ASPPA®
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4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

Response to Request for Comments on Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

July 1, 2011

Employee Benefits Security Administration
Department of Labor

The American Society of Pension Professionals and Actuaries (ASPPA) appreciates the opportunity to respond to the request by the Department of Labor ("Department" or "DOL") for comments on how the DOL can improve its Preliminary Plan for Retrospective Analysis of Existing Rules (the "Request").[1]

ASPPA is a national organization of more than 7,500 retirement plan professionals 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, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system.

Summary

ASPPA applauds the Department for undertaking this initiative and supports the Department's efforts to "promot[e] economic growth, innovation, competitiveness, and job creation while using 'the best, most innovative, and least burdensome tools to achieve regulatory ends.'"[2]

In accordance with the procedure established by the Department, ASPPA posted the following comment on the Department's web portal in response to the Request[3]:

> ASPPA again recommends that the Department amend DOL Regulation § 2520.104b-1 to adopt an "opt-out" approach for the electronic transmission of ERISA notices, i.e., the default method would be electronic delivery. Participants who would prefer to receive their disclosures in paper form could elect to do so without charge.

A more detailed analysis of our comment is provided in the Discussion section below.

[1] 76 Fed. Reg. 34177 (Jun. 13, 2011).
[2] 76 Fed. Reg. 15224 (Mar. 21, 2011).
[3] The Federal Register indicates that comments should be submitted at http://dolregs.ideascale.com.

Discussion

Earlier this year, the Department requested that members of the public provide comments on how it could improve any of its significant regulations by modifying, streamlining, expanding, or repealing them in response to the President's Executive Order 13563.[4] Individuals were instructed to provide ideas through a website designed for this purpose, which allowed members of the public to vote on the ideas presented.

ASPPA suggested several areas that we believed would benefit from modifications to existing regulations and the re-issuance of existing guidance as regulations.[5] These recommendations related to: (1) the exclusion of 403(b) contracts prior to 2009; (2) electronic disclosure as the default option; and (3) a self-correction program for Voluntary Fiduciary Correction Program ("VFCP"). These ideas received significant public support and received the vast majority of the votes.[6] In fact, the Department recognized the level of support for electronic disclosure in its Preliminary Plan when it stated "Among the popular EBSA topics were electronic disclosure of materials required by the Employee Benefit Income Security Act of 1974 (ERISA) and revising/streamlining notice requirements."[7]

Although the Department recently issued a request for information about electronic disclosure by employee benefit plans,[8] it did not include electronic disclosure as a regulatory item in its Preliminary Plan. Instead, the Department indicates that it intends to focus on the amendment of the abandoned plan program and prohibited transaction exemption procedures.[9]

Although revisions to the regulations identified by the Department could help some plans, a much greater number of plans and their participants would benefit from modifications to the electronic disclosure regulation. Currently, participants can be provided with information about their retirement plans electronically under limited circumstances. DOL Regulation § 2520.104b-1 includes a safe harbor for disclosures required by ERISA to be made electronically. Under the regulation, disclosures may only be made electronically to: (1) participants who access documents electronically as an integral part of their job duties; or (2) participants, beneficiaries or other persons who affirmatively consent to electronic disclosure.[10]

Many workers do not access documents electronically as an integral part of their job duties. For example, numerous employees who work in the construction, hospitality, manufacturing, retail, and transportation industries do not access documents electronically as part of their job

[4] 76 Fed. Reg. 15224 (Mar. 21, 2011).
[5] *See*, ASPPA Comment Letter dated March 31, 2011, available at http://www.asppa.org/Document-Vault/pdfs/GAC/2011/03312011-comm.aspx.
[6] Over 450 members of the public indicated support for these ideas.
[7] Department of Labor, *Preliminary Plan for Retrospective Analysis of Existing Rules* 3 (May 2011), available at http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentofLaborPreliminaryRegulatoryReformPlan.pdf.
[8] Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19285 (Apr. 7, 2011).
[9] Department of Labor, *supra* note 6, at 9-10.
[10] DOL Reg. § 2520.104b-1(c)(2)(ii).

duties. However, many of these employees regularly use email and the Internet and would prefer to receive information about their retirement plans electronically.

Electronic disclosure has numerous benefits. For example, electronic disclosures have the ability to be more timely, searchable, environmentally friendly, and more likely to gain the attention of the participant. Electronic disclosure can communicate more effectively than paper documents by directing the reader's attention to key information and providing the ability to click-through to additional information. Allowing retirement plans to provide information electronically to participants for whom plans have email addresses, unless the participant opts for paper, would reduce plan and environmental costs. Additional information about the benefits of electronic disclosure and workers' use of the internet and mobile devices is available in the White Paper written by Professor Peter P. Swire and Kenesa Ahmad entitled, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery"[11] and ASPPA's response to the Department's Request for Information Regarding Electronic Disclosure by Employee Benefit Plans.[12]

As a result, the Department should amend its regulations to adopt an "opt-out" approach to electronic delivery of retirement plan documents. Participants who would prefer to receive their disclosures in paper form could elect to do so.

ASPPA recommends that the Department amend its Preliminary Plan to include modifications to the electronic disclosure regulations.

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These comments were primarily authored by Debra A. Davis, APM, Assistant General Counsel and Director of Government Affairs with input from members of ASPPA's Government Affairs Committee. We welcome the opportunity to discuss these issues with the DOL. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
Mark Dunbar, MSPA, Co-Chair
Gov't Affairs Committee

[11] Available at http://www.asppa.org/Document-Vault/pdfs/GAC/2011/6142011-whitepaper.aspx.
[12] ASPPA Comment Letter dated June 6, 2011, available at http://www.asppa.org/Document-Vault/pdfs/GAC/2011/06062011-comment.aspx.

/s/
Ilene H. Ferenczy, Esq., APM, Co-Chair
Gov't Affairs Committee

/s/
James Paul, APM, Co-Chair
Gov't Affairs Committee