

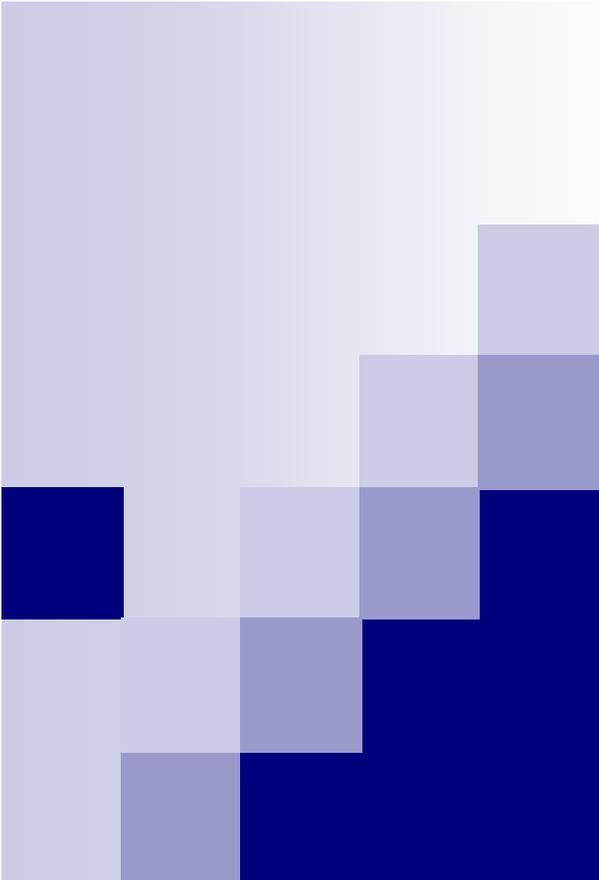
GROOM LAW GROUP, CHARTERED

2007 Employee Benefits Seminar

Potpourri of Plan Communication Issues

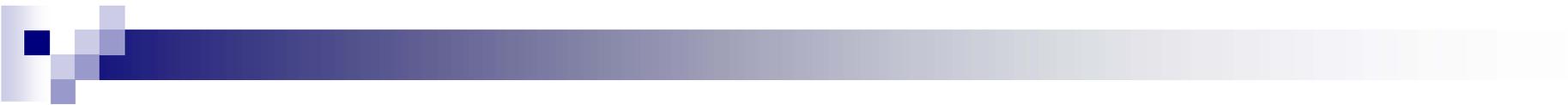
Presenters: Mark Lofgren (Moderator)
Kendall Daines
Liz Dold
Anna Driggs

Topics: PPA-Required Notices
Benefit Statements
SPDs and SMMs



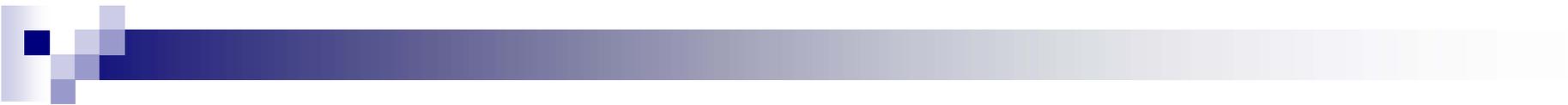
Plan Communication Issues for Qualified Plans

Mark Lofgren, Elizabeth Dold,
Kendall Daines, and Anna Driggs
Groom Law Group



Participant Benefit Statements - Overview

- Section 105(a) of ERISA, as amended by PPA
 - Who
 - To Whom
 - What
 - How
 - When
- Effective Date
 - Generally, beginning in 2007
- Penalty for Non-Compliance – Section 502(c)(1) of ERISA
 - Up to \$110 per day, per participant



Participant Benefit Statements - Guidance

- Model Benefit Statements
 - Not yet available; at the earliest – beginning of 2008
- Field Assistance Bulletin 2006-03 (Dec. 20, 2006)
 - Good faith compliance standard
 - Form, manner, dates for furnishing statements
- Field Assistance Bulletin 2007-03 (Oct. 12, 2007)
 - Revised due date for non-participant directed defined contribution plans



Automatic Enrollment Notices

■ Automatic Enrollment – Safe Harbor

- Annual Notice Required – Must be provided to all eligible employees within a reasonable period before each plan year.
- Content – Must be sufficiently comprehensive to inform employees of their rights and obligations. Must explain the right to opt out of automatic contributions and, if participants direct plan investments, describe the default investment.
- Opportunity to Opt Out – The notice will not be treated as meeting notice requirements unless employees have a reasonable period after receipt to make an affirmative election.



Automatic Enrollment Notices (cont.)

■ Automatic Enrollment – Non-Safe Harbor

- Notice Required – Must be provided within a reasonable period before automatic contributions are deducted from paycheck.



Automatic Enrollment Notices (cont.)

■ “Unwinding” Notice

- Permits a participant to request the distribution of automatic contributions within 90 days of the date contributions are first deducted from his or her paycheck.
- Basically, same notice as required for the automatic enrollment safe harbor, except a description of plan investments is required even if participants may not direct investment.
- Applies to safe-harbor and non-safe harbor designs.

■ ERISA Preemption Notice

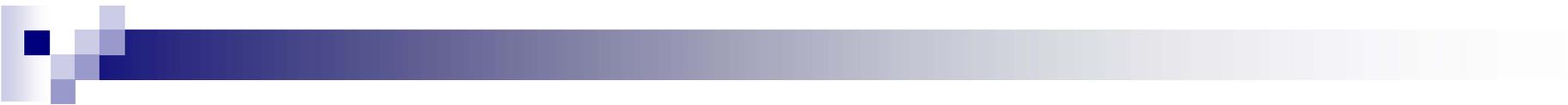
- Relief available only for ERISA 404(c) plans and only if the default investment meets DOL regulations.
- Same notice content as the “unwinding” notice.
- Applies to safe-harbor and non-safe harbor designs.



Automatic Enrollment Notices (cont.)

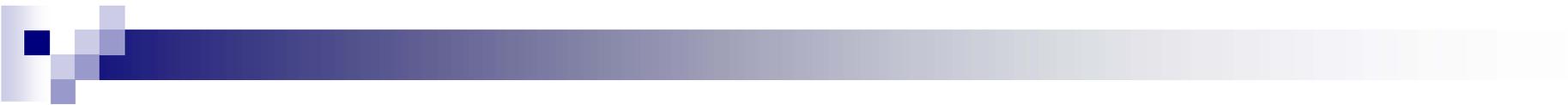
■ Default Investment Notice

- Annual notice explaining the right to direct investment of plan account and the default investment if no direction received.
- Not limited to automatic enrollment situations.



Joint and 75% Optional Survivor Annuity

- PPA generally requires the new “qualified optional survivor annuity” (or “QOSA”) for distributions beginning in 2008
- Applies to defined benefit plans, money purchase plans, and defined contribution plans where participant elects annuity
- QOSA is either a joint and 75% survivor annuity or a joint and 50% survivor annuity, depending on the plan’s QJSA form



Joint and 75% Optional Survivor Annuity (cont.)

- Can avoid new 75% survivor option if plan's QJSA is joint and 100% survivor form, and include joint and 50% as optional form
 - If change plan's QJSA to joint and 100%, consider impact on qualified pre-retirement survivor annuity
- Plan distribution forms will need to be revised for QOSA



Impact of New 417(e) Interest Rate

- Traditional pension plans with lump sum distribution option
 - Minimum lump sum value rules to be phased in over 5 years, beginning in 2008
 - New interest rate – 3-segment, corporate bond yield curve for month before date of distributions (or other period determined by IRS)
 - New mortality table
 - Minimum lump sum amounts will likely decrease in most cases
 - Permitted to continue to use “old” rates if better?
 - Impact on relative value comparisons



Impact of New 417(e) Interest Rate (cont.)

- Cash balance plan annuities
 - Can/must plans move to new 417(e) rates for converting account to annuities?
 - Does existing plan language refer to statute or to 30-year treasury rates?
 - New rates may create higher annuity values
 - Prior change in mortality table was permitted, with cut-back relief
 - Impact on relative value comparisons



Impact of New 417(e) Interest Rate (cont.)

- Application of PPA cut-back relief
- 204(h) notice implications?



Other PPA Required Notices

- **402(f) Notice (existing rollover notice)**
 - Several PPA changes impact the Notice content and timing of distribution
 - IRS is updating existing model notice (Notice 2002-3)
- **QJSA Notice**
 - Extension of distribution period from 30-90 to 30-180 days
- **Notice to Defer**
 - Reasonable, good faith standard until 90 day after regulations are issued
 - safe harbor requirements in Notice 2007-7
 - Proposed Regulations pending (on the 2007-2008 Guidance Plan)



Other PPA Required Notices

- **Benefit Limitation Notice**
 - New DB Notice for Benefit Restrictions Due to Funding Status
- **Funding Notice**
 - Annual DB funding notice to participants
 - pending model notice
- **Diversification Notice**
 - Model notice available in Notice 2006-107.

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PPA-Related Disclosure Requirements

October 18, 2007

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
Notice to Defer	Defined Benefit ("DB") and Defined Contribution ("DC") Plans	New participant notice requirement created by the Pension Protection Act of 2006 ("PPA") that requires plan sponsors to provide participants with a description of the consequences of failing to defer receipt of a plan distribution.	Applies to notices issued in plan years beginning after December 31, 2006 (without regard to the annuity starting date for the distributions).	<p>Notice 2007-7, Q&A-32 provides that a plan will not be treated as failing to meet this new requirement if the plan administrator makes a reasonable attempt to comply with the new requirements for notices provided prior to the 90th day after regulations are issued reflecting the requirement.</p> <p>Notice 2007-7, Q&A-33 provides a safe harbor where "(a) in the case of a defined benefit plan, a description of how much larger benefits will be if the commencement of distributions is deferred; (b) in the case of a defined contribution plan, a description indicating the investment options available under the plan (including fees) that will be available if distributions are deferred; and (c) the portion of the summary plan description that contains any special rules that might materially affect a participant's decision to defer." For purposes of clause (a), a plan administrator can use a description that includes the financial effect of deferring distributions, as described in § 1.417(a)(3)-1(d)(2)(i), based solely on the normal form of benefit.</p>
402(f) Notice	DB and DC Plans	PPA made several changes that impact the 402(f) notice for eligible rollover distributions. For example: (1)	Generally distributions after	Notice 2007-7, Q&A-31 provides the 180-day period applies only to notices issued in the plan years beginning after

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
		<p>extended the required notice distribution period from 30-90 days to 30-180 days prior to date of distribution, (2) added the ability to make a direct rollover from a qualified plan to a Roth IRA, (3) modified Code section 72(t) (10% early distribution penalty) for military and public safety officers to provide additional exceptions, and (4) extended rollover treatment to non-spouse beneficiaries.</p>	<p>December 31, 2006 (Roth IRA after December 31, 2007).</p>	<p>December 31, 2006 without regard to the annuity starting date for the distributions.</p> <p>The IRS model notice does not yet reflect these changes, but the project to update the notice is on the IRS 2007-2008 guidance plan.</p>
<p>Qualified Joint and Survivor Explanation</p>	<p>DB, MPPP, and DC plans with an annuity option</p>	<p>PPA modified the survivor benefits available by creating a "qualified optional survivor annuity," which is based on the annuity benefit available for a survivor annuity under a QJSA. If the survivor annuity provided under a plan's QJSA is less than 75 percent of the annuity payable during the joint lives of the participant and spouse (e.g., joint and 50% survivor annuity), then the survivor annuity payable under the QOSA must equal 75 percent. If the survivor annuity provided under the plan's QJSA is more than 75 percent of the annuity payable during the joint lives of the participant and spouse (e.g., joint and 100% survivor annuity), then the survivor annuity payable under the QOSA equals 50 percent.</p> <p>Period for notice to be sent describing the QJSA and QOSA is extended to 180 days in the same way as the 402(f)</p>	<p>QOSA effective for plan years beginning in 2008 (special rules for CBAs).</p> <p>The 180-period is effective for plan years beginning after December 31, 2006</p>	<p>None to date on the QOSA. Notice 2007-7, Q&A-31 provides effective date information on the 180-day period change.</p>

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
		<p>extension.</p> <p>For defined benefit plans, the PPA changes to the applicable interest and mortality assumptions applicable under Code section 417(e) may impact the amount of lump sum and other optional distribution forms under a plan and may affect the "relative value" disclosures for distributions commencing in 2008.</p>		
Blackout and Mapping Notices	DC	<p>PPA amended section 404(c) in two relevant respects: (1) plan fiduciaries are protected from liability for investment losses by section 404(c) during a "blackout" period if they authorized and implemented the blackout period consistent with the specific statutory requirements; and (2) new section 404(c)(4) was added to provide generally that, if certain requirements are met, section 404(c) relief from liability for investment losses is available for mapping that constitutes a "qualified change in investment options."</p> <p>A "qualified change in investment options" must meet the following requirements: (i) the participant's account is reallocated among one or more new investment options which have characteristics relating to risk and rate of return that are reasonably similar to the existing investment</p>	<p>Except for collectively-bargained plans, these changes generally apply to plan years beginning after December 31, 2007.</p>	<p>No PPA-related guidance.</p>

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
		<p>options immediately before the change, (ii) notice must be sent at least 30 days and no more than 60 days before the effective date of the change, explaining how the account will be invested in the absence of affirmative directions and including information comparing the new and existing options, (iii) the participant must not have provided affirmative investment instructions contrary to the change before the effective date of such change, and (iv) the investments of the participant or beneficiary in effect immediately before the change must have been the product of the exercise of control by the participant or beneficiary.</p>		
Periodic Benefit Statements	DB and DC	<p>PPA amended section 105(a) of ERISA to generally require that plan administrators furnish participants and beneficiaries with periodic benefits statements, which describe (on the basis of the latest available information) the total benefits accrued; the vested accrued benefits or the earliest day on which benefits will vest; and an explanation of any permitted disparity or any floor-offset arrangement that may be applied in determining the benefit. DC plan participants who have the right to direct investment in their accounts must be furnished a quarterly benefit statement which describes the value of each</p>	<p>Except for collectively-bargained plans, the periodic benefit statement requirement applies to plan years beginning after 12/31/06.</p>	<p>FAB 2006-03 (as modified by FAB 2007-03 with respect to the due date for non-participant directed DC plans) provides that until further guidance, DOL will treat a plan administrator as satisfying the periodic benefit statement requirements if the administrator has acted in good faith with a reasonable interpretation of the requirements. FAB 206-03 describes DOL's view of what constitutes good faith compliance with respect to certain requirements (due dates, manner of delivery; form; model diversification language).</p>

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
		<p>investment in their account; an explanation of any applicable restrictions on their right to self-direct investments; an explanation of the benefits of diversification, including a statement of the risk of holding more than 20 percent of a portfolio in the security of one entity; and a notice directing participants/beneficiaries to the DOL website for sources of information on investing and diversification. DC plan participants who do not have the right to direct investment must be furnished with the periodic benefits statement annually. DB plan sponsors must either furnish a benefits statement every three years to certain plan participants or must annually provide a statement describing the availability of the benefits statement. Certain participants and beneficiaries that are not entitled to automatic receipt of benefit statements may receive them upon written request. All statements must be written in a manner calculated to be understood by the average plan participant; and may be delivered in written, electronic or other appropriate form to the extent such form is reasonably accessible to the participants or beneficiaries.</p>		
Benefit Limitation Notice	DB	PPA fundamentally altered the calculations for determining the funding status of DB plans and places	Applies to plan years beginning in	The IRS and Treasury recently released proposed regulations under Code section 430 and 436 regarding the new

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
		new restrictions on certain benefits when the plan falls below certain funding percentages. Under PPA, plan sponsors must provide participants and beneficiaries with notice within 30 days (i) after the plan becomes subject to the limits on prohibited payments or unpredictable uncontingent event benefits or (ii) after the valuation date for the plan year in which the plan's adjusted target attainment percentage is less than 60 percent (or, if earlier, the date on which the adjusted target attainment percentage is deemed to be less than 60 percent).	2008.	funding rules. Regarding the participant notice, the preamble to these regulations provides that, in addition to written form, the notice can be provided in electronic or other form long as such form is reasonably ascertainable to the participant.
Diversification Notice	DC	As part of the legislation resulting from the Enron debacle, PPA created a new right that allows participants who have three years of service to divest their accounts of publicly traded employer securities and be able to direct investment into at least three investment options other than employer securities that each have different risk and return characteristics. PPA also requires plan sponsors to provide notice to participants at least 30 days prior to the individual first being eligible to exercise their diversification rights.	Subject to a three-year phase-in period, the diversification rights apply beginning in 2007.	Notice 2006-107 provides transition guidance during 2007 with respect to the underlying diversification right and a model notice (as directed by PPA) that can be used to satisfy the diversification notice requirement. Note, DOL recently published final regulations under ERISA section 502(c)(7) describing the applicable civil penalties for a plan sponsor who does not provide the notice. 29 C.F.R. § 2560.502c-7.
Funding Notice	DB	Extends the annual funding notice (with additional information required and accelerated time when the notice must be provided) that had only applied to multiemployer plans to single	Plan years beginning after December 31, 2007.	PPA directs DOL to issue a model notice that has not yet been released.

Name of Disclosure	Types of Affected Plans	Changes	Timing/Deadline	IRS/DOL Guidance
		<p>employer DB plans and includes a summary of the PBGC rules governing plan terminations. The notice must be provided to participants, beneficiaries, and the PBGC generally within 120 days after the end of the plan year to which it relates.</p>		
Automatic Enrollment Notice	DC	<p>While the IRS had blessed the use of automatic enrollment arrangements (where participants are automatically required to defer into a 401(k) account unless they affirmatively opt out), PPA modified Code section 401(k) and ERISA to provide a statutory basis for automatic enrollment arrangements and to clarify certain questions regarding automatic enrollment related to ERISA preemption and state wage withholding laws. As part of an automatic enrollment arrangement, plan sponsors must provide participants with a notice which describes (i) the participant's right under the arrangement not to make elective deferrals or to have a different percentage of elective deferrals made on the employee's behalf and (ii) how contributions will be invested absent an employee investment direction. Employees must be provided with a reasonable time period of time after receipt of the notice and prior to when the first elective deferral will be withheld.</p>	Applies beginning in 2008.	None

BENEFIT STATEMENT MATERIALS

Section 105 of ERISA

DOL Guidance

(e) *Cross References.*—For regulations respecting coordination of reports to the Secretaries of Labor and the Treasury, see §3004.

SEC. 105. REPORTING OF PARTICIPANT'S BENEFIT RIGHTS.

Editor's Note

Caution: ERISA §105(a), as follows, is applicable to plan years beginning on or before December 31, 2006. For ERISA §105(a) effective for plan years beginning after December 31, 2006, see below.

(a) *Statement Furnished by Administrator to Participants and Beneficiaries.*—Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

- (1) the total benefits accrued, and
- (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

Editor's Note

Caution: ERISA §105(a), as follows, was amended by the Pension Protection Act of 2006 (Pub. L. No. 109-280), §508(a)(1), generally applicable to plan years beginning after December 31, 2006, with a transition rule for collectively bargained agreements.

(a) *Requirements To Provide Pension Benefit Statements.*—

(1) *Requirements.*—

(A) *Individual account plan.*—The administrator of an individual account plan (other than a one-participant retirement plan described in section 101(i)(8)(B)) shall furnish a pension benefit statement—

(i) at least once each calendar quarter to a participant or beneficiary who has the

right to direct the investment of assets in his or her account under the plan,

(ii) at least once each calendar year to a participant or beneficiary who has his or her own account under the plan but does not have the right to direct the investment of assets in that account, and

(iii) upon written request to a plan beneficiary not described in clause (i) or (ii).

(B) *Defined benefit plan.*—The administrator of a defined benefit plan (other than a one-participant retirement plan described in section 101(i)(8)(B)) shall furnish a pension benefit statement—

(i) at least once every 3 years to each participant with a nonforfeitable accrued benefit and who is employed by the employer maintaining the plan at the time the statement is to be furnished, and

(ii) to a participant or beneficiary of the plan upon written request.

Information furnished under clause (i) to a participant may be based on reasonable estimates determined under regulations prescribed by the Secretary, in consultation with the Pension Benefit Guaranty Corporation.

(2) *Statements.*—

(A) *In general.*—A pension benefit statement under paragraph (1)—

(i) shall indicate, on the basis of the latest available information—

(I) the total benefits accrued, and

(II) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable,

(ii) shall include an explanation of any permitted disparity under section 401(l) of the Internal Revenue Code of 1986 or any floor-offset arrangement that may be applied in determining any accrued benefits described in clause (i),

(iii) shall be written in a manner calculated to be understood by the average plan participant, and

(iv) may be delivered in written, electronic, or other appropriate form to the

ERISA Sec. 105(a)(2)(A)(iv)

extent such form is reasonably accessible to the participant or beneficiary.

(B) *Additional information.*—In the case of an individual account plan, any pension benefit statement under clause (i) or (ii) of paragraph (1)(A) shall include—

(i) the value of each investment to which assets in the individual account have been allocated, determined as of the most recent valuation date under the plan, including the value of any assets held in the form of employer securities, without regard to whether such securities were contributed by the plan sponsor or acquired at the direction of the plan or of the participant or beneficiary, and

(ii) in the case of a pension benefit statement under paragraph (1)(A)(i)—

(I) an explanation of any limitations or restrictions on any right of the participant or beneficiary under the plan to direct an investment,

(II) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified, and

(III) a notice directing the participant or beneficiary to the Internet website of the Department of Labor for sources of information on individual investing and diversification.

(C) *Alternative notice.*—The requirements of subparagraph (A)(i)(II) are met if, at least annually and in accordance with requirements of the Secretary, the plan—

(i) updates the information described in such paragraph which is provided in the pension benefit statement, or

(ii) provides in a separate statement such information as is necessary to enable a participant or beneficiary to determine their nonforfeitable vested benefits.

(3) Defined benefit plans.—

(A) *Alternative notice.*—In the case of a defined benefit plan, the requirements of paragraph (1)(B)(i) shall be treated as met with respect to a participant if at least once each year the administrator provides to the participant notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement. Such notice may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant.

(B) *Years in which no benefits accrue.*—The Secretary may provide that years in which no employee or former employee benefits (within the meaning of section 410(b) of the Internal Revenue Code of 1986) under the plan need not be taken into account in determining the 3-year period under paragraph (1)(B)(i).

Editor's Note

Caution: ERISA §105(b), as follows, generally is applicable to plan years beginning on or before December 31, 2006. For ERISA §105(b) for plan years beginning after December 31, 2006, see below.

(b) One-per-Year Limit on Reports.—In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12-month period.

Editor's Note

Caution: ERISA §105(b), as follows, was amended, generally applicable to plan years beginning after December 31, 2006, with a transition rule for collectively bargained agreements, by the Pension Protection Act of 2006 (Pub. L. No. 109-280), §508(a)(2)(B). For ERISA §105(b) for plan years on or before December 31, 2006, see above.

(b) Limitation on Number of Statements.—In no case shall a participant or beneficiary

of a plan be entitled to more than 1 statement described in subparagraph (A)(iii) or (B)(ii) of subsection (a)(1), whichever is applicable, in any 12-month period.

(c) Individual Statement Furnished by Administrator to Participants Setting Forth Information in Administrator's Internal Revenue Registration Statement and Notification of Forfeitable Benefits.—Each administrator required to register under §6057 of the Internal Revenue Code of 1954 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by §6057(a)(2) of such Code. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

Editor's Note

Caution: ERISA §105(d), as follows, was stricken, generally applicable to plan years beginning after December 31, 2006, by the Pension Protection Act of 2006 (Pub. L. No. 109-280), §508(a)(2)(A).

(d) Plans to Which More Than One Unaffiliated Employer Is Required to Contribute; Regulations.—Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

SEC. 106. REPORTS MADE PUBLIC INFORMATION.

(a) Except as provided in subsection (b), the contents of the annual reports, statements, and other documents filed with the Secretary pursuant to this part shall be public information and the Secretary shall make any such information and data available for inspection in the public document room of the Department of Labor. The Secretary may use the

information and data for statistical and research purposes, and compile and publish such studies, analyses, reports, and surveys based thereon as he may deem appropriate.

(b) Information described in §§105(a) and 105(c) with respect to a participant may be disclosed only to the extent that information respecting that participant's benefits under title II of the Social Security Act may be disclosed under such Act.

SEC. 107. RETENTION OF RECORDS.

Every person subject to a requirement to file any report or to certify any information therefor under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement under §104(a)(2) or (3) of this title shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under §104(a)(2) or (3).

SEC. 108. RELIANCE ON ADMINISTRATIVE INTERPRETATIONS.

In any criminal proceeding under §501 based on any act or omission in alleged violation of this part or §412, no person shall be subject to any liability or punishment for or on account of the failure of such person to (1) comply with this part or §412, if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any regulation or written ruling of the Secretary, or (2) publish and file any information required by any provision of this part if he pleads and proves that he published



FIELD ASSISTANCE BULLETIN NO. 2006 - 03

Date: December 20, 2006

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: PERIODIC PENSION BENEFIT STATEMENTS – PENSION
PROTECTION ACT OF 2006

BACKGROUND:

Section 105 of the Employee Retirement Income Security Act (ERISA) sets forth the requirements applicable to the furnishing of pension benefit statements to plan participants and beneficiaries. Section 508(a) of the Pension Protection Act of 2006 (PPA)¹ amended section 105, making a number of significant changes to the pension benefit statement requirements for both individual account plans and defined benefit plans. Among other things, the amendments to section 105 establish an affirmative obligation to automatically furnish pension benefit statements – at least once each quarter, in the case of individual account plans that permit participants to direct their investments; at least once each year, in the case of individual account plans that do not permit participants to direct their investments; and at least once every three years in the case of defined benefit plans. The amendments also increase the amount of information required to be contained in pension benefit statements for both individual account and defined benefit plans.

The amendments to section 105 are generally applicable to plan years beginning after December 31, 2006, with special rules for plans maintained pursuant to collective bargaining agreements.² Section 508(b) of the PPA requires the

¹ Pub. L. No. 109-280, 120 Stat. 780 (2006).

² See § 508(c) of the Pension Protection Act of 2006.

Department to develop one or more model pension benefit statements within one year of the date of enactment of the PPA (i.e., by August 18, 2007).

Since the enactment of the PPA, representatives of plan sponsors, service providers and others in the employee benefits community have raised a number of interpretive and compliance issues concerning the new pension benefit statement provisions. In particular, concerns have been expressed about the imminent effective date, the absence of guidance, and the cost and burdens attendant to pension benefit statement compliance efforts prior to the adoption of pension benefit statement regulations and the issuance of model pension benefit statements by the Department.

In recognition of the foregoing concerns, including the fact that major changes in what, how, and when pension benefit statement information is furnished to participants and beneficiaries may, in the absence of regulatory guidance from the Department, result in plan sponsors, plans, or participants and beneficiaries (in the case of individual account plans) incurring excessive or unnecessary compliance costs, the Department is providing general guidance in this Bulletin for EBSA's national and regional offices, as well as plan sponsors and administrators, concerning good faith compliance with the pension benefit statement provisions pending the issuance of regulations.

GOOD FAITH COMPLIANCE:

The Department has not yet issued regulations or other guidance concerning compliance with the pension benefit statement provisions of section 105 of ERISA, as amended by section 508(a) of the PPA. Until such regulations or guidance is issued, the Department will, as an enforcement matter, treat a plan administrator as satisfying the requirements of section 105 if the administrator has acted in good faith with a reasonable interpretation of those requirements. This Bulletin provides the Department's views as to what constitutes good faith compliance with certain requirements of section 105.

ISSUES:

1. Form of furnishing statements. In the case of individual account plans that provide for participant direction of investments, to what extent can the benefit statement requirements be satisfied by using multiple documents or sources for the required information?

It appears that, in the case of individual account plans that provide for participant direction, the information required to be included in pension benefit statements will, in many instances, involve multiple service providers, each of

whom is a source for some, but not all, of the required information. For example, the plan administrator may be the source for information on vesting, whereas the plan's recordkeeper or brokerage firm may be the source for investment-related account information. We understand that, in the short term, compiling all the required information for disclosure in a single document may be impractical for plans.

Pending the issuance of further guidance, it is the view of the Department that good faith compliance with the pension benefit statement provisions does not preclude the use of multiple documents or sources for benefit statement information, provided that participants and beneficiaries have been furnished notification that explains how and when the information required by section 105 will be furnished or made available to participants and beneficiaries. Such notification should be written in a manner calculated to be understood by the average plan participant, furnished in any manner that a pension benefit statement could be furnished under this Bulletin (see issue two, below), and furnished in advance of the date on which a plan is required to furnish the first pension benefit statement pursuant to section 105(a)(1)(A)(i) of ERISA.

2. Manner of furnishing statements. To what extent can the pension benefit statement requirements be satisfied using electronic media?

Section 105(a)(2)(A)(iv) provides that a pension benefit statement may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary. In the Technical Explanation of the PPA, prepared by the staff of the Joint Committee on Taxation, the Committee explains, by way of example, that regulations relating to the furnishing of pension benefit statements, "could permit current benefit statements to be provided on a continuous basis through a secure plan website for a participant or beneficiary who has access to the website."³

With regard to the use of electronic media generally, the Department has issued a regulation, at 29 C.F.R. § 2520.104b-1(c), setting forth conditions under which a plan administrator will be deemed to satisfy the requirement, in section 2520.104b-1(b), that certain disclosures be furnished using "measures reasonably calculated to ensure actual receipt of the material." While the furnishing of the required pension benefit statement information in accordance with the safe harbor prescribed in paragraph (c) of section 2520.104b-1 would constitute good faith compliance with section 105, the Department notes that such manner of furnishing is not the exclusive means by which plan administrators could, in the absence of guidance to the contrary, satisfy their obligation to furnish pension

³ See Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006* (JCX-38-06), August 3, 2006.

benefit statement information. In this regard, we note that the Department of the Treasury and Internal Revenue Service recently issued guidance, at 26 C.F.R. § 1.401(a)-21,⁴ relating to the use of electronic media to provide certain notices and documents required to be furnished to participants by retirement plans under the Internal Revenue Code. For purposes of section 105 of ERISA, the Department, pending further guidance and a review of the provisions of section 2520.104b-1(c), will view the furnishing of pension benefit statements in accordance with the provisions of section 1.401(a)-21, as good faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries.

With regard to pension plans that provide participants continuous access to benefit statement information through one or more secure websites, the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notification must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105. Such notification should be written in a manner calculated to be understood by the average plan participant, furnished in any manner that a pension benefit statement could be furnished under this Bulletin, and furnished both in advance of the date on which a plan is required to furnish the first pension benefit statement pursuant to section 105(a)(1)(A)(i) and (ii) of ERISA and annually thereafter.

3. Dates for furnishing statements. Because the new pension benefit statement provisions are applicable as of the first plan year beginning after December 31, 2006, what is the earliest date on which non-collectively bargained pension plans will be required to automatically furnish benefit statements that comply with the new provisions?

With regard to individual account plans that permit participants and beneficiaries to direct the investment of assets in their account, section 105(a)(1)(A)(i) requires that a pension benefit statement be furnished at least once each calendar quarter. For calendar year plans subject to this provision, the first pension benefit statement would be required for the quarter ending March 31, 2007. If a plan operated on a fiscal year basis, with the first plan year (after December 31, 2006) beginning on July 1, 2007, the first pension benefit statement

⁴ 71 FR 61877 (Oct. 20, 2006).

required to comply with the new requirements would be required to be furnished for the quarter ending September 30, 2007.

Plans that do not provide participants or beneficiaries a right to direct their investments are required, pursuant to section 105(a)(1)(A)(ii), to furnish pension benefit statements at least once each calendar year. Whether on a calendar year or fiscal year basis, the first pension benefit statement for such plans that is required to comply with the new requirements would be required to be furnished for the calendar year ending December 31, 2007.

Pending the issuance of further guidance, it is the view of the Department that the furnishing of pension benefit statement information not later than 45 days following the end of the period (calendar quarter or calendar year) will constitute good faith compliance with the requirement to furnish a pension benefit statements in accordance with section 105(a)(1)(A)(i) and (ii).

Defined benefit plans generally are required, pursuant to section 105(a)(1)(B)(i), to furnish participants a pension benefit statement at least once every three years. The first pension benefit statement complying with the new requirements, therefore, would be due for the 2009 plan year, provided that the plan does not elect to comply with the alternative notice requirement in section 105(a)(3)(A). The alternative notice requirement for defined benefit plans provides that the requirements of section 105(a)(1)(B)(i) shall be treated as met with respect to a participant if at least once each year the administrator provides the participant notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement. If a plan elects to take advantage of the alternative notice provision in section 105(a)(3)(A), the required notification must be furnished not later than December 31, 2007.

It is the view of the Department that, in the absence of guidance to the contrary, similar principles would apply in determining good faith compliance by plans maintained pursuant to one or more collective bargaining agreements, with respect to which PPA section 508(c)(2) provides special rules for determining the date on which the provisions of section 105 are effective.

4. Right to direct investments. Will an individual account plan that does not otherwise provide participants the right to direct the investment of assets in their accounts be subject to the requirement to furnish statements quarterly (section 105(a)(1)(A)(i)) merely because the plan permits participants to take participant loans from the plan?

Pending issuance of further guidance, a reasonable interpretation of section 105(a)(1)(A)(i) would be that a participant loan feature does not, standing alone,

cause a plan to be a plan that provides participants the right to direct the investment of assets in their accounts.

5. Limitations or restrictions on right to direct investments. Section 105(a)(2)(B)(ii)(I) requires that the pension benefit statement of an individual account plan that permits participant investment direction include “an explanation of any limitations or restrictions on any right of the participant or beneficiary under the plan to direct an investment.” What types of limitations and restrictions, if any, need not be included in benefit statements?

In the absence of guidance to the contrary, a reasonable interpretation of section 105(a)(2)(B)(ii)(I) would be that benefits statements must include limitations and restrictions on participants' or beneficiaries' rights imposed "under the plan," but need not include limitations and restrictions imposed by investment funds, other investment vehicles, or by state or federal securities laws.

6. Investment principles. Section 105(a)(2)(B)(ii)(II) requires that the pension benefit statement of an individual account plan that permits participant investment direction include “an explanation . . . of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified[.]” In the absence of a model benefit statement, is there language that a plan might use to satisfy this requirement?

It is the view of the Department that, in the absence of guidance to the contrary, the use of the following language will constitute good faith compliance with the requirements of section 105(a)(2)(B)(ii)(II):

To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security, to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk.

In deciding how to invest your retirement savings, you should take into account all of your assets, including any retirement savings outside of the Plan. No single

approach is right for everyone because, among other factors, individuals have different financial goals, different time horizons for meeting their goals, and different tolerances for risk.

It is also important to periodically review your investment portfolio, your investment objectives, and the investment options under the Plan to help ensure that your retirement savings will meet your retirement goals.

7. Notification of diversification rights. May an individual account plan that, prior to January 1, 2007, provides participants and beneficiaries diversification rights at least equal to the new rights conferred under section 204(j), satisfy the notice obligations under section 101(m) of ERISA by providing information concerning the importance of a diversified portfolio in connection with the furnishing of the first quarterly pension benefit statement information required by section 105(a)(1)(A)(i)?

Yes. The Department believes that the information required to be disclosed to participants and beneficiaries pursuant to section 101(m) is most significant for those participants and beneficiaries acquiring new diversification rights under section 204(j). For this reason the Department continues to believe that participants and beneficiaries in plans conferring new diversification rights as of January 1, 2007, should be furnished information concerning such rights and the importance of maintaining a diversified portfolio as soon as possible following January 1, 2007.⁵

With regard to individual account plans that, prior to January 1, 2007, provide participants and beneficiaries diversification rights at least equal to those conferred under section 204(j), the Department is persuaded that the furnishing of the 101(m) notice as a stand-alone disclosure may result both in confusion to participants and beneficiaries and distribution costs that, in many instances, will be passed on to the plan's participants and beneficiaries. In view of the fact that the periodic pension benefit statement required to be furnished pursuant to section 105(a)(1)(A)(i) is required, pursuant to section 105(a)(2)(B)(ii)(II), to contain information similar to that required by section 101(m)(2) concerning the importance of maintaining a diversified portfolio, and the fact that the pension benefit statement required to be furnished pursuant to section 105(a)(1)(A)(i) is required to be furnished within a few months of the furnishing of the 101(m) notice, the Department will treat a plan administrator's compliance with the periodic benefit statement requirements of section 105(a)(1)(A)(i) as satisfying the notice requirements of section 101(m) if, prior to January 1, 2007, the individual account plan provided participants and beneficiaries diversification rights at least equal to those conferred under section 204(j).

⁵ I.R.S. Notice 2006-107.

8. Department of Labor website. Section 105(a)(2)(B)(ii)(III) requires that the pension benefit statement of an individual account plan that permits participant direction of investment include a notice directing participants and beneficiaries to the Internet website of the Department of Labor for sources of information on individual investing and diversification. What Internet address should plan administrators use for this requirement?

For purposes of section 105(a)(2)(B)(ii)(III), plan administrators may use the following Internet address for pension benefit statements:
www.dol.gov/ebsa/investing.html.

Questions concerning this matter may be directed to Jeff Turner or Suzanne Adelman, at 202-693-8523.



FIELD ASSISTANCE BULLETIN NO. 2007-03

Date: October 12, 2007

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: PERIODIC PENSION BENEFIT STATEMENTS FOR NON-PARTICIPANT
DIRECTED INDIVIDUAL ACCOUNT PLANS

On December 20, 2006, the Department of Labor issued Field Assistance Bulletin (FAB) 2006-03 providing guidance for the Employee Benefits Security Administration's national and regional offices concerning good faith compliance with the pension benefit statement provisions of section 105 of ERISA, as amended by the Pension Protection Act of 2006. In FAB 2006-03, the Department indicated, among other things, that, pending the issuance of further guidance, the furnishing of pension benefit statement information not later than 45 days following the end of the relevant period (calendar quarter or calendar year) will constitute good faith compliance with the requirement to automatically furnish pension benefit statements by individual account plans.

Since the issuance of FAB 2006-03, it has come to the attention of the Department that many individual account plans that do not permit participants and beneficiaries to direct the investment of assets in their individual accounts may not be able to comply within the 45-day period set forth in the FAB. It is represented that many of these plans are profit sharing plans and the sponsors of those plans do not determine or contribute profit sharing contributions until after the sponsor's business tax return is completed. Similarly, non-participant directed individual account plans sponsored by partnerships cannot make contribution determinations until completion of the partnership tax return. It also is represented that many such plans are dependent on securing third-party valuations for those assets that do not have a readily ascertainable value. Compliance with the 45-day good faith period, therefore, would appear to be impossible or very expensive for many of these plans unless the benefit statements were based on data from the end of the prior plan year. It is further represented that much of the required information is compiled in connection with the preparation of the plan's Form 5500

Annual Return/Report and, accordingly, the time frame for furnishing benefit statements should correspond to the required filing of the plan's Form 5500.

In view of the foregoing, and pending the issuance of further guidance, the Department is providing the following additional guidance. Plan administrators of individual account plans that do not provide for participant direction of investments will be treated as acting in good faith compliance with a reasonable interpretation of section 105(a)(1)(A)(ii) of ERISA when statements are furnished to participants and beneficiaries on or before the date on which the Form 5500 Annual Return/Report is filed by the plan (but in no event later than the date, including extensions, on which the Annual Return/Report is required to be filed by the plan) for the plan year to which the statement relates.

This guidance supersedes the guidance provided in FAB 2006-03 as it relates to the dates for furnishing pension benefit statements to participants and beneficiaries of individual account plans that do not permit participants and beneficiaries to direct the investment of assets in their individual accounts.

Questions concerning this matter may be directed to Jeff Turner or Suzanne Adelman, at 202-693-8523.