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September 19, 2006

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2006 SEP 19 PM 1:35

Office of Regulations and Interpretations
EBSA, Room N-5669
R.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attention: Revision of Form 5500 and Form 5500 Regulation Revisions (RIN 1210-AB06)

The Employee Benefit Plans Expert Panel of the American Institute of Certified Public Accountants (AICPA) is pleased to respond to the Department of Labor's (DOL) Notice of Proposed Forms Revisions, *Proposed Revision of Annual Information Return/Reports,* and Proposed Rule, *Annual Reporting and Disclosure* (the Proposals). We support the DOL's efforts to streamline the annual reporting burdens on plans and to improve and clarify the Form 5500 Annual Return/Report and the related instructions. Consistent with those goals, we support the electronic filing requirement, and the addition of the Form 5500-SF. We have specific comments about a number of the provisions included in the proposals, which are detailed below.

II.C. ELIMINATION OF LIMITED REPORTING OPTION FOR CODE SECTION 403(b) PENSION PLANS

The Proposals note that, due to certain compliance issues found in Code section 403(b) plans, the DOL reexamined the continued reporting exemptions for 403(b) plans and proposes to amend the annual reporting requirements to put 403(b) plans on par with other pension plans covered by Title I of ERISA. The DOL believes this would enhance the Department's oversight capabilities and improve compliance without substantial additional burden. Under the Proposals, 403(b) plans that are subject to Title I of ERISA would be subject to the same annual reporting rules that apply to other ERISA-covered pension plans, including eligibility to file the proposed Short Form 5500. To accomplish this, the Proposals eliminate the current reporting exemption in CFR 2520.104-44(b)(3). Therefore, 403(b) plans that do not meet the Short Form filing requirements would be subject for the first time to the audit requirements of ERISA section 103(a)(3)(A) and be required to file annual financial statements that have been audited by an independent qualified public accountant (IQPA) with the Form 5500.

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We support improved accountability of 403(b) plans, and agree that the current reporting exemption provided under CFR 2520.104-44(b)(3) for those plans warrants reexamination. However, we wish to point out some critical issues relating to the practicality, costs, and additional burden of achieving this goal which warrant additional study and consideration by the DOL before finalizing the regulations and the 2008 Form 5500 and its instructions.

Additional Cost and Burden

Contrary to the statements in the Proposals that the proposed changes to CFR 2520.104-44(b)(3) and to the Form 5500 and related instructions will not result in a significant increased burden for 403(b) plans, for the reasons discussed below we believe the changes will in fact place a significant additional burden on many of those plans and their sponsors. We have reviewed the estimated burden hours and costs in Table 3 of the Annual Reporting and Disclosure proposal (showing an estimated 9,000 large 403(b) plans affected and an estimated change in cost of $53.9 million–less than $6,000 per plan), and are concerned that these estimates are grossly understated for the reasons discussed below. We believe the DOL should restudy the cost and burden associated with the Proposals and determine a more reasonable estimate of the cost and burden associated with the additional Form 5500 filing requirements and annual independent audits.

While some 403(b) plans already may voluntarily have annual audits for fiduciary or internal purposes, most 403(b) plans currently are not subject to audit. We wish to point out that, for plans that never have been audited, both initial and ongoing audits likely would be very costly and would create a significant additional burden on the plan sponsor, depending on the existence and condition of the plan records necessary to support an audit.

Specifically, the determination of beginning of year participant balances, accumulated data from prior years, and consistency of application of accounting practices over the years—all required to be considered by the auditor in the initial audit of a plan—may be extremely difficult due to changes in personnel at the plan sponsor or TPA and/or a lack of records dating back to the inception of the plan. It is our understanding that some service providers may have difficulty providing a confirmation of balances, such as investments or participant accounts, due to the manner in which they have performed their recordkeeping functions. Also of concern is the auditor's responsibility with respect to understanding and evaluating the effectiveness of a plan's and the plan's service provider's internal controls over accounting. Many plan auditors rely on reports from auditors of third-party administrators used by the plan (i.e., SAS No. 70 reports) to assist them in fulfilling those responsibilities. Most 403(b) plans likely will not have obtained these SAS No. 70 reports in years in which they were not audited. Further, it is our understanding that some service providers involved with 403(b) plans never obtained appropriate SAS No. 70 reports because they were not requested by their clients.

In addition to the difficulties of initial audits noted above, ongoing audits of 403(b) plans also would create a significant added burden on and cost to plans. Unlike 401(k) plans, the funding vehicle(s) for the retirement benefits provided through 403(b) arrangements may consist of a number of different group annuity contracts and custodian accounts, which would require substantial additional work by the plan auditor. Furthermore, the presentation of summaries and allocated accounts would vary from provider to provider, requiring manipulation of the data to make it consistent.

Impracticability of Performing Some 403(b) Plan Audits

We are concerned that for some plans auditors may determine that they are unable to accept audit engagements because the plans may have significant compliance issues, not have historical or complete accounting records or lack other available audit evidence, and other issues. Further, if an auditor agrees to perform an audit of a 403(b) plan and subsequently determines that he or she is unable to perform all of the procedures necessary to support an opinion (for example, is unable to determine that opening balances are not materially misstated or whether accounting practices have been consistently applied), the auditor would be required to disclaim an opinion on the plan's financial statements. As a result, the DOL would not receive the assurance contemplated in the Proposals and may need to reconsider its policy of rejecting filings that contain a disclaimer of opinion on the plan financial statements.

We also are concerned that, because these plans and the related plan records are so complex, many plan sponsors may not have the knowledge or ability to prepare the financial statements or the Form 5500 and related schedules. The degree of work associated with compiling and accumulating information from various investment providers into financial statements could be so significant that, in some cases, the auditor's independence may be compromised and, as a result, he or she would be unable to perform an audit.

In such cases where the audit of a 403(b) plan may be impracticable or cost prohibitive, the DOL may wish to impose a requirement that such plans hire an independent qualified public accountant to perform certain limited agreed upon procedures to the compliance areas of particular concern to the DOL, such as the handling of employee contributions. Those procedures, and the related reporting, would be performed in accordance with attestation standards established by the American Institute of Certified Public Accountants, and in that way, the auditor would specifically address the areas of most concern to the DOL in a more practicable, cost effective manner.

Eligibility to File on Short Form

The proposed rules for small plans (plans with fewer than 100 participants or subject to the 80-120 participant rule) to use the Short Form 5500 require that the plan have 100% of its assets in investments that have a readily ascertainable fair market value. The Proposal states, "because Code section 403(b) plans are generally required to be invested exclusively in annuity contracts or mutual funds, they generally would be eligible to file the proposed Short Form 5500." However, the Proposals limit the availability of this filing option to small plans. As such, many 403(b) plans would not be eligible to file on the short form, as they do not meet the traditional 100 participant or 80-120 participant rules. Further, it is our experience that the guaranteed account portions of group annuity contracts typically do not have readily ascertainable fair market values, particularly those that are deemed "benefit responsive". As such, we question whether annuity contracts actually will qualify under the exception, and whether 403(b) plans invested in those contracts will be eligible to file on the Form 5500-SF.

II.D. ADDITION OF NEW QUESTIONS TO SCHEDULES ON TITLE I COMPLIANCE, SERVICE PROVIDER COMPENSATION, AND PENSION PLAN FUNDING

Schedule A: Identify Insurers That Fail To Supply Information

We agree that it often is difficult for plans to obtain timely and complete Schedule A information from their insurers. As such, we support the Proposals to add a check box to the Schedule A to permit plans to identify situations in which the insurance company or other organization that provides some or all of the benefits under a plan has failed to provide the required Schedule A information.

In addition, it is not uncommon for insurers to provide some or all of the Schedule A information well after the 120 day deadline established by ERISA. Not only does this delay the preparation of the Form 5500, it also delays the issuance of the auditor's report which must be attached to the Form 5500, as the auditor is required to read the information in the Form 5500 and consider whether such information, or the manner of its presentation, is materially inconsistent with the information, or the manner of its presentation, appearing the plan's financial statements. As such, we recommend a check box also be added to the Schedule A to permit plans to identify situations in which the insurance company (or other organization that provides some or all of the benefits under a plan) failed to meet 120-day deadline, but subsequent to the 120-day deadline provided some or all of the information necessary to complete the Form 5500, and also afford the plan the option of specifying what information was provided late.

Schedules H And I: New Supplemental Schedule For Line 4a Of The Schedule H For Reporting Delinquent Participant Contributions

We support the proposed changes to the instructions to clarify that delinquent participant loan repayments should be included on line 4a. We also recommend requiring that when the plan sponsor chooses to include such repayments on line 4a, a notation be made indicating such amounts have been included. This can be accomplished by adding a check box to the supplemental schedule whereby the preparer could indicate that the information is included on line 4a.

We also support the proposal to require delinquent participant contributions to be presented on a supplemental schedule. The Proposal notes that "The IQPA must express an opinion on whether the scheduled information is presented fairly in all material respects in relation to the basic financial statements taken as a whole." If the information regarding delinquent participant contributions is reported only on Line 4a of the Form 5500 and is not included in a supplemental schedule, an auditor has no obligation to apply auditing procedures to that information. Requiring that the information be reported in a supplemental schedule will ensure that the information will be subject to appropriate auditing procedures and opined on by the auditor.

We are unclear, however, about what is intended by the term "standardized schedule." Our interpretation of a "standardized" format would be one similar to that of the Schedule G. However, based on the example schedule provided on the DOL's website and referred to in the Proposal, it appears that the proposed format is instead a "non-standardized" schedule similar to the supplemental schedules for Line 4i-Schedule of Assets (Held at End of Year) and Line 4j-Schedule of Reportable Transactions. The format for those schedules follows the requirements in ERISA §103(a)(3)(A) as they relate to the required information to be included on the schedules.

ERISA §103(a)(3)(A) requires the IQPA to offer his or her opinion as to whether the separate schedules specified in subsection (b)(3) of that section present fairly, and in all material respects, the information contained therein when considered in conjunction with the financial statements taken as a whole. The IQPA therefore is only required to opine on supplemental schedules as they are listed in subsection (b)(3). ERISA §103(b)(3) is specific as to what information should be disclosed. The illustrative schedule presented in the DOL's Proposal does not contain all the information required by ERISA §103(b)(3)(D), such as (a) identity of the party involved, (b) relationship to the plan, employer, or other party-in-interest, and (c) description of transactions, including interest rate. To ensure that the schedule be covered by the auditor's opinion, we recommend that this schedule include information as required by the regulations for a nonexempt transaction, which is similar to that which was required to be reported on Schedule G for late remittances for participant loans. The description also should include whether or not late remittances of participant loans are included or not included. Finally, we recommend that the instructions be revised to require that the schedule also include the date the lost interest was remitted to the plan or is expected to be remitted to the plan. This would help clarify to plan sponsors that they are required to include the delinquent contributions on line 4a until the year they are fully corrected.

II.F. OTHER WELFARE PLAN ISSUES

While the DOL is not proposing to change the audit requirement for welfare plans, the Proposal invites comments and suggestions for other additional steps the Department could take on clarifying reporting rules for welfare plans. The ERISA Advisory Council's *Report of the Working Group on Health and Welfare Form 5500 Requirements* (November 10, 2004) provides an argument for reducing the reporting requirements for welfare plans including limiting the audit requirement to multi-employer plans and those welfare plans that accumulate assets. We agree with the position taken by the Council in its Report and strongly believe the DOL should consider initiating limited reporting obligations under the Form 5500 Annual Return/Report for single-employer defined benefit health and welfare plans that do not accumulate assets (i.e., amounts flowing into the plan each month are equal to or less than amounts paid out monthly), similar to the option traditionally afforded to 403(b) pension plans, and thereby effectively eliminate the audit requirement for such plans, as was recommended by the Advisory Council's Working Group.

Audits of welfare plans are quite complex and, as such, are far more costly than audits of other types of plans. Because of the unique nature of single-employer defined benefit health and welfare plans, audits of those plans provide limited—if any—benefit to plan participants and other interested parties. As discussed below, participants are not using the financial statements to assess the plan's ability to pay benefits when due, and we are unclear as to how the DOL uses them. We believe participants would be better served by having the costs associated with welfare plan audits be available for use by the plan sponsors to pay for other welfare benefits or other monitoring services.

In a single-employer defined benefit health and welfare plan where both participants and the corporate sponsor contribute to the plan and those amounts are used to purchase insurance coverage or otherwise pay for benefits, any shortfall typically is paid by the corporate sponsor. In such plans, the plan's financial statements may not necessarily be an indication of the future probability of the plan's ability to pay benefits because the corporate sponsor funds the costs in excess of plan assets. The plan's financial statements may well show a deficit funding position when it is in fact a financially healthy plan. Since the plan sponsor ultimately will be responsible for paying benefits as claims are presented, it is the financial health of the plan sponsor, not the funded status of the plan itself, that determines the likelihood of participants receiving benefits they were promised. Thus, the picture painted by the financial statements of a single-employer corporate-sponsored plan, while reflecting plan liabilities and obligations and contributions made by the sponsor and employees, may not be fully meaningful in assessing whether the plan has the ability to pay current and future benefits.

Costs for welfare audits have increased in recent years and are significantly higher than costs for pension plan audits for a number of reasons. The preparation of the financial statements and the audit requires a significant amount of time and resources. Preparing the financial statements is time-consuming because of the lack of readily available information and often requires significant accounting knowledge. There is often confusion regarding the reporting entity, activity flowing inside and outside the trust, and the applicability of generally accepted accounting principles. Auditing the numerous benefits offered by a welfare plan requires specialized knowledge of various claim payment and accounting systems, and medical information. The Health Insurance Portability & Accountability Act of 1996, as amended, also significantly affected welfare plan audits, making it difficult to obtain access to health information to perform the audits and maintain documentation as required under auditing standards.

We recommend the DOL consider alternative types of independent audit assurances—such as an agreed upon procedures engagement on benefits paid from large funded single-employer defined benefit welfare plans—to ensure adequate protections exist for participants and beneficiaries of those plans. However, we believe the Department should maintain existing audit requirements for multi-employer welfare plans and for single employer plans that accumulate assets.

OTHER COMMENTS

In addition to the above comments on the items set forth in the Proposals, we have the following recommendations with respect to the 2008 Form 5500 and related instructions.

Schedule C

We recommend the instructions to the Form 5500 clarify when the termination of an accountant should be reported on Schedule C. For example, assume a firm is engaged in 2006 to perform an audit of the 2005 plan financial statements. The prior auditors completed the 2004 plan year audit in 2005. Should the termination of the prior auditors be reported on the 2005 Schedule C (the first plan year for which the new auditors performed the audit), or on the 2006 Schedule C (the year the new firm officially was hired and the prior auditors terminated)?

Schedule H

We believe the information in Schedule H should be consistent with that reported in the plan's financial statements. As such, we do not believe that IBNR for health plans should be included on the Schedule H. Instead, we believe that information about IBNR should be included in Part IV of the Schedule H. We recommend that the instructions to Schedule H, Part I, Lines 1g, 1b(1), 1b(3), and Part IV of the Schedule H be revised as follows (deleted text struck through, new text underlined):

Line 1g. Noncash basis plans should include the total amount of benefit claims that have been processed and approved for payment by the plan. Claims payable should only include those claims processed and approved for payment as of the end of the plan year. ~~Welfare plans should also include "incurred but not reported" benefit claims.~~ Claims incurred as of the end of the year, but not reported until after the end of the plan year (IBNR), should not be reported here. Those amounts should be reported in Part IV on line 4l.

Line 1b(1) Noncash basis filers should include contributions due the plan by the employer but not yet paid. Do not include other amounts due from the employer such as the reimbursement of an expense or the repayment of a loan. Additionally, expected contributions to be made to cover the amount of IBNR should not be included.

Line 1b(3). Noncash basis filers should include contributions due the plan that are not includable in lines 1b(1) or (2). These amounts may include investment income earned but not yet received by the plan and other amounts due to the plan such as amounts due from the employer or another plan for expense reimbursement or from a participant for the repayment of an overpayment of benefits. Expected contributions to be made to cover the amount of IBNR should not be included.

Part IV of the Schedule H:
4l Did the plan have claims incurred
but not reported? Yes____No____Amount_________

Instructions:
Line 4l – Plans that check "Yes" must enter the amount. Claims incurred but not reported are those claims that were incurred by participants or their dependents before the end of the plan year, but that were not reported to the claims administrator until after the plan year. Do not include in this amount claims payable (claims approved and processed before the end of the year) that are already reported in Part I on line 1g.

Schedule H, Question 4g

Question 4g on Schedule H includes a list of examples of assets whose current value is not readily determinable on an established market or set by an independent third party appraised value. To assist preparers in identifying assets that should be included in this item, we suggest that the following assets be added to the list: hedge funds, certain common/collective trusts, and certain stable value funds. The types of CCTs and stable value funds that should be included should be discussed in the instructions. The DOL may wish to consult the AICPA Practice Aid for Auditors, *Alternative Investments—Audit Considerations*, in preparing the instructions.

Schedule H, Part II

We also suggest the following changes to Part II of the Schedule H:

2b(2)(C) Other

2b(2)(D) Total Dividends (add lines 2b(2)(A) through (C)

The existing instructions for Line 2b(2) would then be titled "Lines 2b(2)(A) and (B)," and the following new instruction would be added:

Line 2b(2)(C). Generally these dividends are for investments reported on line 1c(13).

Schedule I, Question 4k

We believe that wording of Question 4k on Schedule I is confusing. To clarify the question, we recommend the following wording:

4k Are you exempt from the audit requirements under the Small Pension Plan Regulations? If no, attach an audit report.

Other

We also request that the instructions clarify how to treat participant loans when investment assets are held in a master trust. Currently the Form itself has information regarding participant loans but the actual instructions do not have any clarifying language.

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The AICPA Employee Benefit Plans Expert Panel appreciates the opportunity to comment on the Proposals. We would be pleased to meet with you to discuss these comments with you at your convenience.

Sincerely,

Marilee Lau

Marilee P. Lau, Chair
Employee Benefit Plans Expert Panel

Cc: Ian Dingwall, Chief Accountant, DOL EBSA