity distribution will provide guaranteed payments in retirement (subject to the plan’s or insurer’s ability to pay) but the participant may have less flexibility with respect to the money in the plan; installment payments allow a participant to determine the rate at which to withdraw assets from the plan, based on his or her own particular circumstances, and any money the participant currently does not need can remain invested in the plan (but the remaining assets are subject to market risk and there is no guarantee that the return on the account will allow the anticipated payments to continue as planned).

(ii) General information. Information and materials that inform a participant or beneficiary about: (A) methods and strategies for managing assets in retirement (e.g., systematic withdrawals, managed payout products, annuities and other guaranteed products), including those that could be used outside the plan; (B) investment alternatives that may be available in retirement (including investment options under the plan) and the general advantages or disadvantages of the investment alternative (without reference to the appropriateness of any individual investment alternative for a particular participant or beneficiary); (C) how to calculate the income stream that could be generated by the participant’s account balance; (D) the various risks faced by retirees (e.g., longevity, market/interest rate, inflation, health and other emergency expenses) and how various products or strategies address these risks; (E) how to do a rollover, when a rollover might be advantageous, and entities that may accept rollovers; and (F) how to proceed with the purchase of an income annuity or other product and when such a purchase might be advantageous.

(iii) Retirement income models. Information and materials (e.g., sample calculations, estimates or case studies) that provide a participant or beneficiary with models, available to all plan participants and beneficiaries, of distribution methods or income streams for hypothetical individuals with different time horizons, risk profiles and ranges of assets, where: (A) such models or estimates are based on generally accepted draw-down theories that take into account average life expectancies and the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time; (B) all material facts and assumptions on which such models or estimates are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return, and other features and rates specific to income annuities or systematic withdrawal plans) accompany the models; (C) to the extent that a model or estimate identifies any specific option available under the plan, the model is accompanied by a statement indicating that other options may be available under the plan (or outside the plan) that may produce different calculations or estimates, and identifying where information on those options may be obtained; and (D) the models or estimates are accompanied by a statement indicating that, in applying particular models or estimates to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (e.g., equity in a home, Social Security benefits, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan, to the extent those items are not taken into account in the model or estimate.

(iv) Interactive tools and services. Questionnaires, worksheets, software, and similar materials or services which provide a participant or beneficiary the means to estimate the retirement income stream that could be generated by an actual or hypothetical account balance, where: (A) 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; (B) there is an objective correlation between the income stream generated by the materials and the information and data supplied by the participant or beneficiary; (C) all material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return, and other features and rates specific to income annuities or systematic withdrawal plans) which may affect a participant's or beneficiary's assessment of the different income streams accompany the materials or are specified by the participant or beneficiary; (D) the materials either take into account other assets, income, and investments (e.g., equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in assessing the adequacy of an estimated income stream, participants or beneficiaries should consider their other assets, income, and investments in addition to their interests in the plan. Questionnaires, worksheets, software, and similar materials or services which allow a participant or

Mr. Robert Doyle
February 18, 2011
Page 5 of 5

beneficiary to evaluate distribution options or vehicles by providing information covered under clauses (i) and (ii) above on an interactive basis.

As in subparagraphs (d)(1)-(d)(4), the information, materials and tools described above do not contain either “advice” or “recommendations” 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.”

Conforming Changes

The Department should make minor conforming changes to other sections of the Bulletin to reflect the expansion to cover education and information on distribution forms and retirement income planning. For example, in paragraph (b) the Department should mention the importance of making informed distribution decisions and that the Department is clarifying the applicability of ERISA section 3(21)(A)(ii) and 29 C.F.R. 2510.3-21(c) to the provision of educational information on distribution options and retirement income decisions, in addition to investment-related educational information, to participants and beneficiaries in participant-directed individual account plans. Similarly, we would expand the subparagraph references at the end of paragraph (d) to include the proposed new subparagraph (d)(5).

* * *

Thank you for considering these recommendations to update the valuable guidance provided in IB 96-1. We believe the changes we outline would be a positive step toward the Department’s goal of helping retirees make informed, appropriate choices to ensure that their savings last a lifetime. We welcome the opportunity to discuss these recommendations further or to provide additional information to you and your staff as you work on these important issues.

Sincerely,



Mary S. Podesta
Senior Counsel – Pension Regulation