

# TAX MANAGEMENT COMPENSATION PLANNING JOURNAL

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## **ERISA's Participant Benefit Statement Requirements: Current Rules Under PPA '06 and a Suggested Blueprint for Future Interpretations**

by Kathryn J. Kennedy\*

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### **Summary:**

*The Pension Protection Act of 2006 now mandates certain automatic disclosure of benefit statements, as well as more timely and expansive disclosure, to ERISA participants and beneficiaries, effective beginning in 2007. Al-*

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*though the Department of Labor (DOL) provided good faith reliance regarding these requirements through a field assistance bulletin, that guidance left plan sponsors and third-party administrators with a number of unanswered questions.*

*Due to the importance of these issues, one of the 2007 Working Groups for the DOL's ERISA Advisory Council has scheduled testimonies so as to provide recommendations to the DOL by November of 2007. To facilitate in the dialogue between the employee benefits community and the DOL, this article explains the new requirements in light of prior proposed regulations (issued under prior law) and the recent field assistance bulletin, and then provides a suggested blueprint for change that hopefully will result in meaningful disclosure to participants and beneficiaries without unduly burdening plan administrators. When writing the regulations, the DOL will need to balance meaningful disclosure of benefits with the administrative impacts and costs of such disclosure for covered plans.*

*The author concludes that these new requirements will have a significant impact on the administrative burdens and costs of employee benefit plans, which unfortunately, in the defined contribution plan model, may be passed along to the participants and beneficiaries either directly or indirectly.*

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## INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that regulates most voluntarily-established-and-maintained employee benefit plans in private industry.<sup>1</sup> Such plans may be established and maintained by a single employer, an employee organization, or jointly by one or more such employers and an employee organization (known as multi-employer or multiple employer plans).<sup>2</sup> When ERISA was passed, the traditional retirement vehicle for a voluntary employee pension plan in private industry was the defined benefit plan model (i.e., in which normal retirement benefits are defined in terms of a formula set forth in the plan, payable at the plan's normal retirement age, and generally in the form of some type of annuity). Under this type of plan, the plan sponsor bears the investment and mortality risks, as the participant is guaranteed the level of benefit regardless of the performance of the plan assets and, if payable as an annuity, is guaranteed payments payable generally over his or her life expectancy.

Since ERISA's passage in 1974, there has been a shift away from the defined benefit plan model to the defined contribution plan model.<sup>3</sup> As participants' account balances are credited with the plan assets' earnings, participants covered by a defined contribution plan bear the investment risk of the plan assets and, if annuities are not provided under the plan or not subsidized under the plan by the plan sponsor, the participants bear the mortality risk of outliving an installment stream of benefit payments. Therefore, Congress has become increasingly concerned that plan participants and beneficiaries covered under pension and profit-sharing plans be better notified on a more regular and timely basis as to the amount of their benefits and, if relevant, how such benefits are being invested.<sup>4</sup> Thus, the Pension Protection Act of 2006 (PPA '06) amended ERISA §105 by making a number

of significant changes to the pension benefit statements for defined contribution and defined benefit plans.<sup>5</sup> By providing more ongoing and meaningful notification to participants as to the value of their retirement funds, Congress hopes that participants will take more of an active role in planning and saving for their retirement.<sup>6</sup>

Although notification is probably more acute for participants covered under a defined contribution plan, the new legislative changes apply to *all* employee pension plans (other than one-person defined contribution plans<sup>7</sup>), including multi-employer and multiple employer plans, and the changes expand the content and frequency of the notification for all plans.<sup>8</sup> The Department of Labor (DOL) has jurisdiction under Title I of ERISA to regulate these disclosure requirements.<sup>9</sup> Due to the importance of these issues, one of the 2007 Working Groups for the DOL's ERISA Advisory Council scheduled testimonies in order to provide recommendations to the DOL by November 2007.<sup>10</sup> The responses received from those

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Congress to review the terms and conditions of all defined contribution plans. *See generally* the list of witness testimonies for the hearing on Corporate Governance and Executive Compensation, held on April 18, 2002, before the Senate Finance Committee, at <http://finance.senate.gov/sitpages/hearing041802.htm> (last visited Aug. 22, 2007).

<sup>5</sup> P.L. 109-280 (Aug. 17, 2006), §508(a). PPA '06 can be accessed from the Government Printing Office Web site: <http://www.gpoaccess.gov/plaws/index.html> (last visited on Aug. 18, 2007).

<sup>6</sup> The legislative history behind PPA '06 indicates the importance of providing regular information to participants and beneficiaries of the value of retirement benefits to increase awareness and appreciation for such benefits. *See* Report on National Employee Savings and Trust Equity Guarantee Act (NESTEG) (S. 1953), Senate Finance Committee (Nov. 2, 2005).

<sup>7</sup> "One-participant retirement plan" is defined in ERISA §101(i)(8)(B). According to the legislative history, "one-participant retirement plan" is "defined as under the provision of ERISA that requires advance notice of a blackout period to be provided to participants and beneficiaries affected by the blackout period." *See* Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" (JCX-38-06) (8/3/06)*.

<sup>8</sup> P.L. 109-280, §508(a)(1), amending ERISA §105(a), effective for plan years beginning after Dec. 31, 2006.

<sup>9</sup> *See* ERISA §109(c), stating that the DOL may prescribe the form and content of any report, statement or document required to be furnished or made available to participants and beneficiaries receiving benefits under the plan.

<sup>10</sup> ERISA §512 provides for the establishment of an Advisory Council on Employee Welfare and Pension Benefit Plans, consisting of 15 members representing employee organizations and employers, as well as the fields of insurance, corporate trust, actuarial counseling, investment counseling, investment management and accounting. After debate and deliberations, the council forms a number of working groups to focus on issues important to the administration of ERISA. One of the 2007 Working Groups is

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<sup>1</sup> P.L. 93-406 (Sept. 4, 1974), codified as amended in various sections of 26 and 29 United States Code (USC). All section references in this article are to ERISA section numbers and the Department of Labor (DOL) regulations thereunder, unless otherwise indicated.

<sup>2</sup> Multi-employer plans refer to plans to which unrelated employers make contributions pursuant to the terms of a collectively-bargained agreement, whereas multiple employer plans refer to plans to which unrelated employers make contributions that are not pursuant to a collectively-bargained agreement.

<sup>3</sup> According to the Pension Benefit Guaranty Corporation (PBGC), the number of insured defined benefit plans fell from 114,396 in 1985 to 30,336 in 2005. *See* Pension Benefit Guaranty Corporation, *Pension Insurance Data Book 2005*, available at <http://www.pbgc.us/docs/2005databook.pdf> (last visited Aug. 18, 2007).

<sup>4</sup> The collapse of the Enron Corporation in 2001 resulted in a loss of \$1.2 billion by employees who invested in Enron stock through the company's §401(k) profit-sharing plan, prompting

testimonies are summarized by the author in this article.<sup>11</sup>

According to Robert J. Doyle, Director of Regulations and Interpretations of the Department of Labor's Employee Benefits Security Administration (EBSA), the new benefit statement requirements will impact an estimated 50,000 defined benefit plans and 640,000 defined contribution plans, covering 110 million participants and beneficiaries.<sup>12</sup> In oral testimony during July 2007, Mr. Doyle estimated that plan administrators of defined contribution plans are already providing 90% of the required information in their voluntary benefit statements.<sup>13</sup> Based on the information received in testimony by the working group, it is unlikely that the new benefit statement requirements will impact small employers similarly to medium and large employers or impact sponsors of defined benefit plans similarly to sponsors of defined contribution plans.<sup>14</sup> Testimony also affirmed that administrators of defined benefit plans require more time than adminis-

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studying the benefit statement requirements of PPA '06. See [http://www.dol.gov/ebsa/aboutebsa/erisa\\_advisory\\_council.html](http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html) (last visited Aug. 22, 2007) for a list of the questions that this working group will seek testimony upon. Christopher Rouse is the chair and the author is the vice chair of that working group. See also <http://www.dol.gov/ebsa/newsroom/pr0619a07.html> (last visited Aug. 22, 2007).

<sup>11</sup> The testimonies presented to the Advisory Council's Working Group on Participant Benefit Statements were held in open public meetings on July 12, 2007, and Sept. 18, 2007. Individuals who testified on July 12 included: Douglas O. Kant on behalf of the American Benefits Council; Judith Mazo on behalf of The Segal Company; Suzanne Samuelson from the Mercer Communications practice; Derrin Watson; and Thomas Finnegan on behalf of ASPPA. At the time this article was submitted for publication, the testimonies for September 18 were not yet available; as a result, they are not reflected in the article. The 2007 Working Group on Participant Benefit Statements will summarize the July and September testimonies and make recommendations in a final report to be submitted to the Secretary of Labor in early November. The DOL will eventually make public that report. See [www.dol.gov/ebsa/publications/main.html](http://www.dol.gov/ebsa/publications/main.html) for a copy of the reports from prior years' working groups.

<sup>12</sup> This is according to Mr. Doyle's testimony before the 2007 Working Group on Participant Benefit Statements, Advisory Council on Employee Welfare and Pension Benefit Plans (July 12, 2007). As Director of Regulations and Interpretations, Mr. Doyle is responsible for managing EBSA's regulatory and interpretive programs under Title I of ERISA. He also serves as a senior policy advisor on legislative, enforcement and other matters affecting pension, group health and other types of employee benefit plans under ERISA. See also U.S. Department of Labor, EBSA, *Private Pension Plan Bulletin, Abstract of 2004 Form 5500 Annual Reports* (Mar. 2007).

<sup>13</sup> *Id.*

<sup>14</sup> According to the testimony of Thomas Finnegan before the 2007 Working Group on Participant Benefit Statements, Advisory Council on Employee Welfare and Pension Benefit Plans (July 12, 2007), the incidence of statements was dependent upon the size of the plan sponsor. For plans with less than 10 participants, over 90% of such plans provide annual statements to active partici-

trators of defined contribution plans to produce reliable benefit statements.<sup>15</sup> In addition, the mutual fund industry may have up-to-date values on participants' defined contribution account balances; however, the plan administrator may not have up-to-date information to complete the *other* information (e.g., vested accrued benefits) required under the statement. Hence, the PPA '06 changes will result in significant disclosure requirements for certain segments of plans, and the cost of such disclosure will have to be passed along to participants or absorbed by the plan sponsor.

Although PPA '06 amended ERISA §105(a), which regulates the content, frequency and class of recipients regarding the benefit statements requirements, ERISA §209(a)(1) (although not amended by PPA '06) is also relevant, as it expands the class of recipients of similar benefit statements and mandates certain recordkeeping requirements needed for the disclosure of benefits. Because the new disclosure requirements under ERISA §105(a) are effective beginning in 2007 (with staggered dates for multi-employer and multiple employer plans), plan administrators are trying to respond as quickly as possible.<sup>16</sup> The penalty for failure to provide the required notice

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pants; for plans with between 10 and 100 participants, over 75% provide annual statements; for plans with between 101 and 500, less than 50% provide annual statements; and for plans with more than 500 participants, the percentage varied and more administrators relied upon non-paper statements. For defined benefit plans, basic disclosure generally included the participant's projected benefit at normal retirement age, accrued benefits and vested accrued benefits. Some statements provided backup data such as date of birth, date of hire, normal retirement age, compensation history and an estimate of Social Security benefits. Cash balance plans produce benefit statements that appear as a defined contribution-type statement with theoretical account balances.

<sup>15</sup> According to the testimony of Suzanne Samuelson before the 2007 Working Group on Participant Benefit Statements, Advisory Council on Employee Welfare and Pension Benefit Plans (July 12, 2007), administrators of defined benefit plans required at least a six- to nine-month period to produce reliable benefit statements in order to assure that the data was accurate. According to the testimony of Judith Mazo before the 2007 Working Group on Participant Benefit Statements, Advisory Council on Employee Welfare and Pension Benefit Plans (July 12, 2007), multiemployer plans would require at least two to three months after the close of the plan year for defined benefit plans to provide individual benefit statements. According to the testimony of Douglas O. Kant, representing the American Benefits Council, before the 2007 Working Group on Participant Benefit Statements, Advisory Council on Employee Welfare and Pension Benefit Plans (July 12, 2007), the due date for the benefit statement for a defined benefit plan should not fall before the due date for the Form 5500 for the year. For large employers, this task requires assembling data on compensation and service from across the country from databases that have different formats because of differences in payroll systems.

<sup>16</sup> PPA '06, §508(c), providing a general effective date for plan years beginning after Dec. 31, 2006, with a special rule for collectively bargained plans equal to the earlier of (1) the later of Dec. 31, 2007, or the date on which the last collectively bargained

under ERISA §105(a) is a daily per-participant charge, assessed against the plan administrator, and payable to the affected participants/beneficiaries, whereas the penalty for failure to comply with the required notice under ERISA §209 is a lesser daily per-participant charge, assessed against the plan administrator, but payable to the DOL.<sup>17</sup>

According to PPA '06, the DOL is required to provide model benefit statements by August of 2007.<sup>18</sup> Unfortunately, as of the date of this writing, model benefit statements have not been issued by the DOL. However, back in December of 2006, the DOL issued a field assistance bulletin to its agents on this topic. That bulletin also provides interim guidance to plan sponsors and administrators until proposed regulations and model statements are issued.<sup>19</sup> Jeffrey J. Turner, Chief, Division of Regulations, Office of Regulations and Interpretations of the DOL's Employee Benefits Security Administration, stated in a January 2007 panel discussion that the DOL was still deciding whether to issue proposed regulations on the individual benefit statement requirements or to proceed directly with final regulations on the topic.<sup>20</sup> Unless the DOL continues to apply many of the rules initially proposed in its 1980 proposed regulations, the author recommends the use of future *proposed* regulations to encourage the dialogue between the agency and the employee benefits community.

Although the statutory requirements to provide disclosure as to the participant's total benefits and vested benefits appear to be straightforward and obvious, the law poses a great number of issues that will need elaboration by the DOL. The end result may be anything but straightforward and obvious. The DOL acknowledges the problems that plan administrators face with the new requirements — the imminent effective date, lack of regulations and the cost and burdens associated with the delivery of the statements.<sup>21</sup> This is of particular concern if the requirements do not result in any meaningful change in participants'

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agreement terminates, or (2) Dec. 31, 2008.

<sup>17</sup> See ERISA §§502(c)(1) (amended by PPA '06 §508(a)(2)(C)) and 209(b). The legislative history is silent as to why noncompliance under ERISA §105 is more onerous than under ERISA §209.

<sup>18</sup> PPA '06, §508(b)(1).

<sup>19</sup> FAB 2006-3 (Dec. 20, 2006), available at [http://www.dol.gov/ebsa/regs/fab\\_2006-3.html](http://www.dol.gov/ebsa/regs/fab_2006-3.html) (last visited Aug. 19, 2007), stating that the intent of the field assistance bulletin was to maintain the status quo so that employers would not have to implement new procedures that would later be changed by final regulations.

<sup>20</sup> See "DOL Still Considering Best Way to Issue PPA Guidance, Senior Official Says," 34 *BNA Pension & Benefits Rep.* 242 (1/30/07).

<sup>21</sup> See FAB 2006-3.

behavior — a real concern for small employers that may already be poised to terminate their retirement plans due to increasing administrative expenses.

Under prior regulations which were issued shortly after ERISA's enactment, the DOL acknowledged that the recordkeeping requirements under ERISA §209 applicable to single employer versus multiple employer plans raised distinct issues, and thus, it reissued separate proposed regulations for such plans. One of the testifiers before the 2007 ERISA Advisory Council Working Group on Participant Statements focused on the differences between the benefit statement issues related to multiemployer plans.<sup>22</sup> However, this article focuses on the requirements of ERISA §105(a) as they apply to all covered plans but only the requirements of ERISA §209(a)(1) applicable to single employer plans.

## OUTLINE OF THIS ARTICLE

This article is divided into nine different subtopics — labeled A through I — to assist the reader in understanding the issues that the DOL will be considering in its proposed regulations and model statements:

- A – prior law and prior proposed regulations (further divided according to prior statutory requirements and DOL 1979 and 1980 proposed regulations);
- B – current law and current guidance (further divided according to PPA '06 changes made to the statute, penalties for noncompliance and initial guidance under the DOL's field assistance bulletin);
- C – plans that are covered by the new rules and intended recipients of the benefit statements (further divided according to covered plans and seven different groups of intended recipients depending on whether the plan is a defined contribution versus a defined benefit plan);
- D – content of the new benefit statements (further divided according to universal requirements for all plans, new disclosure for permitted disparity

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<sup>22</sup> According to Judith Mazo's testimony, *see* note 15 above, electronic communication is more difficult between multiemployer plans and their participants due to multiple working places and lack of access to a computer. Multiemployer plans generally collect data from numerous sources, and thus, individual participant data is not necessarily exact until the participant actually retires and begins distributions. Delivery of individual benefit plans shortly after the close of the plan year would be virtually impossible for multi-employer defined benefit plans, as the information is not known until the completion of the annual actuarial valuation. Thus, the incremental costs of preparation and delivery of participant statements from the defined benefit plan fund would likely result in the reduction of benefits.

and floor-offset arrangements, and additional disclosure required for all and certain defined contribution plans);

- E – frequency of statements, as it relates to any due dates for compliance and the period of coverage that the statement references (further divided for the new requirements for defined contribution plans versus defined benefit plans, and alternative methods of compliance for defined benefit plans);
- F – whether the benefit statement must be furnished in a single statement or whether multiple statements are sufficient;
- G – mode of delivery (e.g., paper or electronic delivery);
- H – coordination of these new disclosure requirements with other ERISA-mandated disclosures to avoid increased administrative costs for the plan and duplication of information for the recipients; and
- I – conclusory remarks.

After each of these segments is discussed, in light of the initially-proposed regulations and recent field assistance bulletin, the author will recommend solutions to outstanding questions. As will be discussed in the next section, this article contains multiple parts. To assist the reader, a table of contents is provided:

- A. Prior Law and Proposed Regulations
  - 1. ERISA §§105 and 209
  - 2. DOL Original 1979 Proposed Regulations
  - 3. DOL Original 1980 Proposed Regulations
- B. Current Law
  - 1. Changes to ERISA §105
  - 2. Penalties Under ERISA §105
  - 3. Initial DOL Guidance
- C. Coverage and Intended Recipients
  - 1. Covered Plans
  - 2. Affected Participants/Beneficiaries
    - a. Defined contribution plans — Four different groups of recipients exist
      - i. Who has the “right to direct the investment of assets in his or her account” for purposes of “DC group one”?
      - ii. Who has an “account under the plan” for purposes of “DC group two”?
      - iii. Who has an “account under the plan” for purposes of “DC group two”?
      - iv. What does it mean to be a participant who “terminates his service with the employer” for purposes of “DC group four”?
    - b. Defined benefit plans — Three different groups of recipients exist

- i. Who has “a nonforfeitable accrued benefit and who is employed by the employer maintaining the plan at the time the statement is to be furnished” for purposes of “DB group one”?
- ii. Who is any “participant or beneficiary under the plan” for purposes of “DB group two”?
- iii. What does it mean to be a participant who “terminates his service with the employer” for purposes of “DB group three”?

- D. Content of Benefit Statements
  - 1. Universal Requirements
    - a. The statute requires “total accrued benefits” and “nonforfeitable pension benefits”
    - b. Alternative disclosure of “nonforfeitable benefits”
    - c. Permitted disparity and floor-offset arrangements
    - d. Ability to understand the benefit statement
  - 2. Defined Contribution Plans — Additional Disclosure
  - 3. Participant-Directed Defined Contribution Plans — Another Level of Additional Disclosure
  - 4. Good Faith Reliance Under FAB 2006-3
  - 5. Coordination with ERISA §101(m) Requirements
- E. Frequency of Disclosure, as well as Due Dates for Compliance and Period of Coverage
  - 1. Defined Contribution Plans
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    - b. Alternative method of disclosure for defined benefit plans
  - 4. Period of Benefit Coverage
- F. Form of Furnishing Statements: Single or Multiple Statements
- G. Mode of Delivery
- H. Coordination with Other ERISA Disclosure Requirements
- I. Some Conclusory Remarks

## A. PRIOR LAW AND PROPOSED REGULATIONS

### 1. ERISA §§105 and 209

As originally enacted, ERISA provided two *different* sections that dealt with reporting of pension benefits — ERISA §105 (titled “Reporting of Participant’s Benefit Rights”), which dealt with the reporting of benefit statements *requested* by any participant

or beneficiary under a covered plan, and ERISA §209 (titled “Recordkeeping and Reporting Requirements”), which dealt with the maintenance of records that served as a basis for benefit statements and the *required* reporting of such information to specific classes of participants and beneficiaries. The information required to be reported under ERISA §§105 and 209 was similar but not identical.<sup>23</sup> ERISA §105(a) required the reporting of total accrued benefits and nonforfeitable (i.e., vested) accrued benefits, whereas ERISA §209(a)(1) required the reporting of total accrued benefits and the *percentage* of such benefits which are nonforfeitable.

Although the plan administrator was required to provide benefit statements when requested under ERISA §105(a), the requirements of ERISA §209 recognized that the duties of reporting benefits and maintenance of records may need to be bifurcated, as the employer generally retains employment records which serve as the basis for the benefit statements, whereas the plan administrator is responsible for computing the benefits and disclosing them to participants and beneficiaries through the benefit statement. For plans in which more than one employer adopts and contributes, former ERISA §105(d) originally subjected such plans to a similar disclosure requirement but only if the DOL (in consultation with the Secretary of Treasury) required such disclosure in its regulations.<sup>24</sup> ERISA §105(c) also requires plan administrators to report certain information to vested participants who terminate service and, thus, have the amount of their deferred vested benefits reported to the IRS.<sup>25</sup>

The penalty provisions applicable to ERISA §§105(a) and 209(a)(1) varied. Failure to com-

ply with a participant’s or beneficiary’s *request* for information under ERISA §105(a) resulted in a \$110/day penalty (within the court’s discretion) or other relief that the court deemed proper, assessed against the plan administrator and payable to the participant or beneficiary.<sup>26</sup> In contrast, failure to comply with the disclosures required under ERISA §209(a)(1) resulted in a civil penalty of \$11/day assessed against the plan administrator and collected by the DOL.<sup>27</sup>

## 2. DOL Original 1979 Proposed Regulations

In its original 1979 proposed regulations (referred to as the DOL 1979 proposal), the DOL linked the requirements of ERISA §§105(a) and 209(a)(1), even though the statutory language of ERISA §209 referred to a “report” and not “pension benefit statement” and the information to be reported was not identical to the information under ERISA §105.<sup>28</sup> However, the DOL’s interpretation certainly appears to be a reasonable reading of the language in ERISA §§105 and 209. ERISA §105 defines the class of recipients who can *request* benefit statements, and ERISA §209 reiterates that class and adds two more classes of recipients who must *automatically* receive benefit statements.

With respect to the participants who are required to receive benefit information under ERISA §105(c) (i.e., vested participants who terminate service and are entitled to deferred vested benefits), both the DOL 1979 and the 1980 proposed regulations stated that plan administrators who comply with the rules of IRC §6057(e) and the regulations thereunder will be deemed to be in compliance with ERISA §105(c).<sup>29</sup> Although OBRA ’89 amended ERISA §105(c) to update its reference to the Internal Revenue Code from the “1954” version to the “1986” version but made

<sup>23</sup> Prior to PPA ’06, ERISA §105 required the benefit statement to report the “total benefits accrued, and the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable,” whereas ERISA §209 required the reporting of “accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.” Also, ERISA §105 was applicable to participants and beneficiaries who requested the information, whereas ERISA §209 was applicable to participants who requested the information, participants who terminated service with the employer, and participants who incurred a one-year break in service.

<sup>24</sup> Former ERISA §105(d) (before repeal by PPA ’06, §508(a)(2)(A)) subjected plans to which more than one unaffiliated employer is required to contribute to the disclosure rules only to the extent provided under Labor Regulations that were coordinated with the IRS. Proposed DOL regulations under ERISA §105, issued on July 25, 1980, were applicable to single-employer plans. *See* 45 Fed. Reg. 51231 (Aug. 1, 1980).

<sup>25</sup> ERISA §105(c) requires the plan administrator to register with the IRS under §6057 of the Internal Revenue Code (IRC) for each participant described in IRC §6057(a)(2)(C) (i.e., each participant, who during the plan year for which the registration is required, separated from service covered under the plan, is entitled to a deferred vested benefit under the plan as of the end of plan year, and has not been paid his or her benefits from the plan).

Such information is disclosed on Schedule SSA of the Form 5500.

<sup>26</sup> ERISA §502(c)(1), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, P.L. 101-410, which was modified by the Debt Collection Improvement Act of 1996, P.L. 104-134, requiring adjustment of civil monetary penalties for inflation. The increase from \$100 to \$110 per day penalty became effective for violations occurring after July 29, 1997.

<sup>27</sup> ERISA §209(b), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, P.L. 101-410, which was modified by the Debt Collection Improvement Act of 1996, P.L. 104-134, requiring adjustment of civil monetary penalties for inflation. The increase from \$10 to \$11 for each employee became effective for violations occurring after July 29, 1997.

<sup>28</sup> Former DOL Prop. Regs. §§2520.105-2-11 and 2520.209-1-9, 44 Fed. Reg. 8294 (Feb. 9, 1979), withdrawn and reissued with former DOL Prop. Regs. §§2520.105-2 and 2520.209-1, 45 Fed. Reg. 51231 (Aug. 1, 1980).

<sup>29</sup> *See* Former DOL Prop. Regs. §§2520.105-11 and 2520.105-2(j).

no other substantive requirements, it is likely that the DOL will continue to rely upon the rules of IRC §6057(e) and the regulations thereunder for purposes of compliance with the rules of ERISA §105(c).<sup>30</sup> Thus, this article does not deal with this group of participants.

By linking §§105(a) and 209 together, it is the author's conclusion that the DOL proposed regulations interpreted ERISA as requiring the reporting of individual benefit statements in the following two situations:

- when the participant or beneficiary needed the information and voluntarily *requested* a benefit statement (e.g., contemplating retirement or dividing plan assets upon a marital dissolution); and
- when Congress presumed that the participant needed the information and *mandated* the disclosure of a benefit statement (e.g., termination of service or a one-year break in service).

The DOL 1979 proposal took a very expansive view of what was required under the statute, prompting numerous and critical comments from practitioners and plan administrators.<sup>31</sup> The comments also highlighted the need to treat disclosure for single employer plans differently than for multi-employer and multiple employer plans. Thus, the DOL retreated from a number of its proposals by withdrawing the 1979 proposed regulations and reissuing proposed regulations in 1980. The 1980 regulations also bifurcated the recordkeeping issues under ERISA §209 for multi-employer and multiple employer plans from those of single employer plans, and the DOL issued a separate set of proposals one week later applicable to those plans.<sup>32</sup> Despite the reissuance of the 1980 regulations under ERISA §§105 and 209, those regulations were never finalized.

### 3. DOL Original 1980 Proposed Regulations

Although the DOL retreated from its 1979 proposal with its 1980 proposal, its interpretation continued to go beyond the literal language of the statute, striking a balance (in the DOL's view) between the meaning-

<sup>30</sup> See P.L. 101-239, §7891(a)(1) (Dec. 19, 1989).

<sup>31</sup> See Preamble to former DOL Prop. Regs. §§2520.105-1-3, note 28 above (“[a] large number of public comments on the 1979 proposal were filed. Many of these comments suggested that substantial revisions should be made to the 1979 proposal. In particular, comments filed on behalf of single and multiple employer plans raised distinct issues.”)

<sup>32</sup> Former DOL Prop. Regs. §§2520.105-3 and 2520.209-3, 45 Fed. Reg. 52824 (Aug. 8, 1980).

ful disclosure of benefits with the cost of such disclosure.<sup>33</sup> The author believes that the DOL 1980 proposal relating to the benefit disclosure and recordkeeping requirements were not onerous, as the typical retirement plan at that time was a defined benefit plan in which benefits changed only annually due to accrual and vesting credits, in contrast to benefits under defined contribution plans in which benefits could change more frequently due to the change in plan assets. More than 30 years later, the more common retirement plan is the defined contribution plan in which benefits change more frequently over the plan year due to the monthly contributions by participants and more frequent valuation of benefits over the plan year. As the national retirement model has had a dramatic shift from a defined benefit to a defined contribution model, the DOL regulations under PPA '06 will undoubtedly be significantly different than the 1980 proposal.

Whether the DOL's position in the 1980 proposal continues to reflect its current position as to the statutory language that has not changed remains to be seen. As the content and frequency of disclosure has dramatically increased by statute, any new proposed regulations will have to cover substantially new material. The statute now codifies some of the DOL 1980 proposal, which raises questions as to whether other portions of the proposals that were not codified will survive under future regulations. Hopefully, the DOL regulations under the new law will continue to balance the need for meaningful communication to the participants/beneficiaries with the administrative burdens and costs of compliance.

## B. CURRENT LAW

### 1. Changes to ERISA §105

Although PPA '06 made substantial changes to the rules of ERISA §105, the recordkeeping and reporting requirements of ERISA §209 were not changed. As discussed below, the *new* statutory requirements under ERISA §105 make a distinction as to the *content* of the benefit statement between defined contribution and defined benefit plans and the *frequency* of disclosure for defined contribution plans that have self-directed participant investments. The new requirements also provide an alternative means of compliance for defined benefit plans. The changes enacted to ERISA by PPA '06 expand the classification of recipi-

<sup>33</sup> *Id.* (“[t]he new proposal is designed to ensure that the information provided to an individual participant is presented in a meaningful fashion, without imposing excessive administrative costs on plans.”)

ents who receive benefit statements — either upon request or automatically — which will obviously increase the administrative burdens and costs for plan administrators.

As the legislative changes enacted by PPA '06 are under Title I and *not* Title II of ERISA, a plan's *qualification* requirements are not affected. Hence, failure to comply with the new rules cannot be cured under the IRS's correction program, referred to as the Employee Plans Compliance Resolution System (EPCRS).<sup>34</sup> Whether the DOL will develop a correction program in the future for noncompliant retirement plans is unknown at this time. Due to the potential penalties for noncompliance, the author recommends that the DOL seriously consider a correction program. As noted earlier, a plan administrator could be assessed a penalty of up to \$110 per day per participant for failing or refusing to comply, unless such failure or refusal resulted from matters beyond the control of the plan administrator.<sup>35</sup> Such a penalty could result in exorbitant costs for small and large employers alike, relative to their annual employer contributions.

## 2. Penalties Under ERISA §105

Under the new law, this penalty is automatic for a plan administrator that fails to comply with the requirements of ERISA §105(a). As a result, instead of being limited to those participants/beneficiaries who requested but did not receive such disclosure, the new rules would impose such a sanction on behalf of *all* participants/beneficiaries who should have received such disclosure, regardless of whether they made a request.<sup>36</sup> Hence, the penalty for noncompliance has risen considerably. For example, a small employer with 20 employees that fails to comply with this mandate exposes itself to a potential penalty of \$2,200/day or \$66,000/month for noncompliance.<sup>37</sup> The penalty continues to be within the court's discretion, which

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<sup>34</sup> Rev. Proc. 2006-27, 2006-22 I.R.B. 945, used by the IRS to correct certain disqualifying defects. For a description of the evolution of EPCRS, see Kennedy, "EPCRS 2006 Makeover: Are the Changes More than Cosmetic?" 34 *Tax Mgmt. Compensation Plan. J.* 183 (8/4/06).

<sup>35</sup> ERISA §502(c)(1).

<sup>36</sup> ERISA §502(c)(1) (unless the failure results from matters reasonably beyond the control of the administrator). See also ERISA §209(b) (failure to furnish information or maintain records for any plan year results in a civil penalty of \$11 for each employee to whom such failure occurs, unless the failure is due to reasonable cause).

<sup>37</sup> *Id.* (each violation with respect to a single participant or beneficiary is to be treated as a separate violation).

may be in the employer's favor.<sup>38</sup> If assessed, the penalty must be paid by the plan administrator to the affected participants and beneficiaries and, thus, is not a fine that is paid to the DOL.<sup>39</sup> Certainly, the potential penalty of \$110/day per participant is a mighty club for the DOL to wield in order to assure compliance. Although this may whet the appetite of the plaintiffs' attorney bar for class action litigation, attorney fees are still discretionary in ERISA cases.<sup>40</sup>

## 3. Initial DOL Guidance

As the statute requires the DOL to provide official guidance within one year after the enactment of PPA '06, the DOL issued a field assistance bulletin last December — FAB 2006-3 — to provide temporary guidance for plans in advance of final regulations. Normally, field assistance bulletins are directives for the DOL field agents; however, the DOL instructed plan sponsors and plan administrators to rely on such directives as interim guidance until regulations are issued. However, the DOL has stated that such guidance is not intended "to represent approaches to the benefit statement requirements that will be reflected in the regulations ultimately adopted by the Department."<sup>41</sup> Hence, the DOL recognizes that although interim guidance is helpful, not all issues have been considered and discussed before the issuance of final regulations.

Although good faith compliance with FAB 2006-3 does provide safe harbor compliance with the statute until final regulations are issued, good faith compliance with the statute is also permitted during this regulatory gap period.<sup>42</sup> Given the breadth of interpretation as to what may be required under the new law, such good faith compliance may be liberally interpreted by plan sponsors and third-party plan administrators. However, given the potential penalty of \$110/day per participant or beneficiary, reliance on the DOL's field assistance bulletin may be the safer course of action.

As the 2007 Working Group of the DOL ERISA Advisory Council is expected to make specific recommendations to the DOL in early November of 2007, it is possible that the DOL may delay the issuance of regulations until it has fully studied the matter and reviewed those recommendations.

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<sup>38</sup> ERISA §502(c)(1), as amended by PPA '06, §508(a)(2)(C).

<sup>39</sup> *Id.*

<sup>40</sup> See ERISA §502(g)(1).

<sup>41</sup> See Doyle's testimony, note 12, above.

<sup>42</sup> FAB 2006-3, see note 19 above.

## C. COVERAGE AND INTENDED RECIPIENTS

### 1. Covered Plans

The current law continues to apply to plans subject to ERISA §4(a), including most qualified retirement plans and tax-sheltered annuity plans (§403(b)) with employer contributions. Although prior law subjected multi-employer and multiple employer plans to disclosure if required by DOL regulations, the current law no longer provides such treatment.<sup>43</sup> As the DOL proposed regulations relating to disclosure for these types of employer plans were never finalized, administrators of such plans were not subject to the prior law requirements. The new law mandate will undoubtedly add to the administrative costs of such plans. Plans that continue to be exempt from the prior and the new requirements include governmental plans (§457(b) plans), top-hat plans, tax-sheltered annuity plans with no employer involvement, most church plans, owner-only plans and IRAs.<sup>44</sup> Such exemption is of particular importance now that the mandated disclosure requirements are automatic and periodic in nature.

### 2. Affected Participants/Beneficiaries

Using the DOL 1980 proposal which linked ERISA §§105 and 209 together, prior law required all plans to provide benefit statements to two different classes of recipients:

- any plan participant or beneficiary who *requested* a benefit statement; and
- participants who were *required* to receive a benefit statement (i.e., those terminating service with the employer or incurring a one-year break in service).

In the latter situation, the phrase “terminated service with the employer” was not defined by statute or regulations, whereas the phrase “one-year break in service with the employer” was defined by statute with reference to ERISA §203(b)(3)(A). Under that

<sup>43</sup> Former ERISA §105(d), repealed by P.L. 109-280, §508(a)(2)(A), effective for plan years beginning after Dec. 31, 2006.

<sup>44</sup> ERISA §4(b) exempts governmental plans, top-hat plans, §403(b) plans without employer involvement, most church plans, owner-only plans, and IRAs. For plan sponsors of §403(b) plans, the question to ask is whether the plan is filing Form 5500. If it is, it is probably subject to these new participant statement requirements; if the arrangement has minimal employer involvement, it is probably exempt from the new requirements.

section, a break in service meant the calendar year, plan year, or other 12-consecutive-month period in which the participant completes less than 501 hours of service with the employer.<sup>45</sup>

Although there is no legislative history, the author surmises that congressional intent under ERISA §209 must have been to mandate disclosure in situations in which a participant’s benefit or vested benefit could change (i.e., upon termination of service when all accruals and vesting would cease), or upon a one-year break in service (i.e., when accruals and vesting may cease due to the reduction of service). Assuming the DOL continues after PPA ’06 to link ERISA §§105 and 209 together, the statute now differentiates among various classes of recipients, depending upon whether the plan is a defined contribution versus defined benefit plan and whether or not the defined contribution plan is a participant-directed plan. Some of these classes of recipients may be distinct, while others may overlap.

In continuing the linkage between ERISA §§105 and 209, the author recommends the use of the following different four classifications for recipients for benefit statements under defined contribution plans:

- participants or beneficiaries who have the right to direct the investment of assets of their account (referred to as “DC group one”)<sup>46</sup> — entitled to *automatic quarterly* statements;
- participants or beneficiaries who have an account under the plan but do not have the right to direct investments (referred to as “DC group two”)<sup>47</sup> — entitled to *automatic annual* statements, but not quarterly statements;
- beneficiaries (as opposed to participants) not described in either of the above two classifications (referred to as “DC group three”)<sup>48</sup> — entitled to *request* statements as needed; and
- participants who terminate service with the employer or incur a one-year break in service with the employer (referred to as “DC group four”)<sup>49</sup> — entitled to a statement upon the occurrence of *certain events* (i.e., termination or a one-year break in service).

<sup>45</sup> Note that ERISA does not impose the Internal Revenue Code requirements relating to controlled groups or affiliated service groups.

<sup>46</sup> The terminology of “DC group one,” “DC group two,” etc. is not found in the statute but was created by the author to distinguish between the various groups of intended recipients. See ERISA §105(a)(1)(A)(i), as amended by PPA ’06, §508(a).

<sup>47</sup> See ERISA §105(a)(1)(A)(ii), as amended by PPA ’06, §508(a).

<sup>48</sup> See ERISA §105(a)(1)(A)(iii), as amended by PPA ’06, §508(a).

<sup>49</sup> See ERISA §209(a)(1)(B) and (C).

For defined benefit plans, the author recommends the use of the following three different classifications for recipients of those benefit statements:

- participants who are employed by the employer maintaining the plan at the time the statement is furnished (referred to as “DB group one”)<sup>50</sup> — entitled to *automatic* statements *every three years*;
- participants and beneficiaries (referred to as “DB group two”)<sup>51</sup> — entitled to *request* statements as needed; and
- participants who terminate service with the employer or incur a one-year break in service with the employer (referred to as “DB group three”)<sup>52</sup> — entitled to a statement upon the occurrence of *certain events* (i.e., termination or a one-year break in service).

#### a. Defined contribution plans

For purposes of analyzing the groups of recipients for defined contribution plan purposes, there are four groups to consider:

- “DC group one”: this includes a participant or beneficiary who has the “right to direct the investment of assets in his or her account.” As the statute does not define “right to direct the investment of assets in his or her account,” the DOL will have to interpret such phrase in its regulations.
- “DC group two”: this includes 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 under such account.” Once the meaning of “right to direct the investment of assets in his or her account” is known, participants and beneficiaries of defined contribution plans that do not satisfy such definition but nevertheless have an “account under the plan” should fall within this category. The DOL will have to interpret the phrase “account under the plan” to further define this category of participants and beneficiaries.
- “DC group three”: since this includes beneficiaries *not* described in “DC group one” or “DC group two” above, it must contemplate the group of beneficiaries who do *not* presently have an account under the plan but could have an account balance in the foreseeable future.

<sup>50</sup> See ERISA §105(a)(1)(B)(i), as amended by PPA '06, §508(a).

<sup>51</sup> See ERISA §105(a)(1)(B)(ii), as amended by PPA '06, §508(a).

<sup>52</sup> See ERISA §209(a)(1)(B) and (C).

- “DC group four”: this includes a participant who “terminates his service with the employer or has a 1-year break in service.” While the phrase “1-year break in service” is defined by statute by referencing ERISA §203(b)(3)(A), the phrase “terminates his service with the employer” is not defined and will need to be interpreted by the DOL.

(i) *Who has the “right to direct the investment of assets in his or her account” for purposes of “DC group one”?*

For purposes of differentiating between “DC group one” and “DC group two,” practitioners have been grappling with the interpretation of the phrase “right to direct the investment of assets in his or her account.” Although the amended ERISA §105 does not define the phrase, it is important to understand the overall intent of PPA '06 in construing such interpretation. One of the overriding purposes of PPA '06 was to encourage the automatic enrollment of participants under defined contribution plans and to provide default investment options under plans for participants who were automatically enrolled and, therefore, had not selected investments if such option was provided under the plan.

PPA '06 recognized that the primary source of retirement savings for most participants covered under voluntary plans maintained by employers in private industry has shifted to defined contribution plans. To promote savings under such plans, the legislation authorizes automatic enrollment of participants and, in the absence of such participant’s investment election under the plan, the law allows for the investment in certain “qualified default investment options” to be defined under DOL regulations.<sup>53</sup> Under proposed regulations relating to qualified default investments, the DOL has stated “in the absence of an investment election,” a participant will be *deemed* to “exercise control over the assets in his account” if the plan invests his account in qualified default investment options that satisfy the DOL regulations.<sup>54</sup> Those regulations condition the use of default investments on the participant’s ability to have an “affirmative investment direction concerning the assets” in his account followed by the participant’s failure to exercise such direction. However, the DOL does not interpret the phrase “affirmative investment direction” in the proposed regulations, and the legislative history is silent on the issue.

<sup>53</sup> According to Jeffrey T. Turner, Chief, Division of Regulations, Office of Regulations and Interpretations of the DOL’s EBSA, the Department received more than 100 comments to its proposed rules relating to “qualified default investment alternatives”; see note 20, above.

<sup>54</sup> DOL Prop. Regs. §2550.404(c)(5), 71 Fed. Reg. 56806 (Sept. 27, 2006).

Before the passage of PPA '06, ERISA did and continues to use the phrase “exercise control over the assets in his account” for certain limited purposes. Under ERISA’s fiduciary rules, the plan trustee is required to invest the plan assets prudently and to diversify such investments.<sup>55</sup> However, ERISA §404(c) provides an exception from such fiduciary requirements if the participant/beneficiary “exercises control over the assets in his account.”<sup>56</sup> To the extent the sponsor of a defined contribution plan provides participants and beneficiaries with such control, the trustee will not be liable for the participant’s or beneficiary’s selection of investments.

The phrase “exercise control over the assets in his account” is defined under DOL final regulations under ERISA §404(c) and begins with the requirement that the participant have “a reasonable opportunity to give investment instructions.” Such opportunity includes the opportunity to obtain written confirmation of the instructions and the identification of a plan fiduciary who is obligated to comply with such instructions.<sup>57</sup> The DOL should take a similar approach to the interpretation of the “right to direct the investments of assets” in the ERISA §105 context and in the context of “qualified default investment options” in order to maintain uniformity in its approach.

Other issues that need to be addressed by the regulations include:

- whether the “right to direct the investment of assets” is conditional upon the participant’s or beneficiary’s *actual* direction of investments;
- whether a participant’s or beneficiary’s right to select a pooled account, but not the underlying assets within the pooled account, constitutes a “right to direct the investments of assets”;
- whether a participant’s or beneficiary’s “right to direct the investment of assets” must extend to *all* assets within the account or may be limited to a discreet group of the employee’s assets within the account (e.g., IRC §401(k) contributions, but not the employer discretionary contributions).

As to the third bullet item above, FAB 2006-3 does not clarify this point but does state that if the trustee

<sup>55</sup> ERISA §404(a)(1)(B) and (C).

<sup>56</sup> ERISA §404(c)(1)(A)(ii), as amended by PPA '06, §621(a)(1), provides that “no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by the plan sponsor or fiduciary.”

<sup>57</sup> DOL Regs. §2550.404c-1(b)(2)(A).

directs the investment of all plan assets but participants are allowed to have participant loans which are treated as directed investments, the plan does not provide participants with the “right to direct the investment of assets.”<sup>58</sup>

For consistency purposes, the author recommends that the DOL adopt its approach under the ERISA §404(c) regulations that the “right to direct the investment of assets” includes the ability to select investments and includes the opportunity to obtain written confirmation of the instructions and the identification of a plan fiduciary who is obligated to comply with such instructions. Such right should not be conditioned upon the participant’s actual selection of investments, as that would impose greater constraints on plan administrators to keep track of those participants who do select and those who do not. As to the second and third bullet items above, the author recommends that the “right to direct the investment of assets” should extend to pooled accounts but should be limited to the portion of the account over which the participant or beneficiary has the right to direct investments.<sup>59</sup>

(ii) *Who has an “account under the plan” for purposes of “DC group two”?*

For purposes of “DC group two,” such participants and beneficiaries include those who do *not* have the “right to direct the investment of assets” but nevertheless have “his or her own account under the plan.” Again, the phrase “his or her own account under the plan” is not defined in ERISA §105, nor is it used elsewhere in ERISA. ERISA’s summary plan description (SPD) requirements trigger for “each participant” and “each beneficiary receiving benefits under the plan.”<sup>60</sup> Presumably, the ERISA §105 “DC group two” class is a smaller subclass than the SPD group of “each participant and beneficiary receiving benefits under the plan.”

The DOL’s 1980 proposal excluded the following groups of participants and beneficiaries from the disclosure requirements on the grounds that disclosure to such individuals would be superfluous:

<sup>58</sup> See note 19, above.

<sup>59</sup> See the testimony of Derrin Watson before the 2007 Working Group on Participant Benefit Statements, Advisory Council on Employee Welfare and Pension Benefit Plans (July 12, 2007), in which he advises the DOL to consider certain “fringe areas” in its regulations: investments in pooled accounts, life insurance, zero balance accounts and accounts which have bifurcated investments including both mutual funds and pooled account investments.

<sup>60</sup> ERISA §102(a), requiring a summary plan description to be furnished to “participants and beneficiaries as provided in section 104(b),” and ERISA §104(b), requiring the furnishing of a summary plan description and annual report to “each participant, and each beneficiary receiving benefits under the plan.”

- participants and beneficiaries currently receiving benefits;
- participants and beneficiaries to whom paid-up insurance policies representing their full benefit entitlements have been distributed;
- participants and beneficiaries who have received full distribution of their benefits;
- participants with deferred vested benefits who have received benefit statements, either upon termination or after having incurred a one-year break in service without returning to service with any employer maintaining the plan and their beneficiaries.<sup>61</sup>

As the new legislation appears to expand, as opposed to contract, the group of recipients eligible to receive benefit statements, there is nothing in the legislation or legislative history to suggest that the 1980 DOL proposal to exclude certain groups of participants/beneficiaries from disclosure on the grounds of being superfluous should be eliminated. Thus, it is recommended that the 1980 DOL proposal which excluded the preceding group of recipients from benefit statements be continued. Such individuals could be deemed not to have “his or her own account” under the plan. One of the individuals testifying before the 2007 DOL ERISA Advisory Council Working Group on Participant Statements also recommended that frozen plans be exempt from the periodic statement requirement, as no further benefits were accruing under the terms of the plan.<sup>62</sup>

(iii) *Who is a beneficiary not otherwise covered under “DC group one” or “DC group two”?*

Beneficiaries who do not fit within “DC group one” or “DC group two” nevertheless may be included in “DC group three,” which permits such class of recipients to *request* a benefit statement. Consistent with the DOL 1980 proposal that ERISA §§105 and 209 created two classes of recipients for benefit statements, participants or beneficiaries who requested them and participants who terminated service or incurred a one-year break in service, the first group could request the information as it was needed; whereas Congress deemed that the second group would automatically receive the information as such information would be relevant upon those events. If

<sup>61</sup> See the Preamble to former DOL Prop. Regs. §2520.105-2, note 28, above.

<sup>62</sup> According to Thomas Finnegan’s testimony, see note 14 above, frozen participants should be on par with other inactive participants. Hence, statements to frozen participants that disclosed no additional information should be provided only upon request.

the DOL regulations under the amended ERISA §105 continue this distinction, there is a group of beneficiaries that would not be included in “DC group one” or “DC group two” but would nevertheless have a need to have the information. This would include individuals who were attempting to obtain an account under the plan through a qualified domestic relations order (QDRO). Such individuals may not yet be beneficiaries able to request a benefit statement; nevertheless, they need the information contained in a benefit statement in order to have a court issue a QDRO. It is likely that the DOL will define “DC group three” with this group of beneficiaries in mind.

(iv) *What does it mean to be a participant who “terminates his service with the employer” for purposes of “DC group four”?*

Although the DOL 1980 proposal did not define the phrase “terminates his service with the employer,” it envisioned a situation in which the participant no longer had an hour of service with the employer or any other employer maintaining the plan. The 1980 proposal endorsed the idea that the reporting of benefits could be made at the *end* of the plan year in which the event occurred that triggered automatic reporting. This reflected the reality that administrative costs would be reduced with a single date approach and that valuations of defined contribution plans are required only annually. The proposal went on to provide that a participant who received a benefit statement upon a termination of service and *thereafter* incurred a one-year break in service would not be entitled to a second benefit statement, as such statement would be the same as the first. Similarly, a participant who received a benefit statement upon incurring a one-year break in service (e.g., a participant who does not terminate service but reduces his or her hours to less than 501 hours of service) and thereafter either terminates service with the employer or incurs another one-year break in service would not be entitled to a second benefit statement, provided the information on the second benefit statement would be the same as that on the first statement.

Because the IRC’s controlled group and affiliated service groups are not applicable under Title I of ERISA, this phrase should be limited to the employer that employs the participant and/or maintains the covered plan. It should not be extended to employers within the controlled group or the affiliated service group, applicable under Title II of ERISA, unless such employer has adopted the covered plan.

## **b. Defined Benefit Plans**

In analyzing the groups of recipients for defined benefit plan purposes, there are three groups to consider:

- “DB group one”: this includes a 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.” The DOL will need to define this group, as such members are entitled to a pension benefit statement once every three years.

- “DB group two”: this includes any “participant or beneficiary under the plan.” Such group is entitled to a pension benefit statement upon request.
- “DB group three”: this includes a participant who “terminates his service with the employer or has a 1-year break in service.” While the phrase “1-year break in service” is defined by statute by referencing ERISA §203(b)(3)(A), the phrase “terminates his service with the employer” is not defined.

*(i) Who has “a nonforfeitable accrued benefit and who is employed by the employer maintaining the plan at the time the statement is to be furnished” for purposes of “DB group one”?*

It would appear that Congress’s intent in limiting “DB group one” to a subset of “all participants” is to reduce the administrative cost of providing pension benefit statements every three years to individuals who either have no vested benefits or where reporting would be superfluous. Hence, the latter group should be the same individuals listed in the DOL 1980 proposal as superfluous, which were listed in the “DC group two” discussion above. The meaning of the phrase “employed by the employer maintaining the plan at the time the statement is to be furnished” should be interpreted consistently with the phrase “terminates his service with the employer” in order to avoid duplicative disclosures and resulting increased administrative costs. Hence, a participant who terminates service with the employer is no longer employed by the employer. Under ERISA §209, a participant who terminates service with the employer or incurs a one-year break in service is entitled to a benefit statement automatically. The DOL 1980 proposal would have required such statement at the end of the plan year in which the event occurred (i.e., termination of service with the employer or any employer maintaining the employer, or a one-year break in service). However, as discussed under “DC group four” above, duplication of information was not required if the participant terminated service and later incurred a one-year break in service, or the participant incurred a one-year break in service and later terminated service or later incurred a subsequent one-year break in service. Similarly, for purposes of “DB group one,” the plan administrator should not have to provide benefit statements for participants who have already received a statement upon termination of service (with the employer or any employer maintaining the plan) or upon a one-year break in service under the three-year re-

porting cycle requirement. Such a requirement would not result in any meaningful disclosure for the participant but would certainly increase plan administrative costs.

*(ii) Who is any “participant or beneficiary under the plan” for purposes of “DB group two”?*

The author believes that “DB group two” should be construed similarly to the “DC group two.” Participants and beneficiaries with an “account under the [defined contribution] plan” are those individuals who have a benefit under the plan, as their “accrued benefits” are equal to their account balances. Similarly, participants or beneficiaries under a defined benefit plan should include those individuals who have an accrued benefit under the plan, regardless of whether it is vested or not. This group has the right to request a benefit statement more often than once every three years, presumably when such individual needs to know the information (e.g., contemplating retirement or termination of service, dissolution of marriage and division of benefits under the plan). The DOL 1980 proposal provided that the plan administrator did not have to provide a requested benefit statement more than once during any 12-month period. PPA ’06 codified this rule for all eligible participants and beneficiaries.<sup>63</sup>

The DOL 1980 proposal also provided an alternative disclosure method. If the plan provided a benefit statement *annually*, then non-vested participants could simply be informed of their non-vested status.<sup>64</sup> If a non-vested participant later requested a complete benefit statement — value of accrued benefits and vested accrued benefits — then the plan administrator was required to furnish such statement.<sup>65</sup> Such a proposal should continue in any final regulations, as it represents meaningful disclosure to that group of recipients but reduces administrative costs for the plan administrator.

*(iii) What does it mean to be a participant who terminates his service with the employer” for purposes of “DB group three”?*

As the requirement to furnish information to this group derives from ERISA §209 and not ERISA §105, this group should be interpreted similarly between defined contribution plans and defined benefit plans. Hence, the same group of individuals included in the discussion of “DC group four” above (i.e., a participant entitled to receive a report automatically who

<sup>63</sup> PPA ’06, §508(a)(2)(B), amending ERISA §105(b).

<sup>64</sup> Former DOL Prop. Regs. §2520.105-2(a)(6)(i) at note 28, above.

<sup>65</sup> Former DOL Prop. Regs. §2520.105-2(a)(6)(ii) at note 28, above.

“terminates service with his employer or has a 1-year break in service”) should be included in “DB group three,” as there is nothing in the language of ERISA §209 to distinguish defined contribution plans from defined benefit plans for purposes of this group of recipients.

## D. CONTENT OF BENEFIT STATEMENTS

### 1. Universal Requirements

#### a. The statute requires “total accrued benefits” and “nonforfeitable pension benefits”

The current law does not alter the prior law mandate requiring that the benefit statement disclose, based on the basis of the latest available information: (1) the total accrued benefits, and (2) the vested accrued benefits and, for individuals not yet vested, the date upon which vesting will occur.<sup>66</sup> One of the 1997 Working Groups for the DOL’s ERISA Advisory Council had recommended annual benefit statements showing projected benefits, as well as vested accrued benefits.<sup>67</sup> This recommendation was not codified under PPA ’06.

In the *defined contribution* plan context in which the participant’s or beneficiary’s accrued benefit is his or her account balance, the DOL 1980 proposal required the disclosure of the account balance. The author recommends continued disclosure of the account balance in the case of defined contribution plans. Some mutual fund companies and insurance companies have been converting the defined contribution account balances into annuities for purposes of disclosing benefits to intended recipients. If the actuarial bases used for converting the account balances into annuities are not those that are set forth under the terms of the plan, the author recommends that the DOL require the reporting of the actuarial conversion bases to be disclosed to participants and beneficiaries.

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<sup>66</sup> ERISA §105(a)(2)(A)(i)(I) and (II), as amended by PPA ’06, §508(a).

<sup>67</sup> See [http://www.dol.gov/ebsa/aboutebsa/erisa\\_advisory\\_council.html](http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html) (last visited Aug. 23, 2007). See also Preamble to former DOL Prop. Regs. §§2520.105-1-3 at note 28, above, in which the DOL states that it does not prohibit the inclusion of projected benefits on the benefit statements but requires that the statement be written in a manner so as not to mislead or misinform participants or beneficiaries. Note also that, according to Suzanne Samuelson’s testimony, see note 15 above, while not required, projected retirement benefits were more helpful to participants in preparing for the future. However, ASPPA, in its written comments, recommends specific participant data be excluded. See [http://www.asppa.org/pdf\\_files/060507DOLquarterly.pdf](http://www.asppa.org/pdf_files/060507DOLquarterly.pdf) (last visited Aug. 31, 2007).

This is of critical importance if the actuarial bases use an unrealistic mortality table (e.g., male mortality only) and/or unrealistic interest rates (e.g., 7 or 8%); such bases should be disclosed to the recipients as they reflect the loads that the insurers are using for purposes of the annuity quote.<sup>68</sup>

In contrast, participants or beneficiaries of *defined benefit* plans generally have an accrued benefit that is expressed as an annual benefit, payable as of the plan’s normal retirement age under a certain normal form of payment. The DOL 1980 proposal simply required the participant’s accrued benefit to be expressed in terms of a straight life annuity payable at the plan’s normal retirement age, or in terms of the *normal form* of benefits offered by the plan.<sup>69</sup> This was the case even if the participant had elected an alternate form of benefit payment, as such individualized information would have added to the cost of compliance.<sup>70</sup> However, if the election of alternative optional forms would affect the participant’s accrued benefits, the plan administrator was required to indicate such, but could refer the participant to the appropriate information in the SPD.<sup>71</sup> This was especially true if the benefit was expressed as a straight life annuity but would likely be paid as a joint and survivor annuity and the survivor portion was to be reduced according to the terms of the plan.

In this approach, the DOL retreated from its earlier 1979 proposal in which it would have required the reporting of alternative forms of benefits had the participant elected an alternate form of payment.<sup>72</sup> Such individualized reporting would have increased the administrative costs. However, to achieve meaningful disclosure, the DOL 1980 proposal would have required reference to the plan’s SPD if alternative forms of benefit payment would reduce or affect the participant’s accrued benefit, especially if the participant’s normal form of benefit payment was the joint and survivor form which would reduce survivor benefits. As PPA ’06 did not alter the statutory language in ERISA §105 regarding the total accrued benefits and the nonforfeitable pension benefits, it should be inferred that Congress is affirming the DOL’s 1980 proposal in this

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<sup>68</sup> For further information regarding the use of annuity quotations by insurers, see McDonald, “As Boomers Retire, Insurers Aim to Cash In,” *Wall St. J.* (June 15, 2007), available at <http://online.wsj.com/article/SB118187429554336353.html> (last visited Aug. 19, 2006).

<sup>69</sup> Former DOL Prop. Regs. §§2520.105-2 and 2520.209-1, 45 Fed. Reg. 51231 (Aug. 1, 1980).

<sup>70</sup> See Preamble to former DOL Prop. Regs. §§105-1-3, at note 28, above.

<sup>71</sup> Former DOL Prop. Regs. §2520.105-2(e)(5)(i) at note 28, above.

<sup>72</sup> See Former DOL Prop. Regs. §2520.105-7(a)(1)(i), at note 28, above.

regard and not adopting any new benefit disclosure information.

The DOL 1980 proposal did not require the benefit statement to disclose specific participant data that was used in making the computation of accrued benefits and vested accrued benefits (e.g., date of hire, years of service, earnings).<sup>73</sup> It is recommended that the DOL not require such specifics in future regulations; to the extent it does require such information, additional processing time will have to be considered for the plan administrator to receive, process and verify as to the accuracy of such information.

### **b. Alternative disclosure of “nonforfeitable benefits”**

The statute did not change the reporting requirement that the statement contain the “nonforfeitable pension benefits” which have accrued, or the “earliest date on which benefits will become nonforfeitable.” Under the DOL 1980 proposal, plans that utilized a graded vesting schedule needed only to indicate the earliest date on which benefits became nonforfeitable, not every subsequent date in which vesting percentage increased.<sup>74</sup> Class year plans were required to indicate the nonforfeitable percentage of each portion of the participant’s account balance, to which a separate nonforfeitable percentage applies.<sup>75</sup> In addition, disclosure of the nonforfeitable accrued benefit had to be in the same form as that in which the accrued benefit had been reported.<sup>76</sup>

PPA ’06 goes beyond the DOL’s 1980 proposal and provides an alternative method of disclosing the nonforfeitable benefits. Under this new alternative, if at least annually the plan administrator either updates the information contained in the benefit statement *or* provides a separate statement enabling the participant or beneficiary to determine the nonforfeitable vested benefits, then the actual amount of the nonforfeitable benefits or the earliest date on which the benefits become nonforfeitable does not have to be disclosed.<sup>77</sup> It is assumed that most plan administrators will avail

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<sup>73</sup> According to Suzanne Samuelson’s testimony, *see* note 15 above, data used to generate the calculation of the participant’s accrued benefits should be disclosed, with the opportunity to correct any incorrect data.

<sup>74</sup> *See* former DOL Prop. Regs. §2520.105-2(e)(3)(i) at note 28, above.

<sup>75</sup> *See* former DOL Prop. Regs. §2520.105-2(e)(3)(ii) at note 28, above.

<sup>76</sup> *See* former DOL Prop. Regs. §2520.105-2(e)(2) at note 28, above.

<sup>77</sup> ERISA §105(a)(2)(C), as amended by PPA ’06 §508(a). According to Thomas Finnegan’s testimony, *see* note 14 above, if the benefit statement requirements are too onerous, the plan administrator will opt for the annual notice which notifies participants of their ability to request a benefit statement.

themselves of this alternative, as it avoids having to make a separate calculation as to each participant’s or beneficiary’s vested benefits and, hopefully, allows the plan administrator to direct the individual to the SPD for purposes of his or her vesting computation. The DOL does have, under the statute, the ability to impose requirements under this alternative. Whether it adopts the 1980 proposal in order for plans to utilize this alternative remains to be seen.

### **c. Permitted disparity and floor-offset arrangements**

For defined benefit plans that provided for a Social Security offset, the DOL’s 1980 proposal provided that only the *net* benefit be disclosed.<sup>78</sup> If such benefit was computed using assumptions about the participant’s earnings for service not covered under the plan, the benefit statement was required to indicate that the reported amounts were approximate. In this respect, PPA ’06 expands the required disclosure by now requiring an explanation of any permitted disparity under IRC §401(l) or any floor-offset arrangement that may be applied in determining accrued benefits.<sup>79</sup> Although the SPD should already explain any permitted disparity or floor-offset arrangements to the extent the participant’s accrued benefit may be affected, this disclosure will presumably require more than just a reference to the SPD’s explanation.<sup>80</sup>

Some practitioners have argued that the use of permitted disparity under defined contribution plans impacts how the contributions are allocated but does not directly affect the determination of the participant’s accrued benefits,<sup>81</sup> and thus, an explanation of permitted disparity is not relevant in the defined contribution plan context. It is unlikely that the DOL will concur with that opinion, as the allocation of contributions does ultimately affect the participant’s accrued benefits, and there is no basis under the statute for a disparate treatment of permitted disparity under defined benefit versus defined contribution plans.

Another question arises as to whether the explanation in the benefit statement must describe the terms of the plan or the actual plan operation. For example, the plan may provide for an integrated discretionary

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<sup>78</sup> Former DOL Prop. Regs. §2520.105-2(e)(2)(C) at note 28, above.

<sup>79</sup> ERISA §105(a)(2)(A)(ii), as amended by PPA ’06, §508(a).

<sup>80</sup> According to Thomas Finnegan’s testimony, *see* note 14 above, ASPPA recommends that the participant statement simply reference the SPD with respect to the plan’s benefit formula. He also recommends that no disclosure should be needed for plans that take permitted disparity into account solely for nondiscrimination and coverage testing.

<sup>81</sup> *See* ASPPA’s comments, available at note 67 above. According to the testimony of Douglas O. Kant, *see* note 15 above, reference to the summary plan description should be sufficient.

profit-sharing contribution but might not have made such contributions in recent years. The statute suggests that the description refers to the terms of the plan as it refers to any permitted disparity or floor-offset “that *may be* applied in determining any accrued benefits” (emphasis added).<sup>82</sup> To require an explanation may prove to be misleading if the plan’s operation does not reflect discretionary plan terms. To avoid unnecessary administrative costs, it is suggested that any required disclosure be descriptive as to the plan’s actual features but not involve individualized disclosure information. Hence, defined contribution plans that do not provide for an actual permitted disparity allocation of contributions in a given plan year should be exempt from any additional disclosure requirements.

#### **d. Ability to understand the benefit statement**

PPA ’06 codifies the DOL 1980 proposal that the benefit statement be written in a manner “calculated to be understood by the average plan participant.”<sup>83</sup> This is consistent with the rules applicable to disclosure under the SPD.<sup>84</sup> However, the DOL’s ERISA Advisory Council indicated in a 2006 Working Paper that SPDs in their traditional form are too complex for the average plan participant to understand, as they are written in “legalese” to protect the plan sponsors in litigation.<sup>85</sup> To the extent the DOL in its model benefit statements provides easy-to-understand model language and a glossary of commonly used terms, this would assist plan administrators in providing meaningful disclosure without the threat and expense of potential litigation.

## **2. Defined Contribution Plans — Additional Disclosure**

PPA ’06 now requires additional disclosure for *all* defined contribution plans and additional disclosure for participant-directed defined contribution plans. All covered defined contribution plans must now disclose “the value of each investment to which assets in the

individual account have been allocated.”<sup>86</sup> This suggests that the list of assets and their values that the participant’s account has invested in, as of the most recent valuation date, be disclosed to the participant. Further, the statute clearly states that such assets and their values be disclosed “as of the most recent valuation date,” so that employers are not forced to make more frequent valuations than required by law. Any investment in employer securities and their values are required to be disclosed, regardless of whether the securities were contributed by the employer or invested at the direction of the participant or beneficiary.

The actual list of investments and their values make more sense in the participant-directed investment scenario, in which the participant is selecting the type of investment, than in the trustee-directed investment scenario. Hopefully, in the context of pooled investments and collective trusts, the listing of the underlying individual investments will not have to be disclosed, as the utility of such information compared with the cost is simply not warranted. In the trustee-directed investment context, disclosure of the actual list of investments and their values is required but will have limited utility to the typical participant, other than knowing the percentage of assets invested in employer securities and their current value.

## **3. Participant-Directed Defined Contribution Plans — Another Level of Additional Disclosure**

Another level of additional disclosure is required for individually self-directed defined contribution plans. There are now three new mandates in such context:

- an explanation of any limitations or restrictions on the participant’s or beneficiary’s right to direct investments;
- an explanation (written in a manner to be understood by the average plan participant/beneficiary) of the importance of a well-balanced and diversified investment portfolio, with an explicit statement that investing more than 20% of one’s portfolio in the security of one entity (such as employer securities) may not be adequately diversified; and
- a notice directing the participant/beneficiary to the DOL’s website regarding sources of information on individual investing and diversification.<sup>87</sup>

<sup>82</sup> See note 79 above.

<sup>83</sup> ERISA §105(a)(2)(A)(iii), as amended by PPA ’06, §508(a).

<sup>84</sup> ERISA §102(a), requiring the summary plan description to be “written in a manner calculated to be understood by the average plan participant.” The DOL interprets that requirement consistent with such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Summary plan descriptions should avoid technical jargon and long, complex sentences and instead focus on clarifying examples and illustrations, the use of clear cross-references and a table of contents. See DOL Regs. §2520.102-2(a).

<sup>85</sup> See *Report of the Working Group on Communications to Retirement Plan Participants*, available at [http://www.dol.gov/ebsa/publications/AC\\_1105b\\_report.html](http://www.dol.gov/ebsa/publications/AC_1105b_report.html) (last visited Aug. 12, 2007).

<sup>86</sup> ERISA §105(a)(2)(B)(i), as amended by PPA ’06, §508(a).

<sup>87</sup> ERISA §105(a)(2)(B)(ii)(I), (II), and (III), as amended by PPA ’06, §508(a).

Under the DOL's field assistance bulletin, the first new mandate requires disclosure of only plan restrictions, not those imposed by an investment fund or vehicle or by state or federal securities laws.<sup>88</sup> Examples of such plan restrictions would include quarterly limits on being able to move to another fund or limits on the number of funds that may be invested. Whether cross-reference to the plan's SPD amounts to good faith compliance before the issuance of final regulations is unclear. Sole reliance on the SPD for this disclosure purpose appears to be contrary to congressional intent.

Regarding the second new mandate, a plan sponsor or administrator may simply copy the language of the statute regarding the importance of diversification. Alternatively, the DOL's field assistance bulletin provides a variety of alternative model notices to achieve the statutory intent:

- to describe the importance of overall diversification, the DOL provides the following model language:

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.

The author believes the DOL already has some effective communication guides that employers should be allowed to rely upon in satisfying this new disclosure requirement. For example, the following may be an appropriate diversification explanation taken from existing DOL publications:

Experts recommend that you spread your money among a range of investments so that your money is diversified.<sup>89</sup> There are two main ways to reduce risk. First,

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<sup>88</sup> See FAB 2006-3, at note 19 above. According to Douglas O. Kant's testimony, see note 15 above, the DOL's position in the field assistance bulletin should be affirmed, noting that this approach was particularly compelling with respect to mutual funds and group trust commingled pooled investments in which these restrictions are imposed by a third-party manager as a condition of participation. See note 79 above.

<sup>89</sup> Excerpt from the DOL's "Taking the Mystery Out of Retirement

diversify *within* each category of investment. You can do this by investing in pooled arrangement, such as mutual funds, index funds, and bank products offered by reliable professionals. Second, you can reduce risk by investing *among* categories of investments. Studies have shown that once you have diversified your investments within each category, the choices you make about how much to put in these major categories is the most important decision you will make and should define your investment strategy. By diversifying into different types of assets, you are more likely to reduce risk, and actually improve return, than by putting all of your money into one investment or one type of investment.<sup>90</sup> If you'd like more information about diversification, go to the Department of Labor's website at [www.dol.gov/ebsa/publications](http://www.dol.gov/ebsa/publications) or call 1.866.444.EBSA (3272) and ask for the DOL publication *Savings Fitness: A Guide to Your Money and Your Financial Future*.

- to describe the problems associated with investing in more than 20% of one's portfolio in a single investment, the DOL provides the following model language:

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.<sup>91</sup>

- although not specifically required by the statute to diversify one's entire portfolio, as opposed to one's retirement portfolio, the DOL provides the following model language:

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, individu-

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ment Planning," available at <http://www.dol.gov/ebsa/publications/NRTOC.html> (last visited Aug. 12, 2007).

<sup>90</sup> Excerpt from the DOL's "Savings Fitness: A Guide to Your Money and Your Financial Future," available at <http://www.dol.gov/ebsa/pdf/savingsfitness.pdf> (last visited Aug. 12, 2007).

<sup>91</sup> See FAB 2006-3, at note 19 above.

als have different financial goals, different time horizons for meeting their goals, and different tolerances for risk.

- although not specifically required by the statute, the DOL provides the following model language to remind participants/beneficiaries to review their investment allocations:

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.<sup>92</sup>

This notice is obviously more important to younger participants/beneficiaries, but that audience typically does not read such statements. Again, use of existing DOL communication guides should be encouraged and relied upon by employers. For example, the following may be effective disclosure to participants and beneficiaries regarding periodic review of their investment allocations:

Your asset allocation may change over time. When you are younger, you might invest more heavily in stocks than bonds and cash. As you get older and enter retirement, you may reduce your exposure to stocks and hold more in bonds and cash. You also might change your asset allocation because your goals, risk tolerance, or financial circumstances have changed. Financial planning is not a one-time process. Monitor the performance of investments. Make adjustments if necessary.<sup>93</sup>

The author believes that the mutual fund industry will design alternative language to comply with the statutory requirements but which dovetails more effectively with the descriptions contained in the plan's SPD and the plan's financial literacy information. To the extent such descriptions provide more meaningful disclosure to participants and beneficiaries, this should be encouraged by the DOL in its regulations. The author does not favor the use of a *single* DOL boilerplate notice for all plans.

#### 4. Good Faith Reliance Under FAB 2006-3

Certainly, reliance on the DOL's model statements amounts to good faith reliance until final regulations

<sup>92</sup> *Id.*

<sup>93</sup> See the DOL's "Savings Fitness: A Guide to Your Money and Your Financial Future," at note 90 above.

are issued. For plans in which a disproportionate amount of investments is in employer securities, such sponsors are going to wish for more elaborative disclosure in order to avoid an exodus from profitable investments in employer securities, thereby causing an immediate decline in value of the employer securities. Also, the new disclosure rules will pose additional problems for closely-held employers that do not provide daily valuation of the employer securities.

#### 5. Coordination with ERISA §101(m) Requirements

PPA '06 imposes a separate divestiture and diversification notice requirement for defined contribution plans that invest in company stock.<sup>94</sup> Such notice is intended to inform participants of their ability to immediately divest any employer securities purchased with elective or other employee contributions and the right to divest any employer securities purchased with employer contributions after the participant completes three years of service.

In its field assistance bulletin, the DOL advised that this divestiture/diversification notice may be accomplished through the diversification disclosure required under ERISA §105 in order to avoid another stand-alone disclosure and the additional costs of compliance.<sup>95</sup>

#### E. FREQUENCY OF DISCLOSURE, AS WELL AS DUE DATES FOR COMPLIANCE AND PERIOD OF COVERAGE

ERISA §105 now mandates automatic disclosure of benefit statements to certain groups of participants and beneficiaries, but varies the frequency of disclosure depending on whether the plan is a defined benefit versus defined contribution plan and whether the defined contribution is participant-directed.<sup>96</sup> However, the statute is silent as to the due date for com-

<sup>94</sup> PPA '06, §507(a), amending ERISA §101 by redesignating subsection (m) as subsection (n) and by inserting a new subsection (m) after subsection (l). Note such notice does not apply to ESOPs that do not hold elective deferral, other employee contributions, or employer matching or certain nonelective contributions.

<sup>95</sup> FAB 2006-3, at note 19 above.

<sup>96</sup> Note that Title I of ERISA distinguishes between an individual account balance plan (or a defined contribution plan), which it defines as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account," versus a defined benefit plan, which it defines

plying with the frequency requirement and is also silent as to the period of coverage that the benefit statement describes. In developing regulations, the author believes that the following three concepts are inextricably connected: (1) *frequency* that mandates how often disclosure is to be made; (2) *due date* that defines the date for furnishing the actual disclosure; and (3) the *period* of coverage of the benefits referred to within the statement. If frequent disclosure is required (e.g., quarterly) and relates to the period of coverage (e.g., for the immediately preceding quarter), the due date for furnishing such disclosure should be set so as to provide meaningful disclosure consistent with the delivery of accurate benefit information relating to the period of disclosure.

Prior law made no distinction in disclosure of benefit statements between defined benefit versus defined contribution plans; it only distinguished between disclosure of benefit statements *upon request* and *upon certain events* (e.g., termination of service or one-year break in service). As prior law was also silent on the issues of due date for compliance and the period of coverage that the benefit statement describes, the DOL 1980 proposal set forth different rules for statements required upon request versus those required upon certain events.<sup>97</sup>

For benefit statements required both *upon request* and *upon certain events*, the DOL 1980 proposal adopted a plan-year-end approach for the disclosure of benefits (i.e., benefits determined as of the end of the prior plan year).<sup>98</sup> However, the due dates varied, depending on whether the statement was required upon request or upon certain events. In the latter situation, the DOL 1980 proposal required the furnishing of benefit statements within 180 days after the end of the plan year in which the termination or break in service occurred.

In the case of benefit statements required upon request, two different due dates were required. Generally, the benefit statement had to be furnished to a participant or beneficiary upon request within the *later* of 60 days of the date of request or 120 days after the end of the plan year which immediately preceded the year in which the request was made.<sup>99</sup> For example, a participant covered under a calendar plan year who

requested a benefit statement on February 1 would have the *later* of 60 days (April 1) or 120 days after the prior plan year (April 30) to receive the information. The extra 60 days provided by the 120-day limit recognized that plan administrators needed more time after the end of the plan year to provide year-end accrued benefits. However, a participant who requested a benefit statement on October 1 should receive such information within 60 days, as it was based on the prior year accrued benefits which should be readily known 120 days after the prior plan year.

The DOL 1980 proposal permitted a plan to provide benefit statements annually as an *alternative* to furnishing benefit statements upon request. Under that alternative, an annual statement could be furnished within 180 days after the end of the plan year. That extended due date coincided with the furnishing of Form 5500 reporting to government agencies the value of total accrued benefits.<sup>100</sup> Such extended period of time also reflected the fact that the typical type of plan at the time of ERISA's enactment was a defined benefit plan, under which benefits are dependent upon the accuracy of a variety of variables (e.g., vesting service, earnings and plan participation service). Thus, it was important for the information used by the plan administrator to be accurate, which required more time to verify and could require input from the employer regarding its data.

Under the new law enacted by PPA '06, frequency as to disclosure of benefit statements now varies as follows:

- “every calendar quarter” for participant-directed defined contribution plans;
- “every calendar year” for non-participant-directed defined contribution plans;
- “once every 3 years” for defined benefit plans;
- upon request by the beneficiary; and
- when the participant “terminates his service with the employer” or “has a 1-year break in service” for defined contribution and defined benefit plans.

The new rules are effective for plan years beginning in 2007 (with staggered dates for multi-employer or multiple employer plans).

As ERISA prescribes due dates for a variety of other types of notices, it is not clear why Congress continued to be silent on the due date for compliance with the disclosure requirements of ERISA §§105 and 209. One could assert that Congress was affirming the due date requirements contained in the DOL 1980

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as “a pension plan other than an individual account plan.” ERISA §3(34) and (35). In contrast, Title II of ERISA, which regulates qualified retirement plans, uses the distinction of defined contribution plans as defined in IRC §414(j) versus defined benefit plans as defined in IRC §414(i).

<sup>97</sup> Former DOL Prop. Regs. §2520.105-2(a)(4) and (b)(1)(iii), at note 28 above.

<sup>98</sup> Former DOL Prop. Regs. §2520.105-2(a)(5), at note 28 above.

<sup>99</sup> Former DOL Prop. Regs. §2520.105-2(a)(4), at note 28 above.

<sup>100</sup> Former DOL Prop. Regs. §2520.105-2(a)(6), at note 28 above.

proposal; however, given that the typical retirement model at the time of that proposal was a defined benefit plan and that the current retirement model is a defined contribution plan, it is reasonable to assume that Congress presumed that the DOL would ascertain new due date requirements under the revised statute.

## 1. Defined Contribution Plans

Under the new requirements, benefit statements are required automatically for participants and beneficiaries under defined contribution plans either “every calendar quarter” or “every calendar year.” The first issue that the DOL must grapple with is whether to read such language literally as referring to each *calendar* quarter (January through March, April through June, July through September, and October through December) or whether such language should be interpreted consistent with the *plan year* actual quarters (not calendar quarters). As ERISA originally provided and continues to provide for fiscal year plan years, it is inconceivable that Congress now requires reporting based on a calendar year quarter for a non-calendar year plan year. This interpretation makes even more sense if the period of coverage that the quarterly reporting refers to is the immediately preceding plan year quarter of benefits. For example, if a plan operates on a March 1 through February 28 plan year, requiring reporting as of March 31 (the first *actual calendar* quarter) relating to the benefits incurred during January through March 31 makes no sense to these participants. Their SPD describes benefits as of a fiscal 12-month period from March 1 through February 28; thus, if quarterly reporting was required, they would expect reporting as to events first occurring March 1 through May 31. Similarly, if the defined contribution plan had an annual disclosure requirement, tying the disclosure of benefits to the calendar year-end (December 31) as opposed to the February 28 plan year-end would make no sense to such participants.

After the discussion above regarding the interpretation of “calendar quarter” and “calendar year,” it is important to realize that defined benefit plans have a longer reporting cycle — “once every 3 years.” Here, Congress did not use the phrase “once every 3 calendar years”; hence, the DOL should not have a problem with interpretation. The statute would appear to require a three-year cycle based on the plan’s 12-month plan year, regardless of whether it is a calendar year or fiscal year.

The author believes that the plan year-end approach is equally valid for disclosures required by request of the beneficiary or upon certain events (e.g., termination of service or one-year break in service) and, thus, should be adopted by the DOL in its regulations.

## 2. Participant-Directed Versus Non-Participant-Directed Defined Benefit Contribution Plans

Assuming that the DOL interprets “calendar quarter” and “calendar year” as referring to the plan’s actual plan year cycle, the more frequent disclosure for participant-directed defined contribution plans (now quarterly) as compared with non-participant-directed defined contribution plans (now annually) still presents problems for the DOL. By requiring quarterly statements for participant-directed defined contribution plans, Congress must have assumed that such plans would be revalued at least quarterly, which is why the participant needs to be advised of the more frequent changes in account balance.<sup>101</sup> However, Congress did not amend ERISA’s requirements to provide for more frequent valuations than annual valuations.

In the typical IRC §401(k) plan, participants may be afforded the ability to make pre-tax and after-tax elective salary deferrals, along with employer matching or discretionary nonelective contributions. It is certainly important for participants in this type of plan to know when the elective contributions are being made (which are generally withheld on a payroll basis) versus when nonelective contributions are being made (which may be once after the end of the plan year) and how much contributions are being invested. If the typical IRC §401(k) plan provides for daily, monthly or quarterly valuations, the new requirement should provide effective disclosure to the participants at least with respect to their elective contributions, and after year-end, with respect to all contributions, as account balances are being updated after each payroll period and investment earnings are being credited at least quarterly.

However, for participant-directed defined contribution plans that provide for semi-annual or annual valuations, the new quarterly requirements will not provide the kind of meaningful disclosure Congress intended unless the DOL regulations force more frequent valuation of benefits.<sup>102</sup> However, it is unlikely that the DOL has the regulatory power to force more

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<sup>101</sup> According to Douglas O. Kant’s testimony, *see* note 15 above, mutual funds are able to provide to participants the status of their defined contribution account investments online in “real time” according to fund and value; however, valuation of annuity contracts and life insurance policies purchased under a defined contribution plan are not readily known, nor is it known what the appropriate value is to be disclosed. *See also* Derrin Watson’s testimony, note 59 above, in which he notes that 45 days may be sufficient for plans using mutual funds, but not realistic for plans with unique investments, such as real estate or privately held stock.

<sup>102</sup> *See* Rev. Rul. 80-155, 1980-1 C.B. 84, applicable to quali-

frequent valuations than annual; in fact, there is nothing in PPA '06's legislative history to indicate that *valuation* of participant-directed plans should be done quarterly. From a practical standpoint, such quarterly valuations of account balances are readily available to a plan trustee; however, the physical transcription and valuations of account balances have not been required in the past, and if required in the future, would require additional administrative expenses to produce and to provide on a benefit statement. One likens this to a bank's disclosure of one's checking account statement for a monthly period of time, but an additional cost if the recipient wishes a copy of the various checks written over the covered period of time. Any disclosure is possible, provided the customer is willing to pay for such costs.

For example, a calendar plan year with only *annual* valuations as of December 31 may provide a quarterly statement reflecting the March 31, 2007 account balance that includes elective contributions from January through March, but no investment earnings on such contributions, since those are not valued until December 31, 2007. Similarly, the quarterly statement reflecting the December 31, 2007 account balance would include elective contributions from January through December and investment earnings on such contributions, as they are valued as of December 31, but they do not report any nonelective employer contributions, as those are not contributed until August 2008, even though they are applied retroactively back to December 31, 2007, when actually made.

The DOL may solve the dilemma of quarterly disclosure for plans that value only semiannually or annually by requiring disclosure based on the most recent elective and nonelective contributions made during the preceding quarter, with a statement informing the participant that such account balance has not yet been credited with investment earnings (if that is the case) but will do so either semiannually or at the end of the plan year. Such a compromise appears to provide the most up-to-date reporting of information to the participant without requiring more frequent valuation of account balances, which Congress clearly did not prescribe under PPA '06.

### 3. Due Date for Furnishing Required Statements

#### a. General rule

Part of the analysis regarding the *frequency* of the benefit statement must involve the *due date* for com-

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plied pension and profit-sharing plans. Also, the testimony of Derin Watson, note 59 above, questions the value of quarterly statements for defined contribution plans in which an employee makes only deferral or investment elections annually. He recommends that the statements be required no more frequently than consistent with the changes permitted under the plan.

plying with the requirement and the period of benefit coverage that the statement provides. As part of tying the frequency of the benefit statement with its due date based on a benefit statement related to up-to-date benefit information, the DOL must weigh the benefit of disclosure to the participant/beneficiary with the cost of such disclosure for the administrator. Certainly, an accelerated due date for disclosure provides more up-to-date information to the participant, but if the information cannot be ascertained accurately as of such due date without significant cost to the plan administrator, the disclosure creates a burden on the plan administrator.

Under its field assistance bulletin, the DOL took a universal *due date* of 45 days after the end of the required period for compliance for *all* covered plans. For example, if quarterly reporting is required on March 31, furnishing of the statement must occur by May 15 in order to have good faith compliance; in contrast, if annual reporting is required on December 31, furnishing of the statement must occur by February 15 of the following year. For defined benefit plans, the first pension statement would be for the 2009 plan year, unless the plan elects to comply with the alternative notice requirement in ERISA §105(a)(3)(A).

The DOL's position in the field assistance bulletin has been critiqued by plan administrators as being unrealistic, certainly for plans valued only annually and especially for defined benefit plans.<sup>103</sup> Certainly, for plans that invest in mutual funds, a 45-day due date is not an onerous requirement. However, for other plans, including plans with unique investments (such as real estate, privately held stock) or for small employers with semi-annual or annual valuation dates, the reporting and valuing of benefits quarterly within a short period of time (e.g., 45 days after the end of the quarter), while doable, will add to the administrative expenses for such administrators.<sup>104</sup>

The author believes the DOL's approach in its 1980 proposal was far more realistic, especially for defined benefit plans. A due date of 180 days after the end of the plan year related to disclosure provides a sufficient period of time for the plan administrator to verify the accuracy of the information. For defined contribution plans, a 45-day due-date period may be realistic for plans with daily, monthly or quarterly valuation dates;

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<sup>103</sup> See Suzanne Samuelson's testimony at note 15 above.

<sup>104</sup> A number of the testifiers (e.g., Finnegan, Kant, Samuelson, Mazo and Watson) objected to the rigid 45-day requirement. It was recommended that an alternative longer period be permitted for smaller recordkeepers of defined contribution plans, especially if multiple vendors are involved. For defined benefit plans, additional time is definitely required in order to collect, review and "scrub" the data for accuracy. This is particularly true if the data is coming from multiple payroll sources. See notes 14, 15 and 59 above.

however, it may not provide meaningful disclosure for defined contribution plans with semiannual or annual valuation dates and may be burdensome for small employers. If a 45-day due-date period is applied, then it is recommended that the administrator be afforded model language from the DOL stating that such account balance may not yet be updated for investment earnings or for employer matching or discretionary contributions. It is recommended that the 45-day due date be extended automatically for small employers (e.g., plans with less than 101 employees) to at least 120 days.<sup>105</sup>

As for defined benefit plans, the DOL 1980 proposal recommended a dual due date for compliance — the later of 60 days after request or 120 days after the end of the plan year. The author believes such an approach is still valid but recommends the 120 days be extended to 180 days. To provide meaningful disclosure, it is essential that the information used in the determination of benefits be accurate. This requires additional time, not only to acquire the information (as a third-party administrator will rely on the employer for the data), but also to verify and correct the data. In contrast, defined contribution plans should have a more accelerated due date, as the data used to determine account balances is more readily ascertainable.

#### **b. Alternative method of disclosure for defined benefit plans**

The statute now provides an alternative method for satisfying the “once every 3 year” reporting requirement for defined benefit plans. If the plan administrator provides, at least once a year, a notice to the participant that the pension benefit statement is available and that the participant may obtain such statement, the “once every 3 year” standard is deemed to have been met. This is a lesser standard than what was required under the alternative method provided under the DOL 1980 proposal for satisfying the “upon request” disclosure requirement. Under that alternative method, a benefit statement had to be provided each year to each vested participant and a statement of non-vested status to each non-vested participant. However, if a non-vested participant requested a benefit statement after receiving this statement of non-vested status, he or she had to be furnished a complete benefit statement.

Under the PPA '06 alternative to the three-year cycle reporting, the plan administrator need only inform the participant, once a year, of the availability of

the benefit statement and the ways in which the participant may request such statement. By resorting to the prior law’s “upon request” reporting requirement, it is assuming that most plan participants will not be requesting statements on an annual or even once every three year basis but, instead, when the information is going to be relevant to the participant (e.g., in contemplation of retirement or upon a dissolution of marriage).<sup>106</sup>

#### **4. Period of Benefit Coverage**

Even if the DOL’s field assistance bulletin due date requirement remains its position, such interpretation may not be necessarily onerous for plan administrators depending on what period of *benefit coverage* the required disclosure relates to. As originally enacted, ERISA only mandates the valuation of benefits be made *once* a plan year, and such plan year does not have to be the calendar year.

If DOL interprets the statute’s mandate of “calendar quarter,” the first quarterly report would relate to the January 1 through March 31, 2007 period. However, even if the plan used monthly or quarterly valuations, a non-calendar plan year may not have a valuation on March 31. Clearly, a non-calendar plan year with semiannual and annual valuations would not have a separate valuation for March 31 either. It is unlikely that Congress intended to move self-directed defined contribution plans to calendar quarter valuation dates, regardless of the plan’s plan year, without explicit language. Such an interpretation causes even greater problems for plans subject to the annual benefit disclosure requirement. Under the DOL’s interpretation, all such plans must report the first required December 31, 2007 statement no later than February 14, 2008, based on account balances or accrued benefits valued as of December 31, 2007. Such a feat is difficult for calendar year plans, let alone non-calendar year plans that may not maintain account balances or accrued benefits as of December 31, 2007.

Thus, it appears more reasonable to tie the “calendar quarter” and “calendar year” to the plan year’s quarters and year-end. Thus, a plan required to make quarterly reports, but maintaining records on an April 1 through March 31 plan year, would be required to report its first quarter April 1 through June 30 by the due date determined after June 30. Similarly, a plan required to make annual reports, but maintaining

<sup>105</sup> According to Douglas O. Kant’s testimony, at note 15 above, small recordkeepers, particularly where multiple vendors are involved, would have a difficult time complying with the 45-day due date. He recommends a longer period, such as the due date for the plan’s annual return (Form 5500) filing.

<sup>106</sup> According to Thomas Finnegan’s testimony, *see* note 14 above, he predicted that if the benefit statement regulations are too onerous, many employers will opt to provide the alternative annual notice informing participants of their right to request a benefit statement. Rather than improving participant communication, the result could be less information being provided.

records on an April 1 through March 31 plan year, would be required to report its first plan year by the due date determined after March 31.

Thus, the author recommends that “calendar quarter” and “calendar year” relate to the plan year’s actual first, second, third and fourth quarters of the 12-month plan year. If a plan is required to make quarterly disclosure but does not provide for daily, monthly, or quarterly valuations, it should report the elective and nonelective contributions accumulated through the end of that quarter, with a statement to participants that investment earnings have not yet been credited but will be at the end (or semiannually) of the plan year. The due dates for compliance with the new reporting requirements should vary for defined contribution and defined benefit plans. A 45-day due date after the end of the reporting period is reasonable for large plans; however, plans with less than 100 participants should be given further extensions. For defined benefit plans for which it is critical to determine accrued benefits based on accurate data, the due date should be 180 days after the end of the plan year. Although the DOL 1980 proposal assumed that such data could be determined 120 days after the end of the plan year, the plan administrator was making those statements available to participants who requested them, not all plan participants and beneficiaries.

## F. FORM OF FURNISHING STATEMENTS: SINGLE OR MULTIPLE STATEMENTS

The statute is silent as to the issue of whether requirements for disclosure of the benefit statement must be fulfilled through a single statement or whether multiple documents or sources of information may be relied upon. This is a highly practical question for a number of different reasons:

- to the extent participants and beneficiaries are receiving the same or similar information through multiple disclosures for different purposes, query as to whether the repeated disclosure results in any greater understanding by the participants or beneficiaries (the author likens the result to sending repeated junk mail ads to such individuals, only to have such recipients tossing such information);
- to the extent the same or similar information has already been disclosed to participants and beneficiaries, query as to whether the cost of additional disclosure is justified in terms of more meaningful disclosure to such individuals;
- to the extent that information is coming from alternate sources (e.g., employer and a third-party

plan administrator), reliance on multiple statements is more practical and cost-efficient than a single source of disclosure; and

- to the extent that the SPD is the primary document for participants and beneficiaries to obtain information for understanding plan benefits, it might make sense to redirect such individuals back to the SPD whenever possible to provide greater context for the more restricted disclosure.

In its field assistance bulletin, the DOL acknowledged that good faith compliance did not preclude the use of multiple documents or sources for benefit statement information.<sup>107</sup> However, such good faith compliance is dependent upon notification to participants and beneficiaries explaining how and when the information required by ERISA §105 will be furnished or made available *and* being furnished in advance of the date the plan was required to furnish the first pension benefit statement under amended ERISA §105. To the author, the latter requirement imposed by the DOL appears to be onerous. Advance notice to the participants and beneficiaries (that multiple documents and source documents would be utilized to satisfy the new requirements of ERISA §105) is simply not required by the statute and does not increase meaningful disclosure to affected participants and beneficiaries, who are accustomed to receiving various forms of information from the plan sponsor or plan administrator, and thus, requiring advance notice that multiple documents or sources will be forthcoming only adds to the cost of disclosure without any meaningful increase in understanding of benefits.

## G. MODE OF DELIVERY

The statute notes that the plan administrator may provide the required benefit statements via “written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.”<sup>108</sup> PPA ’06 added other disclosure requirements (e.g., restrictions on benefits due to plan funding, potential withdrawal liability, right to divest employer securities) using similar delivery requirements (i.e., “written, electronic, or other appropriate form to the extent such form is reasonably accessible to the recipient”).<sup>109</sup> Hence, the DOL’s interpretation will need to be consistent under these various require-

<sup>107</sup> FAB 2006-3, at note 19 above. See Douglas O. Kant’s testimony, at note 15 above, in which he notes that investment in mutual funds versus brokerage accounts involves totally different systems that would require considerable expense and time to consolidate, without any resulting benefit to the participant.

<sup>108</sup> ERISA §105(a)(2)(A)(iv), as amended by PPA ’06, §508(a).

<sup>109</sup> PPA ’06, §§501(a), 202(a) and 507.

ments. In the legislative history, the staff of the Joint Committee on Taxation indicated that the regulations relating to the furnishing of 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 (e.g., intranet site provided by the employer).<sup>110</sup>

Under its general disclosure regulations, the DOL has indicated that electronic delivery of required disclosure is permissible, provided the plan administrator uses measures reasonably calculated to ensure actual receipt of the material.<sup>111</sup> Thus, disclosure may be accomplished by electronic media, provided:

- it results in actual receipt of the transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information)<sup>112</sup> and protects the confidentiality of personal information relating to the individual’s benefits;<sup>113</sup>
- it is prepared and furnished in a manner consistent with the style, format and content requirements applicable to the particular document;<sup>114</sup>
- notice is provided in electronic or non-electronic form, at the time the document is furnished electronically, that apprises the individual of the significance of the document if it is not otherwise reasonably evident as transmitted;<sup>115</sup> and
- the participant, beneficiary or other individual may request a paper version of the electronically-furnished documents.<sup>116</sup>

In its field assistance bulletin, the DOL indicated that relying on compliance with the above requirements will provide good faith compliance under ERISA §105; however, such manner of furnishing electronic statements is not the exclusive method for satisfying the statute’s requirements. The DOL also points to IRS regulations relating to the use of electronic media for satisfying certain notice and document requirements under the IRC as a method for good faith compliance under ERISA §105.<sup>117</sup>

In situations in which participants are afforded continuous access to benefit statements through one or

more secure websites, the DOL will acknowledge such methods as providing good faith compliance under ERISA §105, provided the participants and beneficiaries have been furnished:

- notification that explains the availability of the required pension benefit statement information and how much information can be accessed by the participant or beneficiary; and
- notification that participants and beneficiaries have the right to request a paper version of their pension benefit statement free of charge; and further provided
- that both of these notifications be furnished *in advance* of the date on which the plan is otherwise required to furnish the first benefit statement under ERISA §105.<sup>118</sup>

In testimony before the 2007 DOL ERISA Advisory Council’s Working Group on Participant Statements, Robert J. Doyle stated that the DOL would benefit from additional information from plans and service providers concerning compliance experiences with the DOL’s safe harbor and the IRS regulations. In this regard, the following information would be extremely helpful:

- whether and to what extent DOL regulations should permit benefit statement information to be provided on a continuous basis through a secure plan web site, in lieu of being furnished in statement form;
- the costs attendant on establishing and maintaining such a website;
- the need for security standards;
- how frequently web site information should be updated; and
- how and what information should be communicated to participants and beneficiaries about the web site.<sup>119</sup>

## H. COORDINATION WITH OTHER ERISA DISCLOSURE REQUIREMENTS

PPA ’06 imposes the following additional disclosure requirements for plan administrators and plan sponsors:

61877 (Oct. 20, 2006).

<sup>118</sup> See FAB 2006-3, at note 19 above. According to Douglas O. Kant’s testimony, *see* note 15 above, improvements in internet technology and increase in internet use by employees have led to greater reliance on the use of the internet for communication of benefits to participants and beneficiaries. The data also confirmed that participants do take advantage of internet access.

<sup>119</sup> See testimony from Robert J. Doyle, at note 12, above.

<sup>110</sup> See Joint Committee on Taxation, Technical Explanation of H.R. 4, the “Pension Protection Act of 2006” (JCX-388-06) (8/3/06).

<sup>111</sup> See DOL Regs. §2520.104b-1(c).

<sup>112</sup> *Id.* at §2520.104b-1(c)(1)(i)(A).

<sup>113</sup> *Id.* at §2520.104b-1(c)(1)(i)(B).

<sup>114</sup> *Id.* at §2520.104b-1(c)(1)(ii).

<sup>115</sup> *Id.* at §2520.104b-1(c)(1)(iii).

<sup>116</sup> *Id.* at §2520.104b-1(c)(1)(iv).

<sup>117</sup> See Treas. Regs. §1.401(a)-21; T.D. 9294, 71 Fed. Reg.

- funding notice requirements, beginning in the 2008 plan year, as to whether the plan has met its funding target attainment percentage for the current and two preceding years, or the exact percentage if it is not 100%;<sup>120</sup>
- rollover notice explaining the rollover and taxation rules for distributions from a qualified plan;<sup>121</sup> and
- notice of divestiture of employer stock, beginning in 2007, for plans holding employer stock purchased with elective deferrals or other employee contribution or with employer contributions.<sup>122</sup>

These notices are in addition to the other disclosure requirements applicable to plan administrators of defined contribution and defined benefit plans (e.g., summary plan descriptions, summary of material modification, summary of annual report, reporting of deferred vested benefits, notice of joint and survivor annuity benefits, blackout periods, etc.). The DOL should review all of these disclosure requirements so as to minimize the duplication of information contained in such disclosures. To the extent participants and beneficiaries receive too much information, it is more likely that they will disregard the information, similar to how consumers disregard junk mail received. The end result — circumventing congressional intent — would be to lessen the level of meaningful disclosure afforded to participants and beneficiaries.

## I. SOME CONCLUSORY REMARKS

The DOL's delivery of final regulations and model benefit statements under ERISA §§105 and 209 after PPA '06 represents a huge challenge for this regula-

tory agency during 2007 and beyond. It is certainly hoped that any regulations are issued in proposed form, as there are a number of issues that the agency will have to resolve with input from the pension community before the issuance of final regulations. The author has attempted to highlight that the legislative changes vary for sponsors of defined contribution versus defined benefit plans; sponsors of participant self-directed defined contribution plans versus other defined contribution plans; and sponsors of single employer versus multiple employer or multi-employer plans. The author has focused on the benefit statements required by plan administrators of single employer plans and made recommended changes for that group of recipients.

As an aside, the list of required annual or periodic participant disclosure requirements continues to grow. Under ASPPA's chart for participant disclosures under defined contribution plans, there are 40 different required notices.<sup>123</sup> Certainly, the DOL should take into account that plan participants are used to receiving multiple documents from the plan sponsor and the plan administrator, and thus, reference to alternative notices should be encouraged and not discouraged. Although Congress's goal is to assure transparency for participants and beneficiaries under covered employee pension and profit-sharing plans, hopefully, we have not reached the saturation point where any *new* pieces of information are not used by the intended class of recipients but, instead, end up in their recycle bins. Such disclosure only adds to the administrative cost of the plan without any resulting benefit to the intended participants and beneficiaries. To the extent such administrative costs become too burdensome and result in the termination of plans, that would be a tragic loss for both the employee and employer communities as they struggle to keep pace with the cost of employee benefits.

<sup>120</sup> PPA '06, §501(a), amending ERISA §101(f).

<sup>121</sup> PPA '06, §1102.

<sup>122</sup> PPA '06, §507, enacting revised ERISA §101(m).

<sup>123</sup> See ASPPA Participant Disclosure Chart, available at [http://asppa.org/pdf\\_files/50307\\_DCPartDisclosureChart.pdf](http://asppa.org/pdf_files/50307_DCPartDisclosureChart.pdf) (last visited Sept. 3, 2007).