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April 22, 2013

The Honorable Phyllis Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Room S-2524  
Washington, D.C. 20210

**Re: Final Rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans [RIN 1210-AB07] and related guidance under Field Assistance Bulletin 2012-02R – Recommendation of Realignment Period for Annual Disclosure Deadline**

Dear Assistant Secretary Borzi:

The American Society of Pension Professionals & Actuaries (“ASPPA”) is writing to request transitional relief and clarification of the Final Rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans (the “Final Regulations”).<sup>1</sup> In particular, we are requesting a transitional realignment period for making the “second round”<sup>2</sup> of the annual participant level fee disclosures required by the Final Regulations. In addition, we recommend clarification of the “at least annually” standard in a way that will permit plan administrators more flexibility and reduce plan administrative expenses.<sup>3</sup>

ASPPA is a national organization of more than 11,000 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. ASPPA’s membership is diverse, but united by a common dedication to the employer-based retirement plan system.

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<sup>1</sup> 29 CFR §2550.404a-5, 75 Fed. Reg. 64910 (October 20, 2010)

<sup>2</sup> The “second round” of the annual participant level fee disclosures refers to the second annual disclosure which will be due within 12 months following the initial annual disclosure made under the Final Regulations. For example, if the first annual disclosure was provided by August 30, 2012, the “second round” would be required to be provided within 12 months of such date, i.e., by August 30, 2013.

<sup>3</sup> 29 CFR §2550.404a-5(h)(1)

## Summary

ASPPA recommends that the United States Department of Labor (“DOL”) provide for a transitional realignment period during which plan fiduciaries may choose to issue the “second round” of annual participant disclosures no later than 2 ½ months after the start of the first plan year beginning on or after November 1, 2013. A transitional rule will allow plans to achieve a significant reduction in administrative costs that in most cases would be borne by participants. It will do so by allowing plan administrators to align the annual disclosures with other plan disclosure to participants typically made in proximity to the beginning of a plan year.<sup>4</sup>

Additionally, the DOL should clarify that the “at least annually” standard permits plan administrators to distribute the annual notice on any date within the calendar year provided the distribution date for any year is never more than 18 months from the date on which the preceding annual notice was last distributed.

## Background

Under the Final Regulations, plan administrators of participant-directed individual account plans subject to ERISA are required “to take steps to ensure... that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts, and are provided sufficient information regarding the plan, including fees and expenses, and regarding the designated investment alternatives including fees and expenses attendant thereto to make informed decisions with regard to the management of their individual accounts.”<sup>5</sup> To fulfill these responsibilities, the plan administrator must provide participants and beneficiaries with both annual and quarterly disclosures (the “404a-5 disclosures”).

The applicability date under the Final Regulations (the “applicability date”) is the first day of the first plan year commencing on or after November 1, 2011. The date for the initial participant disclosures was later modified under a final rule issued July 19, 2011,<sup>6</sup> in response to requests to better align this deadline with the effective date of the final regulations issued under ERISA Section 408(b)(2).<sup>7</sup> As a result of the modification, the deadline for the initial disclosure under the Final Regulations was extended until 60 days after the later of: (1) the applicability date; or (2) the effective date of the 408(b)(2) regulations (i.e., July 1, 2012). In accordance with this deadline, the majority of plans were required to provide the first annual 404a-5 disclosure by August 30, 2012, with future annual disclosures to be provided “at least annually thereafter.”<sup>8</sup>

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<sup>4</sup> This need for realignment is largely a result of an extended applicability date that was based on the July 1, 2012 effective date of the final 408(b)(2) regulations.

<sup>5</sup> 29 CFR §2550.404a-5(a)

<sup>6</sup> 76 CFR 42539 (July 19, 2011)

<sup>7</sup> 29 CFR §2550.408b-2

<sup>8</sup> The August 30<sup>th</sup> 2012 deadline generally applied to any plan with a plan year beginning between November 1, 2011 and July 1, 2012.

The Final Regulations define “at least annually thereafter” to mean “at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.”<sup>9</sup> In addition, if there is a change in the information required to be disclosed, participants and beneficiaries must be furnished a description of the change at least 30, but no more than 90 days in advance of the effective date of the change.<sup>10</sup>

The Final Regulations permit plan administrators to furnish the required 404a-5 disclosures along with, or as part of, other documents. Specifically, paragraph (e)(1) of the Final Regulation, acknowledges that annual disclosures may be furnished as part of the plan’s summary plan description, or a pension benefit statement. The effect of this provision is to permit the inclusion of the participant fee disclosure notice with other annual plan disclosures and a likely reduction in plan administrative expenses.

## Discussion

ASPPA is concerned about unnecessary costs and increased administrative burdens associated with the “second round” of annual disclosures under the Final Regulations. The extended initial participant disclosure deadline of August 30, 2012, enabled plan fiduciaries to have the benefit of the information contained in the disclosures made by plan service providers under the 408(b)(2) regulations in preparing the initial 404a-5 disclosures. The extension of the deadline was welcome relief. However, it has resulted in an arbitrary August deadline for the future annual participant disclosures. For most plans, particularly those that operate on a calendar year basis, an annual August deadline has no correlation to the timing of any other disclosures that the plan may be required to make. Therefore, the cost of the annual disclosure becomes a stand-alone expense, rather than enabling the plan administrator to combine it with other required plan disclosures. This is uneconomical for the plan.

The incongruent August deadline also reduces the effectiveness of this important participant notice. Rather than providing this information when participant attention is already directed to employee benefit plans – i.e., at year end during enrollment periods – it is provided in the summer, when it is likely that some percentage of the participants are on vacation. Rather than being part of a well-integrated employee education disclosure, it is an isolated mailing.

The regulations permit the plan fiduciary to “re-set” the deadline for the annual disclosure by doing a second, perhaps duplicate, mailing at the end of the year or early in the prior year. However, the cost of this mailing – which the DOL, itself, advises is not insubstantial<sup>11</sup> – is commonly borne by participants and beneficiaries. Requiring plans to undertake this additional cost for no purpose other than to permit the annual disclosure to

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<sup>9</sup> 29 CFR §2550.404a-5(h)(1)

<sup>10</sup> See 29 CFR §2550.404a-5(c)(1)(ii), (c)(2)(i)(B), and (c)(3)(i)(B).

<sup>11</sup> The DOL estimates that the cost of compliance with the Final Regulation will be between 265 and 442 million dollars per year (2010 dollars). See Dep’t of Labor, *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 75 Fed. Reg. 64910, 64928 (October 20, 2010).

be made at a more intuitive time in the future is contrary to the interests of plan participants.

Tying the deadline for a subsequent annual mailing to the date of the actual earlier mailing may also cause a “creep” in the due date. A conscientious plan administrator will send the 404a-5 disclosure a day or two earlier each year to ensure that the deadline is met. This will continuously re-set the following year’s deadline to this earlier date in order to be within twelve months of the last annual notice. As a result, each year’s deadline must be carefully monitored to ensure that it is not inadvertently missed, as it has the potential to change annually.

It makes sense to provide relief to enable the realignment of the annual deadline to a time when other notices and disclosures are being provided. This permits the plan administrator to take advantage of the economies of scale of providing the notices together, as well as to provide participants with an integrated, well-reasoned educational program. This realignment does not compromise the goal of the 404a-5 disclosure, which is to ensure that participants are apprised of their rights and responsibilities with respect to the investment of their accounts. Therefore, ASPPA recommends a one-time transitional period to permit this annual notice realignment. Under this approach, plan administrators may choose to issue the “second round” of annual participant disclosures within 2 ½ months after the beginning of the first plan year that begins on or after November 1, 2013.

A one-time transitional opportunity to realign a plan’s 404a-5 disclosure deadline would not create a significant delay in providing the annual disclosure or impact access to updated information plan participants may need to make informed decisions regarding their accounts. If there is a change in the information from what was initially disclosed in the initial annual disclosure, plan administrators would still be required to inform participants of such changes without regard to the transitional rule being proposed. Therefore, the one-time opportunity to align the annual 404a-5 disclosure would not delay a participant or beneficiary’s access to updated information if a change occurs.

Additionally, the DOL should provide interpretative guidance that clarifies the meaning of “at least annually” as defined in the Final Regulations. In particular, the phrase “once in any 12-month period” should be clarified to permit notice to be distributed on any date within the calendar year provided the distribution date is within 18 months the date on which the preceding annual notice had been distributed. This would give plan administrators the flexibility to modify their distribution procedures and dates to accommodate changes in the law or to make improvements to the process without causing a substantial gap between distribution dates.

The result of the adoption of this recommendation is a reduction in administrative costs and an improvement in participant communications without diminishing the importance or visibility of the 404a-5 disclosures.

## Recommendation

**ASPPA recommends** that the DOL provide for a one-time transitional realignment period during which plan administrators may choose to issue the “second round” of annual participant disclosures no later than 2 ½ months after the start of the first plan year beginning on or after November 1, 2013. Additionally, the regulatory definition of “at least annually” should be clarified to permit the annual notice to be distributed anytime during a calendar year as long as it is within 18 months of the distribution date of the preceding notice.



These comments were prepared by ASPPA’s Department of Labor subcommittee of the Government Affairs Committee, and primarily authored by Benjamin Spater. We welcome the opportunity to discuss this further with you. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ASPPA, at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

/s/

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/s/

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