ASPPA
WORKING FOR AMERICA'S RETIREMENT

Comments to Proposed Revision of Annual Information Return/Reports

September 19, 2006

Department of Labor
Employee Benefits Security Administration

Department of the Treasury
Internal Revenue Service

Pension Benefit Guaranty Corporation

Fed Reg Vol. 71, No. 140
RIN 1210–AB06
July 21, 2006

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed revisions to the Form 5500 Annual Return/Report forms, including a proposed new Short Form 5500 (Form 5500-SF), filed for employee pension and welfare benefit plans under ERISA and the Internal Revenue Code, as issued by the DOL, IRS and PBGC on July 21, 2006 (Proposed Revisions).

ASPPA is a national society of retirement plan professionals. ASPPA's mission is to educate pension professionals and to preserve and enhance the employer-sponsored pension system. Its membership consists of over 6,000 actuaries, plan administrators, attorneys, CPAs and other retirement plan experts who design, implement and maintain qualified retirement plans covering tens of millions of American workers.

ASPPA commends the agencies for affording the public this opportunity to preview, and comment on, the forms and schedules that will be part of the electronic filing mandate.

Summary of Recommendations

1. The DOL should relax its proposed eligibility conditions for plans to file Form 5500-SF.
2. The implementation of mandatory electronic filing of Form 5500 affords the DOL a unique opportunity to incorporate more information on the forms and schedules, rather than attachments, to ensure uniform reporting by plan administrators.
3. Section 403(b) plan sponsors need clarification about whether their plans are subject to ERISA Title I. In addition, there should be a delayed implementation date for §403(b) plans to conform to the Proposed Revisions.
4. Questions are needed in the "Compliance Questions" section of Form 5500-SF, for clarification and/or simplification, and in Schedules H and I to address deemed distributions of loans.
5. Changes should be made to Form 5500-SF and the instructions to clarify and simplify the filing requirements.
6. Clarifications are needed regarding the electronic signature and record retention requirements under electronic filing.
7. The information proposed for Schedule B, line 12, should become part of a PBGC filing.
8. For Schedule C, the instructions should be clarified. In addition, the definition of "enumerated service provider" should be revised to eliminate service providers such as contract administrators, custodians, trustees, recordkeepers and appraisers. Furthermore, the fees disclosed should be limited to fees paid by the plan (rather than disclosure of fees shared by service providers that do not affect plan costs).

Discussion of Recommendations

1. Expanding the Use of Form 5500-SF

ASPPA commends the DOL for developing a streamlined report that can be utilized by a majority of small plan filers and can help neutralize the burden of adapting to mandatory electronic filing. Certain small plans, however, would be prevented from filing the Form 5500-SF if the rules are adopted as proposed, because the plans fail to satisfy the 100% threshold regarding the types of investments held by the plan.

Currently, the DOL utilizes a 95% threshold for determining whether a small plan is subject to the annual examination and report of an independent public accountant requirement under 29 CFR 2520.104-46. ASPPA believes that establishing a common threshold will cause less confusion to plan sponsors and preparers while still providing sufficient data to the DOL.

ASPPA recommends the DOL relax its proposed eligibility conditions for plans to file Form 5500-SF to include those that meet *either* of the following conditions:

> a. The plan covers 25 or fewer participants on the first day of the plan year and conforms to changes mandated by the Pension Protection Act of 2006 (PPA) for 2007,[1] *or*
>
> b. The plan (1) covers fewer than 100 participants at the beginning of the plan year, or was filed as a small plan last year and did not cover more than 120 participants at the beginning of the current plan year; (2) is not an ESOP or multiemployer plan; (3) does not hold employer securities; and (4) is at least 95% invested in certain secure, readily valued assets (such as mutual fund shares, investment contracts with insurance companies or banks, publicly traded securities held by a registered broker dealer, cash and cash equivalents, and plan loans to participants).

2. Efficiency of Electronic Filing

The implementation of mandatory electronic filing of Form 5500 affords the DOL a unique opportunity to incorporate more information on the face of the form and schedules to ensure uniform reporting by plan administrators. In addition, removing attachments to the extent possible will improve the chances of immediate validation and acceptance of filings by decreasing the likelihood that a filer will attempt to submit a nonstandard format. ASPPA has identified the following items in the Proposed Revisions that can be modified to accomplish this result:

a. Transmittal of contributions

Form 5500-SF, line 10a, and Schedules H and I, line 4a, require the plan administrator to indicate whether any participant monies were not transmitted to the plan by the time prescribed by regulations. ASPPA acknowledges the importance of monitoring and improving compliance with the rules for timely contribution of employees' payroll withholding. If the plan is subject to the requirement to attach the report of an independent qualified public accountant, the Proposed Revision's instructions to Schedules H and I call for an attachment explaining the status of delinquent transmittals. This proposed attachment would mirror information included on supplemental schedules that are already part of the audited financial statements.

In addition, regional DOL offices have used the response to Schedules H and I, line 4a, as the basis for corresponding with plan sponsors about the late deposits. These communications from the regional DOL offices could be more effectively managed if all plan sponsors were required to indicate the status of delinquent remittances as of the filing date on the Form 5500-SF filing. More importantly, all plans, regardless of size, should be required to provide additional information about any late deposits in order to better inform participants and the agencies about the status of the delinquency.

ASPPA recommends the DOL insert another line immediately following line 10a (Form 5500-SF) and line 4a (Schedules H and I) so that the information can be reported on the form, rather than on the proposed attachment. In addition, the information reported should be as of the date of the filing, rather than as of the end of the plan year for which the return is being filed. For example:

If you entered "Yes" on line 10a / 4a, check all that apply as of the date the report is filed:

☐ Not corrected ☐ Self corrected outside VFCP
☐ Pending correction ☐ Fully corrected under VFCP

b. DFVC

Form 5500-SF, line C, and Form 5500, line D, allow a filer to indicate that the return is being filed under an extension of time (the DFVC program). If the DFVC box is checked, an attachment must be included (the attachment states that the filing is being made pursuant to the DFVC program rules), an unnecessary duplication of information. It would be helpful if the Form 5500-SF, line C, and Form 5500, line D, entries distinguished extensions of time using Form 5558 (the extension of time to file federal income tax return of the employer) from "special extensions" that are announced under certain circumstances, such as extensions for presidentially declared disasters, by providing a third check-box at line C/D.[2]

ASPPA recommends that no attachment be required when the DFVC box is checked at line C/D and that an additional check-box be added for "special extensions."[3]

c. Attaching information included in the auditor's report

Schedule H, lines 4i (assets held for investment) and 4j (5% reportable transactions), require the plan to duplicate, as a separate schedule, information that is already reported in supplemental schedules attached to the audited financial statements. While some DFE filings[4] will need to prepare the attachments for lines 4i and 4j, relief from the requirement should be provided to those filings that include supplemental schedules displaying the required information as part of the audited financial statements.

ASPPA recommends eliminating the requirement to attach schedules displaying information required by Schedule H, lines 4i and 4j, if that information is included in the auditor's report that is part of the filing.

3. Elimination of Special Limited Reporting Rule for §403(b) Plans

The revisions proposed by the DOL would, for the first time, require ERISA Title I-covered §403(b) plans to file a full annual report. As stated in the preamble to the Proposed Revisions, the DOL believes that putting the reporting requirements of §403(b) plans "on par with other pension plans...would enhance the Department's oversight capabilities and improve compliance in this area without substantial additional burden." Two issues hinder the ability of tax-exempt employers to fully respond to this proposal: first, employers need clarification about their status as sponsors of Title I-covered plans and, second, financial recordkeeping for §403(b) plans is not institutionalized as it is with §401(k) plans [*i.e.,* §403(b) vendors have never needed to support Form 5500 data collection efforts].

a. Guidance needed for §403(b) ERISA coverage

Current DOL regulations do not provide sufficient guidance to enable tax-exempt employers to be certain if their §403(b) plans are subject to ERISA. Existing regulations suggest that the extent of employer involvement in the administration of the plan is crucial; however, the Proposed Revisions would impose additional IRS requirements on employers offering §403(b) plans. Employers need specific guidance about the interaction of the proposed IRS requirements with the ERISA status of their plans before they will be able to determine their reporting and administrative obligations.

ASPPA recommends that the DOL issue guidance providing specific guidance for determining when a §403(b) plan is covered by Title I of ERISA to help employers recognize, understand and comply with their responsibilities as §403 (b) plan sponsors.

b. Reporting for §403(b) plans

Although the distinctions between §403(b) plans and other retirement plans have diminished over the past few years, significant differences remain in form and operation. These differences make compliance with the full ERISA reporting requirements more difficult for tax-exempt §403(b) plan sponsors than for the sponsors of plans for which the ERISA reporting requirements were designed. For example:

- Section 403(b) plans are commonly offered through multiple vendors of investment products, with the participant choosing the vendor, rather than through a single fund provider or investment platform chosen by the employer. In these situations, vendors tend to view the individual employee as controlling the account and are not geared to providing information, such as account investment earnings and balances, to the plan sponsor that the Proposed Revisions require for the Form 5500.

- Unlike §401(k) and other retirement plans, §403(b) plan investments are restricted to annuities and mutual fund custodial accounts, which are highly regulated and subject to stringent review.

- Section 403(b) plans may not impose eligibility rules or requirements on an employee's ability to make salary deferral contributions. The "universal availability" rule means that, for reporting purposes, the §403 (b) plan sponsor is less likely than the similarly situated §401(k) plan sponsor to qualify as a "small plan."

Under the Proposed Revisions, many small §403(b) plans would be excused from filing detailed financial information, audit reports and an accountant's opinion because §403(b) plans are limited to investments that are strictly regulated and heavily reviewed. Whether a plan is large or small, however, the fact remains that many §403(b) plans historically have not needed to maintain such data, and sponsors need time to gather data and establish procedures for ongoing recordkeeping that will enable them to complete the proposed revisions to Form 5500 or Form 5500-SF. This need for time to establish procedures is especially true for large plans, which will be required to include the opinion of an independent qualified public accountant and audited financial statements with the Form 5500.

ASPPA recommends that the DOL implement a transition period for §403(b) plans to allow sponsors time to establish records (especially plan asset records) sufficient to prepare the proposed revision to Form 5500. One way this could be met is for the §403(b) plans to file a Form 5500-SF through 2011.

ASPPA supports the expanded reporting requirements in principle; however, ***ASPPA further recommends*** that DOL consider limiting the financial reporting to "contributions only" and providing relief from any audit requirement until plan years beginning in 2010.

ASPPA further recommends that participant count information be limited to active employees during any transition period.

4. Financial Reporting of Deemed Distributions of Loans

Financial reporting on the proposed Form 5500-SF, line 8e, and Schedules H and I, line 2g, require plans to report deemed distribution of loans as an adjustment to the net assets available for benefits at the end of the year. Loans that are deemed distributed for tax purposes generally continue to be plan assets for plan qualification and financial reporting. Therefore, traditional recordkeeping and financial reporting systems do not "write off" the deemed distribution amount from the books. This means that loan asset value does not coincide with Form 5500 reporting. Deemed distribution of loan information could be captured in the

"Compliance Questions" section of Form 5500-SF and Schedules H and I. Using the Compliance Questions section would eliminate the confusion around the financial statement reporting when participant loans have been deemed distributed during the plan year.

ASPPA recommends that the DOL insert questions in the Compliance Questions sections to address deemed distributions of loans, rather than requiring Form 5500 financial reporting that is contrary to traditional recordkeeping and financial reporting systems. For example:

During the plan year:

Were any participant loans deemed distributed?	☐ Yes ☐ No Amount ____
Did payments resume on any participant loans deemed distributed in a previous plan year?	☐ Yes ☐ No Amount ____

5. Changes to Form 5500-SF

ASPPA has several concerns about the proposed Form 5500-SF.

a. Lines 6a and 6b

Lines 6a and 6b confirm that a plan may file the short form. This proposed requirement could be built into the Web-based forms to direct preparers to the proper form (Form 5500-SF or Form 5500). In addition, if plans with 25 or fewer participants may file Form 5500-SF without any restrictions (as ASPPA recommends in 1a above), lines 6a and 6b are not appropriate.

ASPPA recommends that Form 5500-SF, lines 6a and 6b, be eliminated.

b. Lines 12a-12c

The information reported at lines 12a-12c could be simplified. These lines seek to confirm that the minimum funding amount will be contributed. Similar information is reported by other plans on Schedule R, lines 6 and 7. ASPPA believes that lines 12a-12c and Schedule R, lines 6 and 7, can be recast as a single line to simply report compliance with minimum funding requirements without sacrificing information for the agencies.

ASPPA recommends that the DOL modify Form 5500-SF, lines 12a-12c, and Schedule R, lines 6 and 7, to simply report compliance with the minimum funding requirements in a single statement. For example:

12. If this is a defined contribution plan subject to the minimum funding requirements, was there a failure to satisfy the minimum funding requirement for the plan year?	
(If "Yes" enter amount of funding deficiency.)	☐ Yes ☐ No Amount ____

c. Grouping text as pension or welfare benefits

The instructions should be reorganized so that text related to pension benefit plans is grouped separately from text related to welfare plans. For example, within the instructions for line 5, one paragraph describes welfare plan "participant," followed by a paragraph describing a "participant" rule regarding alternate payees for pension benefit plans, followed by a paragraph returning to a discussion of welfare plans, followed again by a section on pension benefit plans. The vast majority of Form 5500-SF filers will be pension benefit plans and, therefore, the reorganization of the data will assist preparers in easily locating instructions and accurately inserting information on the form.

ASPPA recommends that text related to pension benefit plans be grouped separately from text related to welfare plans.

6. Clarification Needed

Two issues arise under the electronic format for which clarification is needed.

a. Examination of the electronic file

The Form 5500 signature section contains a declaration that the signatories have "examined this return/report, including accompanying schedules, statement and attachments, *as well as the electronic version of this return/report*" (emphasis added). It is unclear what action must be taken by the plan sponsor and plan administrator to satisfy this statement.

ASPPA recommends that the instructions clearly state what action must be taken by the plan sponsor and plan administrator to satisfy the declaration stated in the Form 5500 signature section.

b. Record retention requirements

Proposed instructions to Forms 5500 and 5500-SF contain the following statement under the "How to File - Electronic Filing Requirement" section: "Even though the Forms 5500 and 5500-SF must be filed electronically, the administrator must keep a copy of the Forms 5500 and 5500-SF, including schedules and attachments, with all required manual signatures on file as part of the plan's records…."

ASPPA requests confirmation that plan sponsors may satisfy the record retention rule by maintaining an electronic version (as permitted under ERISA §107) and, therefore, are not required to keep an actual signature copy of the filing.

7. Proposed Revisions to Schedule B

Schedule B is an actuarial certification regarding a plan's funding status, specifically on the status of the minimum funding standard account. The Proposed Revisions to Schedule B include a new line 12 that is intended to permit the PBGC to better understand the composition of the investments and the percentages of assets held in stock, bonds (by type), real estate or other categories for plans covering more than 1,000 participants. Further, the Macaulay Duration must be reported for all debt securities; however, Enrolled Actuaries generally do not have access to detailed asset information and Macaulay calculations are not traditionally the work of an Enrolled Actuary.

As noted, line 12 must be completed only if the defined benefit plan covers more than 1,000 lives, as shown on Schedule B, line 2(b)(1)(4). This rule substantially shrinks the volume of affected plans.

ASPPA recommends that information proposed to be reported at Schedule B, line 12, become part of a PBGC filing. The PBGC has requested specific information from large plans in the past, such as the notice under ERISA §4010 for certain underfunded plans.

8 Proposed Revisions to Schedule C

The Proposed Revisions would institute sweeping changes to Schedule C. These changes are designed to facilitate service provider fee disclosure so that plan fiduciaries receive sufficient information to enable them to determine the reasonableness of a service provider's compensation. The ERISA Advisory Council and the SEC have both questioned the adequacy of existing service provider fee disclosure.[5]

ASPPA also recognizes the need for full fee disclosure and strongly supports the DOL initiative in this regard. On February 14, 2005, ASPPA submitted comments to the DOL regarding disclosure of fees to plan fiduciaries (Comment Letter). ASPPA, however, is concerned that the implementation of the proposed

Schedule C will result in substantial costs for service providers, which will ultimately be passed on to plans, with little additional meaningful disclosure to plan sponsors. In fact, the proposed Schedule C changes may create even more confusion regarding fees than currently exists.

a. The requirement regarding compensation reported by a plan results in ambiguities

The proposed instructions contain ambiguities regarding reported compensation paid ("directly or indirectly") by a plan. For example, a law firm's invoices must be paid by the plan sponsor to the extent they represent fees for settlor functions provided. Similarly, a plan may pay all investment management and advisory fees out of plan assets, but the plan sponsor may cover administrative charges. There is disagreement among preparers as to whether all fees related to the plan are reportable or only those that are actually paid from the plan's assets. This argument is exacerbated by the fact that the information reported on Schedule C does not correlate to figures reported in Schedule H, Part II, line 2i.

ASPPA recommends that the DOL clarify the instructions for Schedule C to indicate that service provider information required to be reported does not include payments made by the plan sponsor and not reimbursed by the plan/trust.

b. There is a need for additional guidance when using estimates or proxies for disclosure

To reduce costs of compliance, plans and service providers should have maximum flexibility to use estimates or proxies for disclosure. The proposed Schedule C would permit the use of estimated amounts, as long as a formula for calculating payments is also disclosed.

ASPPA recommends that the DOL provide additional guidance regarding the amount of detail required in such disclosure.

c. ASPPA has three fundamental concerns with the proposed Schedule C disclosure regime

1. The heightened disclosure required by the proposed Schedule C, applied to enumerated service providers, is over-inclusive

Heightened disclosure requirements apply to a broadly defined "enumerated service providers." The definition covers all but six of the 27 service provider codes on Form 5500 (only accountants, actuaries, real estate brokers, computing/data processors, lawyers and printers are excluded). While the proposal's general rule is that bundled providers need not disclose the allocation of costs among affiliates or third party subcontractors, the exception for amounts paid to those otherwise contracting with the plan or enumerated service providers would require many, if not most, "service providers to service providers" under bundled arrangements to be subject to this additional disclosure.

This disclosure will not provide useful information to plan sponsors in selecting or monitoring a service provider's fees. Furthermore, and perhaps more importantly, other service providers will be required to disclose such a large volume of information that it could obfuscate information that might be useful to a plan sponsor.

As noted in ASPPA's Comment Letter, additional disclosure by those entities providing investment-related services would cover fees paid for the most expensive component of most plans—the cost of investments (90%, according to DOL's Study of Plan Fees and Expenses). Additionally, even where investment consultants are not fiduciaries, plan sponsors generally rely on their guidance. Thus, plan sponsors would benefit from disclosure relating to whether such guidance may be affected by other factors, such as third party revenue. That same consideration does not apply across the scope of plan functions, such as recordkeeping, custody, or trust services—all of which are incorporated in the proposed enumerated service provider definition and subject to heightened disclosure requirements.

2. Aspects of the proposed Schedule C will likely result in misleading and duplicative fee disclosure

As noted in ASPPA's Comment Letter, ASPPA supports a "total cost" approach to fee and expense disclosure. A total cost approach will simplify fee disclosure and avoid confusion, particularly for small plan sponsors. Requiring disclosure of the allocation of costs or third party payments among providers, as proposed, is likely to result in confusion, and could leave plan sponsors with a mistaken belief that all amounts disclosed as payments on Schedule C by service providers are amounts paid out of plan assets, thereby reducing the rate of return on investments.

The proposed Schedule C also would require a service provider to disclose amounts it receives that cannot be allocated among numerous plans as an amount for each plan equal to the total amount received by the service provider. This disclosure does nothing to enable plan fiduciaries to accurately monitor the reasonableness of fees. Rather, it provides fiduciaries with misleading information regarding actual costs attributable to a single plan.

The proposed Schedule C does not require meaningful disclosure that would address the problems plan sponsors may face in evaluating total plan costs or comparing providers—disclosure on Form 5500 will not result in an "apples to apples" comparison of plan service provider cost. In addition, the disclosure will occur well after a service provider has been selected for the plan and paid for its services.[6]

3. The cost of compliance with the proposed Schedule C likely outweighs the utility of the proposed disclosure

The DOL estimates the time required to complete the proposed Schedule C to be 1:35 minutes. The actual time that will be required to accurately complete the schedule, however, is likely to be much longer because providers would need to enhance systems to facilitate tracking and allocating fees that are attributable to multiple plans, and the plan administrator would need time to identify providers, formulate inquiries and track responses.

Similarly, the costs incurred in connection with the completion of the schedule would also be expected to be high. This increased cost would be particularly problematic for smaller providers.

ASPPA recommends that the heightened disclosure requirements under Schedule C be limited to those providers who provide recommendations or advice regarding investments. Accordingly, the definition of "enumerated service provider" should be revised to eliminate service providers, such as contract administrators, custodians, trustees, recordkeepers and appraisers.

ASPPA also recommends that the fees disclosed on Schedule C be limited to fees and costs paid by the plan, rather than requiring duplicative disclosure of fees shared by service providers that do not affect plan costs.

* * *

These comments were prepared by the Reporting & Disclosure Subcommittee of ASPPA's Government Affairs Committee (GAC), with input from GAC's DOL Subcommittee and Tax Exempt and Governmental Plans Subcommittee. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration.

/s/ Brian H. Graff, Esq., APM Executive Director/CEO	/s/ Teresa T. Bloom, Esq., APM Chief of Government Affairs
/s/ Ilene H. Ferenczy, Esq., CPC, Co-chair Gov't Affairs Committee	/s/ David M. Lipkin, MSPA, Co-chair Gov't Affairs Committee
/s/ Sal L. Tripodi, Esq., APM, Co-chair	/s/ Robert M. Richter, Esq., APM, Chair

Gov't Affairs Committee Administrative Relations Committee

/s/
Nicholas J. White, Esq., APM, Co-chair
Administrative Relations Committee

---

[1]ASPPA supports extending the use of Form 5500-SF to those for whom the PPA mandates simplified filings as preferable to adding a third form.

[2] The instructions to Form 5500-SF under "Using Form 5558" also state that "an electronic copy of the completed *and signed* Form 5558" (emphasis added) must be attached if the box is checked indicating "filing under extension of time." Effective for Form 5500 filings due on or after January 1, 2006, however, the IRS no longer requires a signature on Form 5558. Similar instructions to the Form 5500 under "Using Form 5558" seem to recognize this, as there is no mention that Form 5558 must be signed.

[3] ASPPA submitted comments on September 19, 2006, to the DOL recommending that the Form 5500 be amended to permit plans to include the amounts mandated for the correction of late deposits of elective deferrals as an alternative method for filing under the VFC program.

[4] DFE filings pertain to plans that delay attaching the opinion under the rules of 29 CFR 2520.104-50.

[5] *See ERISA Advisory Council Report of the Working Group on Plan Fees and Reporting on Form 5500* (Nov. 10, 2004), and *Staff Report Concerning Examinations of Select Pension Consultants*, SEC, Office of Compliance Inspections and Examinations (May 16, 2005).

[6] See, *e.g., ERISA Advisory Council Report of the Working Group on Plan Fees and Reporting on Form 5500*, section III.C ("the Form 5500 is not the best vehicle to promote [revenue sharing disclosure] as the Form is filed well after the plan sponsor has already engaged the provider and selected the investment options").