H.R. & BENEFITS E-NEWS

DOL Publishes Interim Guidance On Changes To ERISA Individual Benefit Statements & Diversification Notices Effective For 2007 Plan Years

December 21, 2006

Beginning in the 2007 plan year, pension and profit sharing plan administrators generally must begin providing individual pension benefit statements to participants and beneficiaries in accordance with significantly expanded requirements of Section 105 of the Employee Retirement Income Security Act (ERISA). Section 508(a) of the PPA significantly changed the requirements imposed under ERISA section 105 for furnishing of pension benefit statements to plan participants and beneficiaries for ERISA-covered defined benefit plans as well as 401(k) and other individual account plans. The new rules enacted as part of the Pension Protection Act of 2006 (PPA) generally are effective for plan years beginning after December 31, 2006.[1]

Yesterday, the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) yesterday published interim guidance to assist pension and profit sharing plan administrators in complying with changes individual benefit statements and notices of freedom to divest employer securities required by the PPA pending the Labor Department's adoption of regulations. The guidance provided by Field Assistance Bulletin (FAB) 2006-03 is likely to be particularly welcomed by administrators of 401(k) and other individual account plans that permit participants to self-direct the investment of their plan accounts, as those plans will be required begin providing quarterly pension benefit statements to participants and beneficiaries during the first quarter of the 2007 plan year.

Among other things, the PPA amendments to section 105 establish an affirmative obligation for ERISA-covered pension plans to automatically furnish pension benefit statements

- at least once each calendar 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 PPA amendments also substantially increase the amount of information required to be contained in pension benefit statements for both individual account and defined benefit plans.

The FAQ published December 20th sets forth the Labor Department's views about what will constitute good faith compliance with certain of these new requirements. It specifically provides guidance on form, manner, content, and timing requirements pertaining to individual benefit statements and on the extent to which furnishing the first individual benefit statements can satisfy diversification notice requirements. According to the FAQ, pending the issuance of further guidance, the Department will view the furnishing of pension benefit statement information meeting the FAQ's requirements concerning the form, manner and content of the individual benefit statements not later than 45 days following the end of the period (calendar quarter or calendar year) as constituting good faith compliance with the requirement to furnish a pension benefit statements in accordance with section 105(a)(1)(A)(i) and (ii).

The PPA amendments to ERISA section 105 will require changes to the content and form of the benefit statements. For instance, the pension benefit statements of plans permitting participants and beneficiaries to direct investments will be required to include "an explanation of any limitations or restrictions on any right of the participant or beneficiary under the plan to direct an investment" imposed under the Plan. Pending further guidance, the FAQ states that benefits statements must disclose 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.

ERISA section 105 also 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[.]" The PPA requires that the Labor Department develop a model statement to be used for this purpose. Pending the development of that model benefit statement, however, the FAQ provides a statement that plans can use to meet this requirement.

The PPA also amended ERISA to require plans investing in employer securities to provide participants and beneficiaries with certain rights to direct that plan accounts otherwise invested in employer securities be otherwise invested and requires that plan provide notification to participants and beneficiaries of these rights. The FAQ also indicates that an individual account plan that

[1] Special rules apply to collectively bargained plans.

provides participants and beneficiaries diversification rights at least equal to the new rights conferred under ERISA section 204(j) as of December 31, 2006 can satisfy these 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). According to the FAQ, however, plans conferring new diversification rights as of January 1, 2007, must furnish participants and beneficiaries with information concerning such rights and the importance of maintaining a diversified portfolio as soon as possible following January 1, 2007.

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).

Section 105(a)(2)(B)(ii)(III) also will require 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 web site of the Department of Labor for sources of information on individual investing and diversification. The FAQ states plan administrators may use the following Internet address for pension benefit statements for purposes of section 105(a)(2)(B)(ii)(III),: www.dol.gov/ebsa/investing.html.

For calendar year plans allowing participants to self-direct investments, the first pension benefit statement would be required for the quarter ending March 31, 2007. Plans with fiscal plan years have longer. If a plan operated on a fiscal year basis beginning on July 1, for example, the first pension benefit statement 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 must 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 required to comply with the new requirements would be required to be furnished for the calendar year ending December 31, 2007.

Defined benefit plans generally must 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, unless the plan elects to comply with the alternative notice requirement in section 105(a)(3)(A). Take advantage of the alternative notice provision in section 105(a)(3)(A), the plan must provide a required notification to participants and beneficiaries no later than December 31, 2007. The alternative notice requirement for defined benefit plans provides that the requirements of section 105(a)(1)(B)(i) will 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.

We hope that this information is useful to you. If you have questions about your plan's compliance with the new individual benefit statement requirements or other employee benefits or human resources concerns, would like to request a copy of the FAQ, or are interested in information on upcoming briefings providing more details about these new requirements, please contact: Cynthia Marcotte Stamer, P.C., Member, Glast, Phillips & Murray, P.C., 2200 One Galleria Tower, 13355 Noel Road, LB 48, and Dallas, Texas 75240. Telephone (972) 419-7188. E-mail cstamer@gpm-law.com.

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