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

March 31, 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 ("DOL") for comments on how the DOL can improve any of its significant regulations by modifying, streamlining, expanding, or repealing them (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 membership is diverse and united by a common dedication to the private retirement plan system.

Summary

ASPPA applauds the DOL for undertaking this initiative and supports the DOL'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.'"

ASPPA has previously commented on several areas that we believe would benefit from modifications to existing regulations and the re-issuance of existing guidance as regulations. Following are the comments that ASPPA posted on the DOL's web portal based on our previous comments in response to the Request.[2] A more detailed analysis of these comments is provided in the Discussion section below.

I. Exclusion of 403(b) Contracts Prior to 2009 - ASPPA recommends that the DOL issue regulatory guidance to allow 403(b) contracts issued before 2009 to be excluded from the Form 5500 financial statements per Field Assistance Bulletins 2009-02 and 2010-01. We

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[1] 76 Fed. Reg. 15224 (Mar. 21, 2011).

[2] The Federal Register indicates that comments should be submitted at http://www.dol.gov/regulations/regreview.htm, which directs commenters to http://dolregs.ideascale.com.

also recommend that the DOL appoint a committee of experts to review and suggest modifications to the audit guidelines for 403(b) plans.

II. Electronic Disclosure as the Default Option - ASPPA recommends that DOL Regulation § 2520.104b-1 pertaining to the electronic transmission of ERISA notices be changed to adopt an "opt-out" approach, where the default would be electronic delivery. Participants who would prefer to receive their disclosures in paper form could elect to do so without charge.

III. Self-Correction Program for VFCP - ASPPA recommends that the DOL allow for a self-correction option under VFCP[3] for the late deposit of employee 401(k) contributions if the "Online Calculator" is used to determine lost earnings and certain other requirements are met.

Discussion

I. Exclusion of 403(b) Contracts Prior to 2009

As you know, certain 403(b) plans were required for the first time to include an independent audit as part of the plan's 2009 plan year annual return ("Form 5500"). Unfortunately, numerous sponsors of 403(b) arrangements have had significant difficulties in filing compliant Form 5500s for the 2009 plan year. ASPPA and the National Tax Sheltered Accounts Association ("NTSAA") have previously raised our concerns in a letter sent to the DOL.

The current relief offered under Field Assistance Bulletins ("FABs") 2009-02 and 2010-01 is not providing the benefits anticipated because the auditing community has generally not accepted the information on which the 2009 plan year starting account balances were established. Auditors have indicated that they are constrained by the requirements of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and that the FABs are insufficient.

The new enhanced 2009 reporting obligations for 403(b) plans have presented challenges similar to those faced by plan sponsors when ERISA was enacted. At that time, the Department recognized the problems plan sponsors would have in determining opening balances for the initial independent audit. The Department provided relief using its authority under ERISA § 110. In particular, the Department issued ERISA Regulation § 2520.103-7, which relieved plans for their initial reporting year from the obligation to:

- Display at current value, the statement of assets and liabilities of the plan, as of the end of the previous year;
- Engage an independent qualified public accountant to conduct an examination of the plan's financial statements for the plan year or trust year covered by the initial annual report; and

[3] The Voluntary Fiduciary Correction Program.

- Include with the initial annual report, the opinion of an independent qualified public accountant as to whether the financial statements for the close of the initial plan year are presented on a basis consistent with that of the preceding year.

In addition, under the authority of ERISA Regulation § 2520.104–44, the Department provided relief specific to 403(b) plan sponsors, excusing them from most reporting requirements related to the Form 5500, including the obligation to include a financial statement with the opinion of a qualified independent auditor.

We believe the transitional problems faced by 403(b) plan sponsors in complying with the new reporting rules are every bit as daunting as those present when ERISA was enacted. Consistent with the relief provided at that time, we request that the Department exercise its authority under ERISA § 110 in two ways.

ASPPA recommends that the DOL issue regulations that adopt the positions taken by the DOL in FABs 2009-02 and 2010-01.

ASPPA also recommends that a committee of industry experts be established to suggest, review and modify the existing audit guidelines for 403(b) plans. The committee should specifically consider:

- The differences between group annuities, individual contracts, and individual custodial agreements and the potential for different audit requirements for each;
- The need for relief and clarification that beginning balances as of January 1, 2009, are absolute for all purposes under applicable auditing standards, and that auditors may modify their standard procedures and accept data provided as of January 1, 2010;
- Creation of a model "Audit Checklist" for 403(b) plans that is specific to 403(b)s and does not contain qualified plan requirements; and
- Better coordination between the DOL's rules and the Internal Revenue Service compliance rules by creating educational communications and training materials specifically focusing on 403(b) plans for employers, vendors, auditors and administrators.

II. Electronic Disclosure as the Default Option

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.[4]

[4] DOL Reg. § 2520.104b-1(c)(2(ii).

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

In order for these workers to get documents by email or the Internet, they must affirmatively consent to receive documents electronically.[5] If the information is to be provided through the Internet or by similar means, they must consent in a way that demonstrates their ability to access information in the way it will be provided. It is this requirement that often creates difficulty for plan sponsors. Despite the ease of indicating consent by simply clicking a link in a confirming e-mail from the plan sponsor, many participants will not take the time to provide the needed affirmative consent.

Providing information to 401(k) plan participants that is clear, readable and meets their needs helps participants understand their plans and make decisions in connection with them. Electronic disclosures have the added benefit of 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. As many plans pass through their communication costs to participants, these savings would result in increased retirement benefits for participants.

The DOL has recognized the advantages of electronic disclosure with respect to the filing of the Form 5500. Retirement plans must now file their annual Forms 5500 electronically. When discussing its efforts, the DOL noted the significant cost savings associated with electronic filings as well as the substantial benefits to participants of making Form 5500 data available electronically.[6]

ASPPA recommends that the DOL 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.

III. Self-Correction Program for VFCP

DOL Regulation § 2510.3-102 generally provides that employee contributions and loan repayments must be contributed to a plan as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets. The DOL currently has a Voluntary Fiduciary Correction Program ("VFCP" or the "Program"), which allows plans to correct the late deposit of employee contributions.

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[5] DOL Reg. § 2520.104b-1(c)(2(ii)(A).

[6] 72 Fed. Reg. 64710, 64714 (Nov. 16, 2007).

Due to the DOL's tremendous educational and regulatory efforts over the past 15 years, plan sponsors are increasingly aware of the importance of the timeliness of participant contributions. Additional guidance from the DOL, such as its recently finalized 7-day safe harbor regulation for small plans, should reduce the need for corrections such as those proposed in this recommendation. When delays occur, however, the DOL can further assist plan sponsors seeking to remedy their actions, and can benefit participants seeking greater protection and return on their investments, by encouraging a faster, more cost-effective method to restore assets to the plan.

The Program does not currently include a formal self-correction component for the late deposit of elective deferrals. A self-correction component would allow employers to correct in accordance with the Program's methodology without filing an application with the DOL. The establishment of a recognized self-correction component to VFCP would allow correcting employers to benefit from the efficiencies and certainty of the VFCP correction method. It would also allow the DOL to quantify the many self-correction transactions that are patterned upon and directly result from the formal Program.

ASPPA proposes that plan administrators seeking to self-correct late contributions would report this correction on the Form 5500. Proposed modifications to the Form 5500 for this purpose are described below.

ASPPA also proposes several safeguards to protect the interests of participants and the DOL. ASPPA suggests that plan administrators seeking to self-correct must assume deferrals could have been segregated on the earliest possible date in making corrective contributions to the plan. In other words, plan administrators seeking to self-correct under our VFCP proposal would be required to use the payroll date as the "loss date" for purposes of calculating lost earnings on the late contributions. Plan administrators would also be required to use the VFCP Online Calculator to calculate lost earnings on late contributions. This would further regulate and standardize the calculation of the total amount to be contributed to the plan to fully correct the late contribution.

Second, to be eligible for self-correction, ASPPA proposes that plan administrators be required to retain documentation supporting the information listed on the new schedule described below, such as the dates that contributions were required, when they were made, and the amount of the payment ultimately made to the plan. Specifically, plan administrators must retain data, such as payroll data or trust statements, for the statutory 6-year record retention period. This data must be produced by the plan administrator upon the DOL's request. Additionally, to qualify for self-correction, the plan administrator would be required to produce and retain a narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of late or unpaid contributions and/or repayments, along with supporting documentation for 6 years, and to make that information available to the DOL upon request to document the error and correction.

Third, as is currently the case under the Program, ASPPA proposes that any relief under the self-correction component be conditioned on the truthfulness, completeness and accuracy of the statements made on the Form 5500 (and related schedules), and any subsequent oral or

written statements or submissions. Any material misrepresentations should void the relief provided through the self-correction mechanism.[7]

ASPPA has previously provided information showing how the separate schedules (which had been used for the purpose of preparing the independent qualified public accountant's (IQPA) opinion but which are now required as an attachment to Schedule H or I) could be expanded to reflect self-correction of a late deposit of elective contributions. This information is available at http://www.asppa.org/document-vault/pdfs/GAC/2010/comm1105.aspx.

ASPPA recommends that the DOL adopt a self-correction component as part of VFCP, requiring self-correction to be reported to the DOL as discussed in http://www.asppa.org/document-vault/pdfs/GAC/2010/comm1105.aspx.

These comments were primarily authored by Debra A. Davis, APM, 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,

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[7] See 71 Fed. Reg. 20262, 20269 (Apr. 19, 2006) (VFCP requirements).