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submitted via e-ori@dol.gov

United States Department of Labor
Washington, DC

RE: RIN 1210-AB08
Requirements for Fee Disclosure to Plan Fiduciaries and Participants—Applicability Dates

The Profit Sharing/401k Council of America (“PSCA”) is pleased to offer our comments in response to the Department’s Notice of Proposed Extension of Applicability Dates under 29 CFR 2550.408b-2, the interim final rule concerning fiduciary-level fee disclosure (“service provider disclosure rule”) and 29 CFR 2550.404a-5, the final rule concerning participant-level fee disclosure (“participant disclosure rule”).

PSCA, a national non-profit association of 1,000 companies and their six million employees, advocates increased retirement security through profit sharing, 401(k), 403(b), and related defined contribution programs to federal policymakers and makes practical assistance with profit sharing, 401(k), and 403(b) plan design, administration, investment, compliance, and communication available to its members. PSCA, established in 1947, is based on the principle that “defined contribution partnership in the workplace fits today’s reality.” PSCA’s services are tailored to meet the needs of both large and small companies with members ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

PSCA supports extending the effective date of the service provider disclosure rule to January 1, 2012, as previously announced, and extending the transition period for initial disclosures under the participant disclosure rule from 60 days to 120 days from the applicability date. We offer the following recommendations for improving the proposed notice.

Parity for non-calendar year plans.

We appreciate the Department’s recognition that the two disclosure rules are complementary and that the effective date of the service provider disclosure rule needs to be considered in the implementation of the participant disclosure rule because the information provided under the service provider disclosure rule is needed to comply with the participant disclosure rule. In that regard, we note that the proposed notice applies unevenly depending on a plan’s plan year beginning date. A calendar year plan will have a 120-day transition period following the deadline for the receipt of disclosures under the service provider rule. However, a plan beginning on November 1, 2011, the earliest applicability date under the participant fee disclosure rule, will have only 59 days of transitional relief available after the January 1, 2012, deadline for the provision of the service provider disclosures. **We recommend that the transition rule be**

amended to provide that the transition period is not less than 120 days following the last date on which disclosures are required under the service provider rule. Under this approach, any subsequent change in the date for providing required disclosures under the service provider disclosure rule would not necessitate changing the transition rule under the participant fee disclosure rule. For example, significant changes incorporated in the pending final rule for service provider disclosure, such as the requirement to provide a consolidated disclosure statement, may result in a decision to delay the effective date of the service provider rule.

Interim relief for electronic disclosure.

The participant fee disclosure rule is applicable for participant-directed individual account plans for plan years beginning on or after November 1, 2011. In the preamble to the rule, the Department explains that the current disclosure rules under 29 CFR 2520.104b-1 apply, but that paragraph (g), “manner of furnishing,” is reserved in light of the planned publication of a request for information regarding electronic disclosures in employee benefit plans (“the RFI”). The Department also noted in the preamble that it anticipates that the issues raised in the RFI will be resolved in advance of the fee disclosure applicability date, “so as to ensure for appropriate notice for plans.”

PSCA believes that it is very unlikely that the issues raised in the RFI will be resolved. Any changes promulgated in a final rule prior to the applicability date of the participant fee disclosure rule or in time for plan administrators to adjust their systems to incorporate any changes before the required initial disclosures, despite the expanded transition rule. The participant fee disclosure rule creates a significant new challenge because fee disclosure must be provided not only to participants and beneficiaries, but also to all eligible employees.

Field Assistance Bulletin 2006 (“the FAB”) provides that for purposes of satisfying section 105 of ERISA, relating to the furnishing of pension benefit statements, good faith compliance is met if, in addition to the safe harbor for disclosure through electronic media in 29 CFR 2520-104b-1(c), disclosure is provided in accordance with section 1.401(a)-21 of the Treasury regulations. That regulation provides, in paragraph 1.401(a)-21(c)(2), that information may be provided electronically without the recipient’s consent provided that the “electronic medium used to provide an applicable notice [is] a medium that the recipient has the effective ability to access.” The Treasury standard is more liberal than the Department’s standard in 29 CFR 2520.104b-1(c)(2) in that there is no requirement that access to the electronic medium be in a location where the participants perform their job duties or that use of the medium be an integral part of those duties.

The FAB also provides:

“With regard to pension plans that provide participants with continuous access to benefit statement information through one or more secure web sites, the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notice must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105.”

The FAB requires that the notice be written in an understandable manner. Finally, the notice must be provided both in advance of the first date on which the benefit statement must be furnished and annually thereafter.

Accordingly, PSCA respectfully requests that the Department provides that the relief under Field Assistance Bulletin 2006-03 relating to alternative methods to provide electronic disclosure be applicable to the disclosure requirements under the participant fee disclosure rule until such time as the Department's rules pursuant to the request for information on electronic distribution are finalized and plan administrators are afforded time to make necessary system changes.

Thank you for considering our comments. If I can be of any assistance, or if you have any questions, please do not hesitate to contact me at 202 863 7272.

Sincerely,

Edward Ferrigno