U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

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.

Please note that as a result of changes to the agency's website, the new address for www.dol.gov/ebsa/investing.html is https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/pension-protection-act/investing-and-diversification.