Response to Notice of September 14, 2000, Developing Line of Fiduciary Duty Cases on Disclosure

February 23, 2001

Office of Regulations and Interpretations
Pension and Welfare Benefits Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: Disclosure RFI

Re: Response to Notice of September 14, 2000, Developing Line of Fiduciary Duty Cases on Disclosure

Dear Sir or Madam:

ASPPA is a national organization of over 4,000 members who provide actuarial, consulting, administrative, legal and other professional services for about one-third of the qualified retirement plans in the United States, the majority of which are maintained by small businesses. ASPPA's mission is to educate pension actuaries, consultants, administrators and other benefits professionals and to preserve and enhance the private retirement system as part of the development of a cohesive and coherent national retirement income policy. Its large and broad based membership gives it unusual insight into current practical problems with ERISA and qualified retirement plans, with a particular focus on the issues faced by smaller employers.

This letter responds to your request for information dated September 14, 2000 ("Notice") regarding disclosure of obligations of fiduciaries of employee benefit plans subject to Title I of ERISA. The input was requested with respect to both pension plans (including both defined contribution and defined benefit plans) and welfare plans (particularly health and disability plans). The principal concern and focus of ASPPA members is with pension plans, although many of our members are involved with welfare plans as well. Because of the emphasis of ASPPA's members, this letter will focus on the issue of additional guidance with respect to pension plans only.

As an overall comment, we believe that the Department should not issue regulations at this time addressing fiduciary disclosure requirements. In our view, such regulations would either be incomplete because they cannot realistically address all of the facts and circumstances which may arise, or will be unduly burdensome on plan sponsors. We believe these issues are best left to the courts to flesh out and refine on a case-by-case basis as the need arises.

Our understanding from the Notice is that, except for Varity Corp. v. Howe, 516 U.S. 489 (1996), the Department's focus is on Circuit Court decisions rather then Supreme Court decisions. (The Notice also mentions Pegram v. Herdrich, 120 S. Ct. 2143 (2000); however, as stated in the Notice, that case addressed fiduciary issues arising out of medical decision making under a group health plan.) We believe the lack of Supreme Court guidance is particularly significant because the Circuit Court decisions are not consistent. This lack of consistency is not surprising, but it clearly raises the question of whether the Department should just monitor rather than actively interface with the process of decision making by the courts. Hopefully, the Supreme Court will resolve some of the key conflicts among the Circuit Courts. Even if the Supreme Court does not weigh in, clearer general patterns in the court decisions will most likely evolve. We believe that pronouncements by the Department in this emerging area at this time would have a tendency to impede rather than assist this natural process.

For example, the focus of many of the cases cited in the Notice is the fiduciary responsibility of the employer to give notice with respect to early retirement windows or similar incentive type programs in which the date of a person's retirement or other termination of service will affect whether they are eligible for increased benefits provided in the program Although the Supreme Court has not yet decided this issue, the Circuits have generally evolved a standard to the effect that at least some fiduciary responsibility arises at the point at which such a plan comes under "serious consideration." Exactly what "serious consideration" means maybe unclear in the complex

setting of a large corporation, and the cases are not uniform as to whether the duty is one to affirmatively inform participants in certain situations, or simply to answer accurately questions raised by participants. The conflicts among the different circuits as to these points would make it difficult to draft regulations that conform to all of the relevant decisions. Further, the issues about which many employers might be in greatest doubt -- identifying when a matter comes under serious consideration and exactly what duty the employer has to inform participants after the matter does come under serious consideration -- are highly factual in nature. Thus, regulations that are not exhaustive would probably not answer many of the practical questions. Conversely, regulations which were exhaustive would likely be unduly restrictive, and even then might not answer all questions in specific cases. More fundamentally, the Supreme Court has never reviewed the basis for imposing a fiduciary duty to disclose internal deliberations regarding a settlor function. Issuing regulations explicating a doctrine that may indeed prove *not* to be the law would be premature and inappropriate.

One of the concerns implicitly raised by the Notice is whether employers and others who have fiduciary duties of the type discussed in the Notice will have adequate guidance at this time as to how to discharge their fiduciary duties. In partial response to this concern, we respond to the hypothetical fact patterns numbered 11, 12, 13, 15, 16, and 17 (which deal with retirement plans).

11. Plan modifications are currently controlled by the SPD and SMM regulations. Employers notify employees in accordance with those regulations. Disclosure frequently occurs earlier than the dates required for distributing SPDs and SMMs where the changes affect current plan administration. For example, employers will generally notify participants of changes in the IRC ' 402(g) limit on elective deferrals to a 401(k) plan very early in the year.

12. An employer should provide information to the participant about how the new law may affect the plan, if possible. However, the new mandated benefits may be determinable in different ways, so detailed information about how the change in the law will affect the plan may not yet be available.

13. As we understand the issue raised by number 13, it is that the plan administrator is required to make a value judgment that a lump sum payout instead of an annuity is more advantageous to a participant. Which of these two benefit forms are preferable does not simply depend upon an actuarial determination, as the hypothetical suggests, but also has to do with the specific needs of the participant and/or beneficiary -- an area which is inappropriate for regulations. For example, if a participant is in extremely poor health, a lump sum benefit may be far preferable, and of greater value, than a life annuity, even if the annuity is heavily subsidized. If a participant has a particular investment need or ability, a lump sum may be preferable to an annuity. Alternatively, it is possible that a subsidized annuity may be more advantageous to the participant than a lump sum. An illustration of the amount that the participant would receive under the annuity, already required to be provided to the participant, permits the participant to decide with his or her advisor what is the best choice to make. The court cases mentioned in the Notice do not require additional disclosure with respect to this issue. Currently, a defined benefit plan SPD will frequently indicate how a lump sum is determined, particularly whether the payment is based on the participant's age 65 benefit or on the early retirement benefit, and participants are often provided the actual amount of each benefit. Administrators frequently do not attempt to explain the intricacies of present value calculation, and we believe that is appropriate. As discussed, the two key components to the calculation that should affect an individual's decision to elect one benefit over another – the return on investment the individual would receive and the particular individual's life expectancy – are not in the administrator's purview. As discussed below, this is best addressed, if at all, by more general educational materials developed by the Department.

15. Although the Circuit Court cases do not resolve all issues as to the "how, when, and to whom" disclosure should be made in the situation posed, this appears to be an extremely difficult factual situation. We believe that the evolution of court decisions and appropriate private sector responses should be allowed to continue in this developing area.

16. It is not clear whether the reduction in value of the benefit would be a violation of the anti-cutback rule under ERISA § 204(g) and IRC § 411(d)(6). If it is, then, of course, contemplated action would be either impermissible or limited in its scope. However, assuming that it is permissible, the employer's response in this situation would be guided principally by court decisions, particularly ones in the applicable Circuit. As with number 15, we believe that, because the law in this area is still evolving, the process should be allowed to continue.

17. If the specific issue is proper income tax guidance with respect to qualified plan and retirement plan distributions, IRC § 402(f) requires that a notice be provided and the IRS has prepared a

current safe harbor notice issued as Notice 2000-11. Most employers use this model notice. Thus, the focus here should be on being sure that employers are aware of the existence of the safe harbor notice, rather than writing an extra layer of general rules with respect to correction of inaccurate notices. As discussed below, if additional disclosure is appropriate, the tax treatment of distributions is best addressed by more general educational materials developed by the Department, or by the Internal Revenue Service.

In response to Question 3 of the Request for Comment, we would like to provide the following comments and suggestions:

I. In addressing disclosures implicating a broad array of plans and participants, pattern disclosures and/or notices are very helpful to both participants and plans. One example of this is the tax notices and publications provided by the IRS. Another is the sample notice to spouses regarding their rights under a qualified joint and survivor annuity and qualified pre-retirement survivor annuity. We encourage the Department to embrace this approach where uniform disclosures are sufficient.

II. The Department should be realistic about what is feasible for employers and plan administrators. Employers need sufficient time to address and analyze changes in the law, to prepare a strategy to address them, to develop documents and to adequately educate staff. Employers are already facing enormous changes in the claims area for their welfare plans and in their SPDs. Less change in the regulations is much preferable to more change.

III. Not everyone in the employer's organization can be informed in the benefits area. The Department should permit employers and administrators to prominently and publicly designate the specific department or persons responsible for responding to questions and to require employees to address their questions to the right person. This will permit employers to provide faster and more accurate responses.

At this time, the case law relating to fiduciary disclosure duties of employers is in flux and should be allowed to develop further before determining whether regulatory or other administrative guidance should be issued by the Department. We applaud the Department's concern about developments in this area and suggest that the Department and interested private organizations, such as ASPPA, continue monitoring them for a later determination as to whether regulatory or administrative guidance may be helpful.

This comment was prepared primarily by Michael Canan, William Berke, and Fredric Singerman.

If you have any questions with regard to this matter, please feel free to address them to any of the undersigned.

Very truly yours,

Michael J. Canan, APM, Department of Labor Subcommittee	Chair Brian Graff, Esq. ASPPA Executive Director
R. Bradford Huss, APM, Co-Chair ASPPA Government Affairs Committee	Bruce Ashton, APM, Co-Chair ASPPA Government Affairs Committee
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