



February 15, 2007

Robert Doyle
Director, Office of Regulations & Interpretations
U.S. Department of Labor
200 Constitution Avenue, NW, Suite N-5669
Washington, DC 20210

Dear Mr. Doyle:

The American Society of Pension Professionals & Actuaries (ASPPA), the Small Business Council of America (SBCA), the U.S. Chamber of Commerce (Chamber) and the National Federation of Independent Business (NFIB) appreciate your taking the time to meet with us on February 15, 2007, to discuss issues of concern to our organizations and their members. This letter is intended to supplement our discussion regarding the application of the 45-day requirement to provide benefit statements under the Field Assistance Bulletin (FAB) 2006-03 to *trustee-directed* defined contribution plans.

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.

SBCA is a national nonprofit organization that represents the interests of privately held and family-owned businesses on federal tax, health care and employee benefit matters. SBCA, through its members, represents well over 20,000 enterprises in retail, manufacturing and service industries, virtually all of which are stable small businesses providing health insurance and retirement plans for their employees. SBCA is fortunate to have the leading small business advisors in the country on its Advisory Boards.

The Chamber is the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region with substantial membership in all 50 states.

NFIB is the leading advocacy organization representing small and independent businesses. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its members in Washington and all 50 state capitals. NFIB's mission is to promote and protect the right of our members to own, operate and grow their businesses.

Background

Section 508(a) of the Pension Protection Act of 2006 (PPA) requires plans to provide benefit statements to participants and beneficiaries. These statements generally must be provided: (i) quarterly for participant-directed defined contribution plans; (ii) annually for all other defined contribution plans; and (iii) once every three years for defined benefit plans. PPA states that the information contained in the statements must be provided on the “basis of the latest available information.”

In Field Assistance Bulletin (FAB) 2006-03, the Department of Labor (DOL) stated that plans must provide benefit statements within 45 days after the end of the relevant period to constitute good faith compliance. The FAB states:

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 pension benefit statements in accordance with section 105(a)(1)(A)(i) and (ii).

Trustee-Directed Defined Contribution Plan Issues

There are currently thousands of defined contribution plans where the investment decisions are trustee-directed with no participant direction. Assets in these trustee-directed defined contribution plans must be valued at least annually. The earnings (or losses) are then allocated to participants’ accounts as of the end of the plan year. A substantial portion of these trustee-directed plans are maintained by small businesses for their employees.

The vast majority of participants in trustee-directed defined contribution plans receive annual benefit statements. Those statements, however, are typically prepared for participants at the same time as the Form 5500 and the Summary Annual Report. There are several reasons why annual benefits statements are not prepared until these two reports are completed.

Allocation of Earnings

Many trustee-directed defined contribution plans are profit-sharing plans with a 401(k) feature. In other words, contributions to the plan include employee elective deferrals and an employer profit-sharing contribution. A significant number of these plans will allocate plan investment earnings for the plan year based on the value of account balances as of the first day of plan year plus contributions using a half-year convention (*i.e.*, based on one-half of the elective deferrals made and one-half of the profit-sharing contribution accrued on behalf of the participants for the year). Thus, for example, the plan investment earnings allocable to a participant’s account for the 2006 plan year will be based on the beginning account balance plus one-half of elective deferrals contributed for 2006 and one-half of the 2006 profit-sharing contribution allocable to the participant’s account.

In virtually all cases, the employer will not determine or contribute the profit-sharing contribution until the business tax return is completed. In many cases, with extensions, the

business tax return will not occur until the following September for a calendar year plan.¹ In addition, in the case of a plan of a partnership, IRS rules limit the amount of the contribution based on the amount of “earned income,” which would also not be determined until the return is completed the following September. Thus, for these plans, it is simply not possible to allocate earnings and complete the tax return until well beyond the 45-day period proposed in the FAB.

Asset Valuation

Trustee-directed plans are often invested in assets that are not publicly traded and require an independent appraisal. Appraisals of such non-publicly traded assets are almost never completed within 45 days after the plan year; appraisals are typically completed a significant number of months after the end of the plan year. A common example would be a limited partnership interest. In many cases, valuation of the limited partnership interest is determined as part of the partnership tax return, due October 15, with extensions, assuming a calendar-year taxpayer. The taxpayer, and not the plan, is in control of when the valuation for such a limited partnership is prepared. Another example is non-traded stock of an ESOP. Thus, it would be impossible for the plan to meet the suggested 45-day deadline in the FAB.

Timing of Contributions

As indicated above, many trustee-directed defined contributions plans are profit-sharing plans where contributions for the plan year are not determined and made until the business tax return is completed. Employers do not want to deliver participant benefit statements until they know what the participant’s profit-sharing contribution for the year will be. As noted earlier, in many cases, the calendar year business tax return will not be completed until the following fall.

Expenses

In light of the issues regarding plan asset valuation and the timing of contributions discussed above, plan costs would be materially affected if annual benefit statements were required within 45 days after the end of the plan year. Assuming it is even possible, the plan might have to pay for expensive special asset appraisals for non-publicly traded assets. Further, accounting costs, again assuming all data even being available, would substantially increase for the plan sponsor if it were necessary to meet the suggested deadline. Practitioners have estimated that these additional costs could increase annual plan expenses, by as much as 25 percent, which would likely be borne by plan participants.

Recommendation

ASPPA, SBCA, the Chamber and NFIB recommend that the deadline for trustee-directed defined contribution plans annual benefits statements be no later than the deadline (with extensions) for filing the Form 5500 (*e.g.*, October 15, in the case of a calendar-year plan).

¹ The extended deadlines (assuming calendar-year taxpayers) for various business tax returns are as follows: C and S corporations—9/15; Partnership/LLP—10/15; Sole proprietorship—10/15.

This deadline would address the issues raised above regarding problems associated with the suggested FAB deadline of within 45 days after the end of the plan year.

The significant challenges and added costs associated with a 45-day deadline for trustee-directed defined contribution plans warrants an extended deadline given that the trustee has assumed responsibility for investing plan assets and cannot prepare accurate benefit statements until certain financial reporting is completed. The deadline proposed by ASPPA, SBCA, the Chamber and NFIB is also consistent with the extended deadline for the new funding notice for small business defined benefit plans, as required by section 501 of PPA.

Thank you for your attention to this matter. We would be willing to work with you in developing a workable timetable for these participant benefit statements.

Sincerely,

/s/

Brian H. Graff, Esq., APM, Executive Director/CEO
American Society of Pension Professionals & Actuaries

/s/

Paula Calimafde, Chair
Small Business Council of America

/s/

Aliya Wong, Director of Pension Policy
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